

RULES OF THE UNITED STATES COURT OF FEDERAL CLAIMS

(Revised March 14, 1992, effective March 15, 1992, as amended to January 5, 1999)

General Order No. 1

General Order No. 1 of the United States Claims Court, October 7, 1982, provided that:

“The United States Claims Court inherits substantially all of the jurisdiction, caseload and grand tradition of the United States Court of Claims. To assure continuity in carrying out the business of the court, and to promote the interests of justice and service to the public, it is ordered as follows:

“(1) All published decisions of the United States Court of Claims are accepted as binding precedent for the United States Claims Court, unless and until modified by decisions of the United States Court of Appeals for the Federal Circuit or the United States Supreme Court.

“(2) Every order, decision and ruling entered by the trial or appellate divisions of the United States Court of Claims in cases now pending before the United States Claims Court is adopted in its entirety and will be given full force and effect, unless and until a judge of the United States Claims Court determines such order should be modified, amended or rescinded.

“(3) The United States Claims Court will be the custodian of all records of the United States Court of Claims.

“(4) The United States Claims Court will provide for the publication of all United States Court of Claims decisions which have been certified for publication in the United States Court of Claims Reporter.”

General Order No. 3

IT IS ORDERED that the attached rules [set out below] are adopted as the Rules of the United States Claims Court effective October 1, 1982.

October 7, 1982

By the Court
ALEX KOZINSKI
Chief Judge

General Order No. 9

IT IS ORDERED this date that the attached rules [set out below] are adopted as the Rules of the United States Claims Court effective February 15, 1984.

January 27, 1984

By the Court
ALEX KOZINSKI
Chief Judge

General Order No. 11

IT IS ORDERED this date that the attached rules [set out below] are adopted as the Rules of

the United States Claims Court effective November 1, 1985.

October 28, 1985

By the Court
ALEX KOZINSKI
Chief Judge

General Order No. 28

IT IS ORDERED this date that the attached rules [set out below] are adopted as the Rules of the United States Claims Court effective March 15, 1991.

March 14, 1991

By the Court
LOREN A. SMITH
Chief Judge

General Order No. 31

IT IS ORDERED this date that the attached rules [set out below] are adopted as the Rules of the United States Claims Court effective March 15, 1992.

March 13, 1992

By the Court
LOREN A. SMITH
Chief Judge

General Order No. 33

On October 29, 1992, the Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506 (1992), became effective. Pursuant to Title IX, the United States Claims Court is renamed the United States Court of Federal Claims. For all purposes the new name may be substituted for the previous name. It shall have the identical legal consequences. All documents, motions, orders, forms, or other written instruments shall apply to the new name as they did to the previous name. From this date forward the new name shall be used in place of the United States Claims Court. The Clerk's Office, however, will not reject any filings or pleadings because of the use of the previous name.

IT IS ORDERED, as follows:

(1) All General Orders of the former United States Claims Court are fully applicable to the United States Court of Federal Claims.

(2) Decisions of the United States Court of Federal Claims will be published in the Federal Claims Reporter and cited as “Fed. Cl.” Citations to decisions of the former United States Claims Court shall continue to be cited as decisions of the United States Claims Court (“Cl. Ct.”).

(3) The Rules of the United States Court of Federal Claims shall be abbreviated as “RCFC”.

(4) All members in good standing of the bar of the United States Claims Court shall continue

to be members of the bar of the United States Court of Federal Claims.

(5) Some of the rules do not conform to the statute. The statute will control if there is a conflict. The Court is drafting changes to the RCFC to conform the rules to the recent legislative changes. The court would welcome written comments regarding changes. All written comments should be addressed to: The Honorable John P. Wiese, Chairman, Rules Committee, 717 Madison Place, N.W., Washington, D.C. 20005.

In order to use resources efficiently, all paper stocks bearing the name “United States Claims Court” will be used until exhausted, except as change is needed.

December 4, 1992

By the Court
LOREN A. SMITH
Chief Judge

Change of Name

References to United States Claims Court deemed to refer to United States Court of Federal Claims and references to Claims Court deemed to refer to Court of Federal Claims, see section 902(b) of Pub. L. 102-572, set out as a note under section 171 of this title.

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| 65. | <p>Injunctions.</p> <ul style="list-style-type: none"> (a) Preliminary Injunction. (b) Temporary Restraining Order; Notice; Hearing; Duration. | 81.1. | <p>Legal Assistance by Law Students.</p> <ul style="list-style-type: none"> (a) Appearance. (b) Activities. (c) Eligibility. (d) Supervising Attorneys. |
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- 76. Record on Appeal to a Court of Appeals; Agreed Statement.

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- 85. Title.
- 86. Effective Date.

RULES OF THE UNITED STATES COURT OF FEDERAL CLAIMS

APPENDICES

- A. Instructions to Reporters; Forms.
- B. Procedures for Processing Complaints of Judicial Misconduct Pursuant to 28 U.S.C. §372(c).
- C. Procedure in Common Carrier Cases.
- D. Procedure in Congressional Reference Cases (28 U.S.C. §§1492, 2509).
- E. Application for Attorneys' Fees Under Equal Access to Justice Act.
- F. United States Court of Federal Claims Rules of Disciplinary Enforcement.
- G. Procedures Before Trial.
- H. Motions.
- I. Bill of Costs.
- J. TITLES I-IV Vaccine Rules of the Office of Special Masters of the United States Court of Federal Claims.
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- K. United States Court of Federal Claims Cover Sheet.
- L. United States Court of Federal Claims Subpoena.
Vaccine Subpoena.

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The rules of the United States Court of Federal Claims are based upon the Federal Rules of Civil Procedure (Fed. R. Civ. P. or the Federal Rules). For ease of reference to rulings in Federal Rules Decisions on comparable rules, chapter titles and rule numbers of the Court of Federal Claims rules follow closely the Fed. R. Civ. P. Amendments and additions to the Federal Rules have been made as required to give effect to the jurisdictional differences of the Court of Federal Claims. Federal Rules which are not applicable to the Court of Federal Claims have been omitted, and subdivisions of the Federal Rules that have not been used, either in amended or supplemented form, are so designated.

FEDERAL RULES OF CIVIL PROCEDURE OMITTED

- Rule 22. Interpleader.
- 23.1. Derivative Actions by Shareholders.
- 23.2. Actions Relating to Unincorporated Associations.
- 38. Jury Trial of Right.
- 47. Jurors.
- 48. Juries of Less than Twelve—Majority Verdict.
- 49. Special Verdicts and Interrogatories.

The United States Claims Court was created by the Federal Courts Improvement Act of 1982 (Pub. L. No. 97-164, 96 Stat. 25 (1982)), and redesignated the United States Court of Federal Claims by the Federal Courts Administration Act of 1992 (Pub. L. 102-572, 106 Stat. 4516). It inherited substantially all of the jurisdiction formerly exercised by the United States Court of Claims. Section 139(b)(1) of the Act, 28 U.S.C. §2503(b), authorizes the United States Court of Federal Claims to prescribe rules of practice and procedure for its proceedings.

TITLE I. SCOPE OF RULES—ONE FORM OF ACTION

Rule 1. Scope of Rules

(a) **Scope.** (1) These rules govern all proceedings in actions filed in the United States Court of Federal Claims on or after October 1, 1982, and all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending on October 1, 1982, would not be feasible or would work an injustice. In such event the court by order shall adapt the prior procedures of the United States Court of Claims as required. These rules shall be cited as RCFC.

(2) These rules shall be construed to secure the just, speedy, and inexpensive determination of every action.

(3) In all cases not provided for by rule, a judge may regulate the applicable practice in any manner not inconsistent with these rules.

(b) **Federal Rules of Civil Procedure.** The Federal Rules applicable to civil actions tried by the court sitting without a jury and in effect on December 1, 1991, have been incorporated in these rules to the extent that they appropriately can be applied to proceedings in this court.

(As amended Dec. 4, 1992.)

Rule 2. One Form of Action

There shall be one form of action to be known as a "civil action."

TITLE II. COMMENCEMENT OF ACTION:
SERVICE OF PROCESS, PLEADINGS, MO-
TIONS, AND ORDERS**Rule 3. Commencement of Action**

(a) **Complaint; Filing Period.** A civil action in this court shall be commenced by filing a complaint with the Clerk of the Court. See Rule 77(f)(2).

(b) **Date of Filing.** (1) The records of the clerk, including the date stamped on the complaint, shall be final and conclusive evidence of the date on which a complaint was filed, in the absence of the filing and allowance of a motion under subdivision (b)(2) of this rule.

(2)(A) A party plaintiff who contends that the effective date of plaintiff's complaint should properly be a date earlier than that shown by the clerk's records may seek a corrective order from the court by means of a motion.

(B) Upon motion of a party plaintiff supported by a proper showing that the clerk's records are factually incorrect, the court will correct the records by order.

(C) In a situation where a complaint is stamped by the clerk after the last date allowed by a statute of limitations for the filing of the complaint, if the complaint was received by the clerk through the mail, it may, by order of court, upon motion of the party plaintiff, be deemed to have been filed on the last date allowed if there is a proper showing (i) that the complaint was sent by registered or certified mail, properly addressed to the clerk at 717 Madison Place, N.W., Washington, D.C. 20005, and with return receipt requested; (ii) that it was deposited in the mail sufficiently in advance of the last date allowed for filing to provide for receipt by the clerk on or before such date in the ordinary course of the mail; and (iii) that the party plaintiff as sender exercised no control over the mailing between the deposit of the complaint in the mail and its delivery.

(c) **Copies.** Plaintiff shall file an original and 7 copies of the complaint, the original of which shall be accompanied by the completed cover sheet as shown in Appendix K utilizing the Cover Sheet Information. See Rule 83.

Rule 4. Process

(a) **Service upon the United States.** Service of the complaint upon the United States shall be made through the delivery by the clerk to the Attorney General, or to an agent designated by authority of the Attorney General, of copies of the complaint in numbers prescribed by subdivision (b) of this rule.

(b) **Copies.** The clerk shall serve on the Attorney General or his designated agent 5 copies of the complaint.

(c) **Proof and Date of Service.** At the time the clerk serves a complaint the clerk shall enter the fact of service on the docket, and such entry shall be prima facie evidence of service. For the purposes of this rule, the date of service shall be the date of filing with the clerk.

Rule 5. Service and Filing of Other Papers

(a) **Service; When Required.** Except as otherwise provided in these rules, every order re-

quired by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties.

(b) **Same; How Made.** Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to the attorney or party by mailing it to the attorney or party at the last known address or, if no address is known, by leaving it with the clerk. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at the attorney's or party's office with a clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at the attorney's or party's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing, but filing is not.

(c) **Filing; Certificate of Service.** All papers after the complaint required to be served upon a party, together with a certificate of service, shall be filed with the court, except that depositions upon oral examination and notices thereof, written questions, interrogatories, requests for documents, requests for admission, and answers and responses thereto and other related discovery materials shall not be filed unless on order of court. See Rule 83.

(d) **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 chambers, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. Papers may not be filed by facsimile transmission. All matters are to be brought to the attention of a judge through formal filings rather than by correspondence; letters are not to be directed to a judge unless specifically requested.

(e) **Proof of Service.** (1) Service shall be made by the party, attorney of record or any other person acting under the attorney of record's direction. The person making service shall execute a certificate of service that contains the following information:

- (A) the day and manner of service;
- (B) the person and/or entity served; and
- (C) the method of service employed, *e.g.*, personal, mail, substituted, etc.

(2) The certificate of service shall be attached at the end of the original document, including appendices, and copies thereof. If service other than by mail is used and it is impractical to attach the certificate at time of filing, such certificate may be filed subsequently.

(3) The certificate may at any time be amended or supplied unless to do so would result in material prejudice to the substantial rights of any party.

Rule 6. Time

(a) **Computation.** In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the clerk's office inaccessible, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule and in Rule 77(i), legal holiday includes New Year's Day, Inauguration Day, Martin Luther King's Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, or any other day appointed as a holiday by the President or the Congress of the United States.

(b) **Enlargement.** When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) order the period enlarged if request therefor is made by motion showing good cause before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 52(b), 59(b) and (d), 60(b) and 77.4, except to the extent and under the conditions stated in them. Every motion for enlargement of time must set forth therein the specific number of additional days requested, the date to which the enlargement is to run, the extent to which the time for the performance of the particular act has been previously enlarged, and the reason or reasons upon which the motion for enlargement is based. Motions for enlargement will not be granted on the basis of nonspecific assertions that counsel has been delayed because of the press of other business. Where a motion for enlargement is based on the occurrence of some unanticipated event, counsel must file the motion promptly upon learning of the event. In general, motions for enlargement must be filed at the earliest practicable time and make a persuasive showing that counsel has been working on the matter diligently or has been prevented from doing so by significant matters beyond counsel's control. Motions for enlargements of time must contain a representation that the moving party has discussed the motion with opposing counsel and a statement whether an opposition will be filed or, if opposing counsel cannot be consulted, an explanation of the efforts made to do so.

(c) **Additional Time After Service.** Whenever a party has the right or is required to do some act or take some proceedings within a prescribed pe-

riod after the service of a paper, and the service is made other than by hand on the same day, 3 calendar days shall be added to the prescribed period, except that no days shall be added when a date or time limitation is set by a court order or when a motion is filed pursuant to Rule 59(b) or 83.2(f).

(d) **When Time Begins To Run.** In computing any period of time prescribed or allowed by these rules, or by order of court, or by any applicable statute, the period of time shall commence to run on the day after the service of a paper or the filing of a court order, unless otherwise particularly specified in these rules.

TITLE III. PLEADINGS AND MOTIONS

Rule 7. Pleadings Allowed; Form of Motions

(a) **Pleadings.** There shall be a complaint and an answer; and if the answer contains a counterclaim or offset or a plea of fraud, there shall be a reply thereto. There shall be such third-party pleadings as are permitted by Rule 14. No other pleading shall be allowed, except that the court may order a reply to an answer, or a responsive pleading to a third-party complaint or answer.

(b) **Motions and Other Papers.** (1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought, and shall comply with Appendix H. Any motion, objection, or response may be accompanied by a brief or memorandum, and, if necessary, by supporting affidavits that shall be attached to the motion. Any motion may be accompanied by a proposed order.

(2) The rules applicable to captions, and other matters of form of pleadings apply to all motions and other papers provided for by these rules. See Rules 10(a), 82, 83.1.

(3) All motions shall be signed in accordance with Rule 11. See Rule 83.

(c) **Demurrers, Pleas, Etc., Abolished.** Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used.

Rule 8. General Rules of Pleading

(a) **Claims for Relief.** A pleading which sets forth a claim for relief, whether an original claim, counterclaim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which the pleader is entitled. Relief in the alternative or of several different types may be demanded.

(b) **Defenses; Form of Denials.** A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If the party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments

denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, the pleader may make denials as specific denials of designated averments or paragraphs, or the pleader may generally deny all the averments except such designated averments or paragraphs as the pleader expressly admits; but, when the pleader does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, the pleader may do so by general denial subject to the obligations set forth in Rule 11.

(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, laches, license, payment, release, *res judicata*, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court, if justice so requires, shall treat the pleading as if there had been a proper designation.

(d) Effect of Failure To Deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) Pleading To Be Concise and Direct; Consistency. (1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal or equitable grounds. All statements shall be made subject to the obligations set forth in Rule 11.

(f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice.

Rule 9. Pleading Special Matters

(a) Capacity. It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party, except to the extent required to show the jurisdiction of the court. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, a party shall

do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

(b) Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

(c) Conditions Precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

(d) Official Document or Act. In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law.

(e) Judgment. In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.

(f) Time and Place. For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(g) Special Damage. When items of special damage are claimed, they shall be specifically stated.

(h) Special Matters Required in Complaint. The complaint shall include:

(1) *Action by Other Tribunal or Body.* Any action on the claim taken by Congress or by any department or agency of the United States, or in any judicial proceeding, including any in the Tax Court of the United States.

(2) *Citations of Statutes, Regulations, Orders.* A clear citation of the Act of Congress, regulation of an executive department or agency, or Executive order of the President, where the claim is founded upon such an act, regulation, or order.

(3) *Contracts or Treaties.* If the claim is founded upon a contract or treaty with the United States, a description of the contract or treaty sufficient to identify it. In addition, the plaintiff shall plead the substance of those portions of the contract or treaty on which the plaintiff relies, or shall annex to the complaint a copy of the contract or treaty, indicating the provisions thereof on which the plaintiff relies.

(4) *Patent Suits.* In any patent suit, the claim or claims of the patent or patents alleged to be infringed.

(5) *Ownership of Claim; Assignment.* If the plaintiff is the owner by assignment or other transfer of the claim, in whole or in part, when and upon what consideration the assignment or transfer was made.

(6) *Tax Refund Suits.* In any action for refund of federal tax, for each tax year or period for which a refund is sought, the amount, date, and place of each payment to be refunded; the date and place the return, if any, was filed; the name and address of the taxpayer or taxpayers appearing on the tax return; the date and place the claim for refund was filed; the name and address of the taxpayer or taxpayers appearing on the

claim; and the identification number shown on the return for each plaintiff.

Rule 10. Form of Pleadings

(a) **Caption; Names of Parties.** Every pleading shall contain a caption setting forth the name of the court, the title of the action, the file number, and a designation as in Rule 7(a). In the complaint the title of the action shall include the names of all the parties, see Rule 20(a), the United States being designated as the party defendant in every case, but in other pleadings and other papers it is sufficient to state the name of the first party on each side with an appropriate indication of other parties. But see Rule 72. In pleadings and papers other than the complaint, the name of the judge assigned to the case shall appear under the docket number.

(b) **Paragraphs; Separate Statements.** All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

(c) **Adoption by Reference; Exhibits.** Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes unless otherwise indicated, but the adverse party shall not be deemed to have admitted the truth of the allegations in such exhibit merely because the adverse party has failed to deny them explicitly.

(As amended July 15, 1992.)

Rule 11. Signing of Pleadings, Motions, and Other Papers; Sanctions

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by or for the attorney of record in the signing attorney's own individual name, whose address and telephone number shall be stated. See Rule 81(d)(2). A party who is not represented by an attorney shall sign the pleading, motion, or other paper and state the party's address. Any stipulation for a money judgment shall be signed by an authorized representative of the Attorney General. 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 attorney or party that the attorney or party has read the pleading, motion, or other paper; that to the best of the attorney's or party'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 paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. 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.

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

(a) **When Presented.** The United States shall file its answer to the complaint within 60 days after the service of the pleading in which the claim is asserted. After service of an answer containing a counterclaim, offset, or plea of fraud, plaintiff shall have 20 days within which to file a reply to the counterclaim, offset or plea of fraud. If a reply to an answer or a responsive pleading to a third-party complaint or answer is ordered by the court, the reply or responsive pleading shall be filed within 20 days after service of the order unless the order otherwise directs. The service of a motion permitted under this rule or Rule 56 alters these periods of time, as follows, unless a different time is fixed by order of the court: (1) if the court denies or partially denies or partially allows the motion or postpones its disposition until the trial on the merits or the motion is withdrawn, the responsive pleading shall be filed within 10 days after notice of the court's action, or the date on which the motion is withdrawn, or by the date the response otherwise would have been due, whichever is later; (2) if the court grants a motion for a more definite statement, the responsive pleading shall be filed within 10 days after the service of the more definite statement.

(b) **How Presented.** Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter; (2) lack of jurisdiction over the person; (3) insufficiency of process; (4) failure to state a claim upon which relief can be granted. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (4) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the

pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed, but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) Preliminary Hearings. The defenses specifically enumerated (1)–(4) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) Motion for More Definite Statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing the party's responsive pleadings. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) Motion To Strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon that party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) Consolidation of Defenses in Motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) of this rule on any of the grounds there stated.

(h) Waiver of Preservation of Certain Defenses.

(1) A defense of lack of jurisdiction over the person or insufficiency of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g) of this rule, or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, and an objection of

failure to state a legal defense to a claim, may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

(i) Suspension of Discovery. The filing of a motion pursuant to Rule 12(b), 12(c) or 56 shall not suspend discovery unless for good cause shown on separate motion the court in its discretion so orders.

Rule 13. Counterclaim

(a) Compulsory Counterclaims. The answer shall state as a counterclaim any claim which, at the time of serving the answer, the defendant has against any plaintiff, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the answer need not state the claim if at the time the action was commenced the claim was the subject of another pending action.

(b) Permissive Counterclaims. The answer may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

(c) Counterclaim Exceeding Opposing Claim. A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

(d) Counterclaim Against the United States. [Not used.]

(e) Counterclaim Maturing or Acquired After Pleading. A claim which either matured or was acquired by the defendant after serving its pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.

(f) Omitted Counterclaim. When the defendant fails to set up a counterclaim through oversight, inadvertence or excusable neglect, or when justice requires, it may by leave of court set up the counterclaim by amendment.

(g) Cross-Claim Against Co-Party. [Not used.]

(h) Joinder of Additional Parties. [Not used.]

(i) Separate Trials; Separate Judgments. If the court orders separate trials as provided in Rule 42(b), judgment on a counterclaim may be rendered in accordance with the terms of Rule 54(b) when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of.

Rule 14. Third-Party Practice

(a) When Third Parties May Be Brought In. (1) The court, on its own motion or on the motion of a party, may notify any person with legal capacity to sue and be sued and who is alleged to have an interest in the subject matter of any pending action to appear as a party and assert an interest, if any, therein.

(2) On motion of the United States, the court may summon any third person against whom

the United States may be asserting a claim or contingent claim for the recovery of money paid by the United States in respect of the transaction or matter which constitutes the subject matter of the suit to appear as a party and defend the third party's interest, if any, in such suit.

(3) A motion made by the plaintiff under subdivision (a)(1) hereof shall be filed at the time the complaint is filed. Copies and service of such a motion shall be as provided in Rules 3(c) and 4. A motion made by the United States under subdivision (a)(1) or (2) hereof shall be filed on or before the date on which the answer is required to be filed. For good cause shown, the court may allow any such motion to be filed at a later time.

(b) Content of Motion for Notice to Third Parties. A party desiring to bring in a third party pursuant to subdivision (a)(1) of this rule shall file with the clerk a written motion which shall:

(1) state the name and address of such person, if known;

(2) if the address of such person is unknown, or if such person resides outside the jurisdiction of the United States, or there is good reason why service on such person cannot be had, be accompanied by an affidavit showing why service cannot be had on such person and stating the last-known address of such person; and

(3) set forth the interest which such person appears to have in the action.

(c) Issuance and Service of Notice. (1) If the court, on its own motion or on the motion of a party, orders any third person to be notified pursuant to subdivision (a)(1) of this rule, the clerk shall issue an original and 1 copy of the notice for each third person to be notified. The notice shall contain the names of the parties and a statement of the time within which such third person may appear and shall state that in case the third party fails to appear and assert a claim in the subject matter of the action, the claim or interest of the third party therein shall forever be barred. The notice shall indicate that it is accompanied by a copy of the pleadings, which shall be attached by the moving party.

(2) Upon the issuance of such notice upon motion of a party, the notice shall be delivered by the clerk to the moving party, who shall at the moving party's expense cause the same to be served on the person to be notified by registered or certified mail, return receipt requested, with the moving party to file with the clerk the return of such service, which return shall include the copy of the notice with return receipt attached.

(3) When the court directs the issuance of a notice to a third person on its own motion, each of the existing parties shall, on request of the clerk, deliver to the clerk a sufficient number of copies of pleadings filed by such party to provide the third party to be notified with a copy of each of such pleadings, and the clerk shall forthwith issue such notice as specified in subdivision (c)(1) of this rule and shall forward the same with accompanying copies of the pleadings to the Attorney General for service as provided in subdivision (c)(2) of this rule.

(4) When service of the notice required by subdivision (c)(1) of this rule is to be effected upon

a third person in a foreign country, service of the notice may be made by the moving party or the court, as required by subdivisions (c)(2) and (3) of this rule, and proof of such service may be made in the manner authorized by Rule 4(i) of the Federal Rules.

(d) Service of Notice by Publication. Where, upon motion of a party, the court under subdivision (a)(1) of this rule directs the issuance of a notice to a person upon whom service cannot be had, the moving party shall cause such notice to be published in a newspaper of general circulation in a place designated in the order, for a specified time, not less than once in each of 4 successive weeks. On or before the day of the first publication, the moving party shall send a copy of the notice by registered or certified mail to such person at such person's last-known address and shall file with the clerk an affidavit showing such mailing. The moving party shall procure an affidavit of the publisher showing that publication of the notice has been had as required by the order and shall file such affidavit with the clerk, who shall make an entry on the docket that publication has been had. The affidavit of mailing and the publisher's affidavit, together with the clerk's entry, shall constitute proof of service by publication. Service shall be deemed complete on the date of the last publication. The costs of such service by publication shall be paid by the party at whose instance it was made.

(e) Contents of Motion for Summons to Third Parties. When the United States is asserting a claim for damages or other demand against a third person for the recovery of money paid by the United States in respect of the transaction or matter which constitutes the subject matter of any pending action and desires to have such third person brought in pursuant to subdivision (a)(2) of this rule, it shall file a written motion, which shall comply with the requirements of subdivision (b) of this rule and which shall be accompanied by an appropriate pleading setting forth the claim or contingent claim which it is asserting against such third person.

(f) Issuance and Service of Summons. If the court, on motion of the United States, summons a third person pursuant to subdivision (a)(2) of this rule to answer a claim or contingent claim asserted by the United States, the clerk shall issue an original and 1 copy of such summons for each person to be summoned. The summons shall contain the names of the parties and a statement of the time within which the party summoned is required to appear and answer. The summons shall also state that the United States is asserting a claim against such person, as described in the accompanying pleading of the United States, and shall further state that if such third person fails to appear and answer the claim asserted by the United States, judgment *pro confesso* may be entered against such third person upon the claim of the United States to the same extent as if said third person had appeared and admitted the truth of all the allegations made on behalf of the United States. The summons shall indicate that it is accompanied by a copy or copies of all pleadings filed in said action, naming such pleadings which shall be attached by the moving party. Upon issuance of

the summons, the clerk shall deliver the summons to the Attorney General for personal service and the return of such service shall be made directly to the clerk.

(g) Pleadings of Third Parties. Within 40 days after service upon a third person of a notice or summons issued pursuant to this rule, such person may file a complaint setting forth the person's interest, if any, in the subject matter of the action and the nature of the person's claim against the United States, or an answer, or both, which pleadings shall comply with the requirements of these rules with respect to the filing of original complaints and answers, except that only an original and 2 copies of a complaint are to be filed with proof of service.

Rule 15. Amended and Supplemental Pleadings

(a) Amendments. A party may amend the party's own pleadings once as a matter of course at any time before a response is served or, if the response is one to which no further pleading is permitted and the action has not been scheduled for trial, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's own pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) Amendments To Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) Relation Back of Amendments. Whenever 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, the amendment relates back to the date of the original pleading.

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to file a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statements of a claim for relief or defense. If

the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

(e) Form and Filing. Every amendment to a pleading shall **(1)** include so much of the prior pleading as may be required to show clearly how the pleading is to stand amended; **(2)** comply with the rules for caption, designation, and signature; **(3)** carry designation as the first, second, or subsequent amended pleading; and **(4)** comply with the requirements of Rules 82 and 83, except that upon a proper showing, by motion filed with the court or during pretrial conference or at trial, that the proposed amendments are minor in character or of such brevity as to warrant the use of pasters or interlineation, the court may waive the requirements of this subdivision (e)(4) of this rule.

Rule 16. Pretrial Conferences; Scheduling; Management

(a) Pretrial Conferences; Objectives. **(1)** All procedures before trial shall be governed by Appendix G. **(2)** In any action, the court in its discretion by appropriate order may direct the attorneys for the parties and any unrepresented parties to confer and/or exchange:

- (i)** lists containing the names and addresses of all witnesses they respectively expect to call at trial;
- (ii)** lists of the documentary exhibits which they respectively intend to offer at trial;
- (iii)** written statements of material matters of fact as to which they respectively believe there is no substantial controversy;
- (iv)** written statements of issues of fact and law they respectively believe are in dispute; and
- (v)** such other matters as may be directed by the court.

(3) In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference, or conferences, before trial or to arrange a telephone conference, or conferences for such purposes as:

- (i)** expediting the disposition of the action;
- (ii)** establishing early and continuing control so that the case will not be protracted because of lack of management;
- (iii)** discouraging wasteful pretrial activities;
- (iv)** improving the quality of the trial through more thorough preparation;
- (v)** facilitating the settlement of the case; and
- (vi)** such other matters as may aid in the disposition of the action.

(b) Scheduling and Planning. After the initial status report or conference, the court shall 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 also may include:

- (4)** the date or dates for conferences before trial, a final pretrial conference, and trial; and
- (5)** any other matters appropriate in the circumstances of the case.

(c) Subjects To Be Discussed at Pretrial Conferences. The participants at any conference

under this rule may consider and take 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;

(5) 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) the advisability of referring matters to a master;

(7) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute;

(8) the form and substance of the pretrial order;

(9) the disposition of pending motions;

(10) 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; and

(11) such other matters as may aid in the 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.

(d) Final Pretrial Conference. Any final pretrial conference shall be held as close to the time of trial as reasonable under the circumstances. The participants at any such conference shall formulate a plan for trial, including the program for facilitating the admission of evidence. The conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties.

(e) Pretrial Orders. After any conference held pursuant to this rule, an order shall be entered reciting the action taken, except that after the final pretrial conference the court may recite the contents of its order, other than scheduling matters, on the record. The pretrial order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

(f) Sanctions. If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the court, upon motion or its own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D). In lieu of or in addition to any other sanction, the court shall require the party or the attorney rep-

resenting the party or both to pay the reasonable expenses incurred because of any non-compliance with this rule, including attorneys' fees, unless the court finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

Amended General Order No. 13

The United States Court of Federal Claims is sensitive to rising litigation costs and the delay often inherent in the traditional judicial resolution of complex legal claims. While the mandates of due process inevitably place limits on how expeditious a trial of a complex issue can be, there are no such limits when parties voluntarily seek noncompulsory settlements. Since justice delayed is justice denied, it is an obligation of this court to further the settlement process in all ways consistent with the ultimate guarantee of a fair and complete hearing to those disputes that cannot be resolved by mutual consent. Courts are institutions of last resort and while preserving that "last resort" as a sacred trust, they should insure their use only when other methods of dispute resolution have failed. In response to these concerns, the court is implementing three methods of Alternative Dispute Resolution: *Settlement Judges*, *Mini-Trials*, and *Third-Party Neutrals*. The methods to be used in the Court of Federal Claims are described in the "Notice to Counsel" attached to this Order.

IT IS ORDERED, effective this date, that the Notice to Counsel shall be distributed as follows:

(1) to counsel for all parties in cases currently pending before the Court of Federal Claims, and

(2) to counsel for all parties in cases filed after the date of this Order.

November 8, 1996

By the Court
LOREN A. SMITH
Chief Judge

NOTICE TO COUNSEL

Alternative Dispute Resolution Techniques

In response to rising litigation costs and the delay often inherent in the traditional judicial resolution of complex legal claims, the United States Court of Federal Claims is implementing three methods of alternative dispute resolution (ADR) for use in appropriate cases. The Court of Federal Claims encourages all reasonable avenues toward settlement of disputes, including the usual dialogue between the trial judge and counsel. Implementation by the court of these ADR methods does not preclude use by the parties of other ADR techniques which do not require court involvement.

The ADR methods outlined below are both voluntary and flexible, and should be employed early in the litigation process in order to minimize discovery. Both parties must agree to use the procedures. Because these procedures are designed to promote settlement and involve the application of judicial resources, however, the court views their use as most appropriate where the parties anticipate a lengthy discovery period followed by a protracted trial. These requirements typically will be met where the amount in controversy is greater than \$100,000 and trial is expected to last more than one week.

When both counsel agree and wish to employ one of the ADR methods offered, they should notify the presiding judge of their intent as early as possible in the proceedings, or concurrently with submission of the Joint Preliminary Status Report required by Appendix G. The presiding judge will consider counsels' request and make the final decision whether to refer the case to ADR. If ADR is considered appropriate, the presiding judge will refer the case to the ADR Administrator 1) for assignment to a Court of Federal Claims judge who

will act as a settlement judge or preside over a mini-trial, or 2) for the appointment of a third-party neutral. If the case is referred to an ADR judge, that judge will exercise ultimate authority over the form and function of each method within the general guidelines adopted by the court. Accordingly, the parties will promptly meet with the assigned ADR judge to establish a schedule and procedures for the technique chosen. Should none of these techniques produce a satisfactory settlement, the case will be returned to the presiding judge's docket. Except as allowed by Federal Rule of Evidence 408, all representations made in the course of the selected ADR proceeding are confidential and may not be used for any reason in subsequent litigation.

I. General Provisions

A. Administrator. There will be an ADR Administrator who will assign cases as well as facilitate the program. The Administrator will also keep statistics for each judge who volunteers to participate in the program on the number of pending ADR cases and the disposition of ADR cases.

B. Training. All judges, as well as third-party neutrals shall be properly trained in the handling of ADR matters.

C. Consent. Consent of all parties is required in order for a case to be referred to ADR.

D. Judicial Involvement. The Administrator will assign ADR cases only to judges who have agreed to participate in the program.

II. Settlement Judge

In many circumstances, settlement can be fostered by a frank, in-depth discussion of the strengths and weaknesses of each party's case before a neutral advisor. Although this alternative can be used successfully at any stage of the litigation, it is suggested that it be adopted as early in the process as feasible to eliminate unnecessary cost and delay. Moreover, the agenda for these meetings with the settlement judge should remain flexible to accommodate the requirements of the individual cases. Through this ADR method, the parties will gain the benefit of a judicial assessment of their settlement positions, without jeopardizing their ability to obtain an "impartial" resolution of their case by the presiding judge should settlement not be reached.

III. Mini-Trial

The mini-trial is a highly flexible, expedited procedure where each party presents an abbreviated version of its case to a neutral advisor (a judge other than the presiding judge), who then assists the parties in negotiating a settlement. Because the mini-trial similarly is designed to eliminate unnecessary cost and delay, it should be adopted before extensive discovery commences. This ADR technique, however, should be employed only in those cases which involve factual disputes and are governed by well-established principles of law. Cases which present novel issues of law or where witness credibility is a major factor are handled more effectively by traditional judicial methods.

Although the procedures for each mini-trial should be designed to meet the needs of the individual case, the following guidelines are appropriate in most circumstances:

(a) *Time Frame*—The mini-trial should be governed by strict time limitations. The entire process, including discovery and trial, should conclude within one to three months.

(b) *Participants*—Each party should be represented by an individual with authority to make a final recommendation as to settlement and may be represented by counsel. The participation of senior management/agency officials (principals) with first-hand knowledge of the underlying dispute is highly recommended.

(c) *Discovery*—Any discovery conducted should be expedited, limited in scope where feasible, and scheduled to conclude at least two weeks prior to the mini-trial. Counsel bear a special responsibility to conduct discovery expeditiously and voluntarily in a mini-trial situation. Any discovery disputes which the parties cannot

resolve will be handled by the mini-trial judge. Discovery taken for the purpose of the mini-trial may be used in further judicial proceedings if settlement is not achieved.

(d) *Pre-Hearing Matters*—At the close of discovery, the parties should meet with the mini-trial judge for a pre-hearing conference. The parties normally should provide for exchange of brief written submissions summarizing the parties' positions and narrowing the issues in advance of the hearing. The submission should include a discussion of both entitlement and damages. Contemporaneously with the exchange of the written submissions, the parties should finalize any stipulations needed for the hearing and, where applicable, exchange witness lists and exhibits. The parties also should establish final procedures for the hearing.

(e) *Hearing*—The hearing itself is informal and should generally not exceed one day. The parties may structure their case to include examination of witnesses, the use of demonstrative evidence, and oral argument by counsel. Because the rules of evidence and procedure will not apply, witnesses will be permitted to relate their testimony in the narrative, objections will not be permitted, and a transcript of the hearing will not be made. The role of the mini-trial judge similarly is flexible and may provide for active questioning of witnesses. Each party should present a closing statement to facilitate the post-hearing settlement discussions.

(f) *Post-Hearing Settlement Discussions*—At the conclusion of the informal hearing, the principals and/or counsel meet to discuss resolution of the dispute. The mini-trial judge may play an active role in the discussions, or be available to render an advisory opinion concerning the merits of the claim.

IV. Third-party Neutrals (eighteen-month pilot program)

After entry of an order referring a case to ADR, the parties may request the ADR Administrator to appoint a third-party neutral from a limited panel of experienced attorneys trained to handle ADR. The third-party neutral shall have no conflict of interest and shall either have experience in alternative dispute resolution or shall have expertise in the subject matter of the lawsuit. The third-party neutral will meet with the parties and attempt to resolve the dispute.

At the conclusion of an eighteen-month trial period, this program will be reviewed and modified accordingly.

V. Comment

The court welcomes further input from the bar and general public on this *Notice to Counsel and Amended General Order No. 13*. This input will be considered, along with the initial practical experience under the Order in a continuing effort to further the effective administration of justice.

TITLE IV. PARTIES

Rule 17. Parties Plaintiff and Defendant; Capacity

(a) **Real Party in Interest.** Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same ef-

fect as if the action had been commenced in the name of the real party in interest.

(b) Capacity To Sue or Be Sued. The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of the individual's domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. A partnership or other unincorporated association which has no capacity by law of its state may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States. The capacity to sue or be sued of a representative appointed by a judicial tribunal shall be determined by the order of the judicial tribunal appointing or authorizing the representative and the law of the state or other authority under which the judicial tribunal exercises jurisdiction.

(c) Infants or Incompetent Persons. Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative the infant or incompetent may sue by the infant's or incompetent's next friend or by a guardian ad litem.

Rule 18. Joinder of Claims and Remedies

(a) Joinder of Claims. A party asserting a claim to relief as an original claim, counterclaim, or third-party claim, may join, either as independent or as alternate claims, as many claims as the party has against an opposing party.

(b) Joinder of Remedies. Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties.

Rule 19. Joinder of Persons Needed for Just Adjudication

(a) Persons To Be Joined If Feasible. Subject to, and in the manner provided for by Rule 14, a person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if: (1) in the person's absence complete relief cannot be accorded among those already parties; or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the person's claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made an involuntary plaintiff.

(b) Determination by Court Whenever Joinder Not Feasible. If a person as described in subdivision (a)(1)–(2) of this rule cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: (1) to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measure, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)–(2) of this rule who are not joined, and the reasons why they are not joined.

(d) Exception of Class Actions. This rule is subject to provisions of Rule 23.

Rule 20. Permissive Joinder of Parties

(a) Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. A plaintiff need not be interested in obtaining all the relief demanded. Where two or more plaintiffs demand separate judgments, the complaint shall state the judgment demanded by each plaintiff, shall list the plaintiffs alphabetically in the caption on the basis of surnