Agenda E-19 (Summary)
Rules
September 1992

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE COMMITTEE

ON THE RULES OF PRACTICE AND PROCEDURE

The Committee on the Rules of Practice and Procedure recommends that the Conference:

1. Request that the Chief Justice reactivate an Advisory Committee on the Federal Rules of Evidence with the suggestion of some overlapping membership with the Advisory Committees on the Federal Rules of Civil and Criminal Procedure, and further that the Chief Justice appoint a reporter to serve the reactivated Evidence Rules Committee . . . . pp. 2-3

2. Approve the proposed amendments to Rules 3, 3.1, 4, 5.1, 6, 10, 12, 15, 25, 28, and 34 of the Federal Rules of Appellate Procedure and to Forms 1, 2, and 3 and transmit them to the Supreme Court for its consideration with the recommendation that they be approved by the Court and transmitted to Congress pursuant to law . . . . . pp. 3-4

3. a. Approve the proposed new Rule 26.3 and amendments to Rules 1, 3, 4, 5, 5.1, 6, 9, 12, 16, 17, 26.2, 32, 32.1, 40, 41, 44, 46, 49, 50, 54, 55, 57, and 58 of the Federal Rules of Criminal Procedure and transmit them to the Supreme Court for its consideration with the recommendation that they be approved by the Court and transmitted to Congress pursuant law; and

   b. Approve the proposed amendment to Rule 8 of the Rules Governing Section 2255 Proceedings and transmit it to the Supreme Court for its consideration with the recommendation that it be approved by the Court and transmitted to Congress pursuant to law . . . . . pp. 5-6

4. Approve proposed new Bankruptcy Rule 9036, and the proposed amendments to Bankruptcy Rules 1010, 1013, 1017, 2002, 2003, 2005, 3009, 3015, 3018, 3019, 3020, 5005, 6002, 6006, 6007, 9002, and 9019 and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress pursuant to law . . . . . pp. 6-7

5. Approve the proposed amendments to Official Bankruptcy Forms 5, 9B, 9D, 9F, and 9H . . . . p. 7

6. Approve the proposed amendment to Rule 4 of the Federal Rules of Civil Procedure, the proposed adoption of Forms 1A and 1B, and the proposed abrogation of Form 18-A, and transmit these proposals to the Supreme Court for its consideration with the recommendation that they be approved by the Court and transmitted to Congress pursuant to law. If this recommendation is not approved, your Committee recommends adoption and transmission of these rules and forms but with the alternative language in the text and Committee Notes of Rule 4 and Forms 1A and 1B as reflected in Appendix F . . . . . pp. 7-9

7. Approve new Civil Rule 4.1; proposed amendments to Civil Rules 1, 5, 11, 12, 15, 16, 26, 28, 29, 30, 31, 32, 33, 34, 36, 37, 38, 50, 52, 53, 54, 56, 58, 71A, 72, 73, 74, 75, and 76; proposed new Form 35; and proposed amendments to Forms 2, 33, 34, and 34A, and transmit them to the Supreme Court for its consideration with the recommendation that they be approved by the Court and transmitted to Congress pursuant to law . . . . . .pp. 7-11

8. Approve the proposed amendments to Rules 101, 705, and 1101 of the Federal Rules of Evidence and transmit them to the Supreme Court for its consideration with the recommendation that they be approved by the Court and transmitted to Congress pursuant to law . . . . . pp. 11-12

The remainder of the report is for information and the record.

Agenda E-19
Rules
September 1992

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

Your Committee on Rules of Practice and Procedure met in Washington, D.C. on June 18-20, 1992. All members of the Committee attended the meeting. Also present were Judge Kenneth F. Ripple, Chairman, and Professor Carol Ann Mooney, Reporter, of the Advisory Committee on Appellate Rules; Chief Judge Sam C. Pointer, Jr., Chairman, and Professor Paul D. Carrington, Reporter, of the Advisory Committee on Civil Rules; Judge William Terrell Hodges, Chairman, and Professor David A. Schlueter, Reporter, of the Advisory Committee on Criminal Rules; and Judge Edward Leavy, Chairman, and Professor Alan N. Resnick, Reporter, of the Bankruptcy Rules Advisory Committee.

The reporter to your Committee, Dean Daniel R. Coquillette; Professor Mary P. Squiers, Director of the Local Rules Project; and Bryan Garner, Esquire, Consultant to the Subcommittee on Style, attended the meeting. Also present were Joseph F. Spaniol, Jr., Secretary to your Committee; John K. Rabiej, Patricia S. Channon, Judith W. Krivit, and Anne Rustin of the Administrative Office

Staff; and Mr. Joe S. Cecil of the Research Division of the Federal Judicial Center. Various members of the public also attended the meeting as observers.

I. Advisory Committee on the Federal Rules of Evidence.

After completing its monumental task of writing the Federal Rules of Evidence, the Advisory Committee appointed in 1965 was discharged in 1975 with appreciation. Since then needed amendments to the Rules of Evidence have been considered by the Standing Committee and by the Advisory Committees on Civil and Criminal Rules, mostly by the Criminal Rules Committee.

In 1981 a conference sponsored by the Federal Judicial Center considered problems arising under the evidence rules and concluded that the rules should be reviewed. Later that same year the Judicial Conference approved a Committee recommendation that the Chief Justice be authorized to appoint a new Evidence Rules Committee. To date, however, no action has been taken. Recently various law professors have urged the creation of an Evidence Rules Committee and Circuit Judge Edward Becker has collaborated in writing an article setting forth specific problems that he believes should now be addressed by an Advisory Committee.

Aware that the reactivation of an Evidence Rules Committee might in the future lead to changes in well-settled rules of evidence, something several Committee members considered undesirable, your Committee nonetheless concluded that there are sufficient unsettled areas in the Evidence Rules to warrant review.

Your Committee considered whether the review should be undertaken by one of the existing Advisory Committees, or jointly by two or more advisory committees, but decided to recommend the appointment of a separate Advisory Committee.

Recommendation: That the Chief Justice be requested to reactivate an Advisory Committee on the Federal Rules of Evidence with the suggestion of some overlapping membership with the Advisory Committees on the Federal Rules of Civil and Criminal Procedure, and further that the Chief Justice appoint a reporter to serve the reactivated Evidence Rules Committee.

II. Amendments to the Federal Rules of Appellate Procedure and Forms.

The Advisory Committee on the Federal Rules of Appellate Procedure submitted to your Committee proposed amendments to Appellate Rules 3, 3.1, 4, 5.1, 6, 10, 12, 15, 25, 28, and 34, and Amendments to Forms 1, 2, and 3, together with Committee Notes explaining their purpose and intent.

Most of these proposed amendments were circulated for public comment in August, 1991. Public hearings were scheduled and later cancelled when no one requested an opportunity to testify.

In January, 1992 your Committee also directed that proposed amendments to Appellate Rules 3(c) and 15 be circulated for public comment on an expedited basis because of the perceived need to address an acutely urgent problem. Based upon comments received and further deliberation, the Advisory Committee revised the original proposal to amend Rules 3(c) and 15 and included an additional amendment to Rule 12.

The Advisory Committee also submitted an unpublished proposal to amend Rule 6(b) to conform the practice in bankruptcy cases to the change being recommended in Rule 4(a). The Chairman and Reporter of the Bankruptcy Rules Advisory Committee saw no problem with this proposal.

Your Committee concluded that publication of the proposed amendments to Rules 6 and 12 was not needed and that the changes in the proposed amendments to other rules recommended by the Advisory Committee did not require republication. With the approval of your Committee the Advisory Committee withdrew its proposed amendment to Rule 35 defining what constitutes a quorum of judges for a hearing or rehearing en banc.

Your Committee made certain stylistic and clarifying changes in Rules 3, 3.1, 4, 5.1, and 6 and directed that a cross-reference to Rule 15 be included in Form 3. The proposed amendments to the Federal Rules of Appellate Procedure, as recommended by your Committee, appear in Appendix A together with excerpts from the Advisory Committee report summarizing the comments received, the Committee's review of the issues presented, and the changes made in the published draft.

Recommendation: That the Judicial Conference approve the proposed amendments to Rules 3, 3.1, 4, 5.1, 6, 10, 12, 15, 25, 28, and 34 of the Federal Rules of Appellate Procedure and to Forms 1, 2, and 3 and transmit them to the Supreme Court for its consideration with the recommendation that they be approved by the Court and transmitted to Congress pursuant to law.

III. Amendments to the Federal Rules of Criminal Procedure.

The Advisory Committee on the Federal Rules of Criminal Procedure submitted to your Committee a proposed new Rule 26.3; proposed amendments to Criminal Rules 1, 3, 4, 5, 5.1, 6, 9, 12, 16, 17, 26.2, 32, 32.1, 40, 41, 44, 46, 49, 50, 54, 55, 57, and 58; and a proposed amendment to Rule 8 of the Rules Governing Proceedings in the United States District Courts Under Section 2255 of Title 28, United States Code. The purpose and intent of the proposed amendments are set forth in the Committee Notes accompanying the proposals.

In July, 1991 your Committee approved certain technical amendments to the criminal rules including a change in the term "magistrate" to "magistrate judge" to conform to the new statutory title of the position. Your Committee concluded that publication was not necessary.

In August, 1991 other proposed amendments were circulated for public comment. The responses were relatively few. Public hearings were scheduled and later cancelled when no one requested an opportunity to testify.

The Advisory Committee also indicated that existing subdivision (e) of Rule 32 was no longer needed and recommended that it be deleted and replaced by other language.

The proposed amendments to the Federal Rules of Criminal Procedure, and to Rule 8 of the Rules Governing Section 2255 Proceedings, as recommended by your Committee, appear in Appendix B together with an excerpt from the Advisory Committee Report.

a. **Recommendation:** That the Judicial Conference approve the proposed new Rule 26.3 and amendments to Rules 1, 3, 4, 5, 5.1, 6, 9, 12, 16, 17, 26.2, 32, 32.1, 40, 41, 44, 46, 49, 50, 54, 55, 57, and 58 of the Federal Rules of Criminal Procedure and transmit them to the Supreme Court for its consideration with the recommendation that they be approved by the Court and transmitted to Congress pursuant to law.

b. **Recommendation:** That the Judicial Conference approve the proposed amendment to Rule 8 of the Rules Governing Section 2255 Proceedings and transmit it to the Supreme Court for its consideration with the recommendation that it be approved by the Court and transmitted to Congress pursuant to law.

IV. Amendments to the Bankruptcy Rules and Forms.

(a) Rules. The Advisory Committee on Bankruptcy Rules submitted to your Committee proposed new Bankruptcy Rule 9036; and amendments to Bankruptcy Rules 1010, 1013, 1017, 2002, 2003, 2005, 3009, 3015, 3018, 3019, 3020, 5005, 6002, 6006, 6007, 9002, and 9019 together with Committee Notes explaining their purpose and intent. The proposed new rule and amendments were circulated to the bench and bar for comment in August, 1991, and public hearings were held in Pasadena, California on February 28, 1992. Thereafter the Advisory Committee made certain stylistic changes and certain other technical amendments. With the approval of your Committee the Advisory Committee withdrew the proposed amendment to Rule 3002 that had been circulated for public comment.

The proposed amendments and an excerpt from the Advisory Committee Report are set forth in Appendix C.

Recommendation: That the Judicial Conference approve proposed new Bankruptcy Rule 9036, and the proposed amendments to Bankruptcy Rules 1010, 1013, 1017, 2002, 2003, 2005, 3009, 3015, 3018, 3019, 3020, 5005, 6002, 6006, 6007, 9002, and 9019 and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress pursuant to law.

(b) Forms. The Advisory Committee on Bankruptcy Rules also submitted to your Committee proposed amendments to Official Bankruptcy Forms 5, 9B, 9D, 9F, and 9H. The amendments are technical and have not been submitted for public comment. Under Bankruptcy Rule 9009, Official Forms in Bankruptcy are "prescribed by the Judicial Conference of the United States." Supreme Court approval of changes in Forms is not required. The proposed amendments to these Forms are set out in Appendix D.

Recommendation: That the Judicial Conference approve the proposed amendments to Official Bankruptcy Forms 5, 9B, 9D, 9F, and 9H.

V. Amendments to the Federal Rules of Civil Procedure and Forms.

The Advisory Committee on the Federal Rules of Civil Procedure submitted to your Committee a proposed new Civil Rule 4.1; proposed amendments to Civil Rules 1, 4, 5, 11, 12, 15, 16, 26, 28, 29, 30, 31, 32, 33, 34, 36, 37, 38, 50, 52, 53, 54, 56, 58, 71A, 72, 73, 74, 75, 76, 83, and 84; proposed new Forms 1A, 1B, and 35; the proposed abrogation of Form 18-A; and proposed amendments to Forms 2, 33, 34, and 34A. The purpose and intent of the proposed amendments are set forth in the Committee Notes.

Several of the amendments currently proposed (Rules 4, 4.1, 12, 15, 16, 28, and 71A; Forms 1A, 1B, and 18-A) were circulated

for public comment in October, 1989.[1] These, with other proposed amendments, were approved by the Judicial Conference in September, 1990 and transmitted to the Supreme Court, but were later returned by the Court for additional study in the light of various comments that had been received, most notably from the British Embassy. Based upon these comments and further comments submitted by the British Embassy, the Swiss Embassy, the Department of State, and the Department of Justice, the Advisory Committee and your Committee have made several changes in the proposed amendments to Rules 4, 26, and 28 and to Forms 1A and 1B. With one possible exception relating to Rule 4 and the related forms,[2] your Committee believes that the criticisms expressed have been obviated by these changes, and recommends that these rules and forms, as so modified, be approved and resubmitted to the Supreme Court.

Recognizing that the proposals relating to Rule 4 and the

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[1]An amendment had also been proposed to Rule 26 relating to discovery in foreign countries. Responding to criticisms from the Departments of State and Justice and from certain foreign governments, your Committee decided to delete these provisions from the proposed amendment of Rule 26.

[2]The proposed amendment of Rule 4 still retains the authority of the court to shift the cost of formal service of process to a non-governmental defendant located in a foreign country which declines to comply with a request for waiver of service if that declination is not based upon a law or policy of the foreign government prohibiting such waivers. A minority of your Committee preferred that, in order to eliminate this remaining area of possible controversy involving international relations, this cost-shifting potential be wholly eliminated if a party is located outside the United States. Should this minority view be accepted, it is recommended that this be accomplished by making the minor changes in the text and Notes to Rule 4 and in Forms 1A and 1B shown in Appendix F to this report rather than by disapproving the proposed amendments altogether.

related forms may involve special consideration, your Committee makes its recommendations regarding these proposed changes as a separate item:

> **Recommendation:** That the Judicial Conference approve the proposed amendment to Rule 4 of the Federal Rules of Civil Procedure, the proposed adoption of Forms 1A and 1B, and the proposed abrogation of Form 18-A, and transmit these proposals to the Supreme Court for its consideration with the recommendation that they be approved by the Court and transmitted to Congress pursuant to law. If this recommendation is not approved, your Committee recommends adoption and transmission of these rules and forms but with the alternative language in the text and Committee Notes of Rule 4 and Forms 1A and 1B as reflected in Appendix F.

Several of the proposed amendments (Rules 5, 38, 50, 52, 53, 72, 73, 74, 75, and 76; Forms 2, 33, 34, 34A, and 35) have not been circulated for public comment. Your Committee has determined that these are technical or conforming amendments with respect to which public notice and comment are not necessary or appropriate. The balance of the amendments proposed by the Advisory Committee (Rules 1, 11, 16, 26, 29, 30, 31, 32, 33, 34, 36, 37, 54, 56, and 58), as well as proposed amendments to Rules 83 and 84 (referred to in the next paragraph below), were circulated for public comment in August, 1991. A proposal to amend Rule 43 was also included in the materials circulated for public comment, but pending further study and possible republication, the Advisory Committee decided not to submit to your Committee any proposed change to Rule 43.

Numerous written comments were received, and public hearings were held in Los Angeles, California, on November 21, 1991, and in Atlanta, Georgia, on February 19-20, 1992. Particularly in view of related changes to be considered regarding the Federal Rules of

Appellate Procedure, the Federal Rules of Criminal Procedure, the Federal Rules of Evidence, and the Federal Rules of Bankruptcy Procedure, your Committee unanimously decided to recommit to the Advisory Committee on Civil Rules for further study, and possible republication, the proposed changes in Rules 83 and 84.

Your Committee amended the text of proposed Rule 11 in two respects: first, to provide that imposition of sanctions for a violation of the rule would be discretionary with the judge, not mandatory; and second, to clarify that the certification obligations of the rule apply only in connection with an affirmative presentation of papers to the court (rather than arguably upon the mere passive failure to withdraw a previously filed paper). Your Committee made several additional changes in the text or Notes of other rules, but these were essentially stylistic and technical in nature.

Although these changes, as well as changes made by the Advisory Committee, do alter language contained in the proposals circulated for public comment in August, 1991, the modifications were made in response to suggestions made during the comment period, do not significantly expand the extent of change between current rules and the published proposals, and do not, in your Committee's view, require another period of publication and comment.[3]

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[3]For example, the published draft of Rule 26(a)(1)(A) called for parties to identify "each individual likely to have information that bears significantly on any claim or defense," while the language approved by the Advisory Committee and your Committee calls for the parties to identify "each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings." This change was

As indicated, many of the proposals are controversial, and there were divisions within your Committee, as there had been on the Advisory Committee, with respect to particular aspects of several of the proposed amendments that are set forth in Appendix E. A summary of the principal areas of dispute, indicating the vote within your Committee, is attached as Appendix H.

Recommendation: That the Judicial Conference approve new Civil Rule 4.1; proposed amendments to Civil Rules 1, 5, 11, 12, 15, 16, 26, 28, 29, 30, 31, 32, 33, 34, 36, 37, 38, 50, 52, 53, 54, 56, 58, 71A, 72, 73, 74, 75, and 76; proposed new Form 35; and proposed amendments to Forms 2, 33, 34, and 34A, and transmit them to the Supreme Court for its consideration with the recommendation that they be approved by the Court and transmitted to Congress pursuant to law.

VI. Amendments to the Federal Rules of Evidence.

The Advisory Committee on the Federal Rules of Civil Procedure also submitted to your Committee proposed amendments to Evidence Rules 702 and 705 and proposed amendments to Evidence Rules 101 and 1101 to change the term "magistrate" to "magistrate judge."

Proposed Rules 702 and 705 were circulated for public comment in August, 1991. Public hearings were held in Los Angeles, California, on November 21, 1991, and in Atlanta, Georgia, on

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made primarily at the instance of many commentators who objected to the lack of use of familiar terms such as "relevancy" or "discoverable information," to the problems created by vague allegations tolerated under notice pleading, and to the imposition of a duty to exercise judgment, arguably conflicting with an attorney's responsibility to a client, in identifying which potential witnesses would be most beneficial to an adversary. Although there are some differences in the wording of the published draft and the recommended rule, language was included in both that permits the court (and indeed the parties) to vary the scope of information to be disclosed.

February 19-20, 1992. After considering the responses to the public submission, and in the light of the proposed reactivation of an Advisory Committee on the Federal Rules of Evidence, your Committee decided to refer the proposed amendment of Rule 702 to the new Advisory Committee.

Your Committee, however, recommends approval of the proposed amendment of Rule 705, together with the technical amendments of Rules 101 and 1101, which have not been published. These proposals are set forth in Appendix G.

Recommendation: That the Judicial Conference approve the proposed amendments to Rules 101, 705, and 1101 of the Federal Rules of Evidence and transmit them to the Supreme Court for its consideration with the recommendation that they be approved by the Court and transmitted to Congress pursuant to law.

VII. Information Items.

A. Proposed Rules Amendments Generating Substantial Controversy.

The Chief Justice has informed your chairman of the desire of the members of the Supreme Court to have "some sort of outline or summary to indicate which of the proposed changes [to Rules of procedure] were the subject of substantial controversy, the arguments made on both sides, and the reasoning of the Committees in deciding the controversial matters the way they did. There would be no need to duplicate the Advisory Committee Notes...; our thought was that we would like to be privy to any divisions of opinion within the responsible Committees, and to any substantial objections to the proposed changes."

The summary requested by the Chief Justice is set forth in Appendix H.

B. Style Subcommittee.

The Subcommittee on Style submitted suggestions to the various advisory committees to improve style. Many of these suggestions were adopted. The Civil Rules Advisory Committee suggested, however, that an overall review of the civil rules to improve style would be preferable to a piecemeal approach. The Style Subcommittee has agreed to undertake promptly a full style review of the Civil Rules, and plans are underway for extending the style review to other sets of Rules in cooperation with the Advisory Committees.

C. Long Range Planning.

Your Committee has approved the recommendation of the Long Range Planning Subcommittee that Judge William Schwarzer's proposal to amend the civil rules to authorize Federal-State trial court coordination of complex litigation be referred to the Advisory Committee on Civil Rules for study.

D. Local Rules of District Courts - Uniform Numbering.

Your Committee has authorized the Chairman to distribute to the district courts a memorandum prepared by the Local Rules Project entitled "An Example of a Proposed Numbering System for Local Rules, Including a Civil Justice Delay and Expense Reduction Act Plan." This memorandum is intended to answer the concerns of some districts about how to integrate their respective Delay and Expense Reduction Plans into the numbering

system as originally proposed by the Local Rules Project.

Respectfully submitted,

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Frank H. Easterbrook
William O. Bertelsman
Thomas S. Ellis, III
Alicemarie H. Stotler
Edwin J. Peterson
Charles Alan Wright
Thomas E. Baker
William R. Wilson
Alan W. Perry
George J. Terwilliger, III

Robert E. Keeton, Chairman

Appendix A:	Proposed Amendments to the Federal Rules of Appellate Procedure
Appendix B:	Proposed Amendments to the Federal Rules of Criminal Procedure
Appendix C:	Proposed Amendments to the Federal Rules of Bankruptcy Procedure
Appendix D:	Proposed Amendments to Official Bankruptcy Forms
Appendix E:	Proposed Amendments to the Federal Rules of Civil Procedure and Forms
Appendix F:	Civil Rule 4, Forms 1A and 1B (Alternative Language)
Appendix G:	Proposed Amendments to the Federal Rules of Evidence
Appendix H:	Proposed Rules Amendments Generating Substantial Controversy

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

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

FROM: Honorable Kenneth F. Ripple, Chair
Advisory Committee on Appellate Rules KFR

DATE: June 2, 1992

The Advisory Committee on Appellate Rules submits the following items to the Standing Committee on Rules:

1. Proposed amendments to Federal Rules of Appellate Procedure 3, 3.1, 4, 5.1, 10, 25, 28, and 34, approved by the Advisory Committee on Appellate Rules at its April 30, 1992 meeting. These proposed amendments were published in August 1991. A public hearing was scheduled for December 4, 1991 in Chicago, Illinois but was canceled for lack of interest. The Advisory Committee has reviewed the written comments and, in some instances, altered the proposed amendments in light of the comments. The Advisory Committee recommends withdrawing the proposed amendments to Rule 35 but requests that the Standing Committee approve the other published rules, in their amended form, and send them to the Judicial Conference. Part A of this report includes the amended rules. Part B identifies and discusses the primary criticisms and suggestions; it also explains the changes made in the text or notes after publication; and it discusses any disagreement among the Advisory Committee members concerning the changes. Part C is a summary of the written comments received.

2. Proposed amendments to Federal Rules of Appellate Procedure 3(c), 12, and 15, approved by the Advisory Committee on Appellate Rules by telephone conference after its April 30 meeting. Proposed amendments, dealing with the Torres problem, were published under expedited procedures in February 1992 for a three month

period. The Advisory Committee has reviewed the written comments and now suggests different changes in Rule 3(c), proposes a new subdivision for Rule 12, and suggests style changes in Rules 3(c) and 15(a) and (e). Part D of this report contains the revised rules; it also discusses the major criticisms and suggestions made by the commentators; it explains the changes made in the rules and notes after publication; and, it discusses any disagreement among the Advisory Committee members concerning the approach taken in the revised draft. Part E is a summary of the written comments received.

3. Proposed amendments to Federal Rules of Appellate Procedure 35, and 47. These proposals were approved at the Advisory Committee's April 30th meeting and the Advisory Committee requests the Standing Committee's approval of them for publication. If approved, these new proposals could be published along with the proposed amendments approved for publication by the Standing Committee at its January, 1992 meeting (proposed amendments to Appellate Rules 25, 28, 38, 40, and 41). Part F of this report contains the draft amendments to Rules 35 and 47. Part F also contains proposed amendments to Federal Rule of Appellate Procedure 6(b)(2)(i); these amendments conform Rule 6 to the Rule 4(a)(4) amendments.

ISSUES AND CHANGES
Proposed Amendments to the Federal Rules of Appellate Procedure
Published August, 1991

Rule 3

There were no comments on the proposed amendments to Rule 3. The proposed amendments to Rule 3 are interrelated to the proposed amendments to Rule 4.

The changes approved by the Advisory Committee in Rule 3 after its publication were suggested by the Standing Committee's Style Subcommittee. The apparent intent of the Style Subcommittee is to review and revise those rules that the advisory committees propose amending. The Advisory Committee for Appellate Rules was favorably impressed with the work done by the Style Subcommittee, and for the most part adopted its suggestions. However, the Advisory Committee has some hesitation about the advisability of making style changes in some but not all rules. For example, the Style Subcommittee put rule headings and subheadings in initial capitals in each of the rules containing proposed amendments. Will that mean that until the advisory committee has proposed amendments as to each of the 48 appellate rules, there will be inconsistent capitalization of the headings? In Rule 3, the Advisory Committee's proposed amendment affects only subdivision (d), as a result there is a proposal to put initial capitals in the heading of subdivision (d), but not subdivisions (a), (b), (c), or (e). The Advisory Committee could easily recommend changing the headings of the other subdivisions of Rule 3 to initial capitals--making Rule 3 internally consistent--but other suggested alterations of a rule, or part of a rule, can not be integrated into the remaining rules without more substantive reflection.

Rather than individually list the style changes that have been made in the rules and the committee notes, a copy of the Style Subcommittee's proposed amendments is attached as an appendix to Part B.

The Advisory Committee unanimously approved many, but not all, of the changes recommended by the Style Subcommittee. Those changes that were approved, were approved unanimously and have been incorporated into the revised draft of Rule 3. This memorandum will discuss only the suggestions that were not adopted by the Advisory Committee. The line references here are to the line numbers on the Style Subcommittee's draft.

1. At line 3, it was suggested that "serve notice of the filing ... by mailing a copy" be changed to "send a copy of." The Advisory Committee did not adopt this suggestion because the term "service" is a term of art with substantive implications that need further exploration. Similarly at lines 28, 31, and 38, the verb "serve" is retained and not replaced by "sent." Also at line 44, the verb "mails" is retained and not replaced by "are sent."

2. At several points throughout the rule, it was suggested that "district clerk" or "appellate clerk" replace "clerk of the district court" or "clerk of the court of appeals." The Advisory Committee decided to retain "clerk of the district court" and "clerk of the court of appeals" to avoid confusion. The term "district clerk" could include a bankruptcy clerk, and "appellate clerk" could refer to a clerk in a district court whose assignment is to prepare the district court papers for appeal.

3. At line 13, the Style Subcommittee suggested deleting "named in the notice." The Advisory Committee is of the view that the notice should designate the court to which the party believes an appeal should be taken. The rule should clearly indicate where the clerk of the district court should send a notice of appeal. It is for the court of appeals to determine whether it has jurisdiction under the applicable statute.

Rule 3.1

There were no comments on the proposed amendment to Rule 3.1 The Advisory Committee unanimously approved all of the Style Subcommittee's recommendations and the changes have been incorporated in the revised draft.

Rule 4

The proposed amendments to Rule 4 serve two main purposes: first, to eliminate the trap for a litigant who files a notice of appeal before a posttrial motion or while a posttrial motion is pending; and second, to "codify" the Supreme Court's decision in Houston v. Lack, holding that a notice of appeal filed by an inmate confined in an institution is timely if it is deposited in the institution's internal mail system, with postage prepaid, on or before the filing date.

No comments were submitted concerning subdivision 4(c),

dealing with inmate filings, or subdivision 4(b), dealing with appeals in criminal cases. Five commentators offered suggestions for improving subdivision 4(a). Four of them generally supported the proposed amendments; their suggestions were "fine tuning." One commentator suggested taking an entirely different approach to the 4(a)(4) trap; the committee considered but rejected his suggestion.

The changes made after publication are:

1. "Except as provided in paragraph (a)(4) of this Rule" is added to the beginning of paragraph (a)(1). This cross-reference is intended to alert a reader to the fact that the time for filing a notice of appeal may be delayed by the provisions of paragraph (a)(4).

2. At line 39-40 of this amended draft (line 24 of the published draft), the rule states that a motion for attorney's fees will extend the time for filing a notice of appeal if a district judge enters an order, under Rule 58, extending the time for appeal.[1] Two changes have been made here; first, the description of a Rule 58 order is changed. The published draft described a Rule 58 order as one "delaying entry of judgment and extending the time for appeal." In fact, a Rule 58 order usually will be entered after a district court has entered judgment; therefore, a Rule 58 order extends the time for appeal, it does not delay entry of judgment. Thus the amended description deletes the reference to "delaying entry of judgment."

   Second, lines 39-40 of the amended rule state that a district court may enter a Rule 58 order extending the time for appeal until the district court awards attorney's fees. The published rule stated (at lines 21-25) that a district court could enter a Rule 58 order extending appeal time until the district court awards <u>costs</u> or attorney's fees. Because proposed Rule 58 does not authorize a district court to delay finality of a judgment to award costs, the reference to costs has been deleted.

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[1] The Civil Rule 58 order referred to is contained in a proposed amendment to that rule which is at the same stage of development as the proposed amendments to Appellate Rule 4(a). If any changes are made in proposed Civil Rule 58, the cross-reference in proposed Appellate Rule 4(a) will need to be reexamined.

3. At lines 52-53 the words "effective to appeal from the judgment or order, or part thereof, specified in the notice of appeal" have been added. The Advisory Committee believes that this change, in conjunction with the following sentence, makes it clear that the first-filed notice of appeal covers only those judgments or orders specified in the notice, and that to obtain review of an order disposing of a posttrial motion the notice of appeal must be amended to specify that order.

4. Line 55 states that a party must amend a previously filed notice of appeal to obtain "[a]ppellate review of" an order disposing of a posttrial tolling motion. The published draft (at line 43) stated that "an appeal from" such orders requires amendment of any previously filed notice of appeal. Because, in some circuits, a decision disposing of certain the posttrial motions is not independently appealable but is reviewable only on appeal from the underlying judgment, it is more accurate to speak of "appellate review of" such orders.

5. At line 51, the words "announcement or" have been added between "after" and "entry." This change reinforces the general rule in paragraph (a)(2) that a notice filed after announcement of a decision or order but before entry of the order is treated as filed after the entry.

6. Lines 61-62 state that "[n]o additional fees are required for filing an amended notice of appeal."

7. As with the other rules, the Advisory Committee adopted most of the suggestions made by the Style Subcommittee. This memorandum discusses only those instances when the Advisory Committee disagreed with or altered the suggestions made by the Style Subcommittee.

   a. The Style Subcommittee suggested (line 6 of its draft) that the rule refer to notices filed after the judge announces a decision (emphasis added). The Advisory Committee changed that to after the "court" announces a decision (line 17 of the amended rules).

   b. At lines 9-10 and 93-94 of the Style Subcommittee draft, it is suggested that the rule treat notices filed after announcement but before entry as filed "on the date of entry." The Advisory Committee has changed that to "on the date of and after the entry" (lines 20 and 71 of the amended rules).

c. At line 24 of the Style Subcommittee draft, it is suggested that the rule state that the time for appeal runs from the entry of the "order disposing of the last such motion." The Advisory Committee added the word "outstanding" (line 29 of the amended rules) before the period to eliminate ambiguity. Without the modifier, it is possible to read the phrase as referring to the posttrial motion filed last even though earlier filed motions have not yet been decided. The same language appears at lines 68, 80, 100, and 130 of the Style Subcommittee draft and the changes appear at lines 55, 61, 76, and 95 of the amended rules.

d. At lines 139 to 142, the Advisory Committee decided not to make the changes suggested by the Style Subcommittee because the Advisory Committee added a new item to its agenda dealing with the relationship of these lines to 18 U.S.C. § 3731 and the Advisory Committee does not want to make any changes in these lines until it has had further opportunity to consider that item.

e. At page 13 of the Style Subcommittee's draft, the Style Subcommittee suggested that the note accompanying paragraph (a)(3) should state that the amendment "merely tightens the phrasing" rather than stating that the amendment "is technical in nature." Because there is a long tradition of referring to style changes as "technical" and because both the public and the Congress are familiar with and comfortable with that phrasing, the Advisory Committee decided to retain the reference to the changes as "technical in nature."

8. Several changes have been made to the Committee Notes. Most of the changes simply conform the notes to the changes made in the text of the rule. In addition, the Advisory Committee has dropped language suggesting that a special statistical category be created for notices of appeal held in abeyance under the new rule. (The last two sentences of the second paragraph explaining paragraph (a)(4) have been deleted.)

No one on the Committee favored the alternate approach suggested by one commentator. The recommendation was to retain current Rule 4(a)(4) and allow ad hoc relief by amending Rule 26. The Committee rejected the suggestion for two reasons.

First, the committee favors an approach that eliminates the

trap[2], over one that gives a court discretion to "rescue" a litigant caught in the trap.

Second, it is not clear that the commentator's suggestion could work. Specifically, the commentator suggested amending Rule 26 to authorize a party caught in the 4(a)(4) trap to ask a court to suspend that provision in Rule 4 which invalidates a notice of appeal filed prior to the disposition of a posttrial tolling motion. The suggestion assumes that it is Rule 4(a)(4) that makes a notice of appeal a nullity if it is filed during the pendency of one of the posttrial tolling motions. While it is true that 4(a)(4) states a notice is a nullity if it is filed during the pendency of any of the named motions, there is a line of cases indicating that, at least as to some of the motions, it is the motions themselves that make the appeal premature. The motions suspend the finality of the underlying judgment, making appeal premature. See United States v. Dieter, 429 U.S. 6, 8 (1976) (per curiam); In re X-Cel, Inc., 823 F.2d 192 (7th Cir. 1987). If it is the motion--not Rule 4--that makes appeal premature, suspending the provision in Rule 4 will not cure the problem. The approach taken in the published draft avoids that problem by providing that a notice is held in abeyance and becomes effective upon disposition of the motion.

Rule 5.1

There were no comments submitted on the proposed amendments to Rule 5.1 that change "magistrate" to "magistrate judge." The Advisory Committee unanimously accepted all of the changes suggested by the Style Subcommittee and they have been incorporated in the amended draft.

Rule 10

There were no comments submitted regarding the proposed amendment to Rule 10; the amendment corrects a printer's error. The Advisory Committee unanimously accepted most of the changes

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[2] Rule 4(a)(4) currently provides that if a notice of appeal is filed before the district court disposes of all posttrial tolling motions, the notice of appeal is a nullity and a new notice of appeal must be filed after the disposition of the motions. Many litigants, especially those whose motions are denied, fail to file new notices of appeal and their right to appeal is lost.

suggested by the Style Subcommittee and those changes have been incorporated in the amended draft.

The Advisory Committee altered the Style Subcommittee's suggestions at lines 13 through 15 of the Subcommittee's draft. The Style Subcommittee suggested that the second sentence of paragraph (b)(3) state: "An appellee who desires a transcript of other parts of the proceedings shall . . . file and serve on the appellant a designation the additional parts . . .." The Advisory Committee concluded that dropping the word "necessary" from the second sentence of paragraph (b)(3) would be a substantive change. The Advisory Committee unanimously agreed to change the sentence as follows: "An appellee who believes that a transcript of other party of the proceeding is necessary, shall . . .." (See lines 11-13 of the amended draft.)

The Advisory Committee also retained the "technical" amendment language in the Committee Note.

Rule 25

The proposed amendments to Rule 25 extend the holding in Houston v. Lack to all papers filed by persons confined in institutions. No comments were submitted regarding these amendments. The Advisory Committee unanimously adopted all of the Style Subcommittee's suggestions and they have been incorporated into the amended draft.

Rule 28

The proposed amendment to Rule 28 requires that a party's opening brief include a statement of the standard of review. Only one comment was received and it was not directed at the substance of the amendment. The commentator urged that the Advisory Committee further amend Rule 28 to state that the requirements of Rule 28 are exclusive and cannot be altered or supplemented by local rules. Although one member of the Advisory Committee agreed with the commentator, the Advisory Committee did not adopt the suggestion because, at this time, it has not concluded its discussions about uniformity and the proper role of local rules. Local experimentation with the contents of briefs has proven to be a good testing ground for new requirements. The proposed amendment, as well as the recently added jurisdictional statement requirement, were both prompted by positive experience with local rules.

The Advisory Committee unanimously adopted the Style Subcommittee's suggestions and the changes have been incorporated in the amended draft.

Rule 34

The proposed amendment deletes the requirement that an opening argument include a statement of the case. No comments were submitted. The Advisory Committee unanimously adopted the Style Subcommittee's suggestions and the changes have been incorporated in the amended draft.

Rule 35

The proposed amendment to Rule 35 would create a uniform method for calculating a majority for purposes of hearing or rehearing a case in banc. The proposal does not count vacancies or recusals when determining whether a majority favors granting an in banc hearing. However, it provides that the number of judges participating in an in banc vote must be a majority of the active judges, including any who may be recused.

Five adverse comments were received. The Chief Judges of four circuits wrote in opposition of the proposal. Three of the chief judges believe that the method used by a circuit to convene an in banc hearing is a uniquely internal function. They further note that the courts of appeals have historically had the power to define the base from which a majority is determined and that no compelling reason has been advanced in support of the proposed change. The fourth chief judge opposes the amendment primarily because it would lower significantly the number of judges needed to convene an in banc hearing; he also expresses support for allowing each circuit to continue to determine its own procedure for convening an in banc hearing. The fifth commentator opposes the approach taken in the published draft because, in his opinion, it allows too small a number of judges to convene the court in banc, but he, unlike the chief judges, favors a uniform rule. This commentator would include recused judges in the base so that a circuit could convene in banc only when a majority of all judges in regular active service favor the in banc hearing.

One commentator, who commented favorably upon all the published drafts, supports the amendment but without any substantive comments.

As a result of the strong opposition, the Advisory

Committee voted to withdraw the proposed amendment; seven members favored withdrawal, none opposed it, and one member abstained. The abstaining member believes that a uniform rule should govern such a fundamental matter as the process used to convene a court in banc.

PROPOSED AMENDMENTS - FED. R. APP. P. 3(c) & 15(a) & (e)
Issues and changes
Revised drafts

Rule 3(c) of the Federal Rules of Appellate Procedure requires that a notice of appeal "specify the party or parties taking the appeal." In Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988), the Supreme Court held that a court of appeals has no jurisdiction to hear the appeal of a party not properly identified as an appellant and that the phrase "et al.," is insufficient to identify an unnamed party as an appellant. Id. at 318. Following the Torres decision, the courts of appeals have struggled with how much specificity is sufficient to identify an appellant. A rule change is important because of the current confusion among the courts of appeals.

Because of the importance of the Torres problem, at its January 1992 meeting, the Standing Committee approved immediate publication of the proposed amendments to Fed. R. App. P. 3(c) and 15(a) and (e), as well as Forms 1, 2, and 3. Because the Standing Committee believes that the Torres problem is sufficiently important to justify shortening the usual publication period, the Committee voted to publish the rules and forms only for three months rather than the usual six months. (Although subpart (e) of Rule 15 is not related to the Torres question, publication of all the suggested amendments to Rule 15 at one time was approved.) Public hearings were scheduled for April 8, 1992, but were canceled due to lack of interest.

The published drafts require that each appellant be "named" in the notice of appeal, except in class actions. Although the Standing Committee approved publication of the draft amendments to Rules 3 and 15, the Standing Committee requested that the Advisory Committee continue to explore other alternatives that might better preserve as many appeals as possible.[5]

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[5] A special note accompanying the published rules states:

> The Committee, after receiving public comment, may explore other variations of the proposed amendment here submitted and may recommend a modified amendment without asking for further public comment, Accordingly, the Committee welcomes suggestions of other means to identify appellants in a notice of appeal.

There has been a division of opinion among the members of the Advisory Committee regarding the best way to resolve "the Torres problem."

At the December 1991 meeting a majority of the Advisory Committee supported the published draft -- requiring that each appellant be named -- because it is definitive. The naming requirement allows both the court and all parties to know precisely who is taking the appeal. Consequently, the rule is easy to administer. Naming also requires each litigant to make an explicit choice about taking an appeal. Arguably, the draft resolves the ambiguity of the present rule by telling lawyers and litigants that shorthand methods will not suffice.

The published draft accomplishes these goals by incurring costs, costs that some of the Advisory Committee consider unacceptable. The greatest is the possibility that the right of appeal will be lost because of an inadvertent omission of a party's name. One can also argue that a requirement that a notice of appeal list all names will simply be overlooked by a practicing lawyer because in all other filings with a district court after the complaint such terms as "et al." are sufficient.

For these reasons, some members of the Advisory Committee have opposed the approach taken in the published draft and have favored alternatives that would make it harder for a party to lose a right to appeal through mistaken nomenclature. One such alternative, explored briefly at the Committee's December meeting and in more depth at its April meeting, attempts to resolve the problem of the lost appellant by providing, in essence, that once any party brings an appeal all other litigants are parties to the appeal. Drafts prepared by both Judge Easterbrook and Professor Mooney, modeled on Supreme Court Rule 12.4, were considered at the Advisory Committee's April meeting.

The Supreme Court model leaves to a court of appeals the task of sorting out those parties who actually have an interest in being active in the appellate proceeding. It also requires that a court of appeals realign the parties for purposes of briefing schedules, etc. The clerks of the courts of appeals met in late February and discussed the possibility of amending Rule 3(c) along the lines of Sup. Ct. R. 12.4. The clerks and chief deputies unanimously agreed that given the volume in the courts of appeals, this task would be a formidable one. It is this volume problem that may make the analogy to the Supreme Court's practice limp. Because most petitions for certiorari are denied,

the Supreme Court needs to deal with the realignment problem in only a relatively few cases. Nevertheless, the Advisory Committee agrees that some administrative cost incurred to save an appeal is salutary. Indeed, in its work on Rule 4(a)(4), it settled on an approach that creates some administrative costs in order to ensure that appeals are not lost through inadvertence.

Following the close of the comment period, the Advisory Committee had a telephone conference to discuss the comments and to attempt to reconcile the two differing viewpoints. Two of the seven commentators opposed the approach taken in the published draft; the other five commentators offered suggestions for refining the draft. The Committee tried to balance sensibly the very real concerns of definiteness, certainty, and ease of administration against the possibility of inadvertent and excusable loss of appellate rights. As a result, it proposes new amendments to Rule 3(c) and to Rule 12.

Rule 3. Appeal as of Right--How Taken

* * *

(c) Content of the Notice of Appeal.-- ~~The~~ A notice of appeal ~~shall~~ must specify the party or parties taking the appeal by naming each appellant either in the caption or the body of the notice of appeal. An attorney representing more than one party may fulfill this requirement by describing those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X." A notice of appeal filed pro se is filed on behalf of the party signing the notice and the signer's spouse and minor children, if they are parties, unless the notice of appeal clearly indicates a contrary intent. In a class action, whether or not the class has

been certified, it is sufficient for the notice to name one person qualified to bring the appeal as representative of the class. A notice of appeal also must ~~, shall~~ designate the judgment, order, or part thereof appealed from, and ~~shall~~ must name the court to which the appeal is taken. An appeal ~~shall~~ will not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice. Form 1 in the Appendix of Forms is a suggested form for a notice of appeal.

Committee Note

Note to subdivision (c). The amendment is intended to reduce the amount of satellite litigation spawned by the Supreme Court's decision in Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988). In Torres the Supreme Court held that the language in Rule 3(c) requiring a notice of appeal to "specify the party or parties taking the appeal" is a jurisdictional requirement and that naming the first named party and adding "et al.," without any further specificity is insufficient to identify the appellants. Since the Torres decision, there has been a great deal of litigation regarding whether a notice of appeal that contains some indication of the appellants' identities but does not name the appellants is sufficiently specific.

The amendment states a general rule that specifying the parties should be done by naming them. Naming an appellant in an otherwise timely and proper notice of appeal ensures that the appellant has perfected an appeal. However, in order to prevent the loss of a right to appeal through inadvertent omission of a party's name or continued use of such terms as "et al.," which are sufficient in all district court filings after the complaint, the amendment allows an attorney representing more than one party the flexibility to indicate which parties are appealing without naming them individually. The test established by the rule for determining whether such designations are sufficient is whether

it is objectively clear that a party intended to appeal. A notice of appeal filed by a party proceeding pro se is filed on behalf of the party signing the notice and the signer's spouse and minor children, if they are parties, unless the notice clearly indicates a contrary intent.

In class actions, naming each member of a class as an appellant may be extraordinarily burdensome or even impossible. In class actions if class certification has been denied, named plaintiffs may appeal the order denying the class certification on their own behalf and on behalf of putative class members, United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980); or if the named plaintiffs choose not to appeal the order denying the class certification, putative class members may appeal, United Airlines, Inc. v. McDonald, 432 U.S. 385 (1980). If no class has been certified, naming each of the putative class members as an appellant would often be impossible. Therefore the amendment provides that in class actions, whether or not the class has been certified, it is sufficient for the notice to name one person qualified to bring the appeal as a representative of the class.

Finally, the rule makes it clear that dismissal of an appeal should not occur when it is otherwise clear from the notice that the party intended to appeal. If a court determines it is objectively clear that a party intended to appeal, there are neither administrative concerns nor fairness concerns that should prevent the appeal from going forward.

Rule 12. Docketing the Appeal; Filing a Representation Statement; Filing ~~of~~ the Record

* * *

(b) Filing a Representation Statement.--Within 10 days after filing a notice of appeal, or at such other time designated by a court of appeals, the attorney who filed the notice of appeal must file with the clerk of the court of appeals a statement naming each party represented on appeal

by that attorney.

~~(b)~~ (c) Filing ...

Committee Note

Note to new subdivision (b). This amendment is a companion to the amendment of Rule 3(c). The Rule 3(c) amendment allows an attorney who represents more than one party on appeal to "specify" the appellants by general description rather than by naming them individually. The requirement added here is that whenever an attorney files a notice of appeal, the attorney must soon thereafter file a statement indicating all parties represented on the appeal by that attorney. Although the notice of appeal is the jurisdictional document and it must clearly indicate who is bringing the appeal, the representation statement will be helpful especially to the court of appeals in identifying the individual appellants.

The rule allows a court of appeals to require the filing of the representation statement at some time other than specified in the rule so that if a court of appeals requires a docketing statement or appearance form the representation statement may be combined with it.

Changes Since Publication

Obviously the new draft is significantly different from the published draft. The new draft makes it clear that naming each appellant is the surest way to perfect an appeal on behalf of each of them; however, the draft gives an attorney representing more than one party flexibility to use general descriptive terms as long as the notice makes it clear who intends to appeal. The companion amendment to Rule 12, requiring a representation statement, is intended to assist the court of appeals and the other parties in identifying the individual appellants.

Two commentators suggested that the rule should require listing the names of the parties in the body of the notice and that naming parties in the caption should not be sufficient. The draft continues to provide that naming in the caption is sufficient. It would create an unnecessary trap to treat the names in the caption as insufficient.

A provision is added to the rule dealing with pro se appellants. A notice of appeal filed by a pro se appellant is

sufficient to perfect an appeal on behalf of the signer's spouse and minor children if they are parties, unless the notice indicates a contrary intent.

With regard to class actions, the published rule provided that it would be sufficient for a notice to indicate that it is filed on behalf of the class. The revised draft requires that the notice name one person qualified to bring the appeal as representative of the class.

No substantive changes are made in Rule 15. Only two comments were submitted regarding Rule 15; both support the approach taken in the draft which requires that a petition for review or enforcement of agency orders name each party seeking review. Both comments were from persons who oppose the naming requirement in Rule 3. They support the naming requirement in Rule 15 principally because the notice is the first document filed with any court. The Committee note accompanying subdivision (a) is amended because it previously stated that subdivision (a) was a conforming amendment to Rule 3(c). Style changes are made in Rule 15, consistent with the changes recommended by the Style Subcommittee in other rules.

Only one minor change is made in the published forms even though substantive changes have been made in Rule 3(c), and Forms 1 and 2 are governed by Rule 3(c). The published forms indicate that each appellant/petitioner should be named in the body of the notice of appeal. Although that requirement has been relaxed in Rule 3, naming remains the preferred method and the published amendments to the forms remain appropriate. However, because Rule 3(c) authorizes alternative means an asterisk and footnote referring the reader to Rule 3(c) have been added to Forms 1 and 2.

Rule 15. Review or Enforcement of Agency Orders - How Obtained; Intervention

(a) Petition for Review of Order; Joint Petition. - Review of an order of an administrative agency, board, commission, or officer (hereinafter, the term "agency" ~~shall~~ will include agency, board, commission, or officer) ~~shall~~ must be obtained by filing with the clerk of a court of appeals ~~which~~ that is authorized to review such order, within the time prescribed by law, a petition to enjoin, set aside, suspend, modify, or otherwise review, or a notice of appeal, whichever form is indicated by the applicable statute (hereinafter, the term "petition for review" shall include a petition to enjoin, set aside, suspend, modify, or otherwise review, or a notice of appeal). The petition ~~shall specify the parties~~ must name each party seeking review either in the caption or in the body of the petition. Use of such terms as "et al.," or "petitioners," or "respondents" is not effective to name the parties. The notice of appeal also must ~~and shall~~ designate the respondent and the order or part thereof to be reviewed. Form 3 in the Appendix of Forms is a suggested form of a petition for review. In each case the agency ~~shall~~ must be named respondent. The United States ~~shall~~ will also be

~~deemed~~ a respondent if ~~so~~ required by statute, even though not ~~so~~ designated in the petition. If two or more persons are entitled to petition the same court for review of the same order and their interests are such as to make joinder practicable, they may file a joint petition for review and may thereafter proceed as a single petitioner.

* * *

(e) Payment of Fees. - When filing any separate or joint petition for review in a court of appeals, the petitioner must pay the clerk of the court of appeals the fees established by statute, and also the docket fee prescribed by the Judicial Conference of the United States.

Committee Note

Subdivision (a). The amendment is a companion to the amendment of Rule 3(c). Both Rule 3(c) and Rule 15(a) state that a notice of appeal or petition for review must name the parties seeking appellate review. Rule 3(c), however, provides an attorney who represents more than one party on appeal the flexibility to describe the parties in general terms rather than naming them individually. Rule 15(a) does not allow that flexibility; each petitioner must be named. A petition for review of an agency decision is the first filing in any court and, therefore, is analogous to a complaint in which all parties must be named.

Subdivision (e). The amendment adds subdivision (e). Subdivision (e) parallels Rule 3(e) that requires the payment of fees when filing a notice of appeal. The omission of such a requirement from Rule 15 is an apparent oversight. Five circuits have local rules requiring the payment of such fees, see, e.g., Fifth Cir. Loc. R. 15.1, and Fed. Cir. Loc. R. 15(a)(2).

Form 1. Notice of Appeal to a Court of Appeals From a Judgment or Order of a District Court

United States District Court for the _____
District of _____
File Number _____

A.B., Plaintiff	)	
	)	
v.	)	Notice of Appeal
	)	
C.D., Defendant	)	

Notice is hereby given that ~~C.D., defendant above named,~~ [___ (here name all parties taking the appeal) _____, (plaintiffs) (defendants) in the above named case,*] hereby appeals to the United States Court of Appeals for the _____ Circuit (from the final judgment) (from an order (describing it)) entered in this action on the ____ day of _____, 19__.

(s)_____
Attorney for ~~C.D.~~ [___]
[Address:_____]

* See Rule 3(c) for permissible ways of identifying appellants.

In the proposed forms, it is suggested that the text that is stricken be deleted and that bracketed material be added.

Form 2. Notice of Appeal to a Court of Appeals From a Decision of the [United States] Tax Court

~~TAX COURT OF THE UNITED STATES~~

[UNITED STATES TAX COURT]
Washington, D.C.

A.B., Petitioner	)	
	)	
v.	)	Docket No. _____
	)	
Commissioner of Internal Revenue,	)	
Respondent	)	

Notice of Appeal

Notice is hereby given that ~~A.B.~~ [_____ here name all parties taking the appeal* _____], hereby appeals to the United States Court of Appeals for the _____ Circuit from (that part of) the decision of this court entered in the above captioned proceeding on the _____ day of _____, 19__ (relating to _____).

(s)_____
Counsel for ~~A.B.~~ [_____]
[Address:_____]

* See Rule 3(c) for permissible ways of identifying appellants.

Form 3. Petition for Review of Order of an Agency, Board, Commission or Officer

United States Court of Appeals for the _____ Circuit

A.B., Petitioner	)	
	)	
v.	)	Petition for Review
XYZ Commission, Respondent	)	

~~A.B.~~ [____(here name all parties bringing the petition)____] hereby petitions the court for review of the Order of the XYZ Commission (describe the order) entered on _____, 19__.

[(s)]_____
Attorney for Petitioners
Address:_____

PROPOSED AMENDMENTS
TO THE
FEDERAL RULES OF APPELLATE PROCEDURE[1]

Rule 3. Appeal as of Right--How Taken

* * * * *

(c) *Content of the Notice of Appeal.*--~~The~~ A notice of appeal ~~shall~~ must specify the party or parties taking the appeal by naming each appellant in either the caption or the body of the notice of appeal. An attorney representing more than one party may fulfill this requirement by describing those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X." A notice of appeal filed pro se is filed on behalf of the party signing the notice and the signer's spouse and minor children, if they are parties, unless the notice of

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[1]New matter is underlined; matter to be omitted is lined through.

appeal clearly indicates a contrary intent. In a class action, whether or not the class has been certified, it is sufficient for the notice to name one person qualified to bring the appeal as representative of the class. A notice of appeal also must ~~; shall~~ designate the judgment, order, or part thereof appealed from, ~~;~~ and ~~shall~~ must name the court to which the appeal is taken. ~~Form 1 in the Appendix of Forms is a suggested form of a notice of appeal.~~ An appeal ~~shall~~ will not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice. Form 1 in the Appendix of Forms is a suggested form for a notice of appeal.

(d) ~~*Service of*~~ *Serving the Notice of Appeal*. - The clerk of the district court

shall serve notice of the filing of a notice of appeal by mailing a copy ~~thereof~~ to each party's counsel of record (apart from the appellant's), ~~of each party other than the appellant,~~ or, if a party is not represented by counsel, to the party's last known address. ~~of that party; and the~~ The clerk of the district court shall ~~transmit~~ forthwith send a copy of the notice ~~of appeal~~ and of the docket entries to the clerk of the court of appeals named in the notice. The clerk of the district court shall likewise send a copy of any later docket entry in the case to the clerk of the court of appeals. When ~~an appeal is taken by~~ a defendant appeals in a criminal case, the clerk of the district court shall also serve a copy of the notice of appeal upon the defendant, either by personal service or by mail

addressed to the defendant. The clerk shall note on each copy served the date ~~on~~ ~~which~~ when the notice of appeal was filed and, if the notice of appeal was filed in the manner provided in Rule 4(c) by an inmate confined in an institution, the date when the clerk received the notice of appeal. ~~Failure of t~~ The clerk's failure to serve notice ~~shall~~ does not affect the validity of the appeal. Service ~~shall be~~ is sufficient notwithstanding the death of a party or the party's counsel. The clerk shall note in the docket the names of the parties to whom the clerk mails copies, with the date of mailing.

* * * * *

COMMITTEE NOTE

Note to subdivision (c). The amendment is intended to reduce the amount of satellite litigation spawned by the Supreme Court's decision in Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988). In Torres the Supreme

Court held that the language in Rule 3(c) requiring a notice of appeal to "specify the party or parties taking the appeal" is a jurisdictional requirement and that naming the first named party and adding "et al.," without any further specificity is insufficient to identify the appellants. Since the Torres decision, there has been a great deal of litigation regarding whether a notice of appeal that contains some indication of the appellants' identities but does not name the appellants is sufficiently specific.

The amendment states a general rule that specifying the parties should be done by naming them. Naming an appellant in an otherwise timely and proper notice of appeal ensures that the appellant has perfected an appeal. However, in order to prevent the loss of a right to appeal through inadvertent omission of a party's name or continued use of such terms as "et al.," which are sufficient in all district court filings after the complaint, the amendment allows an attorney representing more than one party the flexibility to indicate which parties are appealing without naming them individually. The test established by the rule for determining whether such designations are sufficient is whether it is objectively clear that a party intended to appeal. A notice of appeal filed by a party proceeding *pro se* is filed on behalf of the party signing the notice and the signer's spouse and minor children, if they are parties, unless the notice clearly indicates a contrary intent.

In class actions, naming each member of a class as an appellant may be extraordinarily

burdensome or even impossible. In class actions if class certification has been denied, named plaintiffs may appeal the order denying the class certification on their own behalf and on behalf of putative class members, United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980); or if the named plaintiffs choose not to appeal the order denying the class certification, putative class members may appeal, United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977). If no class has been certified, naming each of the putative class members as an appellant would often be impossible. Therefore the amendment provides that in class actions, whether or not the class has been certified, it is sufficient for the notice to name one person qualified to bring the appeal as a representative of the class.

Finally, the rule makes it clear that dismissal of an appeal should not occur when it is otherwise clear from the notice that the party intended to appeal. If a court determines it is objectively clear that a party intended to appeal, there are neither administrative concerns nor fairness concerns that should prevent the appeal from going forward.

Note to subdivision (d). The amendment requires the district court clerk to send to the clerk of the court of appeals a copy of every docket entry in a case after the filing of a notice of appeal. This amendment accompanies the amendment to Rule 4(a)(4), which provides that when one of the posttrial motions enumerated in Rule 4(a)(4) is filed, a notice of appeal filed before the

disposition of the motion becomes effective upon disposition of the motion. The court of appeals needs to be advised that the filing of a posttrial motion has suspended a notice of appeal. The court of appeals also needs to know when the district court has ruled on the motion. Sending copies of all docket entries after the filing of a notice of appeal should provide the courts of appeals with the necessary information.

Rule 3.1. Appeals from a Judgments Entered by a Magistrates Judge in a Civil Cases

When the parties consent to a trial before a magistrate judge under ~~pursuant to~~ 28 U.S.C. § 636(c)(1), ~~an appeal from a judgment entered upon the direction of a magistrate shall~~ any appeal from the judgment must be heard by the court of appeals ~~pursuant to~~ in accordance with 28 U.S.C. § 636(c)(3), unless the parties~~, in accordance with 28 U.S.C. § 636(c)(4),~~ consent to an appeal on the record to a district judge ~~of the district court~~ and thereafter, by petition only, to the court

of appeals, in accordance with 28 U.S.C. § 636(c)(4). ~~Appeals to the court of appeals pursuant to~~ An appeal under 28 U.S.C. § 636(c)(3) ~~shall~~ must be taken in identical fashion as an appeal~~s~~ from any other judgment~~s~~ of the district court.

COMMITTEE NOTE

The amendment conforms the rule to the change in title from "magistrate" to "magistrate judge" made by the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, 5117 (1990). Additional style changes are made; no substantive changes are intended.

Rule 4. Appeal as of Right - When Taken

(a) *Appeal~~s~~ in a Civil Case~~s~~.-*

(1) Except as provided in paragraph (a)(4) of this Rule, ~~I~~in a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by

Rule 3 ~~shall~~ must be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date ~~on which it was~~ when the clerk received the notice and ~~transmit~~ send it to the clerk of the district court and ~~it shall be deemed~~ the notice will be treated as filed in the district court on the date so noted.

(2) ~~Except as provided in (a)(4) of this Rule 4, a~~ A notice of appeal filed after the ~~announcement of~~ court announces a decision or order but before the entry of

the judgment or order ~~shall be~~ is treated as filed ~~after such entry and on the day thereof~~ on the date of and after the entry.

(3) If ~~a timely notice of appeal is filed by a~~ one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date ~~on which~~ when the first notice ~~of appeal~~ was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expires.

(4) If any party makes a timely motion of a type specified immediately below, the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. This provision applies to a timely motion under the Federal Rules of Civil Procedure: ~~is filed in the district court by any party:~~

~~(i)~~ (A) for judgment under Rule 50(b);

~~(ii)~~ (B) ~~under Rule 52(b)~~ to amend or make additional findings of fact under Rule 52(b), whether or not ~~an alteration of~~ granting the motion would alter the judgment; ~~would be required if the motion is granted;~~

~~(iii)~~ (C) ~~under Rule 59~~ to alter or amend the judgment under Rule 59; ~~or~~

~~(iv)~~ (D) for attorney's fees under Rule 54 if a district court under Rule 58 extends the time for appeal;

(E) ~~under Rule 59~~ for a new trial under Rule 59; or

(F) for relief under Rule 60 if the motion is served within 10 days after the entry of judgment.

~~, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying~~

~~any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above.~~ A notice of appeal filed after announcement or entry of the judgment but before disposition of any of the above motions is ineffective to appeal from the judgment or order, or part thereof, specified in the notice of appeal, until the date of the entry of the order disposing of the last such motion outstanding. Appellate review of an order disposing of any of the above motions requires the party, in compliance with Appellate Rule 3(c), to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of

the judgment shall file an amended notice of appeal within the time prescribed by this Rule 4 measured from the entry of the order disposing of the last such motion outstanding. No additional fees ~~shall~~ will be required for ~~such~~ filing an amended notice.

* * * * *

(b) *Appeals~~*~~ in a Criminal Cases~~*~~.- In a criminal case, a defendant shall file the notice of appeal ~~by a defendant shall be filed~~ in the district court within 10 days after the entry either of ~~(i)~~ the judgment or order appealed from, or ~~(ii)~~ of a notice of appeal by the Government. A notice of appeal filed after the announcement of a decision, sentence, or order--but before entry of the judgment or order--~~shall be~~ is treated as filed ~~after such entry and on the day thereof~~ on the

date of and after the entry. If a defendant makes a timely motion specified immediately below, in accordance with the Federal Rules of Criminal Procedure, an appeal from a judgment of conviction must be taken within 10 days after the entry of the order disposing of the last such motion outstanding, or within 10 days after the entry of the judgment of conviction, whichever is later. This provision applies to a timely motion:

(1) for judgment of acquittal;

(2) for ~~in~~ arrest of judgment; ~~or~~

(3) for a new trial on any ground other than newly discovered evidence; or

(4) for a new trial based on the ground of newly discovered evidence if the motion is made before or within 10 days after entry of the judgment.

~~has been made, an appeal from a judgment~~

~~of conviction may be taken within 10 days after the entry of an order denying the motion. A motion for a new trial based on the ground of newly discovered evidence will similarly extend the time for appeal from a judgment of conviction if the motion is made before or within 10 days after entry of the judgment.~~ A notice of appeal filed after the court announces a decision, sentence, or order but before it disposes of any of the above motions, is ineffective until the date of the entry of the order disposing of the last such motion outstanding, or until the date of the entry of the judgment of conviction, whichever is later. Notwithstanding the provisions of Rule 3(c), a valid notice of appeal is effective without amendment to appeal from an order disposing of any of the above motions. When an appeal by the

government is authorized by statute, the notice of appeal ~~shall~~ must be filed in the district court within 30 days after ~~the entry of~~ (i) the entry of the judgment or order appealed from or (ii) the filing of a notice of appeal by any defendant.

A judgment or order is entered within the meaning of this subdivision when it is entered ~~in~~ on the criminal docket. Upon a showing of excusable neglect, the district court may~~,~~ --before or after the time has expired, with or without motion and notice~~,~~ --extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.

The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a

sentence under Fed. R. Crim. P. 35(c), nor does the filing of a motion under Fed. R. Crim. P. 35(c) affect the validity of a notice of appeal filed before entry of the order disposing of the motion.

(c) *Appeal by an Inmate Confined in an Institution.*- If an inmate confined in an institution files a notice of appeal in either a civil case or a criminal case, the notice of appeal is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a notarized statement or by a declaration (in compliance with 28 U.S.C. § 1746) setting forth the date of deposit and stating that first-class postage has been prepaid. In a civil case in which the first notice of appeal is filed in the manner provided in this subdivision (c),

the 14-day period provided in paragraph (a)(3) of this Rule 4 for another party to file a notice of appeal runs from the date when the district court receives the first notice of appeal. In a criminal case in which a defendant files a notice of appeal in the manner provided in this subdivision (c), the 30-day period for the government to file its notice of appeal runs from the entry of the judgment or order appealed from or from the district court's receipt of the defendant's notice of appeal.

COMMITTEE NOTE

Note to Paragraph (a)(1). The amendment is intended to alert readers to the fact that paragraph (a)(4) extends the time for filing an appeal when certain posttrial motions are filed. The Committee hopes that awareness of the provisions of paragraph (a)(4) will prevent the filing of a notice of appeal when a posttrial tolling motion is pending.

Note to Paragraph (a)(2). The amendment treats a notice of appeal filed after the announcement of a decision or order, but before its formal entry, as if the notice had

been filed after entry. The amendment deletes the language that made paragraph (a)(2) inapplicable to a notice of appeal filed after announcement of the disposition of a posttrial motion enumerated in paragraph (a)(4) but before the entry of the order, see Acosta v. Louisiana Dep't of Health & Human Resources, 478 U.S. 251 (1986) (per curiam); Alerte v. McGinnis, 898 F.2d 69 (7th Cir. 1990). Because the amendment of paragraph (a)(4) recognizes all notices of appeal filed after announcement or entry of judgment-- even those that are filed while the posttrial motions enumerated in paragraph (a)(4) are pending-- the amendment of this paragraph is consistent with the amendment of paragraph (a)(4).

Note to Paragraph (a)(3). The amendment is technical in nature; no substantive change is intended.

Note to Paragraph (a)(4). The 1979 amendment of this paragraph created a trap for an unsuspecting litigant who files a notice of appeal before a posttrial motion, or while a posttrial motion is pending. The 1979 amendment requires a party to file a new notice of appeal after the motion's disposition. Unless a new notice is filed, the court of appeals lacks jurisdiction to hear the appeal. Griggs v. Provident Consumer Discount Co., 459 U.S. 56 (1982). Many litigants, especially pro se litigants, fail to file the second notice of appeal, and several courts have expressed dissatisfaction with the rule. See, e.g., Averhart v. Arrendondo, 773 F.2d 919 (7th Cir. 1985); Harcon Barge Co. v. D & G Boat Rentals, Inc., 746 F.2d 278 (5th Cir. 1984), *cert. denied*,

479 U.S. 930 (1986).

The amendment provides that a notice of appeal filed before the disposition of a specified posttrial motion will become effective upon disposition of the motion. A notice filed before the filing of one of the specified motions or after the filing of a motion but before disposition of the motion is, in effect, suspended until the motion is disposed of, whereupon, the previously filed notice effectively places jurisdiction in the court of appeals.

Because a notice of appeal will ripen into an effective appeal upon disposition of a posttrial motion, in some instances there will be an appeal from a judgment that has been altered substantially because the motion was granted in whole or in part. Many such appeals will be dismissed for want of prosecution when the appellant fails to meet the briefing schedule. But, the appellee may also move to strike the appeal. When responding to such a motion, the appellant would have an opportunity to state that, even though some relief sought in a posttrial motion was granted, the appellant still plans to pursue the appeal. Because the appellant's response would provide the appellee with sufficient notice of the appellant's intentions, the Committee does not believe that an additional notice of appeal is needed.

The amendment provides that a notice of appeal filed before the disposition of a posttrial tolling motion is sufficient to bring the underlying case, as well as any

orders specified in the original notice, to the court of appeals. If the judgment is altered upon disposition of a posttrial motion, however, and if a party wishes to appeal from the disposition of the motion, the party must amend the notice to so indicate. When a party files an amended notice, no additional fees are required because the notice is an amendment of the original and not a new notice of appeal.

Paragraph (a)(4) is also amended to include, among motions that extend the time for filing a notice of appeal, a Rule 60 motion that is served within 10 days after entry of judgment. This eliminates the difficulty of determining whether a posttrial motion made within 10 days after entry of a judgment is a Rule 59(e) motion, which tolls the time for filing an appeal, or a Rule 60 motion, which historically has not tolled the time. The amendment comports with the practice in several circuits of treating all motions to alter or amend judgments that are made within 10 days after entry of judgment as Rule 59(e) motions for purposes of Rule 4(a)(4). See, *e.g.*, Finch v. City of Vernon, 845 F.2d 256 (11th Cir. 1988); Rados v. Celotex Corp., 809 F.2d 170 (2d Cir. 1986); Skagerberg v. Oklahoma, 797 F.2d 881 (10th Cir. 1986). To conform to a recent Supreme Court decision, however--Budinich v. Becton Dickinson and Co., 486 U.S. 196 (1988)--the amendment excludes motions for attorney's fees from the class of motions that extend the filing time unless a district court, acting under Rule 58, enters an order extending the time for appeal. This amendment is to be read in conjunction with the amendment of Fed. R.

Civ. P. 58.

Note to subdivision (b). The amendment grammatically restructures the portion of this subdivision that lists the types of motions that toll the time for filing an appeal. This restructuring is intended to make the rule easier to read. No substantive change is intended other than to add a motion for judgment of acquittal under Criminal Rule 29 to the list of tolling motions. Such a motion is the equivalent of a Fed. R. Civ. P. 50(b) motion for judgment notwithstanding the verdict, which tolls the running of time for an appeal in a civil case.

The proposed amendment also eliminates an ambiguity from the third sentence of this subdivision. Prior to this amendment, the third sentence provided that if one of the specified motions was filed, the time for filing an appeal would run from the entry of an order denying the motion. That sentence, like the parallel provision in Rule 4(a)(4), was intended to toll the running of time for appeal if one of the posttrial motions is timely filed. In a criminal case, however, the time for filing the motions runs not from entry of judgment (as it does in civil cases), but from the verdict or finding of guilt. Thus, in a criminal case, a posttrial motion may be disposed of more than 10 days before sentence is imposed, i.e. before the entry of judgment. United States v. Hashagen, 816 F.2d 899, 902 n.5 (3d Cir. 1987). To make it clear that a notice of appeal need not be filed before entry of judgment, the amendment states that an appeal may be taken within 10 days after the entry of an order disposing of the

motion, or within 10 days after the entry of judgment, whichever is later. The amendment also changes the language in the third sentence providing that an appeal may be taken within 10 days after the entry of an order denying the motion; the amendment says instead that an appeal may be taken within 10 days after the entry of an order disposing of the last such motion outstanding. (Emphasis added) The change recognizes that there may be multiple posttrial motions filed and that, although one or more motions may be granted in whole or in part, a defendant may still wish to pursue an appeal.

The amendment also states that a notice of appeal filed before the disposition of any of the posttrial tolling motions becomes effective upon disposition of the motions. In most circuits this language simply restates the current practice. See United States v. Cortes, 895 F.2d 1245 (9th Cir.), cert. denied, 495 U.S. 939 (1990). Two circuits, however, have questioned that practice in light of the language of the rule, see United States v. Gargano, 826 F.2d 610 (7th Cir. 1987), and United States v. Jones, 669 F.2d 559 (8th Cir. 1982), and the Committee wishes to clarify the rule. The amendment is consistent with the proposed amendment of Rule 4(a)(4).

Subdivision (b) is further amended in light of new Fed. R. Crim. P. 35(c), which authorizes a sentencing court to correct any arithmetical, technical, or other clear errors in sentencing within 7 days after imposing the sentence. The Committee believes that a sentencing court should be able to act under

Criminal Rule 35(c) even if a notice of appeal has already been filed; and that a notice of appeal should not be affected by the filing of a Rule 35(c) motion or by correction of a sentence under Rule 35(c).

Note to subdivision (c). In Houston v. Lack, 487 U.S. 266 (1988), the Supreme Court held that a *pro se* prisoner's notice of appeal is "filed" at the moment of delivery to prison authorities for forwarding to the district court. The amendment reflects that decision. The language of the amendment is similar to that in Supreme Court Rule 29.2.

Permitting an inmate to file a notice of appeal by depositing it in an institutional mail system requires adjustment of the rules governing the filing of cross-appeals. In a civil case, the time for filing a cross-appeal ordinarily runs from the date when the first notice of appeal is filed. If an inmate's notice of appeal is filed by depositing it in an institution's mail system, it is possible that the notice of appeal will not arrive in the district court until several days after the "filing" date and perhaps even after the time for filing a cross-appeal has expired. To avoid that problem, subdivision (c) provides that in a civil case when an institutionalized person files a notice of appeal by depositing it in the institution's mail system, the time for filing a cross-appeal runs from the district court's receipt of the notice. The amendment makes a parallel change regarding the time for the government to appeal in a criminal case.

Rule 5.1. Appeals by Permission Under 28 U.S.C. § 636(c)(5)

(a) *Petition for Leave to Appeal; Answer or Cross Petition.* -- An appeal from a district court judgment, entered after an appeal ~~pursuant to~~ under 28 U.S.C. § 636(c)(4) to a district judge ~~of the district court~~ from a judgment entered upon direction of a magistrate judge in a civil case, may be sought by filing a petition for leave to appeal. An appeal on petition for leave to appeal is not a matter of right, but its allowance is a matter of sound judicial discretion. The petition shall be filed with the clerk of the court of appeals within the time provided by Rule 4(a) for filing a notice of appeal, with proof of service on all parties to the action in the district court. A notice of appeal need not be

filed. Within 14 days after service of the petition, a party may file an answer in opposition or a cross petition.

* * * * *

COMMITTEE NOTE

The amendment conforms the rule to the change in title from "magistrate" to "magistrate judge" made by the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, 5117 (1990).

* * * * *

Rule 6. ~~Appeals in bankruptcy cases from final judgments and orders of district courts or of bankruptcy appellate panels~~ Appeal in a Bankruptcy Case from a Final Judgment, Order, or Decree of a District Court or of a Bankruptcy Appellate Panel

* * * * *

(b) Appeal from a judgment, order or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction in a bankruptcy case. --

* * * * *

(2) Additional rules. In addition to the rules made applicable by subsection (b)(1) of this rule, the following rules shall apply to an appeal to a court of appeals pursuant to 28 U.S.C. § 158(d) from a final judgment, order or decree of a district court or of a bankruptcy appellate panel exercising appellate jurisdiction pursuant to 28 U.S.C. § 158(a) or (b):

(i) Effect of a Motion for Rehearing on the Time for Appeal. If any party files a timely motion for rehearing under Bankruptcy Rule 8015 ~~is filed~~ in the district court or the bankruptcy appellate panel, the time for appeal to the court of appeals for all parties ~~shall~~ runs from the entry of the order ~~denying the rehearing or the entry of the~~

~~subsequent judgment~~ disposing of the motion. A notice of appeal filed after announcement or entry of the district court's or bankruptcy appellate panel's judgment, order, or decree, but before disposition of the motion for rehearing, is ineffective until the date of the entry of the order disposing of the motion for rehearing. Appellate review of the order disposing of the motion requires the party, in compliance with Appellate Rules 3(c) and 6(b)(1)(ii), to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment, order, or decree shall file an amended notice of appeal within the time prescribed by Rule

4, excluding 4(a)(4) and 4(b), measured from the entry of the order disposing of the motion. No additional fees will be required for filing the amended notice.

* * * * *

COMMITTEE NOTE

Note to Subparagraph (b)(2)(i). The amendment accompanies concurrent changes to Rule 4(a)(4). Although Rule 6 never included language such as that being changed in Rule 4(a)(4), language that made a notice of appeal void if it was filed before, or during the pendency of, certain posttrial motions, courts have found that a notice of appeal is premature if it is filed before the court disposes of a motion for rehearing. See, e.g., In re X-Cel, Inc., 823 F.2d 192 (7th Cir. 1987); In re Shah, 859 F.2d 1463 (10th Cir. 1988). The Committee wants to achieve the same result here as in Rule 4, the elimination of a procedural trap.

Rule 10. The Record on Appeal

* * * * *

(b) *The Transcript of Proceedings; Duty of Appellant to Order; Notice to Appellee if Partial Transcript is Ordered.* -

* * * * *

(3) Unless the entire transcript is to be included, the appellant shall, within the ~~10 days~~ 10-day time provided in paragraph (b)(1) of this Rule 10, file a statement of the issues the appellant intends to present on the appeal, and shall serve on the appellee a copy of the order or certificate and of the statement. ~~If the~~ An appellee ~~deems~~ who believes that a transcript ~~or~~ of other parts of the proceedings ~~to be~~ is necessary ~~, the appellee~~ shall, within 10 days after the service of the order or certificate and the statement of the appellant, file and

serve on the appellant a designation of additional parts to be included. Unless within 10 days after service of ~~such~~ the designation the appellant has ordered such parts, and has so notified the appellee, the appellee may within the following 10 days either order the parts or move in the district court for an order requiring the appellant to do so.

* * * * *

COMMITTEE NOTE

The amendment is technical and no substantive change is intended.

Rule 12. Docketing the Appeal; Filing a Representation Statement; Filing ~~of~~ the Record

* * * * *

(b) *Filing a Representation Statement.*--Within 10 days after filing a notice of appeal, unless another time is designated by the court of appeals, the attorney who

filed the notice of appeal shall file with the clerk of the court of appeals a statement naming each party represented on appeal by that attorney.

~~(b)~~ (c) *Filing the Record, Partial Record, or Certificate.* -- Upon receipt of the record transmitted pursuant to Rule 11(b), or the partial record transmitted pursuant to Rule 11(e), (f), or (g), or the clerk's certificate under Rule 11(c), the clerk of the court of appeals shall file it and shall immediately give notice to all parties of the date on which it was filed.

COMMITTEE NOTE

Note to new subdivision (b). This amendment is a companion to the amendment of Rule 3(c). The Rule 3(c) amendment allows an attorney who represents more than one party on appeal to "specify" the appellants by general description rather than by naming them individually. The requirement added here is that whenever an attorney files a notice of appeal, the attorney must soon thereafter file

a statement indicating all parties represented on the appeal by that attorney. Although the notice of appeal is the jurisdictional document and it must clearly indicate who is bringing the appeal, the representation statement will be helpful especially to the court of appeals in identifying the individual appellants.

The rule allows a court of appeals to require the filing of the representation statement at some time other than specified in the rule so that if a court of appeals requires a docketing statement or appearance form the representation statement may be combined with it.

Rule 15. Review or Enforcement of an Agency Orders - How Obtained; Intervention

(a) *Petition for Review of Order; Joint Petition.* - Review of an order of an administrative agency, board, commission, or officer (hereinafter, the term "agency" ~~shall~~ will include agency, board, commission, or officer) ~~shall~~ must be obtained by filing with the clerk of a court of appeals ~~which~~ that is authorized to review such order, within the time

prescribed by law, a petition to enjoin, set aside, suspend, modify, or otherwise review, or a notice of appeal, whichever form is indicated by the applicable statute (hereinafter, the term "petition for review" ~~shall~~ will include a petition to enjoin, set aside, suspend, modify, or otherwise review, or a notice of appeal). The petition ~~shall specify the parties~~ must name each party seeking review either in the caption or in the body of the petition. Use of such terms as "et al.," or "petitioners," or "respondents" is not effective to name the parties. The petition also must ~~and shall~~ designate the respondent and the order or part thereof to be reviewed. Form 3 in the Appendix of Forms is a suggested form of a petition for review. In each case the agency ~~shall~~ must be named respondent.

The United States ~~shall~~ will also be ~~deemed~~ a respondent if ~~so~~ required by statute, even though not ~~so~~ designated in the petition. If two or more persons are entitled to petition the same court for review of the same order and their interests are such as to make joinder practicable, they may file a joint petition for review and may thereafter proceed as a single petitioner.

* * * * *

(e) *Payment of Fees.* - When filing any separate or joint petition for review in a court of appeals, the petitioner must pay the clerk of the court of appeals the fees established by statute, and also the docket fee prescribed by the Judicial Conference of the United States.

COMMITTEE NOTE

Subdivision (a). The amendment is a companion to the amendment of Rule 3(c). Both Rule 3(c) and Rule 15(a) state that a notice of appeal or petition for review must name the parties seeking appellate review. Rule 3(c), however, provides an attorney who represents more than one party on appeal the flexibility to describe the parties in general terms rather than naming them individually. Rule 15(a) does not allow that flexibility; each petitioner must be named. A petition for review of an agency decision is the first filing in any court and, therefore, is analogous to a complaint in which all parties must be named.

Subdivision (e). The amendment adds subdivision (e). Subdivision (e) parallels Rule 3(e) that requires the payment of fees when filing a notice of appeal. The omission of such a requirement from Rule 15 is an apparent oversight. Five circuits have local rules requiring the payment of such fees, *see, e.g.*, Fifth Cir. Loc. R. 15.1, and Fed. Cir. Loc. R. 15(a)(2).

Rule 25. Filing and Service

(a) *Filing.*- Papers required or permitted to be filed in a court of appeals ~~shall~~ must be filed with the clerk. Filing may be accomplished by mail addressed to the

clerk, but filing ~~shall not be~~ is not timely unless ~~the papers are received by the clerk~~ the clerk receives the papers within the time fixed for filing, except that briefs and appendices ~~shall be deemed~~ are treated as filed on the day of mailing if the most expeditious form of delivery by mail, except~~ing~~ special delivery, is ~~utilized~~ used. Papers filed by an inmate confined in an institution are timely filed if deposited in the institution's internal mail system on or before the last day for filing. Timely filing of papers by an inmate confined in an institution may be shown by a notarized statement or declaration (in compliance with 28 U.S.C. § 1746) setting forth the date of deposit and stating that first-class postage has been prepaid. If a motion requests relief ~~which~~ that may be granted by a single

judge, the judge may permit the motion to be filed with the judge, in which event the judge shall note thereon the date of filing and ~~shall~~ thereafter ~~transmit~~ give it to the clerk. A court of appeals may, by local rule, permit papers to be filed by facsimile or other electronic means, provided such means are authorized by and consistent with standards established by the Judicial Conference of the United States.

* * * * *

COMMITTEE NOTE

The amendment accompanies new subdivision (c) of Rule 4 and extends the holding in Houston v. Lack, 487 U.S. 266 (1988), to all papers filed in the courts of appeals by persons confined in institutions.

Rule 28. Briefs

(a) *Appellant's Brief* ~~*of the appellant*~~.

-- The brief of the appellant ~~shall~~ must

contain, under appropriate headings and in the order here indicated:

* * * * *

(5) An argument. The argument may be preceded by a summary. The argument ~~shall~~ must contain the contentions of the appellant ~~with respect to~~ on the issues presented, and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on. The argument must also include for each issue a concise statement of the applicable standard of review; this statement may appear in the discussion of each issue or under a separate heading placed before the discussion of the issues.

* * * * *

(b) *Appellee's Brief ~~of the Appellee~~*. -- The brief of the appellee ~~shall~~ must conform to the requirements of

~~subdivisions~~ paragraphs (a)(1)-(5), except that ~~a statement of jurisdiction, of the issues, or of the case, need not be made unless the appellee is dissatisfied with the statement of the appellant.~~ none of the following need appear unless the appellee is dissatisfied with the statement of the appellant:

(1) the jurisdictional statement;

(2) the statement of the issues;

(3) the statement of the case;

(4) the statement of the standard of review.

* * * * *

COMMITTEE NOTE

Note to paragraph (a)(5). The amendment requires an appellant's brief to state the standard of review applicable to each issue on appeal. Five circuits currently require these statements. Experience in those circuits indicates that requiring a statement of the standard of review generally results in arguments that are properly shaped in light of the standard.

Rule 34. Oral argument

* * * * *

(c) *Order and Content of Argument.*- The appellant is entitled to open and conclude the argument. ~~The opening argument shall include a fair statement of the case.~~ Counsel ~~will not be permitted to~~ may not read at length from briefs, records, or authorities.

* * * * *

COMMITTEE NOTE

Subdivision (c). The amendment deletes the requirement that the opening argument must include a fair statement of the case. The Committee proposed the change because in some circuits the court does not want appellants to give such statements. In those circuits, the rule is not followed and is misleading. Nevertheless, the Committee does not want the deletion of the requirement to indicate disapproval of the practice. Those circuits that desire a statement of the case may continue the practice.

Form 1. Notice of Appeal to a Court of Appeals From a Judgment or Order of a District Court

United States District Court for the _____
District of _____
File Number _____

A.B., Plaintiff)
)
v.) Notice of Appeal
)
C.D., Defendant)

Notice is hereby given that ~~C.D., defendant above named,~~ [___ (here name all parties taking the appeal)_____, (plaintiffs) (defendants) in the above named case,*] hereby appeals to the United States Court of Appeals for the _____ Circuit (from the final judgment) (from an order (describing it)) entered in this action on the ____ day of _____, 19__.

(s)_____
Attorney for ~~C.D.~~ [___]
[Address:_____]

* See Rule 3(c) for permissible ways of identifying appellants.

In the proposed forms, it is suggested that the text that is stricken be deleted and that bracketed material be added.

Form 2. Notice of Appeal to a Court of Appeals From a Decision of the [United States] Tax Court

~~TAX COURT OF THE UNITED STATES~~

[UNITED STATES TAX COURT]
Washington, D.C.

A.B., Petitioner	)	
	)	
v.	)	Docket No. _____
	)	
Commissioner of Internal Revenue,	)	
Respondent	)	

Notice of Appeal

Notice is hereby given that ~~A.B.~~ [_____ here name all parties taking the appeal* _____], hereby appeals to the United States Court of Appeals for the _____ Circuit from (that part of) the decision of this court entered in the above captioned proceeding on the _____ day of _____, 19__ (relating to _____).

(s)_____
Counsel for ~~A.B.~~ [_____]
[Address:_____]

* See Rule 3(c) for permissible ways of identifying appellants.

Form 3. Petition for Review of Order of an Agency, Board, Commission or Officer

United States Court of Appeals for the _____ Circuit

A.B., Petitioner	)	
	)	
v.	)	Petition for Review
XYZ Commission, Respondent	)	

~~A.B.~~ [_____(here name all parties bringing the petition)_____] hereby petitions the court for review of the Order of the XYZ Commission (describe the order) entered on _____, 19__.

[(s)]_____
Attorney for Petitioners
Address:_____

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

ROBERT E. KEETON
CHAIRMAN

JOSEPH F. SPANIOL, JR.
SECRETARY

CHAIRMEN OF ADVISORY COMMITTEES
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APPELLATE RULES
SAM C. POINTER, JR
CIVIL RULES
WILLIAM TERRELL HODGES
CRIMINAL RULES
EDWARD LEAVY
BANKRUPTCY RULES

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

FROM: Hon. Wm. Terrell Hodges, Chairman
Advisory Committee on Federal Rules of Criminal Procedure

SUBJECT Report on Proposed and Pending Rules of Criminal Procedure and Rules of Evidence

DATE: May 14, 1992

I. INTRODUCTION

At its meeting in April 1992, the Advisory Committee on the Rules of Criminal Procedure acted upon proposed or pending amendments to a number of Rules of Criminal Procedure. This report addresses those proposals and the recommendations to the Standing Committee. A GAP Report and copies of the Rules and the accompanying Committee Notes are attached along with a copy of the minutes of the Committee's April 1992 meeting.

II. RULES OF CRIMINAL PROCEDURE PUBLISHED FOR PUBLIC COMMENT.

In July 1991, the Standing Committee approved amendments in a number of Rules and directed that they be published for public comment. Comments were received on several of the proposed amendments and were carefully considered by the Advisory Committee at its April 1992

meeting. The following discussion briefly notes any significant changes in the language of the proposed amendment and the Committee's recommended action:

A. Rule 12(i). Production of Statements.

This amendment, which requires production of a witness's statements after he or she has testified at a pretrial suppression hearing, received no written comments. The amendment was approved by the Advisory Committee by a unanimous vote. The Committee recommends that this amendment be approved and forwarded to the Judicial Conference.

B. Rule 16(a). Disclosure of Experts.

As approved for publication, the amendment to Rule 16(a) closely tracked a similar amendment to Civil Rule 26. After considering public comments to the Rule, including strong opposition from the Department of Justice, the Committee by a vote of 6 to 5 (The Chair cast the tie-breaking vote) approved a modified amendment which requires production of a "summary" of the expected expert testimony, etc. The Advisory Committee recommends that the amendment to Rule 16(a) be forwarded to the Judicial Conference.

C. Rule 26.2. Production of Statements.

This amendment requires production of a witness's statements after the witness has testified at trial; it recognizes similar amendments in Rules 12.1, 32(f), 32.1, 46 and in Rule 8 of the Rules Governing § 2255 Hearings. Those few comments which were received on this Rule were generally supportive of the amendment. The Committee, however, ultimately deleted references in the Rule to the fact that the witness's prior statement could be ordered disclosed after the court had considered the witness's "affidavit." Now, only the witness's "testimony" triggers the disclosure requirements. The amendment was approved by a 9 to 1 vote with one abstention.

The Advisory Committee recommends that the proposed amendment be approved and forwarded to the Judicial Conference.

D. Rule 26.3 Mistrial.

Rule 26.3 is a new rule which requires the trial court to obtain the views of both sides before ruling on a mistrial motion. Only one comment was received on this amendment and it was favorable. No major changes were made

in the Rule as published and the Committee approved this amendment by a unanimous vote. The Committee recommends that this Rule be approved and forwarded to the Judicial Conference.

E. Rule 32(f). Production of Witness Statements.

This amendment requires production of a witness's statements after they have testified at a sentencing hearing. Only one comment was received; it raised no major objections to the amendment. The Committee, however, removed any reference to affidavits. Thus, disclosure is required only after the witness actually testifies. This amendment was approved by a 9 to 0 vote with one abstention. The Committee recommends that the amendment be approved and forwarded to the Judicial Conference.

F. Rule 32.1. Production of Statements.

The amendment to Rule 32.1 requires disclosure of a witness's prior statements after the witness has testified at hearing to revoke or modify probation or supervised release. As originally published, disclosure would have been required after the court considered the witness's affidavit. That reference was deleted by the Committee. No written comments were received on this amendment. The amendment was approved by a vote of 9 to 0 with one abstention. The Committee recommends that the amendment be approved and forwarded to the Judicial Conference.

G. Rule 40. Commitment to Another District.

The amendment to Rule 40 permits transmission of a facsimile copy of a warrant. Only one comment was received and it suggested that the original warrant be transmitted promptly; that proposal was rejected and the amendment was approved by a unanimous vote. The Advisory Committee recommends that the amendment be approved and forwarded to the Judicial Conference.

H. Rule 41. Search and Seizure.

Only one comment was received on this amendment, which permits consideration of a facsimile transmission in deciding whether to issue a search warrant. The comment recommended that the original be promptly forwarded. That suggestion was not adopted. The Committee decided, however, that the word "judge" following the words "Federal magistrate" should be removed to conform the rule to the definition of that term in Rule 54. The amendment was approved by a unanimous vote. The Advisory Committee

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

FROM: Hon. Wm. Terrell Hodges, Chairman
Advisory Committee on Rules of Criminal Procedure

SUBJECT: GAP Report: Explanation of Changes Made Subsequent to the Circulation for Public Comment of Rules 12, 16, 26.2, 26.3, 32, 32.1, 40, 41, 46, and Rule 8 of the Rules Governing Section 2255 Hearings.

DATE: May 15, 1992

At its July 1991 meeting, the Standing Committee approved the circulation for public comment of proposed amendments to the following Rules of Criminal Procedure and Rules Governing Section 2255 Hearings:

Rule 12(i). Production of Statements.
Rule 16(a). Disclosure of Experts.
Rule 26.2(c). Production of Statements.
Rule 26.3. Mistrial.
Rule 32(f). Production of Statements.
Rule 32.1(c). Production of Statements.
Rule 40. Committment to Another District.
Rule 41(c). Search and Seizure.
Rule 46(i). Production of Statements.
Rule 8, Rules Governing Section 2255 Hearings.

The Advisory Committee has considered the written submissions from members of the public who responded to the request for comment as well as the recommendations of the Standing Committee's Subcommittee on Style. Summaries of any comments on each Rule, the Rules, and the accompanying Committee Notes are attached. The Advisory Committee's actions on the amendments subsequent to the circulation for public comment are as follows:

1. Rule 12(i). Production of Statements.

There were no written comments on the amendment to Rule 12(i). In addition to stylistic changes, the Committee deleted the introductory, "Except as herein provided" language. The amendment deleting the last portion of the subdivision removed the necessity for that language.

2. Rule 16(a). Disclosure of Experts.

The Committee has made several substantive changes to the rule. In response to serious concerns from the Department of Justice, the Committee removed language from

the amendment which would have required a detailed statement of the testimony, etc. to be given by the expert witness. Some changes were also made in the Committee Note to reflect the fact that under the amendment, only a "summary" would be required. The Committee does not believe that the changes require republication and further comment.

3. Rule 26.2(c). Production of Statements.

In addition to changes in style, the Committee removed any reference in the amendment to "affidavits." Thus, as rewritten, a witness's prior statement need only be produced after that witness has actually testified. Similar changes were also made in the amendments to Rules 32(f), 32.1, 46, and Rule 8, Rules Governing Section 2255 Hearings.

4. Rule 26.3. Mistrial.

The Committee has made no changes in the Rule.

5. Rule 32(f). Production of Statements.

Only one comment was received on this amendment and it was favorable. As with the proposed amendment to Rule 26.2, discussed supra, the Committee has removed the reference to "affidavits" and made other suggested stylistic changes. If the Standing Committee agrees to forward this amendment and also to approve the Advisory Committee's recommendation that the current Rule 32(e) be repealed, then this amendment should be redesignated as 32(e).

6. Rule 32.1(c). Production of Statements.

The Committee removed the reference to "affidavits," as noted supra, and made several stylistic changes.

7. Rule 40(a). Committment to Another District.

Several changes in style were made to the amendment.

8. Rule 41(c). Search and Seizure.

The Committee deleted the word "judge" which had followed the words "federal magistrate," in order to conform the rule to the definition for that term found in Rule 54. The word "judge" had apparently been inadvertently included in the proposed amendment to reflect the change in the title of United States Magistrate Judge. However, in the context of this rule, a "federal magistrate" also includes other judges in the federal judiciary. The Committee Note was

revised slightly to reflect the Committee's decision not to expand the amendment to other electronic transmissions.

9. Rule 46(i). Production of Statements.

In addition to several sytlistic changes, the Committee deleted reference to "affidavits." The Committee Note was revised slightly to reflect concerns raised by the Department of Justice and one other commentator that it might be difficult to locate witness statements at early stages of a criminal prosecution. The Note indicates that if a statement is not available at the time of the detention hearing, the court may reconsider the issue if the statement is subsequent produced.

10. Rule 8, Rules Governing Section 2255 Hearings.

In addition to stylistic changes, the Committee deleted the reference to the fact that introduction of a witness's affidavit would trigger the requirement to produce that witness's statements.

Attachments:
Summaries of Comments
Lists of Commentators
Rules and Committee Notes

recommends that the amendment be approved and forwarded to the Judicial Conference.

I. Rule 46(i). Production of Statements.

This amendment requires disclosure of a witness's statements after the witness has testified a detention hearing. Although few comments were received on this rule, the Department of Justice strongly opposed the amendment on the grounds that the requirement at such an early stage in the case makes it extremely difficult to locate prior statements of its witnesses. After lengthy discussion, the Committee approved the amendment (with references to affidavits being removed) by a vote of 8 to 1. The Committee recommends that the amendment be approved and forwarded to the Judicial Conference.

J. Rule 8, Rules Governing Section 2255 Hearings.

This amendment requires production of a witness's statements after the witness has testified a Section 2255 hearing. The one comment received on this amendment pointed out the potential difficulty of locating a witness's prior statements where the hearing is held years later. After deleting references to "affidavits," the Committee approved the amendment by a vote of 9 to 0 with one abstention.

III. PROPOSED AMENDMENTS TO THE RULES OF CRIMINAL PROCEDURE.

A. In General.

At its April 1992 meeting, the Advisory Committee considered proposed amendments to a several Rules. It recommends that the following amendments be approved for publication and comment from the bench and the bar. Copies of the proposed amendments and the Committee Notes are attached.

B. Rule 16(a)(1)(A). Disclosure of Statements by Organizational Defendants.

The proposed amendment to Rule 16 fills a perceived gap in criminal discovery: disclosure of statements by persons associated with an organizational defendant. The amendment requires government disclosure of first, statements which would be discoverable as party admissions and second, a person's statements concerning acts for which the organization would be vicariously liable. The amendment is similar to one proposed recently by the American Bar

Association. The proposed amendment was adopted by the Advisory Committee by a unanimous vote.

C. Rule 29(b). Motion for Judgment of Acquittal.

This amendment, which was suggested by the Department of Justice, would treat motions for a judgment of acquittal in the same way, regardless of whether they are made at the close of the government's case or at the close of all of the evidence. That is, it permits the trial court to defer ruling on a motion for a judgment of acquittal made at the close of the government's case either before or after the jury returns its verdict. If the decision is reserved, only that evidence presented at the time of the motion may be considered. Although this amendment will not affect a large number of cases, the Committee believes that it strikes a good balance between the defendant's interest in avoiding a second trial and the government's interest in preserving its right to appeal a Rule 29 motion. The amendment was approved by the Committee by an 8 to 2 vote.

D. Rule 57. Rules by District Courts.

The proposed amendments to Rule 57 are intended to track similar amendments in the Civil, Appellate, and Bankruptcy Rules. The proposed amendment was approved by a unanimous vote.

E. Rule 59. Technical Amendments.

As with the proposed amendments to Rule 57, supra, the proposed amendments to Rule 59 are intended to track similar amendments in the Civil, Appellate, and Bankruptcy rules. In unanimously approving the proposed amendments, the Committee included the proviso that if the Standing Committee believed that references to statutory changes should be deleted from the proposed amendment, the Committee would concur with that view. The Committee has suggested a similar amendment to Federal Rule of Evidence 1102, infra.

IV. TECHNICAL AMENDMENTS TO THE RULES OF CRIMINAL PROCEDURE

The Advisory Committee recommends that Rule 32(e) be deleted. As written, the provision no longer accurately reflects the law regarding probation. In the Committee's view, this change could be treated as a technical amendment.

If the provision is deleted, it can be replaced by the proposed amendment discussed above regarding disclosure of a witness's statements.

If the Standing Committee agrees that the current Rule 32(e) should be repealed, the Advisory Committee recommends that new Rule 32(f), which was circulated for public comment, supra, should be redesignated as Rule 32(e).

V. RULES OF EVIDENCE.

A. Rules Circulated for Public Comment; Rules 702 & 705

There are currently no Evidence Rules out for public comment which have been proposed by the Criminal Rules Committee. At its April 1992 meeting, however, the Committee discussed the proposed amendments to Federal Rules of Evidence 702 and 705. As before, it believes that there are still serious concerns about the proposed amendments as they apply to criminal trials. After extended discussion on the proposed amendments, the Committee voted unanimously to urge the Standing Committee to table the proposed amendments pending resolution of the question of which entity should be responsible for proposing amendments to the Rules of Evidence, discussed infra.

B. Proposed Amendments to Federal Rules of Evidence.

1. The Committee proposes that an amendment to Federal Rule of Evidence 804(a) be approved for circulation for public comment. The proposed amendment, which is attached, would permit the trial court to decide that a hearsay declarant of "tender years" is unavailable due to a "substantial likelihood that testifying would result in seriour physical, psychological, or emotional trauma..." The amendment would fill a gap in the Federal Rules of Evidence and recognizes a rule which most states have adopted in one form or another: child hearsay statements. The amendment is not limited to child declarants, however. It extends to those whose emotional or psychological age is akin to that of a child.

2. Proposed Amendment to Rule 1102.

The Committee proposes that Federal Rule of Evidence 1102 be amended to permit the Judicial Conference to make technical changes, etc. to the Federal Rules of Evidence in

PROPOSED AMENDMENTS
TO THE
FEDERAL RULES OF CRIMINAL PROCEDURE[1]

Rule 1. Scope

These rules govern the procedure in all criminal proceedings in the courts of the United States, as provided in Rule 54(a); and, whenever specifically provided in one of the rules, to preliminary, supplementary, and special proceedings before United States ~~magistrates~~ magistrate judges and at proceedings before state and local judicial officers.

COMMITTEE NOTE

The Rule is amended to conform to the Judicial Improvements Act of 1990 [P.L. 101-650, Title III, Section 321] which provides that each United States magistrate appointed under section 631 of title 28, United States Code, shall be known as a United States magistrate judge.

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[1]New matter is underlined; matter to be omitted is lined through.

Rule 3. The Complaint

The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a magistrate judge.

COMMITTEE NOTE

The Rule is amended to conform to the Judicial Improvements Act of 1990 [P.L. 101-650, Title III, Section 321] which provides that each United States magistrate appointed under section 631 of title 28, United States Code, shall be known as a United States magistrate judge.

Rule 4. Arrest Warrant or Summons Upon Complaint

* * * * *

(c) FORM.

(1) *Warrant*. The warrant shall be signed by the magistrate judge and shall contain the name of the defendant or, if the defendant's name is unknown, any name or description by which the defendant can be identified with reasonable certainty. It

shall describe the offense charged in the complaint. It shall command that the defendant be arrested and brought before the nearest available magistrate judge.

* * * * *

(d) EXECUTION OR SERVICE; AND RETURN.

* * * * *

(4) *Return*. The officer executing a warrant shall make return thereof to the magistrate judge or other officer before whom the defendant is brought pursuant to Rule 5. At the request of the attorney for the government any unexecuted warrant shall be returned to and canceled by the magistrate judge by whom it was issued. On or before the return day the person to whom a summons was delivered for service shall make return thereof to the magistrate judge before whom the summons is returnable. At the request of the

attorney for the government made at any time while the complaint is pending, a warrant returned unexecuted and not canceled or summons returned unserved or a duplicate thereof may be delivered by the magistrate judge to the marshal or other authorized person for execution or service.

COMMITTEE NOTE

The Rule is amended to conform to the Judicial Improvements Act of 1990 [P.L. 101-650, Title III, Section 321] which provides that each United States magistrate appointed under section 631 of title 28, United States Code, shall be known as a United States magistrate judge.

Rule 5. Initial Appearance Before the Magistrate Judge

(a) IN GENERAL. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before

the nearest available federal magistrate judge or, in the event that a federal magistrate judge is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. § 3041. If a person arrested without a warrant is brought before a magistrate judge, a complaint shall be filed forthwith which shall comply with the requirements of Rule 4(a) with respect to the showing of probable cause. When a person, arrested with or without a warrant or given a summons, appears initially before the magistrate judge, the magistrate judge shall proceed in accordance with the applicable subdivisions of this rule.

(b) MISDEMEANORS AND OTHER PETTY OFFENSES. If the charge against the defendant is a misdemeanor or other petty

offense triable by a United States magistrate judge under 18 U.S.C. § 3401, the magistrate judge shall proceed in accordance with Rule 58.

(c) OFFENSES NOT TRIABLE BY THE UNITED STATES MAGISTRATE JUDGE. If the charge against the defendant is not triable by the United States magistrate judge, the defendant shall not be called upon to plead. The magistrate judge shall inform the defendant of the complaint against the defendant and of any affidavit filed therewith, of the defendant's right to retain counsel or to request the assignment of counsel if the defendant is unable to obtain counsel, and of the general circumstances under which the defendant may secure pretrial release. The magistrate judge shall inform the defendant that the defendant is not

required to make a statement and that any statement made by the defendant may be used against the defendant. The magistrate judge shall also inform the defendant of the right to a preliminary examination. The magistrate judge shall allow the defendant reasonable time and opportunity to consult counsel and shall detain or conditionally release the defendant as provided by statute or in these rules.

A defendant is entitled to a preliminary examination, unless waived, when charged with any offense, other than a petty offense, which is to be tried by a judge of the district court. If the defendant waives preliminary examination, the magistrate judge shall forthwith hold the defendant to answer in the district court. If the defendant does not waive the

preliminary examination, the magistrate judge shall schedule a preliminary examination. Such examination shall be held within a reasonable time but in any event not later than 10 days following the initial appearance if the defendant is in custody and no later than 20 days if the defendant is not in custody, provided, however, that the preliminary examination shall not be held if the defendant is indicted or if an information against the defendant is filed in district court before the date set for the preliminary examination. With the consent of the defendant and upon a showing of good cause, taking into account the public interest in the prompt disposition of criminal cases, time limits specified in this subdivision may be extended one or more times by a federal magistrate judge.

In the absence of such consent by the defendant, time limits may be extended by a judge of the United States only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice.

COMMITTEE NOTE

The Rule is amended to conform to the Judicial Improvements Act of 1990 [P.L. 101-650, Title III, Section 321] which provides that each United States magistrate appointed under section 631 of title 28, United States Code, shall be known as a United States magistrate judge.

Rule 5.1. Preliminary Examination

(a) PROBABLE CAUSE FINDING. If from the evidence it appears that there is probable cause to believe that an offense has been committed and that the defendant committed it, the federal magistrate <u>judge</u> shall forthwith hold the defendant to answer in district court. The finding of probable

cause may be based upon hearsay evidence in whole or in part. The defendant may cross-examine adverse witnesses and may introduce evidence. Objections to evidence on the ground that it was acquired by unlawful means are not properly made at the preliminary examination. Motions to suppress must be made to the trial court as provided in Rule 12.

(b) DISCHARGE OF DEFENDANT. If from the evidence it appears that there is no probable cause to believe that an offense has been committed or that the defendant committed it, the federal magistrate judge shall dismiss the complaint and discharge the defendant. The discharge of the defendant shall not preclude the government from instituting a subsequent prosecution for the same offense.

(c) RECORDS. After concluding the proceeding the federal magistrate judge shall transmit forthwith to the clerk of the district court all papers in the proceeding. The magistrate judge shall promptly make or cause to be made a record or summary of such proceeding.

(1) On timely application to a federal magistrate judge, the attorney for a defendant in a criminal case may be given the opportunity to have the recording of the hearing on preliminary examination made available to that attorney in connection with any further hearing or preparation for trial. The court may, by local rule, appoint the place for and define the conditions under which such opportunity may be afforded counsel.

(2) On application of a defendant addressed to the court or any judge

thereof, an order may issue that the federal magistrate judge make available a copy of the transcript, or of a portion thereof, to defense counsel. Such order shall provide for prepayment of costs of such transcript by the defendant unless the defendant makes a sufficient affidavit that the defendant is unable to pay or to give security therefor, in which case the expense shall be paid by the Director of the Administrative Office of the United States Courts from available appropriated funds. Counsel for the government may move also that a copy of the transcript, in whole or in part, be made available to it, for good cause shown, and an order may be entered granting such motion in whole or in part, on appropriate terms, except that the government need not prepay costs nor furnish security therefor.

COMMITTEE NOTE

The Rule is amended to conform to the Judicial Improvements Act of 1990 [P.L. 101-650, Title III, Section 321] which provides that each United States magistrate appointed under section 631 of title 28, United States Code, shall be known as a United States magistrate judge.

Rule 6. The Grand Jury

* * * * *

(e) RECORDING AND DISCLOSURE OF PROCEEDINGS.

* * * * *

(4) *Sealed Indictments.* The federal magistrate judge to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons.

* * * * *

(f) FINDING AND RETURN OF INDICTMENT. An indictment may be found only upon the concurrence of 12 or more jurors. The indictment shall be returned by the grand jury to a federal magistrate <u>judge</u> in open court. If a complaint or information is pending against the defendant and 12 jurors do not concur in finding an indictment, the foreperson shall so report to a federal magistrate <u>judge</u> in writing forthwith.

* * * * *

COMMITTEE NOTE

The Rule is amended to conform to the Judicial Improvements Act of 1990 [P.L. 101-650, Title III, Section 321] which provides that each United States magistrate appointed under section 631 of title 28, United States Code, shall be known as a United States magistrate judge.

Rule 9. Warrant or Summons Upon Indictment or Information

(a) ISSUANCE. Upon the request of the attorney for the government the court shall issue a warrant for each defendant named in an information supported by a showing of probable cause under oath as is required by Rule 4(a), or in an indictment. Upon the request of the attorney for the government a summons instead of a warrant shall issue. If no request is made, the court may issue either a warrant or a summons in its discretion. More than one warrant or summons may issue for the same defendant. The clerk shall deliver the warrant or summons to the marshal or other person authorized by law to execute or serve it. If a defendant fails to appear in response to the summons, a warrant shall issue. When a defendant arrested with a warrant or given a summons appears initially

before a magistrate judge, the magistrate judge shall proceed in accordance with the applicable subdivisions of Rule 5.

(b) FORM.

(1) *Warrant.* The form of the warrant shall be as provided in Rule 4(c)(1) except that it shall be signed by the clerk, it shall describe the offense charged in the indictment or information and it shall command that the defendant be arrested and brought before the nearest available magistrate judge. The amount of bail may be fixed by the court and endorsed on the warrant.

(2) *Summons.* The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before a magistrate judge at a stated time and place.

(c) EXECUTION OR SERVICE; AND RETURN.

(1) *Execution or Service.* The warrant shall be executed or the summons served as provided in Rule 4(d)(1), (2) and (3). A summons to a corporation shall be served by delivering a copy to an officer or to a managing or general agent or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the corporation's last known address within the district or at its principal place of business elsewhere in the United States. The officer executing the warrant shall bring the arrested person without unnecessary delay before the nearest available federal magistrate judge or, in the event that a federal magistrate judge is not reasonably available, before a

(2) *Return*. The officer executing a warrant shall make return thereof to the magistrate judge or other officer before whom the defendant is brought. At the request of the attorney for the government any unexecuted warrant shall be returned and cancelled. On or before the return day the person to whom a summons was delivered for service shall make return thereof. At the request of the attorney for the government made at any time while the indictment or information is pending, a warrant returned unexecuted and not cancelled or a summons returned unserved or a duplicate thereof may be delivered by the clerk to the marshal or other authorized person for execution or service.

* * * * *

COMMITTEE NOTE

The Rule is amended to conform to the Judicial Improvements Act of 1990 [P.L. 101-650, Title III, Section 321] which provides that each United States magistrate appointed under section 631 of title 28, United States Code, shall be known as a United States magistrate judge.

Rule 12. Pleadings and Motions Before Trial; Defenses and Objections

* * * * *

(i) PRODUCTION OF STATEMENTS AT SUPPRESSION HEARING. ~~Except as herein provided, rule~~ Rule 26.2 ~~shall apply~~ applies at a hearing on a motion to suppress evidence under subdivision (b)(3) of this rule. For purposes of this subdivision, a law enforcement officer ~~shall be~~ is deemed a government witness ~~called by the government, and upon a claim of privilege the court shall excise the portions of the statement containing~~

~~privileged matter~~.

COMMITTEE NOTE

The amendment to subdivision (i) is one of a series of contemporaneous amendments to Rules 26.2, 32(f), 32.1, 46, and Rule 8 of the Rules Governing § 2255 Hearings, which extended Rule 26.2, Production of Witness Statements, to other proceedings or hearings conducted under the Rules of Criminal Procedure. Rule 26.2(c) now explicitly states that the trial court may excise privileged matter from the requested witness statements. That change rendered similar language in Rule 12(i) redundant.

Rule 16. Discovery and Inspection

(a) GOVERNMENTAL DISCLOSURE OF EVIDENCE ~~BY THE GOVERNMENT~~.

(1) *Information Subject to Disclosure.*

* * * * *

(E) EXPERT WITNESSES. At the defendant's request, the government shall disclose to the defendant a written summary of testimony the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence

during its case in chief at trial. This summary must describe the witnesses' opinions, the bases and the reasons therefor, and the witnesses' qualifications.

(2) *Information Not Subject to Disclosure.* Except as provided in paragraphs (A), (B), ~~and~~ (D), and (E) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case~~.~~. Nor does the rule authorize the discovery or inspection ~~or~~ of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500.

* * * * *

(b) THE DEFENDANT'S DISCLOSURE OF EVIDENCE ~~BY THE DEFENDANT~~.

(1) *Information Subject to Disclosure.*

* * * * *

(C) EXPERT WITNESSES. If the defendant requests disclosure under subdivision (a)(1)(E) of this rule and the government complies, the defendant, at the government's request, must disclose to the government a written summary of testimony the defendant intends to use under Rules 702, 703 and 705 of the Federal Rules of Evidence as evidence at trial. This summary must describe the opinions of the witnesses, the bases and reasons therefor, and the witnesses' qualifications.

* * * * *

COMMITTEE NOTE

New subdivisions (a)(1)(E) and

(b)(1)(C) expand federal criminal discovery by requiring disclosure of the intent to rely on expert opinion testimony, what the testimony will consist of, and the bases of the testimony. The amendment is intended to minimize surprise that often results from unexpected expert testimony, reduce the need for continuances, and to provide the opponent with a fair opportunity to test the merit of the expert's testimony through focused cross-examination. See Eads, Adjudication by Ambush: Federal Prosecutors' Use of Nonscientific Experts in a System of Limited Criminal Discovery, 67 N. C. L. Rev. 577, 622 (1989).

Like other provisions in Rule 16, subdivision (a)(1)(E) requires the government to disclose information regarding its expert witnesses if the defendant first requests the information. Once the requested information is provided, the government is entitled, under (b)(1)(C) to reciprocal discovery of the same information from the defendant. The disclosure is in the form of a written summary and only applies to expert witnesses that each side intends to call during its case-in-chief. Although no specific timing requirements are included, it is expected that the parties will make their requests and disclosures in a timely fashion.

With increased use of both scientific and nonscientific expert testimony, one of counsel's most basic discovery needs is to learn that an expert is expected to testify. See Gianelli, Criminal Discovery, Scientific Evidence, and DNA, 44 Vand. L. Rev. 793

(1991); Symposium on Science and the Rules of Legal Procedure, 101 F.R.D. 599 (1983). This is particularly important if the expert is expected to testify on matters which touch on new or controversial techniques or opinions. The amendment is intended to meet this need by first, requiring notice of the expert's qualifications which in turn will permit the requesting party to determine whether in fact the witness is an expert within the definition of Federal Rule of Evidence 702. Like Rule 702, which generally provides a broad definition of who qualifies as an "expert," the amendment is broad in that it includes both scientific and nonscientific experts. It does not distinguish between those cases where the expert will be presenting testimony on novel scientific evidence. The rule does not extend, however, to witnesses who may offer only lay opinion testimony under Federal Rule of Evidence 701. Nor does the amendment extend to summary witnesses who may testify under Federal Rule of Evidence 1006 unless the witness is called to offer expert opinions apart from, or in addition to, the summary evidence.

Second, the requesting party is entitled to a summary of the expected testimony. This provision is intended to permit more complete pretrial preparation by the requesting party. For example, this should inform the requesting party whether the expert will be providing only background information on a particular issue or whether the witness will actually offer an opinion. In some instances, a generic description of the likely witness and that witness's

qualifications may be sufficient, e.g., where a DEA laboratory chemist will testify, but it is not clear which particular chemist will be available.

Third, and perhaps most important, the requesting party is to be provided with a summary of the bases of the expert's opinion. Rule 16(a)(1)(D) covers disclosure and access to any results or reports of mental or physical examinations and scientific testing. But the fact that no formal written reports have been made does not necessarily mean that an expert will not testify at trial. At least one federal court has concluded that that provision did not otherwise require the government to disclose the identity of its expert witnesses where no reports had been prepared. See, e.g., United States v. Johnson, 713 F.2d 654 (11th Cir. 1983, cert. denied, 484 U.S. 956 (1984)(there is no right to witness list and Rule 16 was not implicated because no reports were made in the case). The amendment should remedy that problem. Without regard to whether a party would be entitled to the underlying bases for expert testimony under other provisions of Rule 16, the amendment requires a summary of the bases relied upon by the expert. That should cover not only written and oral reports, tests, reports, and investigations, but any information that might be recognized as a legitimate basis for an opinion under Federal Rule of Evidence 703, including opinions of other experts.

The amendments are not intended to create unreasonable procedural hurdles. As

with other discovery requests under Rule 16, subdivision (d) is available to either side to seek ex parte a protective or modifying order concerning requests for information under (a)(1)(E) or (b)(1)(C).

Rule 17. Subpoena

(a) FOR ATTENDANCE OF WITNESSES; FORM; ISSUANCE. A subpoena shall be issued by the clerk under the seal of the court. It shall state the name of the court and the title, if any, of the proceeding, and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. The clerk shall issue a subpoena, signed and sealed but otherwise in blank to a party requesting it, who shall fill in the blanks before it is served. A subpoena shall be issued by a United States magistrate judge in a proceeding before that magistrate judge, but it need not be under the seal of the court.

* * * * *

(g) CONTEMPT. Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued or of the court for the district in which it was issued if it was issued by a United States magistrate judge.

* * * * *

COMMITTEE NOTE

The Rule is amended to conform to the Judicial Improvements Act of 1990 [P.L. 101-650, Title III, Section 321] which provides that each United States magistrate appointed under section 631 of title 28, United States Code, shall be known as a United States magistrate judge.

Rule 26.2. Production of Witness Statements ~~of Witnesses~~

* * * * *

(c) PRODUCTION OF EXCISED STATEMENT. If the other party claims that the

statement contains privileged information or matter that does not relate to the subject matter concerning which the witness has testified, the court shall order that it be delivered to the court in camera. Upon inspection, the court shall excise the portions of the statement that are privileged or that do not relate to the subject matter concerning which the witness has testified, and shall order that the statement, with such material excised, be delivered to the moving party. Any portion of the statement that is withheld from the defendant over the defendant's objection ~~shall~~ must be preserved by the attorney for the government, and, ~~in the event of a conviction and an appeal by the defendant~~ if the defendant appeals a conviction, ~~shall~~ must be made available to the

appellate court for the purpose of determining the correctness of the decision to excise the portion of the statement.

(d) RECESS FOR EXAMINATION OF STATEMENT. Upon delivery of the statement to the moving party, the court, upon application of that party, may recess the proceedings ~~in the trial for the examination of such statement and for preparation for its use~~ so that counsel may examine the statement and prepare to use it in the ~~trial~~ proceedings.

* * * * *

(g) SCOPE OF RULE. This rule applies at a suppression hearing conducted under Rule 12, at trial under this rule, and to the extent specified:

(1) in Rule 32(f) at sentencing;

(2) in Rule 32.1(c) at a hearing to

revoke or modify probation or supervised release;

(3) in Rule 46(i) at a detention hearing; and

(4) in Rule 8 of the Rules Governing Proceedings under 28 U.S.C. § 2255.

COMMITTEE NOTE

New subdivision (g) recognizes other contemporaneous amendments in the Rules of Criminal Procedure which extend the application of Rule 26.2 to other proceedings. Those changes are thus consistent with the extension of Rule 26.2 in 1983 to suppression hearings conducted under Rule 12. See Rule 12(i).

In extending Rule 26.2 to suppression hearings in 1983, the Committee offered several reasons. First, production of witness statements enhances the ability of the court to assess the witnesses' credibility and thus assists the court in making accurate factual determinations at suppression hearings. Second, because witnesses testifying at a suppression hearing may not necessarily testify at the trial itself, waiting until after a witness testifies at trial before requiring production of that witness's statement would be futile. Third, the Committee believed that it would be feasible to leave the suppression issue open until trial, where

Rule 26.2 would then be applicable. Finally, one of the central reasons for requiring production of statements at suppression hearings was the recognition that by its nature, the results of a suppression hearing have a profound and ultimate impact on the issues presented at trial.

The reasons given in 1983 for extending Rule 26.2 to a suppression hearing are equally compelling with regard to other adversary type hearings which ultimately depend on accurate and reliable information. That is, there is a continuing need for information affecting the credibility of witnesses who present testimony. And that need exists without regard to whether the witness is presenting testimony at a pretrial hearing, at a trial, or at a post-trial proceeding.

As noted in the 1983 Advisory Committee Note to Rule 12(i), the courts have generally declined to extend the Jencks Act, 18 U.S.C. § 3500, beyond the confines of actual trial testimony. That result will be obviated by the addition of Rule 26.2(g) and amendments to the Rules noted in that new subdivision.

Although amendments to Rules 32, 32.1, 46, and Rule 8 of the Rules Governing Proceedings under 28 U.S.C. § 2255 specifically address the requirement of producing a witness's statement, Rule 26.2 has become known as the central "rule" requiring production of statements. Thus, the references in the Rule itself will

assist the bench and bar in locating other Rules which include similar provisions.

The amendment to Rule 26.2 and the other designated Rules is not intended to require production of a witness's statement before the witness actually testifies.

Minor conforming amendments have been made to subsection (d) to reflect that Rule 26.2 will be applicable to proceedings other than the trial itself. And language has been added to subsection (c) to recognize explicitly that privileged matter may be excised from the witness's prior statement.

Rule 26.3 Mistrial

Before ordering a mistrial, the court shall provide an opportunity for the government and for each defendant to comment on the propriety of the order, including whether each party consents or objects to a mistrial, and to suggest any alternatives.

COMMITTEE NOTE

Rule 26.3 is a new rule designed to reduce the possibility of an erroneously ordered mistrial which could produce adverse and irretrievable consequences. The Rule is not designed to change the substantive law

governing mistrials. Instead it is directed at providing both sides an opportunity to place on the record their views about the proposed mistrial order. In particular, the court must give each side an opportunity to state whether it objects or consents to the order.

Several cases have held that retrial of a defendant was barred by the Double Jeopardy Clause of the Constitution because the trial court had abused its discretion in declaring a mistrial. See United States v. Dixon, 913 F.2d 1305 (8th Cir. 1990); United States v. Bates, 917 F.2d 388 (9th Cir. 1990). In both cases the appellate courts concluded that the trial court had acted precipitately and had failed to solicit the parties' views on the necessity of a mistrial and the feasibility of any alternative action. The new Rule is designed to remedy that situation.

The Committee regards the Rule as a balanced and modest procedural device that could benefit both the prosecution and the defense. While the Dixon and Bates decisions adversely affected the government's interest in prosecuting serious crimes, the new Rule could also benefit defendants. The Rule ensures that a defendant has the opportunity to dissuade a judge from declaring a mistrial in a case where granting one would not be an abuse of discretion, but the defendant believes that the prospects for a favorable outcome before that particular court, or jury, are greater than they might be upon retrial.

Rule 32. Sentence and Judgment

* * * * *

~~(e) PROBATION. After conviction of an offense not punishable by death or by life imprisonment, the defendant may be placed on probation if permitted by law.~~

(e) PRODUCTION OF STATEMENTS AT SENTENCING HEARING.

(1) *In General*. Rule 26.2 (a)-(d), and (f) applies at a sentencing hearing under this rule.

(2) *Sanctions for Failure to Produce Statement*. If a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to the moving party, the court may not consider the testimony of a witness whose statement is withheld.

* * * * *

COMMITTEE NOTE

The original subdivision (e) has been

deleted due to statutory changes affecting the authority of a court to grant probation. See 18 U.S.C. 3561(a). Its replacement is one of a number of contemporaneous amendments extending Rule 26.2 to hearings and proceedings other than the trial itself. The amendment to Rule 32 specifically codifies the result in cases such as United States v. Rosa, 891 F.2d 1074 (3d. Cir. 1989). In that case the defendant pleaded guilty to a drug offense. During sentencing the defendant unsuccessfully attempted to obtain Jencks Act materials relating to a co-accused who testified as a government witness at sentencing. In concluding that the trial court erred in not ordering the government to produce its witness's statement, the court stated:

> We believe the sentence imposed on a defendant is the most critical stage of criminal proceedings, and is, in effect, the "bottom-line" for the defendant, particularly where the defendant has pled guilty. This being so, we can perceive no purpose in denying the defendant the ability to effectively cross-examine a government witness where such testimony may, if accepted, add substantially to the defendant's sentence. In such a setting, we believe that the rationale of Jencks v. United States...and the purpose of the Jencks Act would be disserved if the government at such a grave stage of a criminal proceeding could deprive the accused of material valuable not only to the defense but to his very liberty. Id. at 1079.

The court added that the defendant had not been sentenced under the new Sentencing Guidelines and that its decision could take on greater importance under those rules. Under Guideline sentencing, said the court, the trial judge has less discretion to moderate a sentence and is required to impose a sentence based upon specific factual findings which need not be established beyond a reasonable doubt. Id at n. 3.

Although the Rosa decision decided only the issue of access by the defendant to Jencks material, the amendment parallels Rules 26.2 (applying Jencks Act to trial) and 12(i) (applying Jencks Act to suppression hearing) in that both the defense and the prosecution are entitled to Jencks material.

Production of a statement is triggered by the witness's oral testimony. The sanction provision rests on the assumption that the proponent of the witness's testimony has deliberately elected to withhold relevant material.

Rule 32.1. Revocation or Modification of Probation or Supervised Release

* * * * *

(c) PRODUCTION OF STATEMENTS.

(1) *In General.* Rule 26.2(a)-(d) and (f) applies at any hearing under this rule.

(2) *Sanctions for Failure to Produce Statement*. If a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to the moving party, the court may not consider the testimony of a witness whose statement is withheld.

COMMITTEE NOTE

The addition of subdivision (c) is one of several amendments that extend Rule 26.2 to Rules 32(f), 32.1, 46, and Rule 8 of the Rules Governing Proceedings under 28 U.S.C. § 2255. As noted in the Committee Note to Rule 26.2, the primary reason for extending that Rule to other hearings and proceedings rests heavily upon the compelling need for accurate information affecting the witnesses' credibility. While that need is certainly clear in a trial on the merits, it is equally compelling, if not more so, in other pretrial and post-trial proceedings in which both the prosecution and defense have high interests at stake. In the case of revocation or modification of probation or supervised release proceedings, not only is the defendant's liberty interest at stake, the government has a stake in protecting the interests of the community.

Requiring production of witness statements at hearings conducted under Rule 32.1 will enhance the procedural due process

which the rule now provides and which the Supreme Court required in Morrissey v. Brewer, 408 U.S. 471 (1972) and Gagnon v. Scarpelli, 411 U.S. 778 (1973). Access to prior statements of a witness will enhance the ability of both the defense and prosecution to test the credibility of the other side's witnesses under Rule 32.1(a)(1), (a)(2), and (b) and thus will assist the court in assessing credibility.

A witness's statement must be produced only if the witness testifies.

Rule 40. Commitment to Another District

(a) APPEARANCE BEFORE FEDERAL MAGISTRATE JUDGE. If a person is arrested in a district other than that in which the offense is alleged to have been committed, that person must ~~shall~~ be taken without unnecessary delay before the nearest available federal magistrate judge. Preliminary proceedings concerning the defendant must ~~shall~~ be conducted in accordance with Rules 5 and 5.1, except that if no preliminary examination is held

because an indictment has been returned or an information filed or because the defendant elects to have the preliminary examination conducted in the district in which the prosecution is pending, the person must ~~shall~~ be held to answer upon a finding that such person is the person named in the indictment, information or warrant. If held to answer, the defendant must ~~shall~~ be held to answer in the district court in which the prosecution is pending~~,~~ -- provided that a warrant is issued in that district if the arrest was made without a warrant~~,~~ -- upon production of the warrant or a certified copy thereof. The warrant or certified copy may be produced by facsimile transmission.

(b) STATEMENT BY FEDERAL MAGISTRATE JUDGE. In addition to the statements required by Rule 5, the federal magistrate

judge shall inform the defendant of the provisions of Rule 20.

* * * * *

(d) ARREST OF PROBATIONER OR SUPERVISED RELEASEE. If a person is arrested for a violation of probation or supervised release in a district other than the district having jurisdiction, such person must ~~shall~~ be taken without unnecessary delay before the nearest available federal magistrate judge. The federal magistrate judge shall:

(1) Proceed under Rule 32.1 if jurisdiction over the person is transferred to that district;

(2) Hold a prompt preliminary hearing if the alleged violation occurred in that district, and either (i) hold the person to answer in the district court of the district having jurisdiction or (ii)

dismiss the proceedings and so notify that court; or

(3) Otherwise order the person held to answer in the district court of the district having jurisdiction upon production of certified copies of the judgment, the warrant, and the application for the warrant, and upon a finding that the person before the magistrate judge is the person named in the warrant.

(e) ARREST FOR FAILURE TO APPEAR. If a person is arrested on a warrant in a district other than that in which the warrant was issued, and the warrant was issued because of the failure of the person named therein to appear as required pursuant to a subpoena or the terms of that person's release, the person arrested must ~~shall~~ be taken without unnecessary delay before the nearest available federal

magistrate judge. Upon production of the warrant or a certified copy thereof and upon a finding that the person before the magistrate judge is the person named in the warrant, the federal magistrate judge shall hold the person to answer in the district in which the warrant was issued.

(f) RELEASE OR DETENTION. If a person was previously detained or conditionally released, pursuant to chapter 207 of title 18, United States Code, in another district where a warrant, information, or indictment issued, the federal magistrate judge shall take into account the decision previously made and the reasons set forth therefor, if any, but will not be bound by that decision. If the federal magistrate judge amends the release or detention decision or alters the conditions of release, the magistrate judge shall set

92 forth the reasons therefor in writing.

COMMITTEE NOTE

The amendment to subdivision (a) is intended to expedite determining where a defendant will be held to answer by permitting facsimile transmission of a warrant or a certified copy of the warrant. The amendment recognizes an increased reliance by the public in general, and the legal profession in particular, on accurate and efficient transmission of important legal documents by facsimile machines.

The Rule is also amended to conform to the Judicial Improvements Act of 1990 [P.L. 101-650, Title III, Section 321] which provides that each United States magistrate appointed under section 631 of title 28, United States Code, shall be known as a United States magistrate judge.

Rule 41. Search and Seizure

(a) AUTHORITY TO ISSUE WARRANT. Upon the request of a federal law enforcement officer or an attorney for the government, a search warrant authorized by this rule may be issued (1) by a federal magistrate judge, or a state court of record within the federal district, for a search of

property or for a person within the district and (2) by a federal magistrate judge for a search of property or for a person either within or outside the district if the property or person is within the district when the warrant is sought but might move outside the district before the warrant is executed.

* * * * *

(c) ISSUANCE AND CONTENTS.

(1) *Warrant Upon Affidavit.* A warrant other than a warrant upon oral testimony under paragraph (2) of this subdivision shall issue only on an affidavit or affidavits sworn to before the federal magistrate judge or state judge and establishing the grounds for issuing the warrant. If the federal magistrate judge or state judge is satisfied that grounds for the application exist or that there is

probable cause to believe that they exist, that magistrate judge or state judge shall issue a warrant identifying the property or person to be seized and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate judge or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses the affiant may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person

so authorized by the President of the United States. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property or person specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. It shall designate a federal magistrate judge to whom it shall be returned.

(2) Warrant Upon Oral Testimony.

(A) GENERAL RULE. If the circumstances make it reasonable to dispense, in whole or in part, with a written affidavit, a Federal magistrate judge may issue a warrant based upon sworn ~~oral~~ testimony communicated by telephone or other

appropriate means ~~.~~ , including facsimile transmission.

(B) APPLICATION. The person who is requesting the warrant shall prepare a document to be known as a duplicate original warrant and shall read such duplicate original warrant, verbatim, to the Federal magistrate judge. The Federal magistrate judge shall enter, verbatim, what is so read to such magistrate judge on a document to be known as the original warrant. The Federal magistrate judge may direct that the warrant be modified.

(C) ISSUANCE. If the Federal magistrate judge is satisfied that the circumstances are such as to make it reasonable to dispense with a written affidavit and that grounds for the application exist or that there is probable cause to believe that they exist, the Federal magistrate judge

shall order the issuance of a warrant by directing the person requesting the warrant to sign the Federal ~~magistrate's~~ magistrate judge's name on the duplicate original warrant. The Federal magistrate judge shall immediately sign the original warrant and enter on the face of the original warrant the exact time when the warrant was ordered to be issued. The finding of probable cause for a warrant upon oral testimony may be based on the same kind of evidence as is sufficient for a warrant upon affidavit.

(D) RECORDING AND CERTIFICATION OF TESTIMONY. When a caller informs the Federal magistrate judge that the purpose of the call is to request a warrant, the Federal magistrate judge shall immediately place under oath each person whose testimony forms a basis of the application

and each person applying for that warrant. If a voice recording device is available, the Federal magistrate judge shall record by means of such device all of the call after the caller informs the Federal magistrate judge that the purpose of the call is to request a warrant. Otherwise a stenographic or longhand verbatim record shall be made. If a voice recording device is used or a stenographic record made, the Federal magistrate judge shall have the record transcribed, shall certify the accuracy of the transcription, and shall file a copy of the original record and the transcription with the court. If a longhand verbatim record is made, the Federal magistrate judge shall file a signed copy with the court.

* * * * *

(d) EXECUTION AND RETURN WITH INVENTORY.

The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The federal magistrate judge shall upon request deliver a copy of

the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

* * * * *

(g) RETURN OF PAPERS TO CLERK. The federal magistrate judge before whom the warrant is returned shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith and shall file them with the clerk of the district court for the district in which the property was seized.

* * * * *

COMMITTEE NOTE

The amendment to Rule 41(c)(2)(A) is intended to expand the authority of magistrates and judges in considering oral requests for search warrants. It also recognizes the value of, and the public's increased dependence on facsimile machines to transmit written information efficiently and accurately. As amended, the Rule should thus encourage law enforcement officers to seek a warrant, especially when it is necessary, or desirable, to supplement oral

telephonic communications by written materials which may now be transmitted electronically as well. The magistrate issuing the warrant may require that the original affidavit be ultimately filed. The Committee considered, but rejected, amendments to the Rule which would have permitted other means of electronic transmission, such as the use of computer modems. In its view, facsimile transmissions provide some method of assuring the authenticity of the writing transmitted by the affiant.

The Committee considered amendments to Rule 41(c)(2)(B), Application, Rule 41(c)(2(C), Issuance, and Rule 41(g), Return of Papers to Clerk, but determined that allowing use of facsimile transmissions in those instances would not save time and would present problems and questions concerning the need to preserve facsimile copies.

The Rule is also amended to conform to the Judicial Improvements Act of 1990 [P.L. 101-650, Title III, Section 321] which provides that each United States magistrate appointed under section 631 of title 28, United States Code, shall be known as a United States magistrate judge.

Rule 44. Right to and Assignment of Counsel

(a) RIGHT TO ASSIGNED COUNSEL. Every defendant who is unable to obtain counsel

shall be entitled to have counsel assigned to represent that defendant at every stage of the proceedings from initial appearance before the federal magistrate judge or the court through appeal, unless the defendant waives such appointment.

* * * * *

COMMITTEE NOTE

The Rule is amended to conform to the Judicial Improvements Act of 1990 [P.L. 101-650, Title III, Section 321] which provides that each United States magistrate appointed under section 631 of title 28, United States Code, shall be known as a United States magistrate judge.

Rule 46. Release From Custody

* * * * *

(i) PRODUCTION OF STATEMENTS.

(1) *In General*. Rule 26.2(a)-(d) and (f) applies at a detention hearing held under 18 U.S.C. § 3144, unless the court, for good cause shown, rules otherwise in a particular case.

(2) *Sanctions for Failure to Produce Statement.* If a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to the moving party, at the detention hearing the court may not consider the testimony of a witness whose statement is withheld.

COMMITTEE NOTE

The addition of subdivision (i) is one of a series of similar amendments to Rules 26.2, 32, 32.1, and Rule 8 of the Rules Governing Proceedings Under 28 U.S.C. § 2255 which extend Rule 26.2 to other proceedings and hearings. As pointed out in the Committee Note to the amendment to Rule 26.2, there is continuing and compelling need to assess the credibility and reliability of information relied upon by the court, whether the witness's testimony is being considered at a pretrial proceeding, at trial, or a post-trial proceeding. Production of a witness's prior statements directly furthers that goal.

The need for reliable information is no less crucial in a proceeding to determine whether a defendant should be released from custody. The issues decided at pretrial detention hearings are important to both a defendant and the community. For example, a defendant charged with criminal acts may

be incarcerated prior to an adjudication of guilt without bail on grounds of future dangerousness which is not subject to proof beyond a reasonable doubt. Although the defendant clearly has an interest in remaining free prior to trial, the community has an equally compelling interest in being protected from potential criminal activity committed by persons awaiting trial.

In upholding the constitutionality of pretrial detention based upon dangerousness, the Supreme Court in United States v. Salerno, 481 U.S. 739 (1986), stressed the existence of procedural safeguards in the Bail Reform Act. The Act provides for the right to counsel and the right to cross-examine adverse witnesses. See, e.g., 18 U.S.C. § 3142(f)(right of defendant to cross-examine adverse witness). Those safeguards, said the Court, are "specifically designed to further the accuracy of that determination." 481 U.S. at 751. The Committee believes that requiring the production of a witness's statement will further enhance the fact-finding process.

The Committee recognized that pretrial detention hearings are often held very early in a prosecution, and that a particular witness's statement may not yet be on file, or even known about. Thus, the amendment recognizes that in a particular case, the court may decide that good cause exists for not applying the rule.

Rule 49. Service and Filing of Papers

* * * * *

(e) FILING OF DANGEROUS OFFENDER NOTICE. A filing with the court pursuant to 18 U.S.C. § 3575(a) or 21 U.S.C. § 849(a) shall be made by filing the notice with the clerk of the court. The clerk shall transmit the notice to the chief judge or, if the chief judge is the presiding judge in the case, to another judge or United States magistrate judge in the district, except that in a district having a single judge and no United States magistrate judge, the clerk shall transmit the notice to the court only after the time for disclosure specified in the aforementioned statutes and shall seal the notice as permitted by local rule.

COMMITTEE NOTE

The Rule is amended to conform to the Judicial Improvements Act of 1990 [P.L. 101-650, Title III, Section 321] which provides that each United States magistrate appointed under section 631 of title 28, United States

Code, shall be known as a United States magistrate judge.

Rule 50. Calendars; Plans for Prompt Disposition

* * * * *

(b) PLANS FOR ACHIEVING PROMPT DISPOSITION OF CRIMINAL CASES. To minimize undue delay and to further the prompt disposition of criminal cases, each district court shall conduct a continuing study of the administration of criminal justice in the district court and before United States ~~magistrates~~ magistrate judges of the district and shall prepare plans for the prompt disposition of criminal cases in accordance with the provisions of Chapter 208 of Title 18, United States Code.

COMMITTEE NOTE

The Rule is amended to conform to the Judicial Improvements Act of 1990 [P.L. 101-650, Title III, Section 321] which provides

that each United States magistrate appointed under section 631 of title 28, United States Code, shall be known as a United States magistrate judge.

Rule 54. Application and Exception

* * * * *

(b) PROCEEDINGS.

* * * * *

(3) *Peace Bonds.* These rules do not alter the power of judges of the United States or of United States ~~magistrates~~ magistrate judges to hold to security of the peace and for good behavior under Revised Statutes, § 4069, 50 U.S.C. § 23, but in such cases the procedure shall conform to these rules so far as they are applicable.

(4) *Proceedings Before United States ~~Magistrates~~ Magistrate Judges.* Proceedings involving misdemeanors and other petty offenses are governed by Rule

58.

* * * * *

(c) APPLICATION OF TERMS. As used in these rules the following terms have the designated meanings.

* * * * *

"Federal magistrate judge" means a United States magistrate judge as defined in 28 U.S.C. §§ 631-639, a judge of the United States or another judge or judicial officer specifically empowered by statute in force in any territory or possession, the Commonwealth of Puerto Rico, or the District of Columbia, to perform a function to which a particular rule relates.

"Judge of the United States" includes a judge of a district court, court of appeals, or the Supreme Court.

"Law" includes statutes and judicial

decisions.

"Magistrate judge" includes a United States magistrate judge as defined in 28 U.S.C. §§ 631-639, a judge of the United States, another judge or judicial officer specifically empowered by statute in force in any territory or possession, the Commonwealth of Puerto Rico, or the District of Columbia, to perform a function to which a particular rule relates, and a state or local judicial officer, authorized by 18 U.S.C. § 3041 to perform the functions prescribed in Rules 3, 4, and 5.

"Oath" includes affirmations.

"Petty offense" is defined in 18 U.S.C. § 19.

"State" includes District of Columbia, Puerto Rico, territory and insular possession.

"United States magistrate judge" means the officer authorized by 28 U.S.C. §§ 631-639.

COMMITTEE NOTE

The Rule is amended to conform to the Judicial Improvements Act of 1990 [P.L. 101-650, Title III, Section 321] which provides that each United States magistrate appointed under section 631 of title 28, United States Code, shall be known as a United States magistrate judge.

Rule 55. Records

The clerk of the district court and each United States magistrate judge shall keep records in criminal proceedings in such form as the Director of the Administrative Office of the United States Courts may prescribe. The clerk shall enter in the records each order or judgment of the court and the date such entry is made.

COMMITTEE NOTE

The Rule is amended to conform to the Judicial Improvements Act of 1990 [P.L. 101-650, Title III, Section 321] which provides

that each United States magistrate appointed under section 631 of title 28, United States Code, shall be known as a United States magistrate judge.

Rule 57. Rules by District Courts

Each district court by action of a majority of the judges thereof may from time to time, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice not inconsistent with these rules. A local rule so adopted shall take effect upon the date specified by the district court and shall remain in effect unless amended by the district court or abrogated by the judicial council of the circuit in which the district is located. Copies of the rules and amendments so made by any district court shall upon their promulgation be furnished to the judicial council and the Administrative Office of

the United States Courts and be made available to the public. In all cases not provided for by rule, the district judges and ~~magistrates~~ magistrate judges may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act.

COMMITTEE NOTE

The Rule is amended to conform to the Judicial Improvements Act of 1990 [P.L. 101-650, Title III, Section 321] which provides that each United States magistrate appointed under section 631 of title 28, United States Code, shall be known as a United States magistrate judge.

Rule 58. Procedure for Misdemeanors and Other Petty Offenses

(a) SCOPE.

(1) *In General.* This rule governs the procedure and practice for the conduct of proceedings involving misdemeanors and other petty offenses, and for appeals to judges of the district courts in such

cases tried by ~~magistrates~~ United States magistrate judges.

* * * * *

(b) PRETRIAL PROCEDURES.

* * * * *

(2) *Initial Appearance*. At the defendant's initial appearance on a misdemeanor or other petty offense charge, the court shall inform the defendant of:

* * * * *

(E) the right to trial, judgment, and sentencing before a judge of the district court, unless the defendant consents to trial, judgment, and sentencing before a magistrate judge;

(F) unless the charge is a petty offense, the right to trial by jury before either a United States magistrate judge or a judge of the district court; and

* * * * *

(3) *Consent and Arraignment.*

(A) TRIAL BEFORE A UNITED STATES MAGISTRATE JUDGE. If the defendant signs a written consent to be tried before the magistrate judge which specifically waives trial before a judge of the district court, the magistrate judge shall take the defendant's plea. The defendant may plead not guilty, guilty, or with the consent of the magistrate judge, nolo contendere.

(B) FAILURE TO CONSENT. If the defendant does not consent to trial before the magistrate judge, the defendant shall be ordered to appear before a judge of the district court for further proceedings on notice.

(c) ADDITIONAL PROCEDURES APPLICABLE ONLY TO PETTY OFFENSES FOR WHICH NO SENTENCE OF

IMPRISONMENT WILL BE IMPOSED. With respect to petty offenses for which no sentence of imprisonment will be imposed, the following additional procedures are applicable:

* * * * *

(2)*Waiver of Venue for Plea and Sentence.* A defendant who is arrested, held, or present in a district other than that in which the indictment, information, complaint, citation or violation notice is pending against that defendant may state in writing a wish to plead guilty or nolo contendere, to waive venue and trial in the district in which the proceeding is pending, and to consent to disposition of the case in the district in which that defendant was arrested, is held, or

is present. Unless the defendant thereafter pleads not guilty, the prosecution shall be had as if venue were in such district, and notice of the same shall be given to the magistrate judge in the district where the proceeding was originally commenced. The defendant's statement of a desire to plead guilty or nolo contendere is not admissible against the defendant.

* * * * *

(d) SECURING THE DEFENDANT'S APPEARANCE; PAYMENT IN LIEU OF APPEARANCE.

* * * * *

(2) *Notice to Appear.* If a defendant fails to pay a fixed sum, request a hearing, or appear in response to a citation or violation notice, the clerk or a magistrate judge may issue a notice for

the defendant to appear before the court on a date certain. The notice may also afford the defendant an additional opportunity to pay a fixed sum in lieu of appearance, and shall be served upon the defendant by mailing a copy to the defendant's last known address.

* * * * *

(g) APPEAL.

* * * * *

(2) *Decision, Order, Judgment or Sentence by a* United States *Magistrate* Judge.

(A) INTERLOCUTORY APPEAL. A decision or order by a magistrate judge which, if made by a judge of the district court, could be appealed by the government or defendant under any provision of law, shall be subject to an appeal to a judge of the district court provided such appeal is taken within 10 days of the entry of the

decision or order. An appeal shall be taken by filing with the clerk of court a statement specifying the decision or order from which an appeal is taken and by serving a copy of the statement upon the adverse party, personally or by mail, and by filing a copy with the magistrate judge.

(B) APPEAL FROM CONVICTION OR SENTENCE. An appeal from a judgment of conviction or sentence by a magistrate judge to a judge of the district court shall be taken within 10 days after entry of the judgment. An appeal shall be taken by filing with the clerk of court a statement specifying the judgment from which an appeal is taken, and by serving a copy of the statement upon the United States Attorney, personally or by mail, and by filing a copy with the magistrate judge.

* * * * *

COMMITTEE NOTE

The Rule is amended to conform to the Judicial Improvements Act of 1990 [P.L. 101-650, Title III, Section 321] which provides that each United States magistrate appointed under section 631 of title 28, United States Code, shall be known as a United States magistrate judge.

PROPOSED AMENDMENT TO THE RULES GOVERNING PROCEEDINGS IN THE UNITED STATES DISTRICT COURTS UNDER SECTION 2255 OF TITLE 28, UNITED STATES CODE

Rule 8. Evidentiary Hearing

* * * * *

(d) Production of Statements at Evidentiary Hearing.

(1) In General. Federal Rule of Criminal Procedure 26.2(a)-(d), and (f) applies at an evidentiary hearing under these rules.

(2) Sanctions for Failure to Produce Statement. If a party elects not to comply with an order under Federal Rule of Criminal Procedure 26.2(a) to deliver a statement to the moving party, at the evidentiary hearing the court may not consider the testimony of the witness whose statement is withheld.

COMMITTEE NOTE

The amendment to Rule 8 is one of a series of parallel amendments to Federal Rules of Criminal Procedure 32, 32.1, and 46 which extend the scope of Rule 26.2 (Production of Witness Statements) to proceedings other than the trial itself. The amendments are grounded on the compelling need for accurate and credible information in making decisions concerning the defendant's liberty. See the Advisory Committee Note to Rule 26.2(g). A few courts have recognized the authority of a judicial officer to order production of prior statements by a witness at a Section 2255 hearing, see, e.g., United States v. White, 342 F.2d 379, 382, n.4 (4th Cir. 1959). The amendment to Rule 8 grants explicit authority to do so. The amendment is not intended to require production of a witness's statement before the witness actually presents oral testimony.

May 8, 1992

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

FROM: Honorable Edward Leavy, Chairman
Advisory Committee on Bankruptcy Rules

SUBJECT: Proposed Amendments to the Federal Rules of Bankruptcy Procedure

On behalf of the Advisory Committee on Bankruptcy Rules, I have the honor to transmit proposed amendments to the Bankruptcy Rules for consideration by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States.

The preliminary draft of proposed changes to the rules was circulated to members of the bench and bar in August, 1991. Comments were received from 34 respondents after publication of the preliminary draft, including those who testified at the public hearing held in Pasadena, California on February 28, 1992, and those who responded in writing. A report of the comments received after publication of the preliminary draft is enclosed.

The Advisory Committee has made several changes to the preliminary draft after the public comment period. The changes are explained in the enclosed memorandum dated May 5, 1992. Also enclosed is a memorandum dated May 7, 1992, on the proposed amendment to Rule 5005(a) that has been the subject of substantial controversy.

A summary of the proposed amendments is provided for your convenience:

(1) Rules 1010 and 1013 contain technical amendments to delete references to the official forms for the summons and the

order for relief in an involuntary case. These forms were deleted from the official forms effective August 1, 1991.

(2) Rule 1017 is amended to clarify that the date of the filing of a notice of conversion in a case under chapter 12 or chapter 13 of the Bankruptcy Code is treated as the date of the entry of the order of conversion for the purpose of applying Rule 1019. Rule 1019 governs the conversion of a case to a chapter 7 liquidation case.

(3) Rule 2002 is amended to avoid the necessity of sending to the Washington, D.C., address of the Securities and Exchange Commission various notices in connection with a chapter 11 case if the Commission prefers to have the notices sent to a local office. The amendment also clarifies that certain notices are to be sent to the Securities and Exchange Commission only if the Commission has filed a notice of appearance or has made a request filed with the court.

(4) Rule 2003 is amended to extend the time for holding the meeting of creditors in chapter 13 cases by ten days so that courts will have greater flexibility for scheduling the meeting. This change will enable courts, if they so desire, to hold the confirmation hearing and the meeting of creditors on the same day while complying with the minimum notice requirements set forth in Rule 2002.

(5) Rule 2005 is amended to change the word "magistrate" to "magistrate judge." This amendment conforms to § 321 of the Judicial Improvements Act of 1990, Pub. L. 101-650 (1990), which changed the title of United States magistrate to United States magistrate judge.

(6) Rule 3009 is amended to delete the requirement that the court approve the amounts and times of distributions in chapter 7 cases. This change recognizes the role of the United States trustee in supervising trustees.

(7) Rule 3015 is amended to provide a time limit for filing a debt adjustment plan after a case is converted to chapter 13 from a different chapter. In addition, procedures relating to objections to confirmation and post-confirmation modification of plans are also added to the rule. Several of these provisions are now contained in Rules 3019 and 3020. A technical correction is also made to clarify that the plan or summary of the plan must be included with each notice of the confirmation hearing in chapter 12 cases pursuant to Rule 2002(a).

(8) The title to Rule 3018 is amended to indicate that the rule is applicable only in chapter 9 municipality and chapter 11 reorganization cases.

(9) Rule 3019 is amended to limit its application to modification of plans in chapter 9 municipality cases and chapter 11 reorganization cases. Provisions relating to modification of plans in chapter 12 and chapter 13 cases are dealt with in Rule 3015 as changed by the proposed amendments.

(10) Rule 3020 is amended to limit its application to confirmation of plans in chapter 9 and chapter 11 cases. Provisions relating to confirmation of chapter 12 and chapter 13 plans are included in Rule 3015 as changed by the proposed amendments.

(11) Rule 5005 is amended to prohibit the clerk from refusing to accept for filing any paper presented for the purpose of filing solely because it is not presented in proper form. This amendment conforms to the 1991 amendment to Rule 5(e) F.R.Civ.P.

(12) Rule 6002 is amended to conform to the language of § 102(1) of the Bankruptcy Code and to clarify that, in the absence of a request for a hearing, an actual hearing is not required to determine the propriety of a prior custodian's administration of property of the estate.

(13) Rule 6006 is amended to delete the requirement for an actual hearing when a hearing is not requested in connection with a motion relating to the assumption, rejection, or assignment of an executory contract or unexpired lease.

(14) Rule 6007 is amended to clarify that an actual hearing is not required if a hearing is not requested and there are no objections in connection with a motion regarding the abandonment of property of the estate.

(15) Rule 9002 contains a technical amendment necessary to conform to the use of the term "district judge" instead of "judge" in the proposed amendment to Rule 16 F.R.Civ. P.

(16) Rule 9019 is amended to conform to the language of § 102(1) of the Code which clarifies that an actual hearing is not required if a hearing is not requested in connection with a motion to approve a compromise or settlement.

(17) Rule 9036 is added to provide for the electronic transmission of certain notices as an alternative to the mailing of notices pursuant to Rule 2002.

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

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CHAIRMAN

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SAM C. POINTER, JR.
CIVIL RULES
WILLIAM TERRELL HODGES
CRIMINAL RULES
EDWARD LEAVY
BANKRUPTCY RULES

May 7, 1992

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

FROM: Hon. Edward Leavy, Chairman
Advisory Committee on Bankruptcy Rules

SUBJECT: Proposed Amendment Subject to Substantial Controversy

The proposed amendment to Bankruptcy Rule 5005(a) is the only proposed change that has been the subject of substantial controversy.[1] The amendment provides that the clerk shall not refuse to accept for filing any petition or other paper presented for the purpose of filing solely because it is not presented in proper form as required by the Bankruptcy Rules or local rules or practices. This amendment is substantially the same as the 1991 amendment to Rule 5(e) of the Federal Rules of Civil Procedure, which is currently applicable to adversary proceedings in bankruptcy courts pursuant to Bankruptcy Rule 7005.

Seventeen responses were received from the bench and bar regarding the proposed amendment to Rule 5005(a). Nine clerks and one former clerk opposed the proposal. Two bankruptcy judges responded, one in favor and one opposed to the amendment. Three practicing lawyers are in favor and one is opposed to the change. An assistant circuit executive testified regarding the high volume of bankruptcy petitions, often defective in form, that are filed by tenants for the sole purpose of delaying eviction proceedings.

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[1] Proposed amendments to Rule 3002 that were included in the Preliminary Draft of Proposed Amendments published for comment in August, 1991, also have been the subject of substantial controversy, but have been deleted from the proposed amendments that will be presented by the Advisory Committee to the Standing Committee in June, 1992.

Commentators in opposition to the proposed amendment have argued that it will cause significant administrative problems because clerks will be required to accept and process papers that are not in proper form, including those that do not conform to the official forms. Bankruptcy courts are more "paper intensive" than district courts in that bankruptcy practice involves a high volume of filed papers, and it is more difficult and expensive to administer bankruptcy cases if papers are not in proper form. Opponents have argued that it would not be practical to rely on judicial remedies administered by judges to deal with the high volume of defective papers.

A bankruptcy judge from the Central District of California also has argued that rejection of papers that are not in proper form is helpful in dealing with the many cases in that district in which tenants file petitions for the sole purpose of delaying eviction. Petitions filed to delay eviction in Los Angeles are often prepared by so-called "bankruptcy mills," and often are not in proper form. It has been argued that it is an abuse of the bankruptcy laws to file a petition for the sole purpose of delaying eviction, and that the clerk's power to reject defective papers helps to prevent some of this abuse.

A bankruptcy judge in favor of the proposed change has complained that clerks in his district now have unbridled discretion to accept or reject bankruptcy petitions. Attorneys in favor of the proposed amendment have argued that it will be beneficial, especially to legal services organizations providing services to the poor.

The Advisory Committee, after consideration of the comments received and extensive discussion at two meetings, voted (8 in favor, 2 opposed) to approve the proposed amendment to Rule 5005(a). The view of the Advisory Committee is that it is not desirable to permit clerks to refuse to accept a document for filing, especially when the act of filing the petition or other document has serious legal consequences. This view is consistent with the policy of the 1991 amendment to Rule 5(e) of the Federal Rules of Civil Procedure. It is the function of a judge, not a clerk, to decide that a paper is legally insufficient to constitute a valid petition or other document. Problems caused by "bankruptcy mills" who often file defective papers to delay evictions should be solved through legislation or otherwise, but not by permitting clerks to reject petitions that are not in proper form.

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EDWARD LEAVY
BANKRUPTCY RULES

May 5, 1992

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

FROM: Hon. Edward Leavy, Chairman
Advisory Committee on Bankruptcy Rules

SUBJECT: Explanation of Changes Made Subsequent to the Original Publication of the August 1991 Preliminary Draft of the Proposed Amendments to the Bankruptcy Rules

The Advisory Committee on Bankruptcy Rules considered the testimony of each witness at the public hearing held in Pasadena, California, on February 28, 1992, and all other communications received from interested individuals and groups who responded to the Advisory Committee's request for comments on the preliminary draft of proposed amendments to the Bankruptcy Rules published in August, 1991. Changes in language for clarification or stylistic improvement have been made.

The significant changes made by the Advisory Committee subsequent to the original publication of the preliminary draft of the proposed amendments to the rules are:

PART III
CLAIMS AND DISTRIBUTION TO CREDITORS AND EQUITY INTEREST HOLDERS; PLANS

Rule 3002. Filing Proof of Claim or Interest

The Advisory Committee has deleted the proposed amendments to Rule 3002(a) and (c).

The proposed amendment to Rule 3002(a) contained in the preliminary draft would require secured creditors to file proofs of claim for their secured claims to be allowed in chapter 7,

chapter 12, and chapter 13 cases. The proposed change was controversial, and the Advisory Committee decided to withdraw and reconsider it and also to consider possible alternative or additional amendments for future presentation to the Standing Committee.

The proposed amendment to Rule 3002(c), which also was controversial, would give the court discretion to extend the time for filing a proof of claim in a chapter 13 case if the failure to file was due to excusable neglect. The Advisory Committee intends to reconsider the need or wisdom of this change, and to study possible alternative amendments.

Rule 3015. Filing, Objection to Confirmation, and Modification of a Plan in a Chapter 12 Family Farmer's Debt Adjustment or a Chapter 13 Individual's Debt Adjustment Case

The title of this rule has been changed to more accurately reflect the content of the rule.

A sentence has been added to subdivision (f) to provide that, in the absence of an objection, the court may determine that a chapter 12 or chapter 13 plan has been proposed in good faith and not by any means forbidden by law without receiving evidence on these issues. Rule 3020(b)(2), presently applicable in chapter 9, chapter 11, chapter 12, and chapter 13 cases, contains the same provision. As amended, however, Rule 3020 will not apply in chapter 12 and chapter 13 cases. The heading of subdivision (f) has been changed to more accurately reflect the content of the subdivision.

PART V
COURTS AND CLERKS

Rule 5005. Filing and Transmittal of Papers

The Committee Note has been changed to delete the suggestion that the clerk may advise a party or counsel, or may be directed to inform the court, that a paper is not in proper form. The procedures relating to filed papers that are not in proper form are left to local rules and practices. A sentence was added to the Committee Note to clarify that the amendment does not require the clerk to accept for filing papers sent by facsimile transmission.

PART IX
GENERAL PROVISIONS

Rule 9002. Meanings of Words in the Federal Rules of Civil Procedure When Applicable to Cases under the Code

Subdivision (4) has been changed to provide that the phrase "district judge," when used in the Federal Rules of Civil Procedure made applicable to cases under the Code, means "bankruptcy judge" if the case or proceeding is pending before a bankruptcy judge. This is a technical amendment made necessary by the proposed amendment to F.R.Civ.P. 16(b) that will change the word "judge" to "district judge." F.R.Civ.P. 16 is made applicable to adversary proceedings by Bankruptcy Rule 7016. The Advisory Committee recommends that this change be made without publication for public comment because it is technical and does not make any substantive change.

PROPOSED AMENDMENTS
TO THE
FEDERAL RULES OF BANKRUPTCY PROCEDURE[1]

Rule 1010. Service of Involuntary Petition and Summons; Petition Commencing Ancillary Case

On the filing of an involuntary petition or a petition commencing a case ancillary to a foreign proceeding the clerk shall forthwith issue a summons for service. When an involuntary petition is filed, service shall be made on the debtor. When a petition commencing an ancillary case is filed, service shall be made on the parties against whom relief is sought pursuant to § 304(b) of the Code and on ~~such~~ any other parties as the court may direct. The summons ~~shall conform to the appropriate Official Form and a copy~~ shall be served with a copy of the petition in

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[1]New matter is underlined; matter to be omitted is lined through.

the manner provided for service of a summons and complaint by Rule 7004(a) or (b). If service cannot be so made, the court may order that the summons and petition ~~to~~ be served by mailing copies to the party's last known address, and by ~~not less than~~ at least one publication in a manner and form directed by the court. The summons and petition may be served on the party anywhere. Rule 7004(f) and Rule 4(g) and (h) F.R.Civ.P. apply when service is made or attempted under this rule.

COMMITTEE NOTE

This rule is amended to delete the reference to the official form. The official form for the summons was abrogated in 1991. Other amendments are stylistic and make no substantive change.

Rule 1013. Hearing and Disposition of a Petition in an Involuntary ~~Cases~~ Case

(a) CONTESTED PETITION. The court shall determine the issues of a contested petition at the earliest practicable time and forthwith enter an order for relief, dismiss the petition, or enter any other appropriate ~~orders~~ order.

(b) DEFAULT. If no pleading or other defense to a petition is filed within the time provided by Rule 1011, the court, on the next day, or as soon thereafter as practicable, shall enter an order for the relief ~~prayed for~~ requested in the petition.

(c) [Abrogated] ~~ORDER FOR RELIEF. An order for relief shall conform substantially to the appropriate Official Form.~~

COMMITTEE NOTE

Subdivision (c) is abrogated because the official form for the order for relief was abrogated in 1991. Other amendments are stylistic and make no substantive change.

Rule 1017. Dismissal or Conversion of Case; Suspension

* * * * *

(d) PROCEDURE FOR DISMISSAL OR CONVERSION. A proceeding to dismiss a case or convert a case to another chapter, except pursuant to §§ 706(a), 707(b), 1112(a), 1208(a) or (b), or 1307(a) or (b) of the Code, is governed by Rule 9014. Conversion or dismissal pursuant to §§ 706(a), 1112(a), 1208(b), or 1307(b) shall be on motion filed and served as required by Rule 9013. A chapter 12 or chapter 13 case shall be converted without court order on the filing by the debtor of a notice of

conversion pursuant to §§ 1208(a) or 1307(a), and the filing date of the ~~filing of the~~ notice shall be deemed the date of the conversion order for the ~~purpose~~ purposes of applying § 348(c) of the Code and Rule 1019. The clerk shall forthwith transmit to the United States trustee a copy of ~~such~~ the notice.

* * * * *

COMMITTEE NOTE

Subdivision (d) is amended to clarify that the date of the filing of a notice of conversion in a chapter 12 or chapter 13 case is treated as the date of the conversion order for the purpose of applying Rule 1019. Other amendments are stylistic and make no substantive change.

Rule 2002. Notices to Creditors, Equity Security Holders, United States, and United States Trustee

* * * * *

(j) NOTICES TO THE UNITED STATES. Copies of notices required to be mailed to all creditors under this rule shall be mailed

(1) in a chapter 11 reorganization case, to the Securities and Exchange Commission ~~at Washington, D.C., and~~ at any ~~other~~ place the Commission designates, ~~in a filed writing~~ if the Commission has filed either a notice of appearance in the case or ~~has made~~ a written request ~~in a filed writing~~ to receive notices; . . . .

* * * * *

COMMITTEE NOTE

Subdivision (j) is amended to avoid the necessity of sending an additional notice to the Washington, D.C. address of the Securities and Exchange Commission if the Commission prefers to have notices sent only to a local office. This change also clarifies that notices required to be mailed pursuant to this rule must be sent to the Securities and Exchange Commission only if it has filed a notice of appearance or has filed a written request. Other amendments are stylistic and make no substantive change.

Rule 2003. Meeting of Creditors or Equity Security Holders

(a) DATE AND PLACE. In a chapter 7 liquidation or a chapter 11 reorganization

case, ~~Unless the case is a chapter 9 municipality case or a chapter 12 family farmer's debt adjustment case~~, the United States trustee shall call a meeting of creditors to be held ~~not less~~ no fewer than 20 ~~nor~~ and no more than 40 days after the order for relief. In a chapter 12 family farmer debt adjustment case, the United States trustee shall call a meeting of creditors to be held ~~not less~~ no fewer than 20 ~~nor~~ and no more than 35 days after the order for relief. In a chapter 13 individual's debt adjustment case, the United States trustee shall call a meeting of creditors to be held no fewer than 20 and no more than 50 days after the order for relief. If there is an appeal from or a motion to vacate the order for relief, or if there is a motion to dismiss the case, the United States trustee may set a

later ~~time~~ date for the meeting. The meeting may be held at a regular place for holding court or at any other place designated by the United States trustee within the district convenient for the parties in interest. If the United States trustee designates a place for the meeting which is not regularly staffed by the United States trustee or an assistant who may preside at the meeting, the meeting may be held not more than 60 days after the order for relief.

* * * * *

COMMITTEE NOTE

Subdivision (a) is amended to extend by ten days the time for holding the meeting of creditors in a chapter 13 case. This extension will provide more flexibility for scheduling the meeting of creditors. Other amendments are stylistic and make no substantive change.

Rule 2005. Apprehension and Removal of Debtor to Compel Attendance for Examination

* * * * *

(b) REMOVAL. Whenever any order to bring the debtor before the court is issued under this rule and the debtor is found in a district other than that of the court issuing the order, the debtor may be taken into custody under the order and removed in accordance with the following rules:

(1) If the debtor is taken into custody under the order at a place less than 100 miles from the place of issue of the order, the debtor shall be brought forthwith before the court that issued the order.

(2) If the debtor is taken into custody under the order at a place 100 miles or more from the place of issue of the order, the debtor shall be brought

without unnecessary delay before the nearest available United States magistrate judge, bankruptcy judge, or district judge. If, after hearing, the magistrate judge, bankruptcy judge, or district judge finds that an order has issued under this rule and that the person in custody is the debtor, or if the person in custody waives a hearing, the magistrate judge, bankruptcy judge, or district judge shall ~~issue an~~ order ~~of~~ removal, and the person in custody shall be released on conditions ~~assuring~~ ensuring prompt appearance before the court ~~which~~ that issued the order to compel the attendance.

* * * * *

COMMITTEE NOTE

Subdivision (b)(2) is amended to conform to § 321 of the Judicial Improvements Act of 1990, Pub. L. No. 101-650, which changed the

title of "United States magistrate" to "United States magistrate judge." Other amendments are stylistic and make no substantive change.

Rule 3009. Declaration and Payment of Dividends in a Chapter 7 Liquidation ~~Cases~~ Case

In a chapter 7 ~~cases~~ case, dividends to creditors shall be paid as promptly as practicable ~~in the amounts and at the times as ordered by the court~~. Dividend checks shall be made payable to and mailed to each creditor whose claim has been allowed, unless a power of attorney authorizing another entity to receive dividends has been executed and filed in accordance with Rule 9010. In that event, dividend checks shall be made payable to the creditor and to the other entity and shall be mailed to the other entity.

COMMITTEE NOTE

This rule is amended to delete the requirement that the court approve the amounts and times of distributions in chapter 7 cases.

This change recognizes the role of the United States trustee in supervising trustees. Other amendments are stylistic and make no substantive change.

Rule 3015. Filing, Objection to Confirmation, and Modification of a Plan in a Chapter 12 Family Farmer's Debt Adjustment ~~and~~ or a Chapter 13 Individual's Debt Adjustment ~~Cases~~ Case

(a) CHAPTER 12 PLAN. The debtor may file a chapter 12 plan with the petition. If a plan is not filed with the petition, it shall be filed within the time prescribed by § 1221 of the Code.

(b) CHAPTER 13 PLAN. The debtor may file a chapter 13 plan with the petition. If a plan is not filed with the petition, it shall be filed within 15 days thereafter, and such time ~~shall~~ may not be further extended except for cause shown and on notice as the court may direct. If a case is converted to chapter 13, a plan shall be filed within 15 days thereafter,

and such time may not be further extended except for cause shown and on notice as the court may direct.

(c) DATING. Every proposed plan and any modification thereof shall be dated.

(d) NOTICE AND COPIES. The plan or a summary of the plan shall be included with each notice of the hearing on confirmation mailed pursuant to Rule 2002~~(b)~~. If required by the court, the debtor shall furnish a sufficient number of copies to enable the clerk to include a copy of the plan with the notice of the hearing.

(e) TRANSMISSION TO UNITED STATES TRUSTEE. The clerk shall forthwith transmit to the United States trustee a copy of the plan and any modification thereof filed pursuant to subdivision (a) or (b) of this rule.

(f) OBJECTION TO CONFIRMATION;

DETERMINATION OF GOOD FAITH IN THE ABSENCE OF AN OBJECTION. An objection to confirmation of a plan shall be filed and served on the debtor, the trustee, and any other entity designated by the court, and shall be transmitted to the United States trustee, before confirmation of the plan. An objection to confirmation is governed by Rule 9014. If no objection is timely filed, the court may determine that the plan has been proposed in good faith and not by any means forbidden by law without receiving evidence on such issues.

(g) MODIFICATION OF PLAN AFTER CONFIRMATION. A request to modify a plan pursuant to § 1229 or § 1329 of the Code shall identify the proponent and shall be filed together with the proposed modification. The clerk, or some other person as the court may direct, shall give

the debtor, the trustee, and all creditors not less than 20 days notice by mail of the time fixed for filing objections and, if an objection is filed, the hearing to consider the proposed modification, unless the court orders otherwise with respect to creditors who are not affected by the proposed modification. A copy of the notice shall be transmitted to the United States trustee. A copy of the proposed modification, or a summary thereof, shall be included with the notice. If required by the court, the proponent shall furnish a sufficient number of copies of the proposed modification, or a summary thereof, to enable the clerk to include a copy with each notice. Any objection to the proposed modification shall be filed and served on the debtor, the trustee, and any other entity designated by the court,

and shall be transmitted to the United States trustee. An objection to a proposed modification is governed by Rule 9014.

COMMITTEE NOTE

Subdivision (b) is amended to provide a time limit for filing a plan after a case has been converted to chapter 13. The substitution of "may" for "shall" is stylistic and makes no substantive change.

Subdivision (d) is amended to clarify that the plan or a summary of the plan must be included with each notice of the confirmation hearing in a chapter 12 case pursuant to Rule 2002(a).

Subdivision (f) is added to expand the scope of the rule to govern objections to confirmation in chapter 12 and chapter 13 cases. The subdivision also is amended to include a provision that permits the court, in the absence of an objection, to determine that the plan has been proposed in good faith and not by any means forbidden by law without the need to receive evidence on these issues. These matters are now governed by Rule 3020.

Subdivision (g) is added to provide a procedure for post-confirmation modification of chapter 12 and chapter 13 plans. These procedures are designed to be similar to the procedures for confirmation of plans. However, if no objection is filed with respect to a proposed modification of a plan after confirmation, the court is not required to

hold a hearing. See § 1229(b)(2) and § 1329(b)(2) which provide that the plan as modified becomes the plan unless, after notice and a hearing, such modification is disapproved. See § 102(1). The notice of the time fixed for filing objections to the proposed modification should set a date for a hearing to be held in the event that an objection is filed.

Amendments to the title of this rule are stylistic and make no substantive change.

Rule 3018. Acceptance or Rejection of ~~Plans~~ Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case

* * * * *

COMMITTEE NOTE

The title of this rule is amended to indicate that it applies only in a chapter 9 or a chapter 11 case. The amendment of the word "Plans" to "Plan" is stylistic.

Rule 3019. Modification of Accepted Plan Before Confirmation in a Chapter 9 Municipality or a Chapter 11 Reorganization Case

In a chapter 9 or chapter 11 case, ~~After~~ after a plan has been accepted and before its confirmation, the proponent may file a modification of the plan. If the

court finds after hearing on notice to the trustee, any committee appointed under the Code, and any other entity designated by the court that the proposed modification does not adversely change the treatment of the claim of any creditor or the interest of any equity security holder who has not accepted in writing the modification, it shall be deemed accepted by all creditors and equity security holders who have previously accepted the plan.

COMMITTEE NOTE

This rule is amended to limit its application to chapter 9 and chapter 11 cases. Modification of plans after confirmation in chapter 12 and chapter 13 cases is governed by Rule 3015. The addition of the comma in the second sentence is stylistic and makes no substantive change.

Rule 3020. Deposit; Confirmation of Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case

(a) DEPOSIT. In a chapter 11 case,

prior to entry of the order confirming the plan, the court may order the deposit with the trustee or debtor in possession of the consideration required by the plan to be distributed on confirmation. Any money deposited shall be kept in a special account established for the exclusive purpose of making the distribution.

(b) ~~OBJECTIONS~~ OBJECTION TO AND HEARING ON CONFIRMATION IN A CHAPTER 9 OR CHAPTER 11 CASE.

(1) ~~Objections~~ Objection. ~~Objections~~ An objection to confirmation of the plan shall be filed and served on the debtor, the trustee, the proponent of the plan, any committee appointed under the Code, and ~~on~~ any other entity designated by the court, within a time fixed by the court. Unless the case is a chapter 9 municipality case, a copy of every

objection to confirmation shall be transmitted by the objecting party to the United States trustee within the time fixed for ~~the~~ filing ~~of~~ objections. An objection to confirmation is governed by Rule 9014.

(2) Hearing. The court shall rule on confirmation of the plan after notice and hearing as provided in Rule 2002. If no objection is timely filed, the court may determine that the plan has been proposed in good faith and not by any means forbidden by law without receiving evidence on such issues.

(c) ORDER OF CONFIRMATION. The order of confirmation shall conform to the appropriate Official Form and notice of entry thereof shall be mailed promptly as provided in Rule 2002(f) to the debtor, the trustee, creditors, equity security

holders, and other parties in interest. Except in a chapter 9 municipality case, notice of entry of the order of confirmation shall be transmitted to the United States trustee as provided in Rule 2002(k).

(d) RETAINED POWER. Notwithstanding the entry of the order of confirmation, the court may ~~enter all orders~~ issue any other order necessary to administer the estate.

COMMITTEE NOTE

This rule is amended to limit its application to chapter 9 and chapter 11 cases. The procedures relating to confirmation of plans in chapter 12 and chapter 13 cases are provided in Rule 3015. Other amendments are stylistic and make no substantive change.

Rule 5005. Filing and Transmittal of Papers

(a) FILING. The lists, schedules, statements, proofs of claim or interest, complaints, motions, applications, objections and other papers required to be

filed by these rules, except as provided in 28 U.S.C. § 1409, shall be filed with the clerk in the district where the case under the Code is pending. The judge of that court may permit the papers to be filed with the judge, in which event the filing date shall be noted thereon, and they shall be forthwith transmitted to the clerk. The clerk shall not refuse to accept for filing any petition or other paper presented for the purpose of filing solely because it is not presented in proper form as required by these rules or any local rules or practices.

* * * * *

COMMITTEE NOTE

Subdivision (a) is amended to conform to the 1991 amendment to Rule 5(e) F.R.Civ.P. It is not a suitable role for the office of the clerk to refuse to accept for filing papers not conforming to requirements of form imposed by these rules or by local rules or practices. The enforcement of these rules and local rules

is a role for a judge. This amendment does not require the clerk to accept for filing papers sent to the clerk's office by facsimile transmission.

Rule 6002. Accounting by Prior Custodian of Property of the Estate

* * * * *

(b) EXAMINATION OF ADMINISTRATION. On the filing and transmittal of the report and account required by subdivision (a) of this rule and after an examination has been made into the superseded administration, after notice and a hearing, ~~on notice~~ the court shall determine the propriety of the administration, including the reasonableness of all disbursements.

COMMITTEE NOTE

Subdivision (b) is amended to conform to the language of § 102(1) of the Code.

Rule 6006. Assumption, Rejection and Assignment of Executory Contracts and Unexpired Leases

* * * * *

(c) ~~HEARING~~ NOTICE. ~~When~~ Notice of a motion ~~is~~ made pursuant to subdivision (a) or (b) of this rule~~, the court shall set a hearing on notice~~ shall be given to the other party to the contract or lease, to other parties in interest as the court may direct, and, except in a chapter 9 municipality case, to the United States trustee.

COMMITTEE NOTE

This rule is amended to delete the requirement for an actual hearing when no request for a hearing is made. See Rule 9014.

Rule 6007. Abandonment or Disposition of Property

(a) NOTICE OF PROPOSED ABANDONMENT OR DISPOSITION; OBJECTIONS; HEARING. Unless otherwise directed by the court, the trustee or debtor in possession shall give notice of a proposed abandonment or

disposition of property to the United States trustee, all creditors, indenture trustees, and committees elected pursuant to § 705 or appointed pursuant to § 1102 of the Code. ~~An objection may be filed and served by a~~ A party in interest may file and serve an objection within 15 days of the mailing of the notice, or within the time fixed by the court. If a timely objection is made, the court shall set a hearing on notice to the United States trustee and to other entities as the court may direct.

(b) MOTION BY PARTY IN INTEREST. A party in interest may file and serve a motion requiring the trustee or debtor in possession to abandon property of the estate.

(c) [Abrogated] ~~HEARING. If a timely objection is made as prescribed by~~

~~subdivision (a) of this rule, or if a motion is made as prescribed by subdivision (b), the court shall set a hearing on notice to the United States trustee and to other entities as the court may direct.~~

COMMITTEE NOTE

This rule is amended to clarify that when a motion is made pursuant to subdivision (b), a hearing is not required if a hearing is not requested or if there is no opposition to the motion. See Rule 9014. Other amendments are stylistic and make no substantive change.

Rule 9002. Meanings of Words in the Federal Rules of Civil Procedure When Applicable to Cases under the Code

The following words and phrases used in the Federal Rules of Civil Procedure made applicable to cases under the Code by these rules have the meanings indicated unless they are inconsistent with the context:

* * * * *

(4) "District court," "trial court," "court," "district judge," or "judge" means bankruptcy judge if the case or proceeding is pending before a bankruptcy judge.

* * * * *

COMMITTEE NOTE

This rule is revised to include the words "district judge" in anticipation of amendments to the Federal Rules of Civil Procedure.

Rule 9019. Compromise and Arbitration

(a) COMPROMISE. On motion by the trustee and after notice and a hearing ~~on notice to~~ , the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct ~~such other entities as the court may~~

~~designate, the court may approve a compromise or settlement~~.

* * * * *

COMMITTEE NOTE

Subdivision (a) is amended to conform to the language of § 102(1) of the Code. Other amendments are stylistic and make no substantive change.

Rule 9036. Notice by Electronic Transmission

Whenever the clerk or some other person as directed by the court is required to send notice by mail and the entity entitled to receive the notice requests in writing that, instead of notice by mail, all or part of the information required to be contained in the notice be sent by a specified type of electronic transmission, the court may direct the clerk or other person to send the information by such electronic transmission. Notice by electronic transmission is complete, and

the sender shall have fully complied with the requirement to send notice, when the sender obtains electronic confirmation that the transmission has been received.

COMMITTEE NOTE

This rule is added to provide flexibility for banks, credit card companies, taxing authorities, and other entities that ordinarily receive notices by mail in a large volume of bankruptcy cases, to arrange to receive by electronic transmission all or part of the information required to be contained in such notices.

The use of electronic technology instead of mail to send information to creditors and interested parties will be more convenient and less costly for the sender and the receiver. For example, a bank that receives by mail, at different locations, notices of meetings of creditors pursuant to Rule 2002(a) in thousands of cases each year may prefer to receive only the vital information ordinarily contained in such notices by electronic transmission to one computer terminal.

The specific means of transmission must be compatible with technology available to the sender and the receiver. Therefore, electronic transmission of notices is permitted only upon request of the entity entitled to receive the notice, specifying the type of electronic transmission, and only if approved by the court.

Electronic transmission pursuant to this rule completes the notice requirements. The creditor or interested party is not thereafter entitled to receive the relevant notice by mail.

TECHNICAL AMENDMENTS

Hand-marked copies indicating proposed amendments

FORM B5.
(6/90)

FORM 5. INVOLUNTARY PETITION

United States Bankruptcy Court

_____ District of _____

INVOLUNTARY PETITION

IN RE (Name of Debtor—If Individual: Last, First, Middle)	ALL OTHER NAMES used by debtor in the last 6 years (Include married, maiden, and trade names.)
SOC. SEC./TAX I.D. NO. (If more than one, state all.)	
STREET ADDRESS OF DEBTOR (No. and street, city, state, and zip code)	MAILING ADDRESS OF DEBTOR (If different from street address)
COUNTY OF RESIDENCE OR PRINCIPAL PLACE OF BUSINESS	

LOCATION OF PRINCIPAL ASSETS OF BUSINESS DEBTOR (If different from previously listed addresses)

CHAPTER OF BANKRUPTCY CODE UNDER WHICH PETITION IS FILED

☐ Chapter 7 ☐ Chapter 11

INFORMATION REGARDING DEBTOR (Check applicable boxes)

Petitioners believe:
☐ Debts are primarily consumer debts
☐ Debts are primarily business debts (complete sections A and B)

TYPE OF DEBTOR
☐ Individual ☐ Partnership ☐ Corporation Publicly Held ☐ Corporation Not Publicly Held
☐ Other: _____

A. TYPE OF BUSINESS (Check one)
☐ Professional ☐ Retail/Wholesale ☐ Railroad ☐ Transportation ☐ Manufacturing/Mining ☐ Stockbroker ☐ Commodity Broker ☐ Construction ☐ Real Estate ☐ Other

B. BRIEFLY DESCRIBE NATURE OF BUSINESS

VENUE

☐ Debtor has been domiciled or has had a residence, principal place of business, or principal assets in the District for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other District.

☐ A bankruptcy case concerning debtor's affiliate, general partner or partnership is pending in this District.

PENDING BANKRUPTCY CASE FILED BY OR AGAINST ANY PARTNER OR AFFILIATE OF THIS DEBTOR (Report information for any additional cases on attached sheets.)

Name of Debtor	Case Number	Date
Relationship	District	Judge

ALLEGATIONS (Check applicable boxes)

1. ☐ Petitioner(s) are eligible to file this petition pursuant to 11 U.S.C. § 303(b).
2. ☐ The debtor is a person against whom an order for relief may be entered under title 11 of the United States Code.
3.a. ☐ The debtor is generally not paying such debtor's debts as they become due, unless such debts are the subject of a bona fide dispute;

or

b. ☐ Within 120 days preceding the filing of this petition, a custodian, other than a trustee, receiver, or agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession.

COURT USE ONLY

Name of Debtor _____

FORM 5. Involuntary Petition
(10/89)

Case No. _____
(Court use only)

TRANSFER OF CLAIM

☐ Check this box if there has been a transfer of any claim against the debtor by or to any petitioner. Attach all documents evidencing the transfer and any statements that are required under Bankruptcy Rule 1003(a).

REQUEST FOR RELIEF

Petitioner(s) request that an order for relief be entered against the debtor under the chapter of title 11, United States Code, specified in this petition.

Petitioner(s) declare under penalty of perjury that the foregoing is true and correct according to the best of their knowledge, information, and belief.

X _____
Signature of Petitioner or Representative (State title)

_____
Name of Petitioner — Date signed

Name & Mailing ▶ Address of Individual Signing in Representative Capacity _____

X _____
Signature of Attorney — Date

_____
Name of Attorney/Firm (If any)

_____
Address

_____
Telephone No.

X _____
Signature of Petitioner or Representative (State title)

_____
Name of Petitioner — Date signed

Name & Mailing ▶ Address of Individual Signing in Representative Capacity _____

X _____
Signature of Attorney — Date

_____
Name of Attorney/Firm (If any)

_____
Address

_____
Telephone No.

X _____
Signature of Petitioner or Representative (State title)

_____
Name of Petitioner — Date signed

Name & Mailing ▶ Address of Individual Signing in Representative Capacity _____

X _____
Signature of Attorney — Date

_____
Name of Attorney/Firm (If any)

_____
Address

_____
Telephone No.

PETITIONING CREDITORS

Name and Address of Petitioner	Nature of Claim	Amount of Claim
Name and Address of Petitioner	Nature of Claim	Amount of Claim
Name and Address of Petitioner	Nature of Claim	Amount of Claim
Note: If there are more than three petitioners, attach additional sheets with the statement under penalty of perjury, petitioner(s) signatures under the statement and the name(s) of attorney(s) and petitioning creditor information in the format above.		Total Amount of Petitioners' Claims

_____ continuation sheets attached

COMMITTEE NOTE

The form has been amended to require the dating of signatures.

FORM B9B
6/90

United States Bankruptcy Court

Case Number

_____ District of _____

NOTICE OF COMMENCEMENT OF CASE UNDER CHAPTER 7 OF THE BANKRUPTCY CODE, MEETING OF CREDITORS, AND FIXING OF DATES
(Corporation/Partnership No Asset Case)

In re (Name of Debtor)	Address of Debtor	Soc. Sec./Tax Id. Nos.
	Date Case Filed (or Converted)	

☐ Corporation ☐ Partnership

Name and Address of Attorney for Debtor	Telephone Number	Name and Address of Trustee	Telephone Number

☐ This is a converted case originally filed under chapter _____ on _____ (date).

DATE, TIME, AND LOCATION OF MEETING OF CREDITORS

AT THIS TIME THERE APPEAR TO BE NO ASSETS AVAILABLE FROM WHICH PAYMENT MAY BE MADE TO UNSECURED CREDITORS. DO NOT FILE A PROOF OF CLAIM UNTIL YOU RECEIVE NOTICE TO DO SO.

COMMENCEMENT OF CASE. A petition for liquidation under chapter 7 of the Bankruptcy Code has been filed in this court by or against the debtor named above, and an order for relief has been entered. You will not receive notice of all documents filed in this case. All documents filed with the court, including lists of the debtor's property and debts, are available for inspection at the office of the clerk of the bankruptcy court.

CREDITORS MAY NOT TAKE CERTAIN ACTIONS. A creditor is anyone to whom the debtor owes money or property. Under the Bankruptcy Code, the debtor is granted certain protection against creditors. Common examples of prohibited actions by creditors are contacting the debtor to demand repayment, taking action against the debtor to collect money owed to creditors or to take property of the debtor, and starting or continuing foreclosure actions or repossessions. If unauthorized actions are taken by a creditor against a debtor, the court may penalize that creditor. A creditor who is considering taking action against the debtor or the property of the debtor should review § 362 of the Bankruptcy Code and may wish to seek legal advice. If the debtor is a partnership, remedies otherwise available against general partners are not necessarily affected by the commencement of this partnership case. The staff of the clerk of the bankruptcy court is not permitted to give legal advice.

MEETING OF CREDITORS. The debtor's representative, as specified in Bankruptcy Rule 9001(4)(5), is required to appear at the meeting of creditors on the date and at the place set forth above for the purpose of being examined under oath. Attendance by creditors at the meeting is welcomed, but not required. At the meeting, the creditors may elect a trustee other than the one named above, elect a committee of creditors, examine the debtor, and transact such other business as may properly come before the meeting. The meeting may be continued or adjourned from time to time by notice at the meeting, without further written notice to creditors.

LIQUIDATION OF THE DEBTOR'S PROPERTY. The trustee will collect the debtor's property, if any, and turn it into money. At this time, however, it appears from the schedules of the debtor that there are no assets from which any distribution can be paid to the creditors. If at a later date it appears that there are assets from which a distribution may be paid, the creditors will be notified and given an opportunity to file claims.

DO NOT FILE A PROOF OF CLAIM UNLESS YOU RECEIVE A COURT NOTICE TO DO SO

Address of the Clerk of the Bankruptcy Court	For the Court:
	Clerk of the Bankruptcy Court
	Date

FORM B9D
6/90

United States Bankruptcy Court

Case Number

_____ District of _____

NOTICE OF COMMENCEMENT OF CASE UNDER CHAPTER 7 OF THE BANKRUPTCY CODE, MEETING OF CREDITORS, AND FIXING OF DATES
(Corporation/Partnership Asset Case)

In re (Name of Debtor)	Address of Debtor	Soc. Sec./Tax Id. Nos.
	Date Case Filed (or Converted)	

☐ Corporation ☐ Partnership

Name and Address of Attorney for Debtor	Telephone Number	Name and Address of Trustee	Telephone Number

☐ This is a converted case originally filed under chapter _____ on _____ (date).

FILING CLAIMS

Deadline to File a Proof of Claim:

DATE, TIME, AND LOCATION OF MEETING OF CREDITORS

COMMENCEMENT OF CASE. A petition for liquidation under chapter 7 of the Bankruptcy Code has been filed in this court by or against the debtor named above, and an order for relief has been entered. You will not receive notice of all documents filed in this case. All documents filed with the court, including lists of the debtor's property and debts, are available for inspection at the office of the clerk of the bankruptcy court.

CREDITORS MAY NOT TAKE CERTAIN ACTIONS. A creditor is anyone to whom the debtor owes money or property. Under the Bankruptcy Code, the debtor is granted certain protection against creditors. Common examples of prohibited actions by creditors are contacting the debtor to demand repayment, taking action against the debtor to collect money owed to creditors or to take property of the debtor, and starting or continuing foreclosure actions or repossessions. If unauthorized actions are taken by a creditor against a debtor, the court may penalize that creditor. A creditor who is considering taking action against the debtor or the property of the debtor should review § 362 of the Bankruptcy Code and may wish to seek legal advice. If the debtor is a partnership, remedies otherwise available against general partners are not necessarily affected by the commencement of this partnership case. The staff of the clerk of the bankruptcy court is not permitted to give legal advice.

MEETING OF CREDITORS. The debtor's representative, as specified in Bankruptcy Rule 9001(5)(5), is required to appear at the meeting of creditors on the date and at the place set forth above for the purpose of being examined under oath. Attendance by creditors at the meeting is welcomed, but not required. At the meeting, the creditors may elect a trustee other than the one named above, elect a committee of creditors, examine the debtor, and transact such other business as may properly come before the meeting. The meeting may be continued or adjourned from time to time by notice at the meeting, without further written notice to creditors.

LIQUIDATION OF THE DEBTOR'S PROPERTY. The trustee will collect the debtor's property, if any, and turn it into money. If the trustee can collect enough money and property from the debtor, creditors may be paid some or all of the debts owed to them.

PROOF OF CLAIM. Except as otherwise provided by law, in order to share in any payment from the estate, a creditor must file a proof of claim by the date set forth above in the box labeled "Filing Claims." The place to file the proof of claim, either in person or by mail, is the office of the clerk of the bankruptcy court. Proof of claim forms are available in the clerk's office of any bankruptcy court.

Address of the Clerk of the Bankruptcy Court	For the Court:
	Clerk of the Bankruptcy Court
	Date

FORM B9F
6/90

United States Bankruptcy Court

Case Number

_____ District of _____

NOTICE OF COMMENCEMENT OF CASE UNDER CHAPTER 11 OF THE BANKRUPTCY CODE, MEETING OF CREDITORS, AND FIXING OF DATES
(Corporation/Partnership Case)

In re (Name of Debtor)	Address of Debtor	Soc. Sec./Tax Id. Nos.
	Date Case Filed (or Converted)	

☐ Corporation ☐ Partnership

Name and Address of Attorney for Debtor	Telephone Number	Name and Address of Trustee	Telephone Number

☐ This is a converted case originally filed under chapter _____ on _____ (date).

DATE, TIME, AND LOCATION OF MEETING OF CREDITORS

COMMENCEMENT OF CASE. A petition for reorganization under chapter 11 of the Bankruptcy Code has been filed in this court by or against the debtor named above, and an order for relief has been entered. You will not receive notice of all documents filed in this case. All documents filed with the court, including lists of the debtor's property and debts, are available for inspection at the office of the clerk of the bankruptcy court.

CREDITORS MAY NOT TAKE CERTAIN ACTIONS. A creditor is anyone to whom the debtor owes money or property. Under the Bankruptcy Code, the debtor is granted certain protection against creditors. Common examples of prohibited actions by creditors are contacting the debtor to demand repayment, taking action against the debtor to collect money owed to creditors or to take property of the debtor, and starting or continuing foreclosure actions or repossessions. If unauthorized actions are taken by a creditor against a debtor, the court may penalize that creditor. A creditor who is considering taking action against the debtor or the property of the debtor should review § 362 of the Bankruptcy Code and may wish to seek legal advice. If the debtor is a partnership, remedies otherwise available against general partners are not necessarily affected by the filing of this partnership case. The staff of the clerk of the bankruptcy court is not permitted to give legal advice.

MEETING OF CREDITORS. The debtor's representative, as specified in Bankruptcy Rule 9001(5) is required to appear at the meeting of creditors on the date and at the place set forth above for the purpose of being examined under oath. Attendance by creditors at the meeting is welcomed, but not required. At the meeting, the creditors may examine the debtor and transact such other business as may properly come before the meeting. The meeting may be continued or adjourned from time to time by notice at the meeting, without further written notice to creditors.

PROOF OF CLAIM. Schedules of creditors have been or will be filed pursuant to Bankruptcy Rule 1007. Any creditor holding a scheduled claim which is not listed as disputed, contingent, or unliquidated as to amount may, but is not required to, file a proof of claim in this case. Creditors whose claims are not scheduled or whose claims are listed as disputed, contingent, or unliquidated as to amount and who desire to participate in the case or share in any distribution must file their proofs of claim. A creditor who desires to rely on the schedule of creditors has the responsibility for determining that the claim is listed accurately. If the court sets a deadline for filing a proof of claim, you will be notified. The place to file a proof of claim, either in person or by mail, is the office of the clerk of the bankruptcy court. Proof of claim forms are available in the clerk's office of any bankruptcy court.

PURPOSE OF CHAPTER 11 FILING. Chapter 11 of the Bankruptcy Code enables a debtor to reorganize pursuant to a plan. A plan is not effective unless approved by the court at a confirmation hearing. Creditors will be given notice concerning any plan, or in the event the case is dismissed or converted to another chapter of the Bankruptcy Code. The debtor will remain in possession of its property and will continue to operate any business unless a trustee is appointed.

Address of the Clerk of the Bankruptcy Court	For the Court:
	Clerk of the Bankruptcy Court
	Date

FORM B9H
6/90

United States Bankruptcy Court

Case Number

_____ District of _____

NOTICE OF COMMENCEMENT OF CASE UNDER CHAPTER 12 OF THE BANKRUPTCY CODE, MEETING OF CREDITORS, AND FIXING OF DATES
(Corporation/Partnership Family Farmer)

In re (Name of Debtor)	Address of Debtor	Soc. Sec./Tax Id. Nos.
	Date Case Filed (or Converted)	

☐ Corporation ☐ Partnership

Name and Address of Attorney for Debtor	Telephone Number	Name and Address of Trustee	Telephone Number

☐ This is a converted case originally filed under chapter _____ on _____ (date).

FILING CLAIMS

Deadline to file a proof of claim:

DATE, TIME, AND LOCATION OF MEETING OF CREDITORS

FILING OF PLAN AND DATE, TIME, AND LOCATION OF HEARING ON CONFIRMATION OF PLAN

☐ The debtor has filed a plan. The plan or a summary of the plan is enclosed. Hearing on confirmation will be held:

_____ (Date) _____ (Time) _____ (Location)

☐ The debtor has filed a plan. The plan or a summary of the plan and notice of the confirmation hearing will be sent separately.

☐ The debtor has not filed a plan as of this date. Creditors will be given separate notice of the hearing on confirmation of the plan.

DISCHARGE OF DEBTS

Deadline to File a Complaint ~~Objecting to Discharge of the Debtor~~ or to Determine Dischargeability of Certain Types of Debts:

COMMENCEMENT OF CASE. A family farmer's debt adjustment case under chapter 12 of the Bankruptcy Code has been filed in this court by the family farmer named above as the debtor, and an order for relief has been entered. You will not receive notice of all documents filed in this case. All documents filed with the court, including lists of the debtor's property and debts, are available for inspection at the office of the clerk of the bankruptcy court.

CREDITORS MAY NOT TAKE CERTAIN ACTIONS. A creditor is anyone to whom the debtor owes money or property. Under the Bankruptcy Code, the debtor is granted certain protection against creditors. Common examples of prohibited actions by creditors are contacting the debtor to demand repayment, taking action against the debtor to collect money owed to creditors or to take property of the debtor, and starting or continuing foreclosure actions or repossessions. Some protection is also given to certain codebtors of consumers debts. If unauthorized actions are taken by a creditor against a debtor or a protected codebtor, the court may penalize that creditor. A creditor who is considering taking action against the debtor, the property of the debtor, or a codebtor, should review §§ 362 and 1201 of the Bankruptcy Code and may wish to seek legal advice. If the debtor is a partnership, remedies otherwise available against general partners are not necessarily affected by the commencement of this partnership case. The staff of the clerk of the bankruptcy court is not permitted to give legal advice.

MEETING OF CREDITORS. The debtor's representative, as specified in Bankruptcy Rule 9001(5), is required to appear at the meeting of creditors on the date and at the place set forth above for the purpose of being examined under oath. Attendance by creditors at the meeting is welcomed, but not required. At the meeting, the creditors may examine the debtor and transact such other business as may properly come before the meeting. The meeting may be continued or adjourned from time to time by notice at the meeting, without further written notice to creditors.

DISCHARGE OF DEBTS. The debtor may seek a discharge of debts. A discharge means that certain debts are made unenforceable against the debtor. Creditors whose claims against the debtor are discharged may never take action against the debtor to collect the discharged debts. If a creditor believes a specific debt owed to the creditor is not dischargeable under § 523(a)(2), (4), or (6) of the Bankruptcy Code, timely action must be taken in the bankruptcy court by the deadline set forth above in the box labeled "Discharge of Debts." Creditors considering taking such action may wish to seek legal advice.

PROOF OF CLAIM. Except as otherwise provided by law, in order to share in any payment from the estate, a creditor must file a proof of claim by the date set forth above in the box labeled "Filing Claims." The place to file the proof of claim, either in person or by mail, is the office of the clerk of the bankruptcy court. Proof of claim forms are available in the clerk's office of any bankruptcy court.

PURPOSE OF A CHAPTER 12 FILING. Chapter 12 of the Bankruptcy Code enables family farmers to reorganize pursuant to a plan. A plan is not effective unless approved by the bankruptcy court at a confirmation hearing. Creditors will be given notice in the event the case is dismissed or converted to another chapter of the Bankruptcy Code.

Address of the Clerk of the Bankruptcy Court	For the Court:
	Clerk of the Bankruptcy Court
	Date

COMMITTEE NOTE

Forms 9B, 9D, 9F, and 9H are amended to make a technical correction in the reference to Rule 9001(5). Form 9H also contains a technical correction deleting the reference to a complaint objecting to discharge of the debtor.

REPORT ON THE PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND FORMS

Submitted To

THE JUDICIAL CONFERENCE

OF

THE UNITED STATES

By

Standing Committee

On

Rules of Practice and Procedure

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

May 1, 1992

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

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

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

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

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

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

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

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

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

Sincerely,

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

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

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

ISSUES AND CHANGES

Fed. R. Civ. P. 1. (Draft published August 1991)

Relatively non-controversial. A few expressed concern that the proposed amendment would increase judicial discretion and perhaps be misused by some judges. Some concern was also expressed that the Committee Notes, stating that attorneys share responsibility with the court for seeing that the rules are administered to secure the objectives stated in Rule 1, may infringe on the obligations of attorneys towards their clients.

The Advisory Committee is unanimous in recommending adoption of the rule, which is unchanged from the language published in August 1991.

Fed. R. Civ. P. 4. (Draft published October 1989)

Non-controversial except with respect to sending requests for waiver of service into foreign countries. This issue was presumably the reason why the proposed amendment was returned by the Supreme Court for further study.

While the rule was pending before the Supreme Court, the British Embassy had expressed two concerns: first, that extra-territorial mailing of requests under subdivision (d), coupled with the potential for cost-shifting if the request was declined, would contravene the letter or spirit of the Hague Convention; and second, that, at least by omission, the rule appeared to be inconsistent with 28 U.S.C. § 1608 with respect to service on agencies and instrumentalities of foreign states. The Department of Justice, which had expressed no comment when the rule was originally proposed, has subsequently taken the position, essentially echoing concerns of the Department of State, that, to avoid possible offense to other governments, it would be preferable for the rule to restrict the request-for-waiver procedure to defendants located within this country.

After further study, the Advisory Committee has concluded that the potential benefits to litigants--both plaintiffs and defendants--justify use of the request-for-waiver procedure in cases involving foreign defendants but has made changes to the text and Committee Notes, as well as in proposed new Forms 1A and 1B, in an attempt to ameliorate the types of concerns expressed by the British Embassy and the Department of Justice. The proposed revision makes clear that the request for waiver of service--which, in fact, affords significant potential benefits to a defendant residing in a foreign country, both through elimination of potential costs and additional time to respond--is a private, nonjudicial act that does not purport to effect service or constitute any directive from a court. The criticism that a declination, pursuant to foreign law, to waive service when requested by mail could result in unfair cost-shifting is dealt with in the Notes, which explain that cost-shifting would be inappropriate if a refusal is based upon a policy of the foreign government prohibiting all waivers of service.

A change in the language of subdivision (j)(1) corrects the other concern expressed by the British Embassy, relating to agencies and instrumentalities of foreign states. During its study the Committee discovered several other minor drafting errors contained in the text or Notes, such as the language used when making cross-references to other subdivisions, paragraphs, and subparagraphs of the rule. These corrections have been incorporated into the proposed amendment.

While one member would prefer to exclude foreign defendants from the request-for-waiver procedure, the Committee is unanimous in recommending that revised Rule 4 be adopted to replace current Rule 4. The changes in language from the text and Notes published in October 1989 prior to its earlier submission to the Supreme Court are not substantial, but are technical in nature; and, accordingly, the Advisory Committee believes that an additional period for public notice and comment is unnecessary.

Special Note: If the Committee's proposal to make the request-for-waiver procedure available

with respect to defendants located outside the United States is disapproved, Rule 4 need not be rejected in its entirety. Rather, one of two approaches could be adopted: (1) eliminate the cost-shifting feature that is the principal objection raised by the British Embassy (by adding a clause in the last sentence of Rule 4(d)(2) that excludes foreign defendants from the cost-shifting sanction), or (2) limit the Rule 4(d) procedure to domestic defendants (by eliminating the reference to subdivision (f) in the first sentence of Rule 4(d) and eliminating subdivision (a)(1)(B) of Rule 12). The Committee Notes and Forms 1A and 1B would also need to be revised to conform to these changes.

Fed. R. Civ. P. 4.1 (Draft published October 1989)

Non-controversial. This rule was returned by the Supreme Court for further review because of its relationship to the proposed amendment of Rule 4. There are no changes needed in language as previously submitted to the Supreme Court.

The Advisory Committee is unanimous in recommending adoption of Rule 4.1, which is essentially unchanged from the language published in October 1989.

Fed. R. Civ. P. 5 (Not previously published)

Non-controversial. This is a technical amendment, using the broader language of recently revised Fed. R. App. P. 25 to make clear that district courts--and, more importantly at the present time, bankruptcy courts--may permit, to the extent authorized by the Judicial Conference, filing not only by facsimile transmission but also by other electronic means.

The Advisory Committee is unanimous in recommending adoption of Rule 5. Although this has not been published as a proposed change to the Fed. R. Civ. P., the Advisory Committee believes that this is a technical amendment as to which public notice and comment should be eliminated under Rule 4d of the governing procedures and so recommends to the Standing Committee.

Fed. R. Civ. P. 11. (Draft published August 1991)

The proposed amendment of Rule 11 is controversial. It has provoked extensive comment from the bench, bar, and public.

It is appropriate to begin with a brief discussion of the special procedures followed by the Advisory Committee with respect to Rule 11. The Committee had received various requests, formal and informal, for further amendment or abrogation of Rule 11, which had been revised in 1983. The Committee was also aware of several studies of the rule undertaken by various individuals, bar associations, and courts. Whether to propose any change--and, if so, what type of change--was, however, far from clear. The Committee started by publishing a notice that solicited comments about the several aspects of the operation of Rule 11 and by requesting that the Federal Judicial Center conduct certain studies and surveys. The Committee then held a public meeting and heard from various judges, attorneys, and academics who were known to have strong views about Rule 11.

There was no consensus about whether--or how--the rule should be amended. Some urged that the 1983 revision be retained with little or no change. Some urged that any amendment was premature and should be deferred until more experience had been gained. Some suggested various changes to deal with specific problems that had arisen. Others urged that it be restored, in essence, to its pre-1983 form or, indeed, be eliminated altogether.

After considering these comments and the FJC studies and survey, the Committee concluded that the widespread criticisms of the 1983 version of the rule, though frequently exaggerated or premised on faulty assumptions, were not without some merit. The goal of the 1983 version remains a proper and legitimate one, and its insistence that litigants "stop-and-think" before filing pleadings, motions, and other papers should, in the opinion of the Committee, be retained. Many of the initial difficulties have been resolved through case law over the past nine years. Nevertheless, there was support for the following propositions: (1) Rule 11, in conjunction with other rules, has tended to impact plaintiffs more frequently and severely than defendants; (2) it occasionally has created problems for a party which seeks to assert novel legal contentions or which needs discovery from other persons to determine if the party's belief about the facts can be supported with evidence; (3) it has too rarely been enforced through nonmonetary sanctions, with cost-shifting having become the normative sanction; (4) it provides little incentive, and perhaps a disincentive, for a party to abandon positions after determining they are no longer supportable in fact or law; and (5) it sometimes has produced unfortunate conflicts between attorney and client, and exacerbated contentious behavior between counsel. In addition, although the great majority of Rule 11 motions have not been granted, the time spent by litigants and the courts in dealing with such motions has not been insignificant.

The Committee then drafted a proposed amendment with the objective of increasing the fairness and effectiveness of the rule as a means to deter presentation and maintenance of frivolous positions, while also reducing the frequency of Rule 11 motions. The proposed amendment was published in August 1991 and has generated many comments, written and oral.

Summarized below are the principal criticisms and suggestions that the Committee has received. Several of these, it may be noted, are embodied in an alternative proposal for amendment of Rule 11 sponsored by Attorney John Frank and others, which has gained significant support from various judges, lawyers, and organizations.

Opposition to this revision as "weakening" the rule. It is correct that, given the "safe harbor" provisions and those affecting the type of sanction to be imposed, the amendment should reduce the number of Rule 11 motions and the severity of some sanctions. The Advisory Committee is unanimous that, to the extent these changes may be viewed as "weakening" the rule, they are nevertheless desirable.

Opposition to any amendment as "premature." While several problem areas encountered under the 1983 version of Rule 11 have been corrected by case law, others remain and cannot be cured by greater experience within the bench and bar. By the time the new amendments can become effective, a period of ten years will have elapsed since the prior revision. The Advisory Committee is unanimous that changes should not be deferred for additional time and study.

Application to discovery documents. Notes to the published draft asked for comments on whether Rule 11 should be made explicitly inapplicable to discovery documents, and indicated that the Advisory Committee would be considering such a change without additional publication. The comments received support this change. The Advisory Committee is unanimous that this change should be made and has done so through the addition of subdivision (d).

Continuing duty to withdraw unsupportable contentions. The published draft abandoned the "signer snapshot" approach of the current rule that imposes obligations solely on the persons signing a paper and measures those obligations solely as of the time the paper is filed. It provided that litigants have a duty not to maintain a contention that, though perhaps initially believed to be meritorious, is no longer supportable in fact or law. Several comments expressed concern that, at least as drafted, the revision might lead to disruptive and wasteful activities based on a mere failure to re-read and amend previously filed pleadings, motions, or briefs. The Advisory Committee believes that this latter criticism is well taken and has made several modifications to the published language of the text and limited the expansion to non-signers to persons who "pursues" a previously filed paper. These changes, coupled with the "safe harbor" provisions, should minimize these concerns.

Duty to conduct pre-filing investigation. Some critics express skepticism regarding the obligation to conduct an appropriate pre-filing investigation in view of the provisions allowing pleading on "information and belief" and affording a "safe harbor" against the filing of Rule 11 motions if unsupportable contentions are withdrawn. The basic requirement for pre-filing investigation is retained in the text of the rule, and, as the Committee Notes make clear, pleading on information and belief must be preceded by an inquiry reasonable under the circumstances. The revision is not a license to join parties, make claims, or present defenses without any factual basis or justification. However, it must be acknowledged that, with these changes, some litigants may be tempted to conduct less of a pre-filing investigation than under the current rule. The Advisory Committee believes that this risk is justified, on balance, by the benefits from the changes.

Pleading "as a whole." Several comments urged that the revision of Rule 11 incorporate the approach adopted in some decisions, permitting sanctions only if, taken "as a whole," the paper violated the standards of the rule. The Advisory Committee continues to believe that the "stop-and-think" obligations apply to all of the allegations and assertions, not just to a majority of them. Nevertheless, the language of the published draft might have inappropriately encouraged an excessive number of Rule 11 motions premised upon a detailed parsing of pleadings and motions. The Advisory Committee has changed the text of subdivision (b) to eliminate the specific reference to a "claim, defense, request, demand, objection, contention, or argument" and has also modified the accompanying Notes to emphasize that Rule 11 motions should not be prepared--or threatened--for minor, inconsequential violations or as a substitute for traditional motions specifically designed to enable parties to challenge the sufficiency of pleadings. These changes, coupled with the opportunity to correct allegations under the "safe harbor" provisions, should eliminate the need for court consideration of Rule 11 motions directed at insignificant aspects of a complaint or answer.

"Mandatory" sanctions. The most frequent criticism has been that the revision leaves in place the current mandate that some sanction be imposed if the court determines that the rule has been violated. The suggestion is that, even if a violation is found, the district court should have discretion not to impose any sanction. Two members of the Advisory Committee prefer this approach, though do not request that this view be expressed as a formal minority view in the Committee Notes. The other members of the Advisory Committee believe that, particularly given the opportunity through the "safe harbor" provisions to withdraw an unsupportable contention before a Rule 11 motion is even filed, some sanction should be imposed if the court is called upon to determine, and does determine, that the rule has been violated. As under the current rule, the court retains discretion as to the particular sanction to be imposed, subject however to the principle that it not be more severe than needed for effective deterrence, and the court's decision whether a violation has occurred is reviewed on appeal for abuse of discretion.

Payment of monetary sanctions to an adversary. Another frequent criticism is that the draft continues to permit a monetary award to be paid to an adversary for damages resulting from a Rule 11 violation, rather than limiting monetary awards to penalties paid into court. The Advisory Committee agrees with the premise that cost-shifting has created the incentive for many unnecessary Rule 11 motions, has too frequently been selected as the sanction, and, indeed, has led to the large awards most often cited by critics of the 1983 rule. Both in the text and the Committee Notes, the published draft contained language that, while continuing to permit cost-shifting awards, explicitly recited the deterrent purpose of Rule 11 sanctions and the potential for non-monetary sanctions. The Advisory Committee remains convinced that there are situations--particularly when unsupportable contentions are filed to harass or intimidate an adversary in some cases involving litigants with greatly disparate financial resources--in which cost-shifting may be needed for effective deterrence. The Committee has, however, made a further change in the text of subdivision (c)(2) to emphasize that cost-shifting awards should be the exception, rather than the norm, for sanctions. As to the expenses incurred in presenting or opposing a Rule 11 motion, the published draft provides the court with discretion to award fees to the prevailing party: this is needed to discourage non-meritorious Rule 11 motions without creating a disincentive to

the presentation of motions that should be filed.

Protection of represented parties (as distinguished from attorneys) from sanctions. The current rule permits the court to impose a sanction upon the person who signed the paper, "a represented party, or both." The published draft would have restricted the imposition of monetary sanctions upon a represented party to situations in which the party was responsible for a violation of Rule 11(b)(1) (papers filed to harass or for other improper purpose). Comments have been mixed: some opposing any such restriction; others opposing any monetary sanctions on represented parties; others suggesting variants on the language in the draft. Upon further reflection and consideration of the comments, the Advisory Committee believes that the prohibition of monetary sanctions against a represented party should be limited to violations of Rule 11(b)(2) (frivolous legal arguments), and has changed the language of subdivision (c)(2)(A) accordingly.

Sanctions against law firms. The published draft contained provisions designed to remove the restrictions of the current rule respecting sanctions upon law firms. See Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120 (1989) (1983 version of Rule 11 does not permit sanctions against law firm of attorney signing groundless complaint). While many comments supported this change, others opposed it, urging that sanctions be imposed only on the individual attorney found to have violated the rule. The Advisory Committee believes that, consistent with general principles of agency, it is often appropriate for a law firm to be held jointly responsible for violations by its partners, associates, and employees. Given the opportunity under the "safe harbor" provisions to avoid sanctions imposed on a motion, coupled with the changes designed to reduce the frequency of "fee-shifting" sanctions that have produced the largest monetary sanctions, the Committee has added to the published draft in subdivision (c)(1)(A) language clarifying that a law firm should ordinarily be held jointly accountable in such circumstances.

Court-initiated sanctions after case dismissed. Several groups have suggested that the safe harbor provisions, which under the published draft apply only to motions filed by other litigants, should apply also to show cause orders issued at the court's own initiative. The Advisory Committee continues to believe that court-initiated show cause orders--which typically relate to matters that are akin to contempt of court--are properly treated somewhat differently from party-initiated motions. The published draft does, however, contain provisions in subdivision (c)(2)(B) protecting a litigant from monetary sanctions imposed under a show cause order not issued until after the claims made by or against it have been voluntarily dismissed or settled.

Standards for appellate review. Some of the comments have urged that the revision contain language modifying the standard for appellate review announced in Cooter & Gell v. Hartmarx Corp., ___ U.S. ___ (1990). The Advisory Committee concludes that the arguments are not sufficiently compelling to justify a deviation from the principle that ordinarily the rules should not attempt to prescribe standards for appellate review.

The Advisory Committee has carefully considered the various criticisms and suggestions, as well as those comments favoring the published proposal. Ultimately the only disagreement within the Committee related, as noted above, to whether imposition of sanctions should be mandatory or discretionary. The two members who favored the discretionary standard nevertheless believe that proposed amendment is preferable to the current rule, and accordingly the Committee is unanimous in recommending adoption of the proposed amendment of Rule 11. As noted above, several changes have been made to the language of the amendment as published. These changes, however, either are essentially technical and clarifying in nature, or represent less of a modification of the current Rule 11 than had been proposed in the published draft; and the Committee believes that the proposed amendment can and should be forwarded to the Judicial Conference without an additional period for public notice and comment.

Fed. R. Civ. P. 12. (Draft published in October 1989)

Relatively non-controversial. This rule was returned by the Supreme Court for further review because of its relationship to the proposed amendment of Rule 4. The only changes from the language previously submitted to the Supreme Court are technical, stylistic improvements.

The Advisory Committee is unanimous in recommending adoption of Rule 12, which, except for stylistic improvements, is essentially unchanged from the language published in October 1989.

Fed. R. Civ. P. 15. (Draft published in October 1989)

Non-controversial. This rule was actually adopted by the Supreme Court on April 30, 1991, and forwarded to Congress. It contained, however, a cross-reference to Rule 4 that, with the Court's deferral of action on Rule 4, was in error. The error was corrected in P.L 102-198. This proposed amendment will restate the cross-reference to conform to the proposed amendment of Rule 4 that is to be resubmitted.

The Advisory Committee is unanimous in recommending adoption of Rule 15, which is essentially unchanged from the language published in October 1989.

Fed. R. Civ. P. 16. (Draft published in August 1991)

Controversial in part. Most of the proposed amendments involve technical or clarifying changes that were generally supported as desirable. A few questioned the need for the amendments and were concerned about the increasing length and potential complexity of the rule. A few expressed opposition to "managerial judging," while some others preferred that the rule mandate more personal involvement by a judicial officer.

A few of the changes, however, provoked strong criticisms and are discussed below.

Compulsory attendance and participation by parties in settlement procedures. The published draft would have authorized the court to require that parties, or their insurers, attend a settlement conference and participate in special procedures (ADR) designed to foster settlement. Several of the comments opposed any form of mandatory (albeit non-binding) ADR and were fearful that explicit authority to require party attendance at settlement conferences would be misused by some judges to coerce settlements. The Advisory Committee is also aware of the strong feelings of many that this authority is needed and, indeed, already within the court's inherent powers. On review, the Committee concluded that, given the mandate for local experimentation under the Civil Justice Reform Act, the explicit authorization provided in the published draft for mandatory attendance and participation should be deleted. The changes made in the last sentence of proposed subdivision (c) do, however, contain a provision, comparable to 28 U.S.C. § 473(b)(5), with respect to party representatives being accessible by telephone during settlement conferences with the court. The rule does not attempt to address the extent to which a court by exercise of its inherent powers can compel parties to attend conferences or participate in alternative dispute resolution procedures and does not limit the powers of court to compel participation when authorized to do so by statute.

Potential for summary judgment at Rule 16 conferences. Several comments opposed the language in proposed subdivision (c)(5) that would permit a court at a pretrial conference to enter summary judgments. This opposition was based upon fears that courts might precipitously grant summary judgments at a conference without affording the procedural safeguards built into Rule 56. On reflection, the Advisory Committee has concluded that subdivision (c)(5) should be modified to eliminate those concerns. However, a court can still under subdivision (c)(11) act at a pretrial conference on a motion for summary judgment that is ripe for decision at that time and is also empowered to enter a show cause order under Rule 56(g)(3).

Pretrial limitations on extent of evidence. Several opposed the proposed amendment of subdivision (c)(15) authorizing the court, after meeting with counsel, to enter "an order establishing a reasonable limit on the length of time allowed for the presentation of evidence or on the number of witnesses or documents that may be presented." The opposition reflects, in part, a concern about managerial judging or about infringing on counsels' ability to control the trial process, and in part a fear that many judges will misuse this discretion. The Advisory Committee has modified the language of this subdivision, but remains convinced that a reasonable limit on the length of trial is desirable in some cases, that such a limitation can be fairer to the parties when determined in advance of trial than when imposed during trial, and that abuses can be corrected through appellate review.

Timing of scheduling orders. The published draft changed the date by which a scheduling order should be entered from 120 days after the complaint is filed to 60 days after a defendant has appeared. Several suggest that this deadline may come too early, particularly in multi-party cases. The Advisory Committee concludes that the language from the published draft should be changed to provide that the order be entered within 90 days after a defendant has appeared or within 120 days after the complaint has been served on a defendant. Of course, courts can and frequently should enter scheduling orders before such deadlines.

The Advisory Committee has carefully considered the various criticisms and suggestions, as well as those comments favoring the published proposal. The Committee is unanimous in recommending adoption of the proposed amendment of Rule 16. As noted above, several changes have been made to the language of the amendment as originally published. These changes, however, either are essentially technical and clarifying in nature, or represent less of a modification of the current Rule 16 than had been proposed in the published draft; and the Committee believes that the proposed amendment can and should be forwarded to the Judicial Conference without an additional period for public notice and comment.

Fed. R. Civ. P. 26. (Drafts published October 1989 and August 1991)

Controversial. The last sentence in subdivision (a)(5) was contained in the draft published in October 1989. The other proposed changes were contained in the draft published in August 1991 and, particularly with respect to proposed subdivision (a)(1), have provoked the most intense division within the bench and bar of any of the proposed amendments. However, as discussed below, the Advisory Committee has made changes to the language contained in the published drafts which should eliminate many of the concerns expressed. The principal criticisms and suggestions are as follows:

Mandatory early pre-discovery disclosures. Subdivision (a)(1) of the August 1991 published draft required litigants to disclose specified core information about the case; namely, potential witnesses, documentary evidence, damage claims, and insurance. The objectives were to eliminate the time and expense of preparing formal discovery requests with respect to that information and to enable the parties to plan more effectively for the discovery that would be needed. Critics attacked the timing and scope of the disclosure requirements, as well as the related penalty provisions for noncompliance, viewing them as both impractical, counterproductive, and disruptive of the attorney-client relationship. On further consideration, the Advisory Committee has made certain changes with respect to the scope of the disclosures and provisions for sanctions that, coupled with the provisions mandating an early meeting of the parties, should alleviate some of these concerns. One Committee member preferred, as suggested by many critics, that initial disclosures be limited to potential witnesses and documents supporting the party's contentions; the other members, however, remained of the view that the obligation should relate to all such witnesses and documents. Many critics also urged that early disclosure requirements not be adopted until after the studies of the experience of courts under the Civil Justice Reform Act. To delay consideration of rules changes until completion of those studies would effectively postpone the effective date of any national standards until December 1998, a delay the Advisory Committee believed unwise. However, the proposed rule is written in a manner that permits district courts during the period of experimentation to depart from the national standards and determine whether and to what extent pre-discovery disclosures should be required.

Pre-discovery planning meeting of parties. The August 1991 published draft contemplated that the exchange of pre-discovery disclosures under subdivision (a)(1) should preferably occur at a meeting of the parties, but did not require that such a meeting take place. The most severe critics of the disclosure requirement supported the concept of an early meeting of the parties to explore and clarify the issues in the case as a prelude to conduct of discovery and, indeed, generally urged that such a meeting be mandatory, whether or not early disclosures were required. Complementing the changes made in subdivision (a)(1), the Advisory Committee has changed the published draft so that subdivision (f), rather than being deleted, is modified to require that the parties meet and attempt to agree on a proposed discovery plan for incorporation in the scheduling order and to facilitate the exchange of required disclosures.

"Notice pleading" and scope of discovery. Many comments suggested that reductions in the time and expense of discovery and other pretrial proceedings require a reconsideration of "notice pleading" and discovery relevant to the "subject matter" or "reasonably calculated to lead to the discovery of admissible evidence." While these suggestions may have merit, they could not, in the opinion of the Advisory Committee, be effected incident to the present publication notice and are ones that should be given careful study and consideration in the future.

Expert reports. The August 1991 published draft required that detailed written reports of parties' experts be exchanged during the discovery period and generally limits the direct testimony of such experts to the matters contained in those reports as may have been seasonably supplemented prior to trial. Several comments argued that this requirement would cause unnecessary additional expenses, discourage "real" experts from agreeing to testify, and create problems at trial. Requirements such as these have, however, been beneficially used in several courts for many years, and the Advisory Committee remains convinced that the concept is sound. However, the Committee has changed the language in subdivision (a)(2) to make clear that it applies only to specially retained or employed experts--and not, for example, to treating physicians. It has also made changes in the text of subdivision (e) to lessen the burden of supplementation and in the Notes to proposed FRE Rule 702 in recognition that intervening events may sometimes justify a change in expert testimony.

Discovery in a foreign country. The last sentence in proposed subdivision (a)(5) is drawn from language published in October 1989 and later submitted to the Supreme Court, which, like Rule 4, was subsequently returned by the Supreme Court for further consideration. While the amendment was pending before the Court, the British Embassy had expressed its concern that, particularly with respect to the Committee Notes, the provisions relating to discovery in foreign countries were inconsistent with the Hague Convention. A similar concern was more recently expressed by Switzerland. On the other hand, the Department of Justice believes the change unnecessarily restricts discovery from foreign litigants and has urged that the Rule not contain any language relating to foreign discovery. The Committee has made minor changes in the text of the rule and more significant changes in the Notes that, in the Committee's view, represent an appropriate balance between the competing considerations that affect foreign discovery. The proposed revision does not, however, attempt to overturn Société Nationale Industrielle Aérospatiale v. United States District Court, 482 U.S. 522 (1987), which, no doubt, is what some foreign litigants would prefer.

> Special Note: If the Committee's proposal regarding foreign discovery is disapproved, the remainder of Rule 26 need not be rejected. The last sentence of proposed Rule 26(a)(5) could be deleted, together with introductory clause to Rule 28(b). The Committee Notes would be modified for conformity with those changes.

Claims of privilege. The August 1991 published draft contains, like Rule 45 as became effective in December 1991, provisions requiring that notice be given when information is withheld on a claim of privilege or work product. Based upon suggestions made in several comments, the Advisory Committee has changed the language of the draft to make clear that the obligation to describe items withheld does not require disclosure of matters that are themselves privileged and only relates to items that are otherwise discoverable (and hence not when unreasonably burdensome requests are made).

The Advisory Committee has carefully considered the various criticisms and suggestions, as well as those

comments favoring the published proposal. The Committee is unanimous in recommending adoption of the proposed amendment of Rule 26. As noted above, several changes have been made to the language of the amendment as originally published. These changes, however, either are essentially technical and clarifying in nature, or represent less of a modification of the current Rule 26 than had been proposed in the published draft; and the Committee believes that the proposed amendment can and should be forwarded to the Judicial Conference without an additional period for public notice and comment.

Fed. R. Civ. P. 28. (Draft published October 1989)

Non-controversial. This rule was returned by the Supreme Court for further review because of its relationship to the proposed amendment of Rule 4. There are no changes needed in language as previously submitted to the Supreme Court.

The Advisory Committee is unanimous in recommending adoption of Rule 28, which is essentially unchanged from the language published in October 1989.

Fed. R. Civ. P. 29. (Draft published August 1991)

Non-controversial.

The Advisory Committee is unanimous in recommending adoption of Rule 29, which, except for stylistic improvements, is unchanged from the language published in August 1991.

Fed. R. Civ. P. 30. (Draft published August 1991)

Controversial. The aspects of the proposed amendment receiving the most attention in the comments received are discussed below.

Limits on number and length of depositions. As published, the draft imposed presumptive limits on the number (10 per side, including depositions under Rule 31) and on the length (6 hours per deposition). While many of the comments supported these limits, many opposed any limits, many opposed any presumptive limits (asserting that limits should be imposed only by the court on a case-by-case analysis), and many opposed either or both of the limits as too restrictive, particularly in certain types of cases. The Advisory Committee continues to believe that the presumptive limit on the number of depositions--which can, and in many case should, be changed by the court in the scheduling order or by written stipulation of the parties--is workable and desirable as a means for forcing litigants to be more selective in their deposition practice. A majority of the Committee, however, concluded that any presumptive limit on the length of depositions is a matter more properly left at this time for experimentation under the Civil Justice Reform Act, and the draft has been changed to effect this result.

Non-stenographic depositions. None of the published amendments has received a larger number of objections than the proposal relieving parties from the necessity of obtaining court approval or agreement of other parties as a condition to taking depositions by non-stenographic means. Many of these comments came from court reporters, but many members of the bar made similar comments. This opposition urges that video and audio recordings are unreliable and difficult to use at trial. The Advisory Committee is, however, unanimous that these concerns are adequately dealt with in the proposed amendments, which permit other parties to arrange for a stenographic transcription if they choose to do so and which require a party proposing to use video or audio recordings at trial to prepare and furnish to adversaries and the court a transcript of the portions to be offered.

Objections and directions not to answer. The text of the published draft authorized sanctions upon a finding that an attorney had impeded, delayed, or engaged in other conduct frustrating the fair examination of

the deponent. As illustrations of conduct subject to such sanctions, the Notes referred to "speaking" objections or otherwise coaching the deponent, and improper directions not to answer. There has been no substantial disagreement with this concept, but several suggested that it would be preferable to move some of the language from the Notes into the text of the rule, where it would be more obvious. The Advisory Committee believes that this suggestion has merit and has modified the language of subdivision (d)(1) accordingly.

The Advisory Committee has carefully considered the various criticisms and suggestions, as well as those comments favoring the published proposal. The Committee is unanimous in recommending adoption of the proposed amendment of Rule 30. As noted above, several changes have been made to the language of the amendment as originally published. These changes, however, either are essentially technical and clarifying in nature, or represent less of a modification of the current Rule 30 than had been proposed in the published draft; and the Committee believes that the proposed amendment can and should be forwarded to the Judicial Conference without an additional period for public notice and comment.

Fed. R. Civ. P. 31. (Draft published August 1991)

Moderately controversial.

The only aspect of this proposed amendment that has received any substantial criticism is the provision, paralleling the provision in Rule 30, that places a presumptive limit on the number of persons who may be deposed on written questions (10 per side, including depositions under Rule 30). The Advisory Committee continues to believe that this limitation--which can be modified by the court or by stipulation of the parties--is workable and desirable.

The Advisory Committee is unanimous in recommending adoption of the rule, which is essentially unchanged from the language published in August 1991.

Fed. R. Civ. P. 32. (Draft published August 1991)

Relatively non-controversial.

The only aspect of this proposed amendment that received any substantial opposition was the proposal to permit use at trial of depositions of expert witnesses without having to establish their unavailability. On further consideration, the Committee has decided to eliminate this proposed change.

The Advisory Committee is unanimous in recommending adoption of the rule as modified.

Fed. R. Civ. P. 33. (Draft published August 1991)

Moderately controversial.

As published, the draft set a presumptive limit on interrogatories--"15 in number including all subparts" propounded by any party to another. Many oppose any limitation other than on a special case-by-case analysis, while others say that the number is too low or that the language relating to subparts will generate controversy. After considering the comments, the Advisory Committee has concluded that the presumptive limit--which can be changed by court directive or stipulation--should be raised to 25 and has made minor changes in the text and Notes to address the problems presented by subparts.

The Advisory Committee is unanimous in recommending adoption of the rule, which, except for minor changes in the text and Notes, is the same as contained in the published draft.

Fed. R. Civ. P. 34. (Draft published August 1991)

Non-controversial.

The Advisory Committee is unanimous in recommending adoption of Rule 34, which, except for stylistic improvements, is essentially unchanged from the language published in August 1991.

Fed. R. Civ. P. 36. (Draft published August 1991)

Non-controversial.

The Advisory Committee is unanimous in recommending adoption of Rule 36, which, except for stylistic improvements, is essentially unchanged from the language published in August 1991.

Fed. R. Civ. P. 37. (Draft published August 1991)

Moderately controversial.

Several of those opposed to mandatory pre-discovery disclosures under Rule 26(a)(1) echoed their position by expressing opposition to the nature and severity of sanctions under Rule 37 for failure to comply with these requirements. In part these objections are muted by the Committee's action in eliminating any national requirements for such disclosures. In addition, the Advisory Committee has made some minor changes in the published text and Notes to Rule 37(c)(1) and has revised (rather than abrogated) the provisions of Rule 37(g) for conformity with revised Rule 26(f).

The Advisory Committee is unanimous in recommending adoption of Rule 37, which, except for the changes noted above and a few stylistic improvements, is the same language published in August 1991.

Fed. R. Civ. P. 50. (Not previously published)

Non-controversial.

The Advisory Committee is unanimous in recommending adoption of Rule 50. Although this has not been published, the Advisory Committee believes that this is a technical amendment as to which public notice and comment should be eliminated under Rule 4d of the governing procedures and so recommends to the Standing Committee.

Fed. R. Civ. P. 52. (Not previously published)

Non-controversial.

The Advisory Committee is unanimous in recommending adoption of Rule 52. Although this has not been published, the Advisory Committee believes that this is a technical amendment as to which public notice and comment should be eliminated under Rule 4d of the governing procedures and so recommends to the Standing Committee.

Fed. R. Civ. P. 54. (Draft published August 1991)

Relatively non-controversial.

The principal criticism of this proposed amendment involved subdivision (d)(2)(D)(i), authorizing adoption of schedules by which the value of legal services in a district will ordinarily be measured. After further consideration, the Advisory Committee has deleted this language, concluding that inclusion of this explicit authorization may result in more problems than benefits. The Committee's action, however, should not be viewed as implying that district courts lack the authority to adopt such schedules as local rules.

The Advisory Committee is unanimous in recommending adoption of Rule 54, which, except for deletion of subdivision (d)(2)(D)(i), is essentially unchanged from the published draft.

Fed. R. Civ. P. 56. (Draft published August 1991)

Moderately controversial.

While there is substantial support for this revision, many question say that it is unnecessary or unduly complex, and are apprehensive that any change in the rule might diminish the utility of summary judgment procedures. Some oppose the amendment because it incorporates into the rule the principles enunciated in Supreme Court decisions that they believe were wrongly decided.

Timing; offers of proof. The Advisory Committee continues to believe that summary judgment should not be granted against a party before it has had a reasonable opportunity to obtain discovery on matters not within its control and possession which are needed to oppose the motion. The current rule provides that, upon a showing that a party cannot within the prescribed time obtain affidavits justifying its opposition to summary judgment, the court may deny the motion or may allow additional time; the Committee believes that, in such circumstances, the court should also have the option to receive an offer of proof.

Discretion; preclusion of motions. Some object to the language affording the trial court with some discretion not to enter a summary adjudication that might be permitted under the rule. The revision, however, merely brings the language of the rule (currently worded as mandatory) into conformity with court decisions. These decisions recognize the need for some discretion, particularly with respect to issues that are not wholly dispositive of the claims made by or against a party. The Committee Notes have been changed to explain the reasons for, and limitations on, this discretion. The published draft provided in subdivision (g)(1) that the court could preclude Rule 56 motions on particular issues; on further consideration, the Committee has concluded that this language should be deleted.

The Advisory Committee has carefully considered the various criticisms and suggestions, as well as those comments favoring the published proposal. While one member would have preferred that the text of the rule indicate that summary judgment is mandatory when warranted, the Committee is unanimous in recommending adoption of the proposed amendment of Rule 56, which, with the exception of the minor change in subdivision (g)(1) explained above, is the same as the published draft. Various clarifying changes have been made in the Committee Notes.

Fed. R. Civ. P. 58. (Draft published August 1991)

Relatively non-controversial.

The Advisory Committee has carefully considered the various criticisms and suggestions, as well as those comments favoring the published proposal. The Committee is unanimous in recommending adoption of the proposed amendment of Rule 58, which is essentially unchanged from the language in the published draft.

Fed. R. Civ. P. 71A. (Draft published October 1989)

Non-controversial. This rule was returned by the Supreme Court for further review because of its relationship to the proposed amendment of Rule 4.

The Advisory Committee is unanimous in recommending adoption of Rule 71A, which is essentially unchanged from the language published in October 1989.

Fed. R. Civ. P. 83. (Draft published August 1991)

Moderately controversial.

Several of the comments expressed concern over the proliferation of local rules, a concern shared by the Advisory Committee. The Committee believes, however, that the proposed amendments of Rule 83--with the exception of subdivision (b)--will serve to reduce, rather than aggravate, the problems associated with local rules and standing orders. At the suggestion of the Standing Committee, moreover, the Advisory Committee has revised the text of the published draft to require that local rules be consistent with, but not duplicative of, the various national rules and conform to any uniform numbering system prescribed by the Judicial Conference.

The primary criticisms were directed to subdivision (b), which authorizes experimental local rules inconsistent with the national rules. The Committee believes, however, that with the limitations written into the text--(1) they must be approved by the Judicial Conference and (2) they must be limited in duration to a period of five years--the revision provides a sound basis for potentially useful experimentation.

The Advisory Committee has carefully considered the various criticisms and suggestions, as well as those comments favoring the published proposal. The Committee is unanimous in recommending adoption of the proposed amendment of Rule 83, which incorporates into the published draft minor stylistic changes and the changes recommended by the Standing Committee.

Fed. R. Civ. P. 84. (Draft published August 1991)

Non-controversial.

No criticism was expressed to the published draft, which contained only the provisions found in subdivision (a).

Subdivision (b), similarly delegating to the Judicial Conference the authority to make technical changes, has been added at the suggestion of the Standing Committee and has not been published for comment.

The Advisory Committee is unanimous in recommending adoption of Rule 84. Although subdivision (b) has not been published, the Advisory Committee believes that this is a technical amendment as to which public notice and comment should be eliminated under Rule 4d of the governing procedures and so recommends to the Standing Committee.

Forms 1A and 1B; Abrogation of Form 18-A. (Draft published October 1989)

Non-controversial.

Forms 1A and 1B, with minor stylistic improvements, that were previously approved and submitted to complement the proposed changes in Rule 4. The Advisory Committee is unanimous in recommending

(contingent upon adoption of Rule 4) adoption of these forms and abrogation of Form 18-A.

Form 35. (Not previously published.)

Non-controversial.

This is a new form designed to illustrate the type of report contemplated under Rule 26(f) and to serve as a checklist for litigants conducting the pre-discovery planning meeting. It complements the change in Rule 26(f). Although it has not been published, the Advisory Committee believes that, as a technical amendment which is merely illustrative, public notice and comment can and should be eliminated under Rule 4d of the governing procedures and so recommends to the Standing Committee.

Fed. R. Evid. 702. (Draft published August 1991)

Controversial.

Many support the proposed amendment; many do not. The primary criticisms can be summarized as follows: (1) reliability and usefulness of expert testimony should be left to the jury; (2) increased judicial scrutiny respecting expert testimony should apply only in civil cases; (3) the Notes mischaracterize the Frye test and fail to give sufficient guidance with respect to the new standards; and (4) a separate advisory committee should be formed to consider amendments to the evidence rules in a more comprehensive manner.

The Advisory Committee has carefully considered the various criticisms and suggestions, as well as those comments favoring the published proposal. With one member dissenting, the Committee recommends adoption of the proposed amendment of Rule 702, which incorporates into the published draft minor stylistic changes. The Committee Notes have, however, been significantly expanded and clarified. The Committee expresses no view as to whether a separate advisory committee on evidence rules should be established, but believes that adoption of the proposed revision of Rule 702 should not be deferred.

Fed. R. Evid. 705. (Draft published August 1991)

Relatively non-controversial.

The Advisory Committee is unanimous in recommending adoption of the rule, which is essentially unchanged from the language published in August 1991.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND FORMS

Submitted To

THE JUDICIAL CONFERENCE

OF

THE UNITED STATES

By

Standing Committee

On

Rules of Practice and Procedure

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PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND FORMS[1]

Rule 1. Scope and Purpose of Rules

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

COMMITTEE NOTES

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

Rule 4. ~~Process~~ Summons

(a) ~~**Summons; Issuance.** Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver the summons to the plaintiff or the plaintiff's attorney, who shall be responsible for prompt service of the summons and a copy of the complaint. Upon request of the~~

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

~~plaintiff separate or additional summons shall issue against any defendants.~~

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

(b) **Issuance.** Upon or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons

is in proper form, the clerk shall sign, seal, and issue it to the plaintiff for service on the defendant. A summons, or a copy of the summons if addressed to multiple defendants, shall be issued for each defendant to be served.

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

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

(2) ~~(A) A summons and complaint shall, except as provided in subparagraphs (B) and (C) of this paragraph, be served~~ Service may be effected by any person who is not a party and who is ~~not less than~~ at least 18 years of age. At the request of the plaintiff, however, the court may direct that service be effected by a United States

marshal, deputy United States marshal, or other person or officer specially appointed by the court for that purpose. Such an appointment must be made when the plaintiff is

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

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

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

~~(iii) pursuant to an order issued by the court stating that a United States marshal or deputy United States marshal, or a person specially appointed for that purpose, is required to serve the summons and complaint in order that service be properly effected in that particular~~

~~action.~~

~~(C) A summons and complaint may be served upon a defendant of any class referred to in paragraph (1) or (3) of subdivision (d) of this rule—~~

~~(i) pursuant to the law of the State in which the district court is held for the service of summons or other like process upon such defendant in an action brought in the courts of general jurisdiction of that State, or~~

~~(ii) by mailing a copy of the summons and of the complaint (by first class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to form 18-A and a return envelope, postage prepaid, addressed to the sender. If no acknowledgment of service under this subdivision of this rule is received by the sender within 20 days after the date of mailing, service of such summons and complaint shall be made under subparagraph (A) or (B) of this paragraph~~

~~in the manner prescribed by subdivision (d)(1) or (d)(3).~~

~~(D) Unless good cause is shown for not doing so the court shall order the payment of the costs of personal service by the person served if such person does not complete and return with 20 days after mailing, the notice and acknowledgment of receipt of summons.~~

~~(E) The notice and acknowledgment of receipt of summons and complaint shall be executed under oath or affirmation.~~

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

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

(1) A defendant who waives service of a

summons does not thereby waive any objection to the venue or to the jurisdiction of the court over the person of the defendant.

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

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

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

(C) shall be accompanied by a copy of the complaint and shall identify the

court in which it has been filed;

(D) shall inform the defendant, by means of a text prescribed in an official form promulgated pursuant to Rule 84, of the consequences of compliance and of a failure to comply with the request;

(E) shall set forth the date on which the request is sent;

(F) shall allow the defendant a reasonable time to return the waiver, which shall be at least 30 days from the date on which the request is sent, or 60 days from that date if the defendant is addressed outside any judicial district of the United States; and

(G) shall provide the defendant with an extra copy of the notice and request, as well as a prepaid means of compliance in writing.

If the defendant fails to comply with the request, the court shall impose the costs subsequently incurred in effecting service on the defendant unless good cause for the failure be shown.

(3) A defendant that, before being

served with process, timely returns a waiver so requested is not required to serve an answer to the complaint until 60 days after the date on which the request for waiver of service was sent, or 90 days after that date if the defendant was addressed outside any judicial district of the United States.

(4) When the plaintiff files a waiver of service with the court, the action shall proceed, except as provided in paragraph (3), as if a summons and complaint had been served at the time of filing the waiver, and no proof of service shall be required.

(5) The costs to be imposed on a defendant under paragraph (2) for failure to comply with a request to waive service of a summons shall include the costs subsequently incurred in effecting service under subdivision (e), (f), or (h), together with the costs, including a reasonable attorney's fee, of any motion required to collect the costs of service.

(~~e~~1) **Service Upon Individuals Within a Judicial District of the United States.** Unless otherwise provided by federal law, service ~~U~~upon

an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in any judicial district of the United States:

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

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

(f) Service Upon Individuals in a Foreign Country. Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be

effected in a place not within any judicial district of the United States:

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

(2) if there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice:

(A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or

(B) as directed by the foreign authority in response to a letter rogatory or letter of request; or

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

(i) delivery to the individual personally of a copy of the summons and the complaint; or

(ii) any form of mail

requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or

(3) by other means not prohibited by international agreement as may be directed by the court.

(g~~2~~) **Service Upon Infants and Incompetent Persons.** Service u~~U~~pon an infant or an incompetent person ~~by serving the summons and complaint~~ in a judicial district of the United States shall be effected in the manner prescribed by the law of the state in which the service is made for the service of summons or like process upon any such defendant in an action brought in the courts of general jurisdiction of that state. Service upon an infant or an incompetent person in a place not within any judicial district of the United States shall be effected in the manner prescribed by paragraph (2)(A) or (2)(B) of subdivision (f) or by such means as the court may direct.

(h~~3~~) **Service Upon Corporations and Associations.** Unless otherwise provided by federal law, service u~~U~~pon a domestic or foreign

corporation or upon a partnership or other unincorporated association ~~which~~ that is subject to suit under a common name, and from which a waiver of service has not been obtained and filed, shall be effected:

(1) in a judicial district of the United States in the manner prescribed for individuals by subdivision (e)(1), or by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant~~,~~, or

(2) in a place not within any judicial district of the United States in any manner prescribed for individuals by subdivision (f) except personal delivery as provided in paragraph (2)(C)(i) thereof.

(i4) **Service Upon the United States, and Its Agencies, Corporations, or Officers.**

(1) Service u~~U~~pon the United States~~,~~ shall be effected

(A) by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court or by sending a copy of the summons and of the complaint by registered or certified mail addressed to the civil process clerk at the office of the United States attorney and

(B) by also sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia, and

(C) in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered or certified mail to ~~such~~ the officer or agency.

(~~5~~2) Service ~~—U~~upon an officer, ~~or~~ agency, or corporation of the United States~~,~~ shall be effected by serving the United States in the manner prescribed by paragraph (1) of this subdivision and by also sending a copy of the summons and of the complaint by registered or certified mail to ~~such~~ the officer, ~~or~~ agency, or corporation. ~~— If the agency is a corporation the copy shall be delivered as provided in paragraph (3) of this subdivision of this rule.~~

(3) The court shall allow a reasonable time for service of process under this subdivision for the purpose of curing the failure to serve multiple officers, agencies, or corporations of the United States if the plaintiff has effected service on either the United States attorney or the Attorney General of the United States.

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

(1) Service upon a foreign state or a political subdivision, agency, or instrumentality thereof shall be effected pursuant to 28 U.S.C. § 1608.

(2) Service u~~U~~pon a state, ~~or~~ municipal corporation, or other governmental organization ~~thereof~~ subject to suit~~,~~ shall be effected by delivering a copy of the summons and of the complaint to ~~the~~ its chief executive officer ~~thereof~~ or by serving the summons and complaint in the manner prescribed by the law of that state for the service of summons or other like process upon any such defendant.

~~(c) Summons: Service Upon Party Not Inhabitant of or Found Within State. Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a~~

~~party not an inhabitant of or found within the state, or (2) for service upon or notice to such a party to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of the party's property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule.~~

(~~f~~k) Territorial Limits of Effective Service. ~~All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state. In addition, persons who are brought in as parties pursuant to Rule 14, or as additional parties to a pending action or a counterclaim or cross-claim therein pursuant to Rule 19, may be served in the manner stated in paragraphs (1)-(6) of subdivision (d) of this rule at all places outside the state but within the United States that are not more than 100 miles from the place in which the action is commenced, or to which it is assigned or transferred for trial, and persons required to~~

~~respond to an order of commitment for civil contempt may be served at the same places. A subpoena may be served within the territorial limits provided in Rule 45.~~

(1) Service of a summons or filing a waiver of service is effective to establish jurisdiction over the person of a defendant

(A) who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located, or

(B) who is a party joined under Rule 14 or Rule 19 and is served at a place within a judicial district of the United States and not more than 100 miles from the place from which the summons issues, or

(C) who is subject to the federal interpleader jurisdiction under 28 U.S.C. § 1335, or

(D) when authorized by a statute of the United States.

(2) If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing

a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.

(~~g~~l) ~~Return.~~ Proof of Service. If service is not waived, t~~T~~he person ~~serving the process~~ effecting service shall make proof ~~of service~~ thereof to the court ~~promptly and in any event within the time during which the person served must respond to the process~~. If service is made by a person other than a United States marshal or deputy United States marshal, ~~such~~ the person shall make affidavit thereof. Proof of service in a place not within any judicial district of the United States shall, if effected under paragraph (1) of subdivision (f), be made pursuant to the applicable treaty or convention, and shall, if effected under paragraph (2) or (3) thereof, include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court. ~~If service is made under subdivision (e)(2)(C)(ii) of this rule, return shall be made by the sender's filing~~

~~with the court the acknowledgment received pursuant to such subdivision.~~ Failure to make proof of service does not affect the validity of the service. The court may allow proof of service to be amended.

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

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

~~(1) Manner. When the federal or state law referred to in subdivision (e) of this rule authorizes service upon a party not an inhabitant of or found within the state in which the district court is held, and service is to be effected upon the party in a foreign country, it is also sufficient if service of the summons and complaint is made: (A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general

~~jurisdiction; or (B) as directed by the foreign authority in response to a letter rogatory, when service in either case is reasonably calculated to give actual notice; or (C) upon an individual, by delivery to the individual personally, and upon a corporation or partnership or association, by delivery to an officer, a managing or general agent; or (D) by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or (E) as directed by order of the court. Service under (C) or (E) above may be made by any person who is not a party and is not less than 18 years of age or who is designated by order of the district court or by the foreign court. On request, the clerk shall deliver the summons to the plaintiff for transmission to the person or the foreign court or officer who will make the service.~~

~~(2) Return. Proof of service may be made as prescribed by subdivision (g) of this rule, or by the law of the foreign country, or by order of the court. When service is made pursuant to subparagraph (1)(D) of this~~

~~subdivision, proof of service shall include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court.~~

(~~j~~m) ~~Summons; Time~~ **Time Limit for Service.** If ~~a~~ service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint ~~and the party on whose behalf such service was required cannot show good cause why such service was not made within that period~~, the court ~~action shall be dismissed as to that defendant without prejudice~~, upon ~~the court's~~ motion or on its own initiative ~~with~~ after notice to ~~such party or upon motion~~ the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period. This subdivision ~~shall~~ does not apply to service in a foreign country pursuant to subdivision (~~i~~f) or (j)(1)~~of this rule~~.

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

(1) If a statute of the United States so provides, the court may assert jurisdiction over property. Notice to claimants of the property shall then be sent in the manner provided by the statute or by service of a summons under this rule.

(2) Upon a showing that personal jurisdiction over a defendant cannot, in the district where the action is brought, be obtained with reasonable efforts by service of summons in any manner authorized by this rule, the court may assert jurisdiction over any of the defendant's assets found within the district by seizing the assets under the circumstances and in the manner provided by the law of the state in which the district court is located.

COMMITTEE NOTES

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

Purposes of Revision. The general purpose of this

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

First, the revised rule authorizes the use of any means of service provided by the law not only of the forum state, but also of the state in which a defendant is served, unless the defendant is a minor or incompetent.

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

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

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

Finally, the revised rule extends the reach of federal courts to impose jurisdiction over the person of all defendants against whom federal law claims are made and who can be constitutionally subjected to the jurisdiction of the courts of the United States. The

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

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

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

The revised rule is entitled "Summons" and applies only to that form of legal process. Unless service of the summons is waived, a summons must be served whenever a person is joined as a party against whom a claim is made. Those few provisions of the former rule which relate specifically to service of process other than a summons are relocated in Rule 4.1 in order to simplify the text of this rule.

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

4A Wright & Miller, Federal Practice and Procedure § 1131 (2d ed. 1987).

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

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

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

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

Subdivision (d). This text is new, but is substantially derived from the former subdivisions (c)(2)(C) and (D), added to the rule by Congress in 1983. The aims of the provision are to eliminate the costs of service of a summons on many parties and to foster cooperation among adversaries and counsel. The rule operates to impose upon the defendant those costs

that could have been avoided if the defendant had cooperated reasonably in the manner prescribed. This device is useful in dealing with defendants who are furtive, who reside in places not easily reached by process servers, or who are outside the United States and can be served only at substantial and unnecessary expense. Illustratively, there is no useful purpose achieved by requiring a plaintiff to comply with all the formalities of service in a foreign country, including costs of translation, when suing a defendant manufacturer, fluent in English, whose products are widely distributed in the United States. See Bankston v. Toyota Motor Corp., 889 F.2d 172 (8th Cir. 1989).

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

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

It was unclear whether the former rule authorized mailing of a request for "acknowledgement of service" to defendants outside the forum state. See 1 R. Casad, Jurisdiction in Civil Actions (2d Ed.) 5-29, 30 (1991) and cases cited. But, as Professor Casad observed, there was no reason not to employ this device in an effort to obtain service outside the state, and there are many instances in which it was in

fact so used, with respect both to defendants within the United States and to defendants in other countries.

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

It is hoped that, since transmission of the notice and waiver forms is a private nonjudicial act, does not purport to effect service, and is not accompanied by any summons or directive from a court, use of the procedure will not offend foreign sovereignties, even those that have withheld their assent to formal service by mail or have objected to the "service-by-mail" provisions of the former rule. Unless the addressee consents, receipt of the request under the revised rule does not give rise to any obligation to answer the lawsuit, does not provide a basis for default judgment, and does not suspend the statute of limitations in those states where the period continues to run until service. The only adverse consequence to the foreign defendant is one shared by domestic defendants; namely, the potential imposition of costs of service that, if successful in the litigation, it would not otherwise have to bear. However, this shifting of expense would not be proper under the rule if the foreign defendant's refusal to waive service was based upon a policy of its government prohibiting all waivers of service.

With respect to a defendant located in a foreign country like the United Kingdom, which accepts documents in English, whose Central Authority acts

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

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

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

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

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

sender should maintain a record of the transmission to assure proof of transmission if receipt is denied, but a party receiving such a transmission has a duty to cooperate and cannot avoid liability for the resulting cost of formal service if the transmission is prevented at the point of receipt.

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

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

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

The provisions in former subdivision (c)(2)(C)(ii) of this rule may have been misleading to some parties. Some plaintiffs, not reading the rule carefully, supposed that receipt by the defendant of the mailed complaint had the effect both of establishing the jurisdiction of the court over the defendant's person and of tolling the statute of limitations in actions in which service of the summons is required to toll the limitations period. The revised rule is clear

that, if the waiver is not returned and filed, the limitations period under such a law is not tolled and the action will not otherwise proceed until formal service of process is effected.

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

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

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

Some plaintiffs may send a notice and request for waiver and, without waiting for return of the waiver, also proceed with efforts to effect formal service on the defendant. To discourage this practice, the cost-shifting provisions in paragraphs (2) and (5) are limited to costs of effecting service incurred after the time expires for the defendant to return the

waiver. Moreover, by returning the waiver within the time allowed and before being served with process, a defendant receives the benefit of the longer period for responding to the complaint afforded for waivers under paragraph (3).

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

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

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

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

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

Subdivision (f). This subdivision provides for service on individuals who are in a foreign country, replacing the former subdivision (i) that was added to Rule 4 in 1963. Reflecting the pattern of Rule 4 in incorporating state law limitations on the exercise of jurisdiction over persons, the former subdivision (i)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Jurisdiction in Civil Actions (2d Ed.) chap. 5 (1991).

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

This paragraph corrects a gap in the enforcement of federal law. Under the former rule, a problem was presented when the defendant was a non-resident of the United States having contacts with the United States sufficient to justify the application of United States law and to satisfy federal standards of forum selection, but having insufficient contact with any single state to support jurisdiction under state long-arm legislation or meet the requirements of the Fourteenth Amendment limitation on state court territorial jurisdiction. In such cases, the defendant was shielded from the enforcement of federal law by the fortuity of a favorable limitation on the power of state courts, which was incorporated into the federal practice by the former rule. In this respect, the revision responds to the suggestion of the Supreme Court made in Omni Capital Int'l v. Rudolf Wolff & Co., Ltd., 484 U.S. 97, 111 (1987).

There remain constitutional limitations on the exercise of territorial jurisdiction by federal courts over persons outside the United States. These restrictions arise from the Fifth Amendment rather than from the Fourteenth Amendment, which limits state-court reach and which was incorporated into federal practice by the reference to state law in the text of the former subdivision (e) that is deleted by this revision. The Fifth Amendment requires that any defendant have affiliating contacts with the United States sufficient to justify the exercise of personal jurisdiction over that party. Cf. Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 418 (9th Cir. 1977). There also may be a further Fifth Amendment constraint in that a plaintiff's forum selection might be so inconvenient to a defendant that it would be a denial of "fair play and substantial justice" required by the due process clause, even though the defendant had significant affiliating contacts with the United States. See DeJames v. Magnificent Carriers, 654 F.2d 280, 286 n.3 (3rd

Cir.), cert. denied, 454 U.S. 1085 (1981). Compare World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293-294 (1980); Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702-03 (1982); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476-78 (1985); Asahi Metal Indus. v. Superior Court of Cal., Solano County, 480 U.S. 102, 108-13 (1987). See generally R. Lusardi, Nationwide Service of Process: Due Process Limitations on the Power of the Sovereign, 33 Vill. L. Rev. 1 (1988).

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

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

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

Subdivision (l). This subdivision assembles in one place all the provisions of the present rule bearing on proof of service. No material change in the rule

is effected. The provision that proof of service can be amended by leave of court is retained from the former subdivision (h). See generally 4A Wright & Miller, Federal Practice and Procedure § 1132 (2d ed. 1987).

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

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

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

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

Paragraph (2) provides for other uses of quasi-in-rem jurisdiction but limits its use to exigent circumstances. Provisional remedies may be employed as a means to secure jurisdiction over the property of a defendant whose person is not within reach of the court, but occasions for the use of this provision should be rare, as where the defendant is a fugitive or assets are in imminent danger of disappearing. Until 1963, it was not possible under Rule 4 to assert jurisdiction in a federal court over the property of a defendant not personally served. The 1963 amendment to subdivision (e) authorized the use of state law procedures authorizing seizures of assets as a basis for jurisdiction. Given the liberal availability of long-arm jurisdiction, the exercise of power quasi-in-rem has become almost an anachronism. Circumstances too spare to affiliate the defendant to the forum state sufficiently to support long-arm jurisdiction over the defendant's person are also inadequate to support seizure of the defendant's assets fortuitously found within the state. Shaffer v. Heitner, 433 U.S. 186 (1977).

Rule 4.1 Service of Other Process

(a) Generally. Process other than a summons as provided in Rule 4 or subpoena as provided in Rule 45 shall be served by a United States marshal, a deputy United States marshal, or a person specially appointed for that purpose, who shall make proof of service as provided in Rule 4(l). The process may be served anywhere within the territorial limits of the state in which the district court is located, and, when authorized by a statute of the United States, beyond the territorial limits of that state.

(b) Enforcement of Orders: Commitment for

Civil Contempt. An order of civil commitment of a person held to be in contempt of a decree or injunction issued to enforce the laws of the United States may be served and enforced in any district. Other orders in civil contempt proceedings shall be served in the state in which the court issuing the order to be enforced is located or elsewhere within the United States if not more than 100 miles from the place at which the order to be enforced was issued.

COMMITTEE NOTES

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

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

Service of process is not required to notify a party of a decree or injunction, or of an order that the party show cause why that party should not be held in contempt of such an order. With respect to a party who has once been served with a summons, the service of the decree or injunction itself or of an order to show cause can be made pursuant to Rule 5. Thus, for example, an injunction may be served on a party through that person's attorney. Chagas v. United States , 369 F.2d 643 (5th Cir. 1966). The same is true for service of an order to show cause.

Waffenschmidt v. Mackay, 763 F.2d 711 (5th Cir. 1985).

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

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

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

* * * *

(e) Filing with the Court Defined. The filing of papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the

office of the clerk. ~~Papers may be filed by facsimile transmission if permitted by rules of the district court, provided that the rules~~ A court may, by local rule, permit papers to be filed by facsimile or other electronic means if such means are authorized by and consistent with standards established by the Judicial Conference of the United States. The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or by any local rules or practices.

COMMITTEE NOTES

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

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

(a) Signature. Every pleading, written motion, and other paper ~~of a party represented by an attorney~~ shall be signed by at least one attorney of record in the attorney's individual

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

~~cost of litigation. If a pleading, motion, or other~~ An unsigned paper ~~is not signed, it~~ shall be stricken unless ~~it is signed promptly after the~~ omission of the signature is corrected promptly after being called to the attention of the ~~pleader or movant~~ attorney or party.

(b) Representations to Court. ~~If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.~~ By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,--

(1) it is not being presented for any improper purpose, such as to harass or to

cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) **Sanctions.** If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How Initiated.

(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an

order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless

the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) Inapplicability to Discovery. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.

COMMITTEE NOTES

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

The rule retains the principle that attorneys and pro se litigants have an obligation to the court to

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

Subdivision (a). Retained in this subdivision are the provisions requiring signatures on pleadings, written motions, and other papers. Unsigned papers are to be received by the Clerk, but then are to be stricken if the omission of the signature is not corrected promptly after being called to the attention of the attorney or pro se litigant. Correction can be made by signing the paper on file or by submitting a duplicate that contains the signature. A court may require by local rule that papers contain additional identifying information regarding the parties or attorneys, such as telephone numbers to facilitate facsimile transmissions, though, as for omission of a signature, the paper should not be rejected for failure to provide such information.

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

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

tenable and by generally providing protection against sanctions if they withdraw or correct contentions after a potential violation is called to their attention.

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

The certification with respect to allegations and other factual contentions is revised in recognition that sometimes a litigant may have good reason to believe that a fact is true or false but may need discovery, formal or informal, from opposing parties or third persons to gather and confirm the evidentiary basis for the allegation. Tolerance of factual contentions in initial pleadings by plaintiffs or defendants when specifically identified as made on information and belief does not relieve litigants from the obligation to conduct an appropriate investigation into the facts that is reasonable under the circumstances; it is not a license to join parties, make claims, or present defenses without any factual basis or justification. Moreover, if evidentiary support is not obtained after a reasonable opportunity for further investigation or discovery, the party has a duty under the rule not to persist with that contention. Subdivision (b) does not require a formal amendment to pleadings for which evidentiary support is not obtained, but rather calls upon a litigant not

thereafter to advocate such claims or defenses.

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

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

The changes in subdivisions (b)(3) and (b)(4) will serve to equalize the burden of the rule upon plaintiffs and defendants, who under Rule 8(b) are in effect allowed to deny allegations by stating that from their initial investigation they lack sufficient information to form a belief as to the truth of the allegation. If, after further investigation or discovery, a denial is no longer warranted, the defendant should not continue to insist on that denial. While sometimes helpful, formal amendment of the pleadings to withdraw an allegation or denial is not required by subdivision (b).

Arguments for extensions, modifications, or reversals of existing law or for creation of new law do not violate subdivision (b)(2) provided they are "nonfrivolous." This establishes an objective standard, intended to eliminate any "empty-head pure-heart" justification for patently frivolous arguments. However, the extent to which a litigant has researched the issues and found some support for its theories even in minority opinions, in law review articles, or

through consultation with other attorneys should certainly be taken into account in determining whether paragraph (2) has been violated. Although arguments for a change of law are not required to be specifically so identified, a contention that is so identified should be viewed with greater tolerance under the rule.

The court has available a variety of possible sanctions to impose for violations, such as striking the offending paper; issuing an admonition, reprimand, or censure; requiring participation in seminars or other educational programs; ordering a fine payable to the court; referring the matter to disciplinary authorities (or, in the case of government attorneys, to the Attorney General, Inspector General, or agency head), etc. See Manual for Complex Litigation, Second, § 42.3. The rule does not attempt to enumerate the factors a court should consider in deciding whether to impose a sanction or what sanctions would be appropriate in the circumstances; but, for emphasis, it does specifically note that a sanction may be nonmonetary as well as monetary. Whether the improper conduct was willful, or negligent; whether it was part of a pattern of activity, or an isolated event; whether it infected the entire pleading, or only one particular count or defense; whether the person has engaged in similar conduct in other litigation; whether it was intended to injure; what effect it had on the litigation process in time or expense; whether the responsible person is trained in the law; what amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case; what amount is needed to deter similar activity by other litigants: all of these may in a particular case be proper considerations. The court has significant discretion in determining what sanctions, if any, should be imposed for a violation, subject to the principle that the sanctions should not be more severe than reasonably necessary to deter repetition of the conduct by the offending person or comparable conduct by similarly situated persons.

Since the purpose of Rule 11 sanctions is to deter rather than to compensate, the rule provides that, if a monetary sanction is imposed, it should ordinarily be paid into court as a penalty. However, under unusual circumstances, particularly for (b)(1) violations, deterrence may be ineffective unless the

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

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

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

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

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

Explicit provision is made for litigants to be provided notice of the alleged violation and an opportunity to respond before sanctions are imposed. Whether the matter should be decided solely on the basis of written submissions or should be scheduled for oral argument (or, indeed, for evidentiary presentation) will depend on the circumstances. If the court imposes a sanction, it must, unless waived, indicate its reasons in a written order or on the record; the court should not ordinarily have to explain its denial of a motion for sanctions. Whether a violation has occurred and what sanctions, if any, to impose for a violation are matters committed to the discretion of the trial court; accordingly, as under

current law, the standard for appellate review of these decisions will be for abuse of discretion. See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990) (noting, however, that an abuse would be established if the court based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence).

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

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

The rule provides that requests for sanctions must be made as a separate motion, i.e., not simply included as an additional prayer for relief contained

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

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

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

The power of the court to act on its own initiative is retained, but with the condition that this be done through a show cause order. This procedure provides the person with notice and an opportunity to respond. The revision provides that a monetary sanction imposed after a court-initiated show cause order be limited to a penalty payable to the court and that it be imposed only if the show cause order is issued before any voluntary dismissal or an agreement of the parties to settle the claims made by or against the litigant.

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

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

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

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

(a) When Presented.—

(1) Unless a different time is prescribed in a statute of the United States, a~~A~~ defendant shall serve an answer

(A) within 20 days after being served with ~~the service of~~ the summons and complaint ~~upon that defendant~~, or

(B) if service of the summons has been timely waived on request under Rule 4(d), within 60 days after the date when the request for waiver was sent, or within 90 days after that date if the defendant was addressed outside any judicial district of the United States ~~except when service is made under rule 4(e) and a different time is prescribed in the order of court under the statute of the United States or in the statute or rule of court of the state~~.—

(2) A party served with a pleading stating a cross-claim against that party shall serve an answer thereto within 20 days after ~~the service upon that party~~ being served. The

plaintiff shall serve a reply to a counterclaim in the answer within 20 days after service of the answer, or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs.—

(3) The United States or an officer or agency thereof shall serve an answer to the complaint or to a cross-claim, or a reply to a counterclaim, within 60 days after the service upon the United States attorney of the pleading in which the claim is asserted.

(4) Unless a different time is fixed by court order, t~~T~~he service of a motion permitted under this rule alters these periods of time as follows~~, unless a different time is fixed by order of the court~~:

(~~1~~A) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; or

(~~2~~B) if the court grants a motion for a more definite statement, the responsive pleading shall be served

within 10 days after the service of the more definite statement.

* * * * *

COMMITTEE NOTES

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

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

Rule 15. Amended and Supplemental Pleadings

* * * *

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

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

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

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

The delivery or mailing of process to the United States Attorney, or United States Attorney's designee, or the Attorney General of the United States, or an agency or officer

who would have been a proper defendant if named, satisfies the requirement of subparagraphs (A) and (B) of this paragraph (3) with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

* * * *

COMMITTEE NOTES

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

Rule 16. Pretrial Conferences; Scheduling; Management

* * * *

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

(1) to join other parties and to amend

the pleadings;

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

(3) to complete discovery.

The scheduling order may also include

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

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

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

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

(c) Subjects ~~to be Discussed~~ for Consideration at Pretrial Conferences. ~~The participants a~~At any conference under this rule

~~may consider and take action~~ consideration may be given, and the court may take appropriate action, with respect to

(1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses;

(2) the necessity or desirability of amendments to the pleadings;

(3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence;

(4) the avoidance of unnecessary proof and of cumulative evidence, and limitations or restrictions on the use of testimony under Rule 702 of the Federal Rules of Evidence;

(5) the appropriateness and timing of summary adjudication under Rule 56;

(6) the control and scheduling of discovery, including orders affecting disclosures and discovery pursuant to Rule 26 and Rules 29 through 37;

(~~5~~7) the identification of witnesses

and documents, the need and schedule for filing and exchanging pretrial briefs, and the date or dates for further conferences and for trial;

(~~6~~8) the advisability of referring matters to a magistrate judge or master;

(~~7~~9) ~~the possibility of~~ settlement ~~or~~ and the use of ~~extrajudicial~~ special procedures to ~~resolve~~ assist in resolving the dispute when authorized by statute or local rule;

(~~8~~10) the form and substance of the pretrial order;

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

(~~10~~2) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;

(13) an order for a separate trial pursuant to Rule 42(b) with respect to a claim, counterclaim, cross-claim, or third-party claim, or with respect to any particular issue in the case;

(14) an order directing a party or parties to present evidence early in the trial with respect to a manageable issue that could, on the evidence, be the basis for a judgment as a matter of law under Rule 50(a) or a judgment on partial findings under Rule 52(c);

(15) an order establishing a reasonable limit on the time allowed for presenting evidence; and

(~~11~~6) such other matters as may ~~aid in~~ facilitate the just, speedy, and inexpensive disposition of the action.

At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed. If appropriate, the court may require that a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute.

* * * *

COMMITTEE NOTES

Subdivision (b). One purpose of this amendment is to provide a more appropriate deadline for the initial

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

In many cases the scheduling order can and should be entered before this deadline. However, when setting a scheduling conference, the court should take into account the effect this setting will have in establishing deadlines for the parties to meet under revised Rule 26(f) and to exchange information under revised Rule 26(a)(1). While the parties are expected to stipulate to additional time for making their disclosures when warranted by the circumstances, a scheduling conference held before defendants have had time to learn much about the case may result in diminishing the value of the Rule 26(f) meeting, the parties' proposed discovery plan, and indeed the conference itself.

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

the extent of discovery (e.g., number and length of depositions) otherwise permitted under these rules or by a local rule.

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

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

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

Paragraph (4) is revised to clarify that in advance of trial the court may address the need for, and possible limitations on, the use of expert testimony under Rule 702 of the Federal Rules of Evidence. Even when proposed expert testimony might be admissible under the standards of Rules 403 and 702 of the evidence rules, the court may preclude or limit such

testimony if the cost to the litigants--which may include the cost to adversaries of securing testimony on the same subjects by other experts--would be unduly expensive given the needs of the case and the other evidence available at trial.

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

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

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

The amendment of paragraph (9) should be read in conjunction with the sentence added to the end of subdivision (c), authorizing the court to direct that, in appropriate cases, a responsible representative of the parties be present or available by telephone during a conference in order to discuss possible settlement of the case. The sentence refers to participation by a party or its representative. Whether this would be the individual party, an officer of a corporate party, a representative from an insurance carrier, or someone else would depend on the circumstances. Particularly in litigation in which governmental agencies or large amounts of money are involved, there may be no one with on-the-spot settlement authority, and the most that should be expected is access to a person who would have a major role in submitting a recommendation to the body or board with ultimate decision-making responsibility. The selection of the appropriate representative should ordinarily be left to the party and its counsel. Finally, it should be noted that the unwillingness of a party to be available, even by telephone, for a settlement conference may be a clear signal that the time and expense involved in pursuing settlement is likely to be unproductive and that personal participation by the parties should not be required.

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

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

Paragraph (15) is also new. It supplements the power of the court to limit the extent of evidence under Rules 403 and 611(a) of the Federal Rules of Evidence, which typically would be invoked as a result of developments during trial. Limits on the length of trial established at a conference in advance of trial

can provide the parties with a better opportunity to determine priorities and exercise selectivity in presenting evidence than when limits are imposed during trial. Any such limits must be reasonable under the circumstances, and ordinarily the court should impose them only after receiving appropriate submissions from the parties outlining the nature of the testimony expected to be presented through various witnesses, and the expected duration of direct and cross-examination.

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

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

(1) Initial Disclosures. Except to the extent otherwise stipulated or directed by order or local rule, a party shall, without awaiting a discovery request, provide to other parties:

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

(B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things in

the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings;

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

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

Unless otherwise stipulated or directed by the court, these disclosures shall be made at or within 10 days after the meeting of the

parties under subdivision (f). A party shall make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) Disclosure of Expert Testimony.

(A) In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the

witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(C) These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on

the same subject matter identified by another party under paragraph (2)(B), within 30 days after the disclosure made by the other party. The parties shall supplement these disclosures when required under subdivision (e)(1).

(3) Pretrial Disclosures. In addition to the disclosures required in the preceding paragraphs, a party shall provide to other parties the following information regarding the evidence that it may present at trial other than solely for impeachment purposes:

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

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

(C) an appropriate identification

of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises. Unless otherwise directed by the court, these disclosures shall be made at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by the court, a party may serve and file a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under subparagraph (B) and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under subparagraph (C). Objections not so disclosed, other than objections under Rules 402 and 403 of the Federal Rules of Evidence, shall be deemed waived unless excused by the court for good cause shown.

(4) Form of Disclosures; Filing. Unless otherwise directed by order or local rule, all disclosures under paragraphs (1) through (3) shall be made in writing, signed, served, and

promptly filed with the court.

(5) Methods to Discover Additional Matter. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property under Rule 34 or 45(a)(1)(C), for inspection and other purposes; physical and mental examinations; and requests for admission.

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

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

identity and location of persons having knowledge of any discoverable matter. ~~It is not a ground for objection that t~~The information sought need not be ~~will be in~~admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) Limitations. By order or by local rule, the court may alter the limits in these rules on the number of depositions and interrogatories and may also limit the length of depositions under Rule 30 and the number of requests under Rule 36. The frequency or extent of use of the discovery methods ~~set forth in subdivision (a)~~ otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) ~~the discovery is unduly burdensome or~~

~~expensive~~ the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, ~~limitations on~~ the parties' resources, ~~and~~ the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

~~(2) Insurance Agreements. A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purpose of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.~~

* * * *

(4) Trial Preparation: Experts.

~~Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:~~

(A)~~(i)~~ A party may ~~through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.~~

~~(ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.~~ depose any person who has been identified as an expert whose opinions may be presented at trial.

If a report from the expert is required under subdivision (a)(2)(B), the deposition shall not be conducted until after the report is provided.

(B) A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial~~,~~ only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subdivision~~s (b)(4)(A)(ii) and (b)(4)(B) of this rule~~; and (ii) with respect to discovery obtained under ~~subdivision~~

~~(b)(4)(A)(ii) of this rule the court may require, and with respect to discovery obtained under~~ subdivision (b)(4)(B) of this rule the court shall require~~,~~ the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(5) Claims of Privilege or Protection of Trial Preparation Materials. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the

movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

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

(2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters;

(5) that discovery be conducted with no one present except persons designated by the court;

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

(7) that a trade secret or other confidential research, development, or commercial information not be ~~disclosed~~ revealed or be ~~disclosed~~ revealed only in a designated way; and

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or other person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) ~~Sequence and~~ Timing and Sequence of Discovery. Except when authorized under these rules or by local rule, order, or agreement of the parties, a party may not seek discovery from any source before the parties have met and conferred as required by subdivision (f). Unless the court upon motion, for the convenience of parties and witnesses and in the interests of

justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

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

(1) A party is under a duty ~~seasonably~~ to supplement ~~the response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of the person's testimony.~~ at appropriate intervals its disclosures under subdivision (a) if the party

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

(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns ~~obtains information upon the basis of which (A) the party knows~~ that the response ~~was incorrect when made, or (B) the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment~~ is in some material

respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

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

(f) Meeting of Parties; Planning for ~~Discovery Conference.~~ ~~At any time after commencement of an action the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon motion by the attorney for any party if the motion includes~~ Except in actions exempted by local rule or when otherwise ordered, the parties shall, as soon as practicable and in any event at least 14 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by

subdivision (a)(1), and to develop a proposed discovery plan. The plan shall indicate the parties' views and proposals concerning:

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

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

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

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

~~(5) A statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion. Each party and each party's attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party. Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than 10 days after service of the motion.~~

The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging and being present or represented at the meeting, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 10 days after the meeting a written report outlining the plan. ~~Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if~~

~~any; and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.~~

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

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

(1) Every disclosure made pursuant to subdivision (a)(1) or subdivision (a)(3) shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the disclosure and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.

(2) Every discovery request, ~~for~~

~~discovery or~~ response, or objection ~~thereto~~ made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party ~~who is not represented by an attorney~~ shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification ~~that the signer has read the request, response, or objection, and~~ that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, ~~it~~ the request, response, or objection is:

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

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

(~~3~~C) not unreasonable or unduly

burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

(3) If <u>without substantial justification</u> a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the <u>disclosure, </u>request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

COMMITTEE NOTES

<u>Subdivision (a).</u> Through the addition of

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

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

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

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

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

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

to reject all such requirements for the present, are designed to eliminate certain discovery, help focus the discovery that is needed, and facilitate preparation for trial or settlement.

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

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

Unlike subparagraphs (C) and (D), subparagraph (B) does not require production of any documents. Of course, in cases involving few documents a disclosing party may prefer to provide copies of the documents rather than describe them, and the rule is written to afford this option to the disclosing party. If, as

will be more typical, only the description is provided, the other parties are expected to obtain the documents desired by proceeding under Rule 34 or through informal requests. The disclosing party does not, by describing documents under subparagraph (B), waive its right to object to production on the basis of privilege or work product protection, or to assert that the documents are not sufficiently relevant to justify the burden or expense of production.

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

Subparagraph (C) imposes a burden of disclosure that includes the functional equivalent of a standing Request for Production under Rule 34. A party claiming damages or other monetary relief must, in addition to disclosing the calculation of such damages, make available the supporting documents for inspection and copying as if a request for such materials had been made under Rule 34. This obligation applies only with respect to documents then

reasonably available to it and not privileged or protected as work product. Likewise, a party would not be expected to provide a calculation of damages which, as in many patent infringement actions, depends on information in the possession of another party or person.

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

Unless the court directs a different time, the disclosures required by subdivision (a)(1) are to be made at or within 10 days after the meeting of the parties under subdivision (f). One of the purposes of this meeting is to refine the factual disputes with respect to which disclosures should be made under paragraphs (1)(A) and (1)(B), particularly if an answer has not been filed by a defendant, or, indeed, to afford the parties an opportunity to modify by stipulation the timing or scope of these obligations. The time of this meeting is generally left to the parties provided it is held at least 14 days before a scheduling conference is held or before a scheduling order is due under Rule 16(b). In cases in which no scheduling conference is held, this will mean that the meeting must ordinarily be held within 75 days after a defendant has first appeared in the case and hence that the initial disclosures would be due no later than 85 days after the first appearance of a defendant.

Before making its disclosures, a party has the obligation under subdivision (g)(1) to make a reasonable inquiry into the facts of the case. The rule does not demand an exhaustive investigation at this stage of the case, but one that is reasonable under the circumstances, focusing on the facts that are alleged with particularity in the pleadings. The type of investigation that can be expected at this point will vary based upon such factors as the number

and complexity of the issues; the location, nature, number, and availability of potentially relevant witnesses and documents; the extent of past working relationships between the attorney and the client, particularly in handling related or similar litigation; and of course how long the party has to conduct an investigation, either before or after filing of the case. As provided in the last sentence of subdivision (a)(1), a party is not excused from the duty of disclosure merely because its investigation is incomplete. The party should make its initial disclosures based on the pleadings and the information then reasonably available to it. As its investigation continues and as the issues in the pleadings are clarified, it should supplement its disclosures as required by subdivision (e)(1). A party is not relieved from its obligation of disclosure merely because another party has not made its disclosures or has made an inadequate disclosure.

It will often be desirable, particularly if the claims made in the complaint are broadly stated, for the parties to have their Rule 26(f) meeting early in the case, perhaps before a defendant has answered the complaint or had time to conduct other than a cursory investigation. In such circumstances, in order to facilitate more meaningful and useful initial disclosures, they can and should stipulate to a period of more than 10 days after the meeting in which to make these disclosures, at least for defendants who had no advance notice of the potential litigation. A stipulation at an early meeting affording such a defendant at least 60 days after receiving the complaint in which to make its disclosures under subdivision (a)(1)--a period that is two weeks longer than the time formerly specified for responding to interrogatories served with a complaint--should be adequate and appropriate in most cases.

Paragraph (2). This paragraph imposes an additional duty to disclose information regarding expert testimony sufficiently in advance of trial that opposing parties have a reasonable opportunity to prepare for effective cross examination and perhaps arrange for expert testimony from other witnesses. Normally the court should prescribe a time for these disclosures in a scheduling order under Rule 16(b), and in most cases the party with the burden of proof on an issue should disclose its expert testimony on that issue before other parties are required to make

their disclosures with respect to that issue. In the absence of such a direction, the disclosures are to be made by all parties at least 90 days before the trial date or the date by which the case is to be ready for trial, except that an additional 30 days is allowed (unless the court specifies another time) for disclosure of expert testimony to be used solely to contradict or rebut the testimony that may be presented by another party's expert. For a discussion of procedures that have been used to enhance the reliability of expert testimony, see M. Graham, Expert Witness Testimony and the Federal Rules of Evidence: Insuring Adequate Assurance of Trustworthiness, 1986 U. Ill. L. Rev. 90.

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

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

protected from disclosure when such persons are testifying or being deposed.

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

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

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

Subparagraph (A) requires the parties to designate the persons whose testimony they may present as

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

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

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

Subparagraph (C) requires disclosure of exhibits, including summaries (whether to be offered in lieu of other documentary evidence or to be used as an aid in understanding such evidence), that may be offered as substantive evidence. The rule requires a separate listing of each such exhibit, though it should permit voluminous items of a similar or standardized character to be described by meaningful categories. For example, unless the court has otherwise directed, a series of vouchers might be shown collectively as a single exhibit with their starting and ending dates. As with witnesses, the exhibits that will probably be offered are to be listed separately from those which are unlikely to be offered but which are listed in

order to preserve the right to do so if needed because of developments during trial. Under revised Rule 37(c)(1) the court can permit use of unlisted documents the need for which could not reasonably have been anticipated in advance of trial.

Upon receipt of these final pretrial disclosures, other parties have 14 days (unless a different time is specified by the court) to disclose any objections they wish to preserve to the usability of the deposition testimony or to the admissibility of the documentary evidence (other than under Rules 402 and 403 of the Federal Rules of Evidence). Similar provisions have become commonplace either in pretrial orders or by local rules, and significantly expedite the presentation of evidence at trial, as well as eliminate the need to have available witnesses to provide "foundation" testimony for most items of documentary evidence. The listing of a potential objection does not constitute the making of that objection or require the court to rule on the objection; rather, it preserves the right of the party to make the objection when and as appropriate during trial. The court may, however, elect to treat the listing as a motion "in limine" and rule upon the objections in advance of trial to the extent appropriate.

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

Paragraph (4). This paragraph prescribes the form of disclosures. A signed written statement is required, reminding the parties and counsel of the solemnity of the obligations imposed; and the signature on the initial or pretrial disclosure is a certification under subdivision (g)(1) that it is complete and correct as of the time when made. Consistent with Rule 5(d), these disclosures are to be filed with the court unless otherwise directed. It is anticipated that many courts will direct that expert

reports required under paragraph (2)(B) not be filed until needed in connection with a motion or for trial.

Paragraph (5). This paragraph is revised to take note of the availability of revised Rule 45 for inspection from non-parties of documents and premises without the need for a deposition.

Subdivision (b). This subdivision is revised in several respects. First, former paragraph (1) is subdivided into two paragraphs for ease of reference and to avoid renumbering of paragraphs (3) and (4). Textual changes are then made in new paragraph (2) to enable the court to keep tighter rein on the extent of discovery. The information explosion of recent decades has greatly increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument for delay or oppression. Amendments to Rules 30, 31, and 33 place presumptive limits on the number of depositions and interrogatories, subject to leave of court to pursue additional discovery. The revisions in Rule 26(b)(2) are intended to provide the court with broader discretion to impose additional restrictions on the scope and extent of discovery and to authorize courts that develop case tracking systems based on the complexity of cases to increase or decrease by local rule the presumptive number of depositions and interrogatories allowed in particular types or classifications of cases. The revision also dispels any doubt as to the power of the court to impose limitations on the length of depositions under Rule 30 or on the number of requests for admission under Rule 36.

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

Third, paragraph (4)(A) is revised to provide that experts who are expected to be witnesses will be subject to deposition prior to trial, conforming the norm stated in the rule to the actual practice followed in most courts, in which depositions of experts have become standard. Concerns regarding the expense of such depositions should be mitigated by the fact that the expert's fees for the deposition will ordinarily be borne by the party taking the

deposition. The requirement under subdivision (a)(2)(B) of a complete and detailed report of the expected testimony of certain forensic experts may, moreover, eliminate the need for some such depositions or at least reduce the length of the depositions. Accordingly, the deposition of an expert required by subdivision (a)(2)(B) to provide a written report may be taken only after the report has been served.

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

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

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

The rule does not attempt to define for each case what information must be provided when a party asserts a claim of privilege or work product protection. Details concerning time, persons, general subject matter, etc., may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories. A party can seek relief through a protective order under subdivision (c) if compliance with the requirement for providing this information would be an unreasonable burden. In rare circumstances some of the pertinent information affecting applicability of the claim, such as the identity of the client, may itself be privileged; the rule provides that such information need not be

disclosed.

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

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

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

The meeting of counsel is to take place as soon as practicable and in any event at least 14 days before the date of the scheduling conference under Rule 16(b) or the date a scheduling order is due under Rule

16(b). The court can assure that discovery is not unduly delayed either by entering a special order or by setting the case for a scheduling conference.

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

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

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

Subdivision (f). This subdivision was added in 1980 to provide a party threatened with abusive discovery with a special means for obtaining judicial intervention other than through discrete motions under Rules 26(c) and 37(a). The amendment envisioned a two-step process: first, the parties would attempt to frame a mutually agreeable plan; second, the court would hold a "discovery conference" and then enter an order establishing a schedule and limitations for the

conduct of discovery. It was contemplated that the procedure, an elective one triggered on request of a party, would be used in special cases rather than as a routine matter. As expected, the device has been used only sparingly in most courts, and judicial controls over the discovery process have ordinarily been imposed through scheduling orders under Rule 16(b) or through rulings on discovery motions.

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

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

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

tailored to the circumstances of the particular case.

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

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

The parties are directed under subdivision (a)(1) to make the disclosures required by that subdivision at or within 10 days after this meeting. In many cases the parties should use the meeting to exchange, discuss, and clarify their respective disclosures. In other cases, it may be more useful if the disclosures are delayed until after the parties have discussed at the meeting the claims and defenses in order to define the issues with respect to which the initial disclosures should be made. As discussed in the Notes to subdivision (a)(1), the parties may also need to consider whether a stipulation extending this 10-day period would be appropriate, as when a defendant would otherwise have less than 60 days after being served in which to make its initial disclosure. The parties should also discuss at the meeting what additional information, although not subject to the disclosure requirements, can be made available informally without the necessity for formal discovery requests.

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

The litigants are expected to attempt in good faith to agree on the contents of the proposed discovery plan. If they cannot agree on all aspects of the plan, their report to the court should indicate the competing proposals of the parties on those items, as well as the matters on which they agree. Unfortunately, there may be cases in which, because of disagreements about time or place or for other reasons, the meeting is not attended by all parties or, indeed, no meeting takes place. In such situations, the report--or reports--should describe the circumstances and the court may need to consider sanctions under Rule 37(g).

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

Subdivision (g). Paragraph (1) is added to require signatures on disclosures, a requirement that parallels the provisions of paragraph (2) with respect to discovery requests, responses, and objections. The provisions of paragraph (3) have been modified to be consistent with Rules 37(a)(4) and 37(c)(1); in combination, these rules establish sanctions for violation of the rules regarding disclosures and

discovery matters. Amended Rule 11 no longer applies to such violations.

Rule 28. Persons Before Whom Depositions May Be Taken

* * * *

(b) **In Foreign Countries.** ~~In a foreign country, d~~Depositions may be taken in a foreign country (1) pursuant to any applicable treaty or convention, or (2) pursuant to a letter of request (whether or not captioned a letter rogatory), or (3) on notice before a person authorized to administer oaths in the place ~~in which~~ where the examination is held, either by the law thereof or by the law of the United States, or (~~2~~4) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of the commission to administer any necessary oath and take testimony~~, or (3) pursuant to a letter rogatory~~. A commission or a letter ~~rogatory~~ of request shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter ~~rogatory~~ of request that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a

letter ~~rogatory~~ of request may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter ~~rogatory~~ of request may be addressed "To the Appropriate Authority in [here name the country]." When a letter of request or any other device is used pursuant to any applicable treaty or convention, it shall be captioned in the form prescribed by that treaty or convention. Evidence obtained in response to a letter ~~rogatory~~ of request need not be excluded merely ~~for the reason that~~ because it is not a verbatim transcript, because ~~or that~~ the testimony was not taken under oath, or ~~for~~ because of any similar departure from the requirements for depositions taken within the United States under these rules.

* * * *

COMMITTEE NOTES

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

cannot be taken under oath. For a discussion of the impact of such treaties upon the discovery process, and of the application of principles of comity upon discovery in countries not signatories to a convention, see *Société Nationale Industrielle Aérospatiale v. United States District Court*, 482 U.S. 522 (1987).

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

Rule 29. Stipulations Regarding Discovery Procedure

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

COMMITTEE NOTES

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

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

Rule 30. Depositions Upon Oral Examination

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

(1) ~~After commencement of the action,~~ ~~any~~ party may take the testimony of any person, including a party, by deposition upon oral examination without leave of court except as provided in paragraph (2). ~~Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take~~

~~a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under Rule 4(e), except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) if special notice is given as provided in subdivision (b)(2) of this rule.~~ The attendance of witnesses may be compelled by subpoena as provided in Rule 45. ~~The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.~~

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

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

(B) the person to be examined

already has been deposed in the case; or

(C) a party seeks to take a deposition before the time specified in Rule 26(d) unless the notice contains a certification, with supporting facts, that the person to be examined is expected to leave the United States and be unavailable for examination in this country unless deposed before that time.

(b) Notice of Examination: General Requirements; ~~Special Notice;~~ ~~Non-Stenographic~~ Method of Recording; Production of Documents and Things; Deposition of Organization; Deposition by Telephone.

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. If a subpoena duces tecum is to be

served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to, or included in, the notice.

(2) ~~Leave of court is not required for the taking of a deposition by the plaintiff if the notice (A) states that the person to be examined is about to go out of the district where the action is pending and more than 100 miles from the place of trial, or is about to go out of the United States, or is bound on a voyage to sea, and will be unavailable for examination unless the person's deposition is taken before expiration of the 30-day period, and (B) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and the attorney's signature constitutes a certification by the attorney that to the best of the attorney's knowledge, information, and belief the statement and supporting facts are true. The sanctions provided by Rule 11 are applicable to the certification.~~

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

~~(b)(2) the party was unable through the exercise of diligence to obtain counsel to represent the party at the taking of the deposition, the deposition may not be used against the party.~~

The party taking the deposition shall state in the notice the method by which the testimony shall be recorded. Unless the court orders otherwise, it may be recorded by sound, sound-and-visual, or stenographic means, and the party taking the deposition shall bear the cost of the recording. Any party may arrange for a transcription to be made from the recording of a deposition taken by nonstenographic means.

(3) ~~The court may for cause shown enlarge or shorten the time for taking the deposition.~~ With prior notice to the deponent and other parties, any party may designate another method to record the deponent's testimony in addition to the method specified by the person taking the deposition. The additional record or transcript shall be made at that party's expense unless the court otherwise orders.

~~(4) The parties may stipulate in writing or the court may upon motion order that the testimony at a deposition be recorded by other than stenographic means. The stipulation or order shall designate the person before whom the deposition shall be taken, the manner of recording, preserving and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. A party may arrange to have a stenographic transcription made at the party's own expense. Any objections under subdivision (c), any changes made by the witness, the witness' signature identifying the deposition as the witness' own or the statement of the officer that is required if the witness does not sign, as provided in subdivision (e), and the certification of the officer required by subdivision (f) shall be set forth in a writing to accompany a deposition recorded by non-stenographic means.~~ Unless otherwise agreed by the parties, a deposition shall be conducted before an officer appointed or designated under Rule 28 and shall begin with a statement on the record

by the officer that includes (A) the officer's name and business address; (B) the date, time, and place of the deposition; (C) the name of the deponent; (D) the administration of the oath or affirmation to the deponent; and (E) an identification of all persons present. If the deposition is recorded other than stenographically, the officer shall repeat items (A) through (C) at the beginning of each unit of recorded tape or other recording medium. The appearance or demeanor of deponents or attorneys shall not be distorted through camera or sound-recording techniques. At the end of the deposition, the officer shall state on the record that the deposition is complete and shall set forth any stipulations made by counsel concerning the custody of the transcript or recording and the exhibits, or concerning other pertinent matters.

* * * *

(7) The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone or other remote electronic means. For the purposes of

this rule and Rules 28(a), 37(a)(1), and 37(b)(1)~~, and 45(d)~~, a deposition taken by ~~telephone~~ such means is taken in the district and at the place where the deponent is to answer questions ~~propounded to the deponent~~.

(c) **Examination and Cross-Examination; Record of Examination; Oath; Objections.** Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Federal Rules of Evidence except Rules 103 and 615. The officer before whom the deposition is to be taken shall put the witness on oath or affirmation and shall personally, or by someone acting under the officer's direction and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other ~~means ordered in accordance with~~ method authorized by subdivision (b)(42) of this rule. ~~If requested by one of the parties the testimony shall be transcribed.~~ All objections made at the time of the examination to the qualifications of the officer taking the deposition, ~~or~~ to the manner of taking it, ~~or~~ to the evidence presented, ~~or~~ to the conduct of any party, ~~and any other objection~~

~~to~~ or to any other aspect of the proceedings~~,~~ shall be noted by the officer upon the record of the deposition~~. Evidence objected to shall be~~ ; but the examination shall proceed, with the testimony being taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and the party taking the deposition shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

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

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

(2) By order or local rule, the court may limit the time permitted for the conduct of a deposition, but shall allow additional time consistently with Rule 26(b)(2) if needed

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

(3) At any time during ~~the taking of the~~ a deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is

pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(e) ~~Submission to~~ Review by Witness; Changes; Signing. ~~When the testimony is fully transcribed, the deposition shall be submitted to the witness for examination and shall be read to or by the witness, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within 30 days of its submission to the witness, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign, together with~~

~~the reason, if any, given therefor; and the deposition may then be used as fully as though signed unless on a motion to suppress under Rule 32(d)(4) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.~~ If requested by the deponent or a party before completion of the deposition, the deponent shall have 30 days after being notified by the officer that the transcript or recording is available in which to review the transcript or recording and, if there are changes in form or substance, to sign a statement reciting such changes and the reasons given by the deponent for making them. The officer shall indicate in the certificate prescribed by subdivision (f)(1) whether any review was requested and, if so, shall append any changes made by the deponent during the period allowed.

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

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

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

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

(2) Unless otherwise ordered by the court or agreed by the parties, the officer shall retain stenographic notes of any deposition taken stenographically or a copy of the recording of any deposition taken by another method. Upon payment of reasonable charges therefor, the officer shall furnish a copy of the transcript or other recording of the deposition to any party or to the deponent.

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COMMITTEE NOTES

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

fourth sentences are relocated.

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

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

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

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

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

Paragraph (2)(C) revises the second sentence of the former subdivision (a) as to when depositions may be taken. Consistent with the changes made in Rule 26(d), providing that formal discovery ordinarily not commence until after the litigants have met and conferred as directed in revised Rule 26(f), the rule requires leave of court or agreement of the parties if a deposition is to be taken before that time (except when a witness is about to leave the country).

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

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

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

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

Revised paragraph (4) requires that all depositions

be recorded by an officer designated or appointed under Rule 28 and contains special provisions designed to provide basic safeguards to assure the utility and integrity of recordings taken other than stenographically.

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

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

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

Subdivision (d). The first sentence of new paragraph (1) provides that any objections during a deposition must be made concisely and in a non-argumentative and non-suggestive manner. Depositions frequently have been unduly prolonged, if not unfairly frustrated, by lengthy objections and colloquy, often suggesting how the deponent should respond. While objections may, under the revised rule, be made during a deposition, they ordinarily should be limited to those that under Rule 32(d)(3) might be waived if not made at that time, i.e., objections on grounds that might be immediately obviated, removed, or cured, such

as to the form of a question or the responsiveness of an answer. Under Rule 32(b), other objections can, even without the so-called "usual stipulation" preserving objections, be raised for the first time at trial and therefore should be kept to a minimum during a deposition.

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

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

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

Paragraph (3) authorizes appropriate sanctions not only when a deposition is unreasonably prolonged, but also when an attorney engages in other practices that improperly frustrate the fair examination of the deponent, such as making improper objections or giving directions not to answer prohibited by paragraph (1).

In general, counsel should not engage in any conduct during a deposition that would not be allowed in the presence of a judicial officer. The making of an excessive number of unnecessary objections may itself constitute sanctionable conduct, as may the refusal of an attorney to agree with other counsel on a fair apportionment of the time allowed for examination of a deponent or a refusal to agree to a reasonable request for some additional time to complete a deposition, when that is permitted by the local rule or order.

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

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

Rule 31. Depositions Upon Written Questions

(a) Serving Questions; Notice.

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

person, including a party, by deposition upon written questions without leave of court except as provided in paragraph (2). The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. ~~The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.~~

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

(A) a proposed deposition would result in more than ten depositions being taken under this rule or Rule 30 by the plaintiffs, or by the defendants, or by third-party defendants;

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

(C) a party seeks to take a deposition before the time specified in Rule 26(d).

(3) A party desiring to take a

deposition upon written questions shall serve them upon every other party with a notice stating (1) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs, and (2) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with the provisions of Rule 30(b)(6).

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

* * * *

COMMITTEE NOTES

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

Rule 32. Use of Depositions in Court Proceedings

(a) Use of Depositions.

* * * *

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds:

(A) that the witness is dead; or

(B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or

(C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or

(D) that the party offering the

deposition has been unable to procure the attendance of the witness by subpoena; or

(E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

A deposition taken without leave of court pursuant to a notice under Rule 30(a)(2)(C) shall not be used against a party who demonstrates that, when served with the notice, it was unable through the exercise of diligence to obtain counsel to represent it at the taking of the deposition; nor shall a deposition be used against a party who, having received less than 11 days notice of a deposition, has promptly upon receiving such notice filed a motion for a protective order under Rule 26(c)(2) requesting that the deposition not be held or be held at a different time or place and such motion is pending at the time the deposition is held.

* * * *

(c) Form of Presentation. Except as otherwise directed by the court, a party offering deposition testimony pursuant to this rule may offer it in stenographic or nonstenographic form, but, if in nonstenographic form, the party shall also provide the court with a transcript of the portions so offered. On request of any party in a case tried before a jury, deposition testimony offered other than for impeachment purposes shall be presented in nonstenographic form, if available, unless the court for good cause orders otherwise.

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COMMITTEE NOTES

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

the proposed deponent is the movant, the deponent would have "just cause" for failing to appear for purposes of Rule 37(d)(1). Inclusion of this provision is not intended to signify that 11 days' notice is the minimum advance notice for all depositions or that greater than 10 days should necessarily be deemed sufficient in all situations.

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

Rule 33. Interrogatories to Parties

(a) **Availability~~; Procedures for Use~~.** Without leave of court or written stipulation, a~~A~~ny party may serve upon any other party written interrogatories, not exceeding 25 in number including all discrete subparts, to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Leave

to serve additional interrogatories shall be granted to the extent consistent with the principles of Rule 26(b)(2). Without leave of court or written stipulation, i~~I~~nterrogatories may~~, without leave of court,~~ not be served ~~upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party~~ before the time specified in Rule 26(d).

(b) Answers and Objections.

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

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

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

~~serve answers or objections within 45 days after service of the summons and complaint upon that defendant~~. ~~The court may allow a~~A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties subject to Rule 29.

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

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

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

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion

or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time.

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

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COMMITTEE NOTES

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

Subdivision (a). Revision of this subdivision limits interrogatory practice. Because Rule 26(a)(1)-(3) requires disclosure of much of the information previously obtained by this form of discovery, there should be less occasion to use it. Experience in over half of the district courts has confirmed that limitations on the number of interrogatories are useful and manageable. Moreover, because the device can be costly and may be used as a means of harassment, it is desirable to subject its use to the control of the court consistent with the principles stated in Rule 26(b)(2), particularly in multi-party cases where it has not been unusual for the same interrogatory to be propounded to a party by more than one of its adversaries.

Each party is allowed to serve 25 interrogatories upon any other party, but must secure leave of court (or a stipulation from the opposing party) to serve a larger number. Parties cannot evade this presumptive limitation through the device of joining as "subparts" questions that seek information about discrete separate subjects. However, a question asking about communications of a particular type should be treated

as a single interrogatory even though it requests that the time, place, persons present, and contents be stated separately for each such communication.

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

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

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

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

Paragraph (4) is added to make clear that objections must be specifically justified, and that

unstated or untimely grounds for objection ordinarily are waived. Note also the provisions of revised Rule 26(b)(5), which require a responding party to indicate when it is withholding information under a claim of privilege or as trial preparation materials.

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

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

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

* * * *

(b) Procedure. ~~The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.~~ The request shall set forth, either by individual item or by category, the items to be inspected ~~either by individual item or by category~~, and describe each ~~item and category~~ with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. Without leave of court or written stipulation, a request may not be served before the time specified in Rule 26(d).

The party upon whom the request is served shall serve a written response within 30 days after the service of the request~~, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant~~. ~~The court may allow a~~A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties, subject to Rule 29. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for the objection shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label

them to correspond with the categories in the request.

* * * *

COMMITTEE NOTES

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

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

Rule 36. Requests for Admission

(a) Request for Admission. A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b)(1) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for

inspection and copying. ~~The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.~~ Without leave of court or written stipulation, requests for admission may not be served before the time specified in Rule 26(d).

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

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

* * * *

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COMMITTEE NOTES

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

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

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

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

(2) Motion.

(A) If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions. The

motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.

(B) If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make

the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order. ~~If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).~~

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

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

(A) If the motion is granted or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after affording an opportunity ~~for hearing,~~ to be heard, require the party or deponent whose conduct necessitated the motion or the

party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in ~~obtaining the order~~ making the motion, including attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the ~~opposition to the motion~~ opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust.

(B) If the motion is denied, the court may enter any protective order authorized under Rule 26(c) and shall, after affording an opportunity ~~for hearing,~~ to be heard, require the moving party or the attorney ~~advising~~ filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the

making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(C) If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26(c) and may, after affording an opportunity to be heard, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

* * * *

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

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

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

(2) If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (~~1~~A) the request was held objectionable pursuant to Rule 36(a), or (~~2~~B) the admission sought was of no substantial importance, or (~~3~~C) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or (~~4~~D) there was other good reason for the failure to admit.

(d) Failure of Party to Attend at Own

Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule. Any motion specifying a failure under clause (2) or (3) of this subdivision shall include a certification that the movant has in good faith conferred or attempted to confer with the party failing to answer or respond in an effort to obtain such answer or response without court action. In lieu of any order or in addition thereto, the court

shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has ~~applied~~ a pending motion for a protective order as provided by Rule 26(c).

* * * *

(g) Failure to Participate in the Framing of a Discovery Plan. If a party or a party's attorney fails to participate in the development and submission ~~framing~~ of a proposed discovery plan ~~by agreement~~ as ~~is~~ required by Rule 26(f), the court may, after opportunity for hearing, require such party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

COMMITTEE NOTES

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

Pursuant to new subdivision (a)(2)(A), a party dissatisfied with the disclosure made by an opposing party may under this rule move for an order to compel disclosure. In providing for such a motion, the revised rule parallels the provisions of the former rule dealing with failures to answer particular interrogatories. Such a motion may be needed when the information to be disclosed might be helpful to the party seeking the disclosure but not to the party required to make the disclosure. If the party required to make the disclosure would need the material to support its own contentions, the more effective enforcement of the disclosure requirement will be to exclude the evidence not disclosed, as provided in subdivision (c)(1) of this revised rule.

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

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

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

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

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

motion that could have been avoided by conferring with opposing counsel.

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

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

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

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

Preclusion of evidence is not an effective incentive to compel disclosure of information that, being supportive of the position of the opposing party, might advantageously be concealed by the disclosing party. However, the rule provides the court with a wide range of other sanctions--such as declaring specified facts to be established, preventing contradictory evidence, or, like spoliation of evidence, allowing the jury to be informed of the

fact of nondisclosure--that, though not self-executing, can be imposed when found to be warranted after a hearing. The failure to identify a witness or document in a disclosure statement would be admissible under the Federal Rules of Evidence under the same principles that allow a party's interrogatory answers to be offered against it.

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

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

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

Rule 38. Jury Trial of Right

* * * *

(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 the issue, and (2) filing the demand as required by Rule 5(d). Such demand may be

indorsed upon a pleading of the party.

* * * *

(d) Waiver. The failure of a party to serve and file a demand as required by this rule ~~and to file it as required by Rule 5(d)~~ 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.

COMMITTEE NOTES

Language requiring the filing of a jury demand as provided in subdivision (d) is added to subdivision (b) to eliminate an apparent ambiguity between the two subdivisions. For proper scheduling of cases, it is important that jury demands not only be served on other parties, but also be filed with the court.

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

(a) Judgment as a Matter of Law.

(1) If during a trial by jury a party has been fully heard on ~~with respect to~~ an issue and there is no legally sufficient evidentiary basis for a reasonable jury to ~~have found~~ find for that party on ~~with respect to~~ 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 ~~on any~~ with respect to a claim~~,~~ ~~counterclaim, cross-claim, or third-party claim~~ or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

* * * *

* * * *

COMMITTEE NOTES

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

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

* * * *

(c) Judgment on Partial Findings. If during a trial without a jury a party has been fully heard on ~~with respect to~~ 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 ~~on any~~ with respect to a claim~~,~~ ~~counterclaim, cross-claim, or third-party 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.

COMMITTEE NOTES

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

Rule 53. Masters

(a) Appointment and Compensation. The court in which any action is pending may appoint a special master therein. As used in these rules, the word "master" includes a referee, an auditor, an examiner, and an assessor. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct; provided that this provision for compensation

shall not apply when a United States magistrate judge is designated to serve as a master ~~pursuant to Title 28, U.S.C. § 636(b)~~. The master shall not retain the master's report as security for the master's compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

(b) Reference. A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it. Upon the consent of the parties, a magistrate judge may be designated to serve as a special master without regard to the provisions of this subdivision.

* * * *

(f) Application to 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.

COMMITTEE NOTES

This revision is made to conform the rule to changes made by the Judicial Improvements Act of 1990.

Rule 54. Judgments; Costs

* * * *

(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 cCosts 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 and served 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.

(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), and a judgment shall be set forth in a separate document as provided in Rule 58.

(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 subdivision (b) thereof and may refer a motion for attorneys' 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.

COMMITTEE NOTES

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

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

Paragraph (2). This new paragraph establishes a procedure for presenting claims for attorneys' fees, whether or not denominated as "costs." It applies also to requests for reimbursement of expenses, not taxable as costs, when recoverable under governing law incident to the award of fees. Cf. West Virginia Univ. Hosp. v. Casey, ___ U.S. ___ (1991), holding, prior to the Civil Rights Act of 1991, that expert witness fees were not recoverable under 42 U.S.C. § 1988. As noted in subparagraph (A), it does not, however, apply to fees recoverable as an element of damages, as when sought under the terms of a contract; such damages typically are to be claimed in a pleading and may involve issues to be resolved by a jury. Nor, as provided in subparagraph (E), does it apply to awards of fees as sanctions authorized or mandated under these rules or under 28 U.S.C. § 1927.

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

2412(d)(1)(B) (30-day filing period).

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

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

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

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

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

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

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

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

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

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

Fee awards should be made in the form of a separate judgment under Rule 58 since such awards are subject to review in the court of appeals. To facilitate

review, the paragraph provides that the court set forth its findings and conclusions as under Rule 52(a), though in most cases this explanation could be quite brief.

Subparagraph (D) explicitly authorizes the court to establish procedures facilitating the efficient and fair resolution of fee claims. A local rule, for example, might call for matters to be presented through affidavits, or might provide for issuance of proposed findings by the court, which would be treated as accepted by the parties unless objected to within a specified time. A court might also consider establishing a schedule reflecting customary fees or factors affecting fees within the community, as implicitly suggested by Justice O'Conner in Pennsylvania v. Delaware Valley Citizens' Council, 483 U.S. 711, 733 (1987) (O'Conner, J., concurring) (how particular markets compensate for contingency). Cf. Thompson v. Kennickell, 710 F. Supp. 1 (D.D.C. 1989) (use of findings in other cases to promote consistency). The parties, of course, should be permitted to show that in the circumstances of the case such a schedule should not be applied or that different hourly rates would be appropriate.

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

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

Rule 56. Summary Judgment

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

~~(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is~~

~~asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.~~

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

(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.~~ A party may move for summary adjudication at any time after the parties to be affected have made an appearance in the case and have had a reasonable opportunity to discover relevant evidence pertinent thereto that is not in their possession or under their control. Within 30 days after the motion is served, any other party may serve and file a response.

(1) The motion shall, without argument, (A) describe the claims, defenses, or issues as to which summary adjudication is warranted, specifying the judgment or determination sought; and (B) recite in separately numbered paragraphs the specific facts asserted to be not genuinely in dispute and on the basis of which the judgment or determination should be granted, citing the particular pages or paragraphs of stipulations, admissions, interrogatory answers, depositions, documents, affidavits, or other materials supporting those assertions.

(2) A response shall, without argument, (A) state the extent, if any, to which the party agrees that summary adjudication is warranted, specifying the judgment or determination that should be entered; (B) indicate the extent to which the asserted facts recited in the motion are claimed to be false or in genuine dispute, citing the particular pages or paragraphs of any stipulations, admissions, interrogatory answers, depositions, documents, affidavits, or other materials supporting that contention; and (C) recite in separately numbered paragraphs any additional facts that preclude summary adjudication, citing the materials evidencing those facts. To the extent a party does not timely comply with clause (B) in challenging an asserted fact, it may be treated as having admitted that fact.

(3) If a motion for summary adjudication or response is based to any extent on depositions, interrogatory answers, documents, affidavits, or other materials that have not been previously filed, the party shall append to its motion or response the pertinent

portions of such materials. Only with leave of court may a party moving for summary adjudication supplement its supporting materials.

(4) Arguments supporting a party's contentions as to the controlling law or the evidence respecting asserted facts shall be submitted by a separate memorandum at the time the party files its motion or response or at such other times as the court may permit or direct.

(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~~ may enter ~~make~~ an order specifying the controlling law or the facts that ~~appear without substantial controversy~~ are not genuinely in dispute, including the extent to

which liability or the amount of damages or other relief is not ~~in controversy~~ a dispute for trial, 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.~~ Unless the order is modified by the court for good cause, the trial shall be conducted in accordance with the law so specified and by treating the facts so specified as established. An order that does not adjudicate all claims with respect to all parties may be entered as a final judgment to the extent permitted by Rule 54(b).

(e) ~~Form of Affidavits; Further Testimony; Defense Required~~Matters to Be Considered. ~~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.~~

(1) Subject to paragraph (2), the court, in deciding whether an asserted fact is genuinely in dispute, shall consider stipulations, admissions, and, to the extent filed, the following: (A) depositions, interrogatory answers, and affidavits to the extent such evidence would be admissible if the deponent, person answering the interrogatory, or affiant were testifying at trial and, with respect to an affidavit, if it affirmatively shows that the affiant would be competent to testify to the matters stated therein; and (B) documentary evidence to the

extent such evidence would, if authenticated and shown to be an accurate copy of original documents, be admissible at trial in the light of other evidence. A party may rely upon its own pleadings, even if verified, only to the extent of allegations therein that are admitted by other parties.

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

(f) **When Evidence ~~Affidavits are~~ Unavailable.** Should it appear from the affidavits of a party opposing ~~the~~ a motion for summary adjudication that the party cannot for ~~reasons stated present by affidavit facts essential to justify the party's opposition~~ good cause shown present materials needed to support that opposition, the court may ~~refuse the application for judgment or~~ deny the motion, may permit an offer of proof, 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.

(g) ~~Affidavits Made in Bad Faith~~Conduct of

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

225 genuinely in dispute.

COMMITTEE NOTES

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

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

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

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

The revised language makes clear at the outset of

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

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

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

as an exercise of discretion.

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

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

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

A primary benefit of summary adjudication is elimination of ultimately wasteful discovery and other preparation for trial. For this reason, early filing

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

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

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

The requirement that motions for summary adjudication contain cross-references to evidentiary materials and be accompanied by pertinent portions of such materials not previously filed is not directly applicable when the movant contends that there is no admissible evidence to support a fact as to which another party has the burden of proof. In such situations the motion should recite and, to the extent feasible demonstrate, that there is no such evidentiary support for that fact, and the opposing parties will have the obligation to show in their responses the existence of such evidence.

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

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

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

Subdivision (d). The revision provides that, when a court denies summary adjudication in the form sought by a movant, it may--but is no longer required to--enter an order specifying which facts are without genuine dispute and accordingly are thereafter to be treated as established. The revision also permits a court to enter rulings as to legal propositions to control further proceedings, subject to its power to modify the ruling for good cause. Finally, the revision makes explicit that "partial summary judgments" may be entered as final judgments to the extent permitted by Rule 54(b). Although not explicitly addressed in the rule, denial of summary adjudication (or granting of partial summary judgment) is ordinarily an interlocutory order not subject to the law-of-the-case doctrine; and the court is not precluded from reconsidering its ruling or considering a new motion, as may be appropriate because of developments in the case or changes of law. The rule is not intended to alter case law that permits immediate appeal of the denial of summary judgment in limited circumstances. See, e.g., Mitchell v. Forsyth, 472 U.S. 511 (1985) (denial of qualified immunity defense).

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

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

The admissibility of depositions, answers to interrogatories, and affidavits should be determined as if the deponent, person answering interrogatories, or affiant were testifying in person, with the proviso

that an affidavit must affirmatively show that the affiant would be competent (e.g., have personal knowledge) to testify. For purposes of Rule 56 a declaration under penalty of perjury signed in the manner authorized by 28 U.S.C. § 1746 should be treated the same as a notarized affidavit.

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

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

Subdivision (f). Extensions of time to oppose summary adjudication should be less frequent than under the former rule because of new restrictions as to when such motions can be filed and the longer time allowed for the response. A request should be presented by an affidavit which, under the revised rule, must reflect good cause for the inability to comply with the stated time requirements. The revised rule also permits the court to accept an offer of proof where a party shows in its affidavit that it is currently unable to procure supporting materials in a form that would satisfy the requirements of subdivision (e).

Subdivision (g). The new provisions of subdivision (g) give explicit recognition to powers of the court in conducting proceedings to resolve motions under

Rule 56 that were probably implicit prior to the revision.

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

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

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

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

court's power to schedule separate trials under Rule 42(b) on issues that involve credibility and weight of evidence.

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

Rule 58. Entry of Judgment

Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so

set forth and when entered as provided in Rule 79(a). Entry of the judgment shall not be delayed ~~for the taxing of costs~~, nor the time for appeal extended, in order to tax costs or award fees, except that, when a timely motion for attorneys' fees is made under Rule 54(d)(2), the court, before a notice of appeal has been filed and has become effective, may order that the motion have the same effect under Rule 4(a)(4) of the Federal Rules of Appellate Procedure as a timely motion under Rule 59. Attorneys shall not submit forms of judgment except upon the direction of the court, and these directions shall not be given as a matter of course.

COMMITTEE NOTES

Ordinarily the pendency or post-judgment filing of a claim for attorney's fees will not affect the time for appeal from the underlying judgment. See Budinich v. Becton Dickinson & Co., 486 U.S. 196 (1988). Particularly if the claim for fees involves substantial issues or is likely to be affected by the appellate decision, the district court may prefer to defer consideration of the claim for fees until after the appeal is resolved. However, in many cases it may be more efficient to decide fee questions before an appeal is taken so that appeals relating to the fee award can be heard at the same time as appeals relating to the merits of the case. This revision permits, but does not require, the court to delay the finality of the judgment for appellate purposes under revised Fed. R. App. P. 4(a) until the fee dispute is decided. To accomplish this result requires entry of an order by the district court before the time a notice of appeal becomes effective for appellate

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

Rule 71A. Condemnation Of Property

* * * *

(d) Process.

* * * *

(3) Service of Notice.

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

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

* * * *

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

~~(h)~~.

* * * *

COMMITTEE NOTES

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

Rule 72. Magistrates~~~~ Judges; Pretrial Orders

(a) Nondispositive Matters. A magistrate judge to whom a pretrial matter not dispositive of a claim or defense of a party is referred to hear and determine shall promptly conduct such proceedings as are required and when appropriate enter into the record a written order setting forth the disposition of the matter. Within 10 days after being served with a copy of the magistrate~~'s~~ judge's order, a party may serve and file objections to the order; a party may not thereafter assign as error a defect in the magistrate~~'s~~ judge's order to which objection was not timely made. The district judge to whom the case is assigned shall consider such objections and shall modify or set aside any portion of the magistrate~~'s~~ judge's order found to be clearly erroneous or contrary to law.

(b) Dispositive Motions and Prisoner

Petitions. A magistrate judge assigned without consent of the parties to hear a pretrial matter dispositive of a claim or defense of a party or a prisoner petition challenging the conditions of confinement shall promptly conduct such proceedings as are required. A record shall be made of all evidentiary proceedings before the magistrate judge, and a record may be made of such other proceedings as the magistrate judge deems necessary. The magistrate judge shall enter into the record a recommendation for disposition of the matter, including proposed findings of fact when appropriate. The clerk shall forthwith mail copies to all parties.

A party objecting to the recommended disposition of the matter shall promptly arrange for the transcription of the record, or portions of it as all parties may agree upon or the magistrate judge deems sufficient, unless the district judge otherwise directs. Within 10 days after being served with a copy of the recommended disposition, a party may serve and file specific, written objections to the proposed findings and recommendations. A party may respond to another party's objections within 10 days after being

served with a copy thereof. The district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate ~~'s~~ judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

COMMITTEE NOTES

This revision is made to conform the rule to changes made by the Judicial Improvements Act of 1990.

Rule 73. Magistrates Judges; Trial by Consent and Appeal Options

(a) Powers; Procedure. When specially designated to exercise such jurisdiction by local rule or order of the district court and when all parties consent thereto, a magistrate judge may exercise the authority provided by Title 28, U.S.C. § 636(c) and may conduct any or all proceedings, including a jury or nonjury trial, in a civil case. A record of the proceedings shall be made in accordance with the requirements

of Title 28, U.S.C. § 636(c)(7).

(b) Consent. When a magistrate judge has been designated to exercise civil trial jurisdiction, the clerk shall give written notice to the parties of their opportunity to consent to the exercise by a magistrate judge of civil jurisdiction over the case, as authorized by Title 28, U.S.C. § 636(c). If, within the period specified by local rule, the parties agree to a magistrate's judge's exercise of such authority, they shall execute and file a joint form of consent or separate forms of consent setting forth such election.

~~No~~ A district judge, magistrate judge, or other court official ~~shall attempt to persuade or induce a party to consent to a reference of a civil matter to a magistrate under this rule, nor shall~~ may again advise the parties of the availability of the magistrate judge, but, in so doing, shall also advise the parties that they are free to withhold consent without adverse substantive consequences. ~~a~~A district judge or magistrate judge shall not be informed of a party's response to the clerk's notification, unless all parties have consented to the referral

of the matter to a magistrate judge.

The district judge, for good cause shown on the judge's ~~motion~~ own initiative, or under extraordinary circumstances shown by a party, may vacate a reference of a civil matter to a magistrate judge under this subdivision.

(c) Normal Appeal Route. In accordance with Title 28, U.S.C. § 636(c)(3), unless the parties otherwise agree to the optional appeal route provided for in subdivision (d) of this rule, appeal from a judgment entered upon direction of a magistrate judge in proceedings under this rule will lie to the court of appeals as it would from a judgment of the district court.

(d) Optional Appeal Route. In accordance with Title 28, U.S.C. § 636(c)(4), at the time of reference to a magistrate judge, the parties may consent to appeal on the record to a district judge of the ~~district~~ court and thereafter, by petition only, to the court of appeals.

COMMITTEE NOTES

This revision is made to conform the rule to changes made by the Judicial Improvements Act of 1990. The Act requires that, when being reminded of the availability of a magistrate judge, the parties be advised that withholding of consent will have no "adverse substantive consequences." They may, however, be advised if the withholding of consent will

have the adverse procedural consequence of a potential delay in trial.

Rule 74. Method of Appeal From Magistrate Judge to District Judge Under Title 28, U.S.C. § 636(c)(4) and Rule 73(d)

(a) When Taken. When the parties have elected under Rule 73(d) to proceed by appeal to a district judge from an appealable decision made by a magistrate judge under the consent provisions of Title 28, U.S.C. § 636(c)(4), an appeal may be taken from the decision of a magistrate judge by filing with the clerk of the district court a notice of appeal within 30 days of the date of entry of the judgment appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days of such entry. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days thereafter, or within the time otherwise prescribed by this subdivision, whichever period last expires.

The running of the time for filing a notice of appeal is terminated as to all parties by the timely filing of any of the following motions with the magistrate judge by any party, and the

full time for appeal from the judgment entered by the magistrate judge commences to run anew from entry of any of the following orders: (1) granting or denying a motion for judgment under Rule 50(b); (2) granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or denying a motion under Rule 59 to alter or amend the judgment; (4) denying a motion for a new trial under Rule 59.

An interlocutory decision or order by a magistrate judge which, if made by a district judge ~~of the district court~~, could be appealed under any provision of law, may be appealed to a district judge ~~of the district court~~ by filing a notice of appeal within 15 days after entry of the decision or order, provided the parties have elected to appeal to a district judge ~~of the district court~~ under Rule 73(d). An appeal of such interlocutory decision or order shall not stay the proceedings before the magistrate judge unless the magistrate judge or district judge shall so order.

Upon a showing of excusable neglect, the

magistrate judge may extend the time for filing a notice of appeal upon motion filed not later than 20 days after the expiration of the time otherwise prescribed by this rule.

* * * *

(c) Stay Pending Appeal. Upon a showing that the magistrate judge has refused or otherwise failed to stay the judgment pending appeal to the district judge under Rule 73(d), the appellant may make application for a stay to the district judge with reasonable notice to all parties. The stay may be conditioned upon the filing in the district court of a bond or other appropriate security.

* * * *

COMMITTEE NOTES

This revision is made to conform the rule to changes made by the Judicial Improvements Act of 1990.

Rule 75. Proceedings on Appeal From Magistrate Judge to District Judge Under Rule 73(d)

* * * *

(b) Record on Appeal.

(1) Composition. The original papers and exhibits filed with the clerk of the district court, the transcript of the

proceedings, if any, and the docket entries shall constitute the record on appeal. In lieu of this record the parties, within 10 days after the filing of the notice of appeal, may file a joint statement of the case showing how the issues presented by the appeal arose and were decided by the magistrate judge, and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented.

(2) Transcript. Within 10 days after filing the notice of appeal the appellant shall make arrangements for the production of a transcript of such parts of the proceedings as the appellant deems necessary. Unless the entire transcript is to be included, the appellant, within the time provided above, shall serve on the appellee and file with the court a description of the parts of the transcript which the appellant intends to present on the appeal. If the appellee deems a transcript of other parts of the proceedings to be necessary, within 10 days after the service of the statement of the appellant, the

appellee shall serve on the appellant and file with the court a designation of additional parts to be included. The appellant shall promptly make arrangements for inclusion of all such parts unless the magistrate judge, upon motion, exempts the appellant from providing certain parts, in which case the appellee may provide for their transcription.

(3) Statement in Lieu of Transcript. If no record of the proceedings is available for transcription, the parties shall, within 10 days after the filing of the notice of appeal, file a statement of the evidence from the best available means to be submitted in lieu of a transcript. If the parties cannot agree they shall submit a statement of their differences to the magistrate judge for settlement.

* * * *

COMMITTEE NOTES

This revision is made to conform the rule to changes made by the Judicial Improvements Act of 1990.

Rule 76. Judgment of the District Judge on the Appeal Under Rule 73(d) and Costs

(a) Entry of Judgment. When the parties have elected under Rule 73(d) to appeal from a

judgment of the magistrate judge to a district judge, the clerk shall prepare, sign, and enter judgment in accordance with the order or decision of the district judge following an appeal from a judgment of the magistrate judge, unless the district judge directs otherwise. The clerk shall mail to all parties a copy of the order or decision of the district judge.

* * * *

(c) Costs. Except as otherwise provided by law or ordered by the district judge, costs shall be taxed against the losing party; if a judgment of the magistrate judge is affirmed in part or reversed in part, or is vacated, costs shall be allowed only as ordered by the district judge. The cost of the transcript, if necessary for the determination of the appeal, and the premiums paid for bonds to preserve rights pending appeal shall be taxed as costs by the clerk.

COMMITTEE NOTES

This revision is made to conform the rule to changes made by the Judicial Improvements Act of 1990.

APPENDIX OF FORMS

Form 1A. Notice of Lawsuit and Request for Waiver of Service of Summons

TO: _____(A)_____
[as _____(B)_____ of _____(C)_____]

A lawsuit has been commenced against you (or the entity on whose behalf you are addressed). A copy of the complaint is attached to this notice. It has been filed in the United States District Court for the _____(D)_____ and has been assigned docket number _____(E)_____.

This is not a formal summons or notification from the court, but rather my request that you sign and return the enclosed waiver of service in order to save the cost of serving you with a judicial summons and an additional copy of the complaint. The cost of service will be avoided if I receive a signed copy of the waiver within _____(F)_____ days after the date designated below as the date on which this Notice and Request is sent. I enclose a stamped and addressed envelope (or other means of cost-free return) for your use. An extra copy of the waiver is also attached for your records.

If you comply with this request and return the signed waiver, it will be filed with the court and no summons will be served on you. The action will then proceed as if you had been served on the date the waiver is filed, except that you will not be obligated to answer the complaint before 60 days from the date designated below as the date on which this notice is sent (or before 90 days from that date if your address is not in any judicial district of the United States).

If you do not return the signed waiver within the time indicated, I will take appropriate steps to effect formal service in a manner authorized by the Federal Rules of Civil Procedure and will then, as authorized by those Rules, ask the court to require you (or the party on whose behalf you are addressed) to pay the full costs of such service. In that connection, please read the statement concerning the duty of parties to waive the service of the summons, which is set forth on the reverse side (or at the

foot) of the waiver form.

I affirm that this request is being sent to you on behalf of the plaintiff, this __ day of _____, ___.

_____

Signature of Plaintiff's Attorney or Unrepresented Plaintiff

Notes:

A–Name of individual defendant (or name of officer or agent of corporate defendant)

B–Title, or other relationship of individual to corporate defendant

C–Name of corporate defendant, if any

D–District

E–Docket number of action

F–Addressee must be given at least 30 days (60 days if located in foreign country) in which to return waiver

Form 1B. Waiver of Service of Summons

TO: (name of plaintiff's attorney or unrepresented plaintiff)

I acknowledge receipt of your request that I waive service of a summons in the action of _____ (caption of action), which is case number (docket number) in the United States District Court for the _____ (district). I have also received a copy of the complaint in the action, two copies of this instrument, and a means by which I can return the signed waiver to you without cost to me.

I agree to save the cost of service of a summons and an additional copy of the complaint in this lawsuit by not requiring that I (or the entity on whose behalf I am acting) be served with judicial process in the manner provided by Rule 4.

I (or the entity on whose behalf I am acting) will retain all defenses or objections to the lawsuit or to the jurisdiction or venue of the court except for objections based on a defect in the summons or in the service of the summons.

I understand that a judgment may be entered against me (or the party on whose behalf I am acting) if an answer or motion under Rule 12 is not served upon you within 60 days after (date request was sent), or within 90

days after that date if the request was sent outside the United States.

_____ _____

Date Signature

Printed/typed name: _____

[as _____]

[of _____]

To be printed on reverse side of the waiver form or set forth at the foot of the form:

Duty to Avoid Unnecessary Costs of Service of Summons

Rule 4 of the Federal Rules of Civil Procedure requires certain parties to cooperate in saving unnecessary costs of service of the summons and complaint. A defendant who, after being notified of an action and asked to waive service of a summons, fails to do so will be required to bear the cost of such service unless good cause be shown for its failure to sign and return the waiver.

It is not good cause for a failure to waive service that a party believes that the complaint is unfounded, or that the action has been brought in an improper place or in a court that lacks jurisdiction over the subject matter of the action or over its person or property. A party who waives service of the summons retains all defenses and objections (except any relating to the summons or to the service of the summons), and may later object to the jurisdiction of the court or to the place where the action has been brought.

A defendant who waives service must within the time specified on the waiver form serve on the plaintiff's attorney (or unrepresented plaintiff) a response to the complaint and must also file a signed copy of the response with the court. If the answer or motion is not served within this time, a default judgment may be taken against that defendant. By waiving service, a defendant is allowed more time to answer than if the summons had been actually served when the request for waiver of service was received.

COMMITTEE NOTES

Forms 1A and 1B reflect the revision of Rule 4. They replace Form 18-A.

Form 2. Allegation of Jurisdiction

(a) Jurisdiction founded on diversity of citizenship and amount.

Plaintiff is a [citizen of the State of Connecticut][1] [corporation incorporated under the laws of the State of Connecticut having its

principal place of business in the State of Connecticut] and defendant is a corporation incorporated under the laws of the State of New York having its principal place of business in a State other than the State of Connecticut. The matter in controversy exceeds, exclusive of interest and costs, the sum of ~~ten~~ fifty thousand dollars.

(b) Jurisdiction founded on the existence of a Federal question ~~and amount in controversy~~.

The action arises under [the Constitution of the United States, Article ___, Section ___]; [the ___ Amendment to the Constitution of the United States, Section ___]; [the Act of ___, ___ Stat. ___; U.S.C., Title ___, § ___]; [the Treaty of the United States (here describe the treaty)][2] as hereinafter more fully appears. ~~The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars.~~

* * * *

COMMITTEE NOTES

This form is revised to reflect amendments to 28 U.S.C. §§ 1331 and 1332 providing jurisdiction for federal questions without regard to the amount in controversy and raising the amount required to be in controversy in diversity cases to fifty thousand dollars.

Form 18-A. [Abrogated]

COMMITTEE NOTES

This form is superseded by Forms 1A and 1B in view of the revision of Rule 4.

Form 33. Notice of ~~Right to Consent to the Exercise of Civil Jurisdiction by a Magistrate~~ Availability of a Magistrate Judge to Exercise Jurisdiction and Appeal Option

In accordance with the provisions of Title 28, U.S.C. § 636(c), you are hereby notified that ~~the~~ a United States magistrate~~s~~ judge of this district court~~, in addition to their other duties, upon the consent of all parties in a civil case,~~ is available to exercise the court's jurisdiction and to conduct any or all proceedings in ~~a civil~~ this case including a jury or nonjury trial, and ~~order the~~ entry of a final judgment. Exercise of this jurisdiction by a magistrate judge is, however, permitted only if all parties voluntarily consent.

You ~~should be aware that your decision to consent, or not to consent, to the referral of your case to a United States magistrate must be entirely voluntary. Only if all parties to the case consent to the reference to a magistrate~~

~~will either the judge or magistrate to whom the case has been assigned be informed of your decision.~~ may, without adverse substantive consequences, withhold your consent, but this will prevent the court's jurisdiction from being exercised by a magistrate judge. If any party withholds consent, the identity of the parties consenting or withholding consent will not be communicated to any magistrate judge or to the district judge to whom the case has been assigned.

An appeal from a judgment entered by a magistrate judge may be taken directly to the United States court of appeals for this judicial circuit in the same manner as an appeal from any other judgment of a district court. Alternatively, upon consent of all parties, an appeal from a judgment entered by a magistrate judge may be taken directly to a district judge. Cases in which an appeal is taken to a district judge may be reviewed by the United States court of appeals for this judicial circuit only by way of petition for leave to appeal.

Copies of the Form for the "Consent to ~~Proceed Before~~ Jurisdiction by a United States Magistrate

Judge" and "Election of Appeal to a District Judge" are available from the clerk of the court.

COMMITTEE NOTES

This form, together with Form 34, is revised in light of the Judicial Improvements Act of 1990. Section 308 modified 28 U.S.C. § 636(c)(2) to enhance the potential of parties consenting to trial before a magistrate judge. While the exercise of jurisdiction by a magistrate judge remains dependent on the voluntary consent of the parties, the statute provides that the parties should be advised, and may be reminded, of the availability of this option and eliminates the proscription against judicial suggestions of the potential benefits of referral provided the parties are also advised that they "are free to withhold consent without adverse substantive consequences." The parties may be advised if the withholding of consent will result in a potential delay in trial.

Form 34. Consent to ~~Proceed Before~~ Exercise of Jurisdiction by a United States Magistrate Judge, Election of Appeal to District Judge

UNITED STATES DISTRICT COURT
_____ DISTRICT OF _____

Plaintiff,	)	
vs.	)	Docket No. _____
Defendant.	)	

CONSENT TO ~~PROCEED BEFORE~~ JURISDICTION BY A UNITED STATES MAGISTRATE JUDGE

In accordance with the provisions of Title 28, U.S.C. § 636(c), the undersigned party or parties to the above-captioned civil matter hereby voluntarily ~~waive their rights to proceed before~~

~~a judge of the United States district court and~~ consent to have a United States magistrate judge conduct any and all further proceedings in the case, including trial, and order the entry of a final judgment.

_____ _____
Date Signature

ELECTION OF APPEAL TO DISTRICT JUDGE

[Do not execute this portion of the Consent Form if ~~the parties~~ you desire that the appeal lie directly to the court of appeals.]

In accordance with the provisions of Title 28, U.S.C. § 636(c)(4), the undersigned party or parties elect to take any appeal in this case to a district judge of this court.

_____ _____
Date Signature

Note: Return this form to the Clerk of the Court ~~only~~ if ~~all parties have consented~~ you consent to ~~proceed before~~ jurisdiction by a magistrate judge. Do not send a copy of this form to any district judge or magistrate judge.

Form 34A

UNITED STATES DISTRICT COURT
_____ DISTRICT OF _____

Plaintiff,	)	
vs.	)	Docket No. _____
Defendant.	)	

ORDER OF REFERENCE

IT IS HEREBY ORDERED that the above-captioned matter be referred to United States Magistrate Judge _____ for all further proceedings and entry of judgment in accordance with Title 28, U.S.C. § 636(c) and the ~~foregoing~~ consent of the parties.

_____
U. S. District Judge

Form 35. Report of Parties' Planning Meeting

[Caption and Names of Parties]

1. Pursuant to Fed. R. Civ. P. 26(f), a meeting was held on (date) at (place) and was attended by:
(name) for plaintiff(s)
(name) for defendant(s) (party name)
(name) for defendant(s) (party name)

2. **Pre-Discovery Disclosures.** The parties [have exchanged] [will exchange by (date)] the information required by [Fed. R. Civ. P. 26(a)(1)] [local rule ___].

3. **Discovery Plan.** The parties jointly propose to the court the following discovery plan: [Use separate paragraphs or subparagraphs as necessary if parties disagree.]

Discovery will be needed on the following subjects: (brief description of subjects on which discovery will be needed)

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

Maximum of ___ interrogatories by each party to any other party. [Responses due ___ days after service.]

Maximum of ___ requests for admission by each party to any other party. [Responses due __ days after service.]

Maximum of ___ depositions by plaintiff(s) and ___ by defendant(s).

Each deposition [other than of _____] limited to maximum of ___ hours unless extended by agreement of parties.

Reports from retained experts under Rule 26(a)(2) due:
from plaintiff(s) by (date)
from defendant(s) by (date)

Supplementations under Rule 26(e) due (time(s) or interval(s)).

4. **Other Items.** [Use separate paragraphs or subparagraphs as necessary if parties disagree.]

The parties [request] [do not request] a conference with the court before entry of the scheduling order.

The parties request a pretrial conference in (month and year).

Plaintiff(s) should be allowed until (date) to join additional parties and until (date) to amend the pleadings.

Defendant(s) should be allowed until (date) to join additional parties and until (date) to amend the pleadings.

All potentially dispositive motions should be filed by (date).

Settlement [is likely] [is unlikely] [cannot be evaluated prior to (date)] [may be enhanced by use of the following alternative dispute resolution procedure: [_____

_____].

Final lists of witnesses and exhibits under Rule 26(a)(3) should be due
from plaintiff(s) by _____(date)_____
from defendant(s) by _____(date)_____

Parties should have ___ days after service of final lists of witnesses and exhibits to list objections under Rule 26(a)(3).

The case should be ready for trial by ____(date)____ [and at this time is expected to take approximately _____(length of time)_____].

[Other matters.]

Date: _____

COMMITTEE NOTES

This form illustrates the type of report the parties are expected to submit to the court under revised Rule 26(f) and may be useful as a checklist of items to be discussed at the meeting.

(UPDATED 9/14/92)

Agenda E-19 (Appendix F)
Rules
September, 1992

Attachment--Alternative language if Rule 4 amended.

Text of Rule 4: (lines 176-177 found on page 8):

If ~~the~~ a defendant located within the United States fails to comply with ~~the~~ a request for waiver made by a plaintiff located within the United States, the court shall impose the costs subsequently incurred in effecting service on the defendant unless good cause for the failure be shown.

Committee Notes to Rule 4:

last two sentences in initial, run-over paragraph found on page 28:

~~The only adverse consequence to the foreign defendant is one shared by domestic defendants; namely, the potential imposition of costs of service that, if successful in the litigation, it would not otherwise have to bear. However, this shifting of expense would not be proper under the rule if the foreign defendant's refusal to waive service was based upon a policy of its government prohibiting all waivers of service.~~ Nor are there any adverse consequences to a foreign defendant, since the provisions for shifting the expense of service to a defendant that declines to waive service apply only if the plaintiff and defendant are both located in the United States.

last sentence in first full paragraph found on page 30:

Sufficient cause not to shift the cost of service would exist, however, if the defendant did not receive the request; or was insufficiently literate in English to understand it~~, or was located in a foreign country whose laws or policies prohibited its residents from waiving service of formal judicial process even from its own courts~~. It should be noted that the provisions for shifting the cost of service apply only if the plaintiff and the defendant are both located in the United States, and accordingly a foreign defendant need not show "good cause" for its failure to waive service.

Form 1A: first sentence of next-to-last paragraph of form on page 201:

If you do not return the signed waiver within the time indicated, I will take appropriate steps to effect formal service in a manner authorized by the Federal Rules of Civil Procedure and will then, ~~as~~ to the extent authorized by those Rules, ask the court to require you (or the party on whose behalf you are addressed) to pay the full costs of such service.

Form 1B: second sentence of first paragraph of Instructions at bottom (or reverse) of form on page 203:

A defendant located in the United States who, after being notified of an action and asked by a plaintiff located in the United States to waive service of a summons, fails to do so will be required to bear the cost of such service unless good cause be shown for its failure to sign and return the waiver.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE

Submitted To

THE JUDICIAL CONFERENCE

OF

THE UNITED STATES

By

Standing Committee

On

Rules of Practice and Procedure

TABLE OF CONTENTS

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE[1]

Rule 101. Scope

These rules govern proceedings in the courts of the United States and before the United States bankruptcy judges and United States magistrates~~~~ judges, to the extent and with the exceptions stated in rule 1101.

COMMITTEE NOTES

This revision is made to conform the rule to changes made by the Judicial Improvements Act of 1990.

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion

The expert may testify in terms of opinion or inference and give reasons therefor without ~~prior disclosure of~~ first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

COMMITTEE NOTES

This rule, which relates to the manner of presenting testimony at trial, is revised to avoid an arguable conflict with revised Rules 26(a)(2)(B) and 26(e)(1) of the Federal Rules of Civil Procedure or

---

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

with revised Rule 16 of the Federal Rules of Criminal Procedure, which require disclosure in advance of trial of the basis and reasons for an expert's opinions.

If a serious question is raised under Rule 702 or 703 as to the admissibility of expert testimony, disclosure of the underlying facts or data on which opinions are based may, of course, be needed by the court before deciding whether, and to what extent, the person should be allowed to testify. This rule does not preclude such an inquiry.

Rule 1101. Applicability of Rules

(a) Courts and ~~magistrates~~ judges. These rules apply to the United States district courts, the District Court of Guam, the District Court of the Virgin Islands, the District Court for the Northern Mariana Islands, the United States courts of appeals, the United States Claims Court, and to United States bankruptcy judges and United States magistrate~~s~~ judges, in the actions, cases, and proceedings and to the extent hereinafter set forth. The terms "judge" and "court" in these rules include United States bankruptcy judges and United States magistrate~~s~~ judges.

* * * *

(e) Rules applicable in part. In the following proceedings these rules apply to the extent that matters of evidence are not provided

for in the statutes which govern procedure therein or in other rules prescribed by the Supreme Court pursuant to statutory authority: the trial of ~~minor~~ misdemeanors and other petty offenses ~~by~~ before United States magistrate~~s~~ judges; * * * *

COMMITTEE NOTES

This revision is made to conform the rule to changes in terminology made by Rule 58 of the Federal Rules of Criminal Procedure and to the changes in the title of United States magistrates made by the Judicial Improvements Act of 1990.

Agenda E-19
(Appendix H)
Rules
September, 1992

PROPOSED RULES AMENDMENTS
GENERATING SUBSTANTIAL CONTROVERSY

At its meeting on June 18-20, 1992, the Committee on Rules of Practice and Procedure reviewed the proposed rules amendments submitted by the four advisory committees and with few exceptions voted unanimously to recommend their adoption. In some instances clarifying and stylistic changes were made. A summary of changes made by the Committee and the proposals generating substantial controversy are set forth below.

The notes below often indicate the reasoning of dissenting or minority views, and also include as an attachment a letter by Judge Frank H. Easterbrook giving his reasons for opposing certain resolutions. In most cases, the majority view of the Standing Committee follows the reasoning of the Advisory Committee notes. We do not repeat that reasoning here. The reader may consult those notes directly. Where the Standing Committee's reasoning differs from the Advisory Committee notes, an explanation is given here.

I. Federal Rules of Appellate Procedure.

None of the proposed rules presented, in their present form, caused significant disagreement either in the Advisory Committee or in the Standing Committee. The Standing Committee made several technical and stylistic changes that were not controversial.

One of the proposed changes, now unanimously approved, is the product of earlier disagreement over other drafts, both at the Advisory Committee and Standing Committee levels. The amendments to Rules 3(c), 12, 15(a) and (e) address the problems experienced by the courts of appeals in the wake of Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988). Following this decision, the courts of appeals have struggled with how much specificity is sufficient to identify an appellant.

Because this rule change is important to arrest the current confusion among the courts of appeals, at its January 1992 meeting, the Standing Committee approved immediate publication of the earlier proposed amendments to Fed. R. App. P. 3(c) and 15(a) and (e), as well as Forms 1, 2, and 3. There was, however, significant division of opinion among the members of the Advisory Committee regarding the best way to resolve "the Torres problem." The published drafts required that each appellant be "named" in

the notice of appeal, except in class actions. A majority of the Advisory Committee believed that requiring that each appellant be named was preferable because it is definitive. The naming requirement allows both the court and all parties to know precisely who is taking the appeal. Naming also requires each litigant to make an explicit choice about taking an appeal.

On the other hand, the published draft accomplished these goals by incurring costs, costs that some of the Advisory Committee considered unacceptable. The greatest cost is the possibility that the right of appeal will be lost because of an inadvertent omission of a party's name. One can also argue that a requirement that a notice of appeal list all names will simply be overlooked by a practicing lawyer because in all other filings with a district court after the complaint such terms as "et al." are sufficient.

Because the Standing Committee believed that the Torres problem is sufficiently important to justify shortening the usual publication period, the Committee voted to publish the rules and forms only for three months rather than the usual six months. Although the Standing Committee approved publication of these draft amendments, the Standing Committee requested that the Advisory Committee continue to explore other alternatives that might better preserve as many appeals as possible. A special note accompanying publication advised that the Committee would consider variations and welcomed suggestions of other means to identify appellants.

Following the close of the comment period, the Advisory Committee considered the comments and, pursuant to the request of the Standing Committee, attempted to reconcile the two differing viewpoints. Two of the seven commentators opposed the approach taken in the published draft; the other five commentators offered suggestions for refining the draft. The Committee tried to balance sensibly the very real concerns of definiteness, certainty, and ease of administration against the possibility of inadvertent and excusable loss of appellate rights. As a result, it proposed new amendments to Rule 3(c) and to Rule 12.

The proposed amendment to Rule 3 states a general rule that specifying the parties should be done by naming them. Naming an appellant in an otherwise timely and proper notice of appeal ensures that the appellant has perfected an appeal. However, in order to prevent the loss of a right of appeal through inadvertent omission of a party's name or continued use of such terms as "et al.," which are sufficient in all district court filings after the complaint, the amendment allows an attorney representing more than one party the flexibility to indicate which parties are appealing without naming them individually. The test established by the rule for determining whether such designations are sufficient is whether it is objectively clear

that a party intended to appeal. If a court determines it is objectively clear that a party intended to appeal, there are neither administrative concerns nor fairness concerns that should prevent the appeal from going forward.

This proposal was recommended by the Advisory Committee and approved unanimously, with technical amendments by the Standing Committee.

II. Federal Rules of Criminal Procedure.

The Committee made several nonsubstantive changes in the proposals submitted by the Advisory Committee on the Criminal Rules as set forth below. Controversies were few.

1. Rule 26.2(g), Scope of Rule. This Rule was completely restated to clarify its intended use at sentencing under Rule 32(f), at a revocation hearing under Rule 32.1(c), at a detention hearing under Rule 46(i), and at a Rule 8 hearing conducted under 28 U.S.C. § 2255. The vote was unanimous.

2. Rule 16(a) and (b). The Department of Justice objected to the proposal to require the government to give a defendant, upon request, a summary of the expert testimony it intends to use in its case in chief at trial, and to require the defendant to do the same if the defendant has made a request. The Standing Committee approved the proposal by a vote of 7 to 2.

3. Rule 46(i)(1). The Committee added the following phrase at the end of this subparagraph "unless the court, for good cause shown, rules otherwise in a particular case." The proposed amendment of Rule 46(i)(1) was originally approved by a vote of 5 to 3, but upon reconsideration, following adoption of the new language for Rule 26.2(g), was approved without dissent.

III. Federal Rules of Bankruptcy Procedure.

The proposed amendments to the Bankruptcy Rules submitted by the Advisory Committee were not controversial, except for the proposed amendment of Rule 5005(a) prohibiting a clerk of a bankruptcy court from refusing to accept a paper for filing solely because it was not presented in proper form. The proposed amendment to Rule 5005(a) conforms to the 1991 amendment of Rule 5(e) of the Federal Rules of Civil Procedure. The Advisory Committee received only a few adverse comments, but a member of the Standing Committee, Judge Frank H. Easterbrook, strongly opposed the proposal. See his letter of June 24, 1992 to Mr. Spaniol, attached. The Committee voted 7 to 2 to approve the amendment of Rule 5005(a).

IV. Federal Rules of Evidence.

The proposals to amend Rules 101, 705, and 1101 were not controversial and were unanimously approved by the Committee. Judge Easterbrook, however, expressed the view that the proposed amendment of Rule 702, relating to expert testimony, should have been approved and not withdrawn for further consideration by a new Advisory Committee on Rules of Evidence. See the attached letter.

V. Federal Rules of Civil Procedure.

The proposed amendments to Rules 4(f), 11, 16, 26(a)(1) and (g), and 56 as originally published, were reported by the Advisory Committee to have generated significant adverse comment by the bench and bar and by certain foreign governments. In light of the comments received the Advisory Committee modified its original proposals for submission to the Standing Committee, which in turn made other changes as follows:

1. Service of a Summons and the Taking of a Deposition in a Foreign Country; Rule 4(f) and Rule 26(a)(5).

The proposed amendments to these Rules, returned by the Supreme Court for further study, were republished for comment in August, 1991. In the light of comment received from foreign embassies, and the State and Justice Department, the Advisory Committee made some modifications. The Standing Committee further deleted the proposed amendment to Rule 26(a)(5), pertaining to discovery in another country, that had been criticized by foreign embassies, and further, deleted the final clause in proposed Rule 4(f)(3) that may have contributed to controversy and was not needed.

Rule 4 provides that a defendant who fails to waive service of a summons may be liable for costs subsequently incurred in effecting service. If it is decided to shield a defendant located outside the United States from this potential liability, suggested language to amend Rule 4(f) for this purpose is set out in Appendix F to the Committee report.

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

The Committee amended proposed Rule 11 to make the imposition of sanctions discretionary with the trial court, not mandatory. There was disagreement in the Committee. See Judge Easterbrook's letter, attached.

The Committee also amended subdivision (b) to make clear that the obligations of the Rule apply only to the initial filing

of a paper and to later advocating it (but not to a failure to withdraw a previously filed paper).

As amended, the proposed amendment of this Rule was approved by vote of 9 to 2.

3. Rule 16. Pretrial Practice.

After considering the comments received and testimony given at the public hearings, the Advisory Committee modified the proposal to amend Rule 16.

A minority of the Standing Committee felt that the published draft of Rule 16(c)(9) (concerning Alternate Dispute Resolution) and the provisions in lines 63-66 of the submitted draft (concerning attendance of parties at settlement conferences) should be used instead of the revisions made by the Advisory Committee. The minority view was that the published version constituted a strong endorsement of the power of the individual trial judge to employ ADR and to conduct settlement conferences with parties in attendance.

The minority believed that the Advisory Committee version (which allows ADR only if authorized by local rule or statute and is somewhat equivocal concerning parties being required to attend settlement conferences) in effect diluted the published draft. The minority believed this dilution was unjustified since extremely few negative comments were received to the published draft. Also those trial judges who strongly favor use of ADR and judicial encouragement of settlement had no chance to comment on the weaker version employed by the Advisory Committee.

The Committee approved the proposed amendment of Rule 16, as modified by the Advisory Committee, by vote of 8 to 3.

4. Rule 26(a)(1). Required Disclosure.

The Advisory Committee reported that the requirement of an initial disclosure without awaiting a discovery request generated adverse comment from various segments of the bar, although others approved. In the light of comment received the Advisory Committee modified the published version to meet some of the objections offered.

One Committee member expressed the view that requiring disclosure to be made of "information relevant to disputed facts alleged with particularity" is dangerous, that a complaint identical to Official Form 9 pleads nothing with particularity, that the defendant would have no obligation to disclose anything, and that needless litigation would develop on the meaning of "particularity." Since this language contains a new standard, not one widely circulated and commented on and concerning which

no public hearing was held, he felt recirculation was desirable particularly when the new standard has been criticized by both plaintiffs' and defendants' groups that have seen it.

After full consideration and approval of minor changes, the Committee, by vote of 10 to 1, approved the proposed amendment of the Rule submitted by the Advisory Committee.

5. Rule 56. Summary Judgment.

Some Committee members thought that the proposed revision of Rule 56 should be returned to the Advisory Committee to consider less substantial changes. By vote of 8 to 3 the Committee rejected this view and approved the proposed amendment submitted by the Advisory Committee.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
219 SOUTH DEARBORN STREET
CHICAGO, ILLINOIS 60604

CHAMBERS OF
FRANK H. EASTERBROOK
CIRCUIT JUDGE

June 24, 1992

Joseph F. Spaniol, Jr.
Secretary, Committee on Rules
of Practice and Procedure
Judicial Conference of the United States
Washington, D.C. 20544

Dear Mr. Spaniol:

To facilitate the presentation to the Judicial Conference and the Supreme Court of the full spectrum of views on the Standing Committee, I briefly recap some of the less persuasive of the positions I staked out at the meeting June 18-20.

Bankruptcy Rule 5005. The Advisory Committee proposes to forbid clerks of bankruptcy courts from refusing to accept papers for filing, no matter how obviously deficient those papers may be in matters of form. We passed this proposal on to the Judicial Conference, rejecting my proposed amendment to delete the words "or other paper" on line 9 of the draft.

I understand the principal motivation for the amendment to be that because filing the petition in bankruptcy triggers the automatic stay of 11 U.S.C. §362, a clerk should not intervene. This makes sense; the legal consequences of filings should be in the hands of a judge. But I do not see why this should carry over to all other filings in bankruptcy courts. Enormous quantities of paper come over the transom of a clerk's office. To help judges deal with this flux, both the Supreme Court and the local courts have promulgated rules for form—the size of the paper and the type matter, how the papers are to be bound, and so on. Enforcing these rules makes everyone's life easier, and the more mechanical the enforcement the more time will be available for judicial tasks. Doubtless clerks err now and again (though the Committee Note does not say that mistakes are a problem), which consumes a little time of counsel; better counsel's time than judicial time, which cannot be reclaimed or augmented.

The Committee Note attached to the amendment states that "[i]t is not a suitable role for the office of the clerk to refuse to accept for filing papers not conforming to requirements of form imposed by these rules or by local rules or practices." Why? The Committee does not say. The assertion is not only unreasoned but contrary to long-standing practice. It not only is "suitable" but also has been the norm for as long as the United States has been a nation.

The Clerk of the Supreme Court rejects papers defective in form. In recent years the Clerk also has rejected petitions and jurisdictional statements filed out of time, remitting counsel to motions to compel the Clerk to accept the papers. Clerks of the courts of appeals regularly reject briefs that do not comply

with the typeface and appendix requirements. The Clerk of the Seventh Circuit maintains a list of characteristics every brief or motion must possess. If the brief flunks—if, for example, an appellant's brief omits a jurisdictional statement or does not include a copy of the district court's opinion—the Clerk returns the brief with an explanation of the deficiency. It would greatly and pointlessly increase the work of judges of my court if we had to do all this ourselves, and I am confident that even more time is saved in bankruptcy courts by taking care of formal matters at the time of filing.

Judicial time should be reserved for judging. Handling the flow of paper is what clerks are for. We should not transfer ministerial, paper-control matters from the staff to the judges.

Civil Rule 11. The Advisory Committee recommended substantial changes designed to make Rule 11 less a bone of contention without unduly diminishing its role in specifying the care and consideration expected of counsel. As one who thinks that Rule 11 in its original form served a salutary function, I am skeptical of any change but was willing to defer to the Advisory Committee's judgment that the changes it proposed would deal with real problems without harm to the rule's central mission.

The Standing Committee made two further changes that I believe *will* do substantial harm. I do not believe that the Supreme Court should adopt these additional changes—and that if the Court believes that its options are leaving the rule as it is, and promulgating the package the Standing Committee submitted, the Court should leave Rule 11 alone.

Abusive and frivolous litigation is a plague. Careless or, worse, impositional use of the legal system is expensive to both the courts (for it consumes judicial time and thus injures litigants in other cases) and other litigants. A profession eager to collect millions from physicians who make the slightest slip, or designers of cars, or pharmaceutical houses, should not spare itself. We call an act negligent when the injury it inflicts exceeds the costs of precautions, and the legal system regularly "shifts the costs" when people fail to take care. This system of payments simultaneously compensates and deters (by requiring the actors to take into account the costs borne by others).

So too with Rule 11. Requiring the actor to take account of the other side's costs is especially important in litigation because there is no market through which actors internalize costs. Negligent physicians must pay more for insurance and find it harder to attract patients; manufacturers of flimsy cars cannot charge as much as Mercedes does for its sturdier models. But a lawyer who carelessly (or maliciously) inflicts costs on adversaries and the judicial system pays suffers no penalty, because he does not rely on the custom of his adversaries. To the contrary, he may reap a reward because his own client rejoices when life is made miserable for the adversary. To curtail this problem, we must bring the costs back home to the side that creates them—the *full* costs, not just tongue clucking by judges.

a. The amendment to Rule 11 is problematic to start with because it rests on a supposition that compensation to the injured side usually is unimportant

and that deterrence may be achieved by sanctions less than the injury inflicted. This is mistaken. Although there are debates about how best to determine optimal sanctions for deterrence, every model of sanctions starts with the harm done and moves up, to account for the fact that some harmful acts are not caught or punished. I refrain from citing the voluminous academic literature; the proposition I have just given is not controversial. An amendment that simultaneously reduces the sanction and the probability of punishment—as the amendment to Rule 11 does--necessarily curtails deterrence.

The change in the Committee Note to describe payment of the actual costs of the wrong as "exceptional" aggravates the problem. It is as if we were saying that only in "exceptional" cases should a polluter be required to pay the costs of cleanup; in the main, "deterrence" could be achieved by sending polluters to view films about the evils of toxic chemicals and "continuing pollution education." Ha! That bears about as much relation to the system of incentives as did Marx's belief that people would produce according to their abilities rather than rewards. The legal system creates powerful incentives to make demands regardless of the costs imposed on others—or precisely *because of* the costs imposed on others. If we are serious about deterring this misconduct, we must use a system of penalties based on these costs.

b. Rule 11 in its current form, and as transmitted by the Advisory Committee, says that the court "shall" impose a sanction for violations. The Standing Committee voted to change this to "may." I think the change regrettable.

One objection against the current version of Rule 11 is disparity in administration. Some judges are gung ho; others do not like the business of sanctions. Deferential review, see *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990), means that appellate courts do not produce uniformity. Thus it is all the more important that district judges strive for evenhanded administration—which will not happen if they are given license to disregard even established violations. Some judges will announce "I do not award sanctions", which is not sound for the judicial system. Sanctioning is unpleasant business for judges, yet the benefits are systemic. Deterrence affects how lawyers behave in other cases before other judges, and many courts are reluctant to invest the time and mental energy needed to achieve this elusive benefit. A mandate in the rule enlists all judges in this common endeavor, and makes the sting less in each case. Sanctions should depend on a rule of law, not on whims of judges.

Those who favored "may" over "shall" saw it as mitigating some of the rule's harshness. I do not think it "harsh" to impose some sanction every time a lawyer fails to conduct a reasonable investigation before filing, any more than it is unjust to use the tort system when a driver fails to conduct a reasonable investigation before turning left. No matter. The proposed amendment to Rule 11 contains a better device: the safe harbor for withdrawing papers.

Consider when "may" will make a difference. Not when the judge initiates the sanctions process; this is discretionary in terms. Only party-initiated sanctions are affected by the shall-may debate. And all party-initiated sanctions pass through the safe harbor, in which the filer has 21 days to withdraw. So the uni-

verse of concern is papers filed without reasonable investigation, to which the proponent stubbornly adheres after the deficiency is drawn to his attention. Having had two bites at the apple, this lawyer is not entitled to a third at the discretion of the judge—especially not when the judge already has a choice of sanction.

If we are serious about Rule 11, we should retain the "shall." If we are not serious about Rule 11, we should return to the pre-1983 version and have done with the masquerade.

Evidence Rule 702. After voting to recommend the establishment of an advisory committee on evidence, the Standing Committee voted to refer Rule 702 to this committee for study. This is regrettable; the Supreme Court should promulgate Rule 702 in the form recommended by the Advisory Committee without another long delay.

Procrastination, waiting, and more postponement is the order of the day under the current statutes. Three years are the minimum time to make any changes. If we are to wait for the creation and appointment of a brand new committee, then the additional delay is at least five years. The amendments to Rule 702 are designed to combat the upsurge of junk science in litigation, and this is a serious problem that needs attention now rather than far in the future.

If there were dissatisfaction on the Standing Committee with the substance of the proposal, I could see the benefit in more study. Yet only two members of the Standing Committee expressed such concern: Mr. Wilson, who wants plaintiffs to be able to use chiropractors as witnesses, and Mr. Terwilliger, who believes that prosecutors should be able to use dubious science in criminal cases even though the doors should be closed to junk science in civil cases. Neither of these positions is sound. People who believe that broken bones cause cancer (as chiropractors do) should not be allowed inside a courtroom, and the standards of expert testimony should be more rather than less exacting in criminal cases.

Be that as it may, the other members of the Standing Committee expressed no opposition to the draft proposed by the Advisory Committee. We are left with a proposal to have more process for the sake of process. I can't see why.

The proposed amendment would be a step in the right direction. The Advisory Committee's note to its draft is eloquent. Judges ought to ensure that supposedly scientific testimony has a footing in genuine science. Juries cannot evaluate scientific disputes. "Credibility" on the stand is a measure of whether the witness *believes* what he is saying (or perhaps whether he has a good baritone voice). Scientists do not resolve controversies by strength of belief but by asking whether results are replicated and consistent with a theory capable of making testable predictions. Before asking a jury to assess the subject, the judge ought to ensure that all of the scientific testimony is recognized as *science*—that it could be published in a journal, even if it would not persuade the profession. (Many published papers later are falsified or bypassed.) This change also would resolve a controversy among the courts. Several, such as the Fifth Circuit, apply a test similar to the proposed amendment. *Christophersen v. Allied-Signal*

Corp., 939 F.2d 1106 (5th Cir. 1991) (in banc). Others, such as the Third Circuit, believe that the current version of Rule 702 mandates a let-it-all-in approach. *In re Paoli R.R. Yard PCB Litigation*, 916 F.2d 829 (3d Cir. 1990). We can and should adopt a uniform and sensible rule now rather than let this question fester until the turn of the century.

I hope these thoughts prove helpful.

Sincerely,

Frank H. Easterbrook

cc: Hon. Robert E. Keeton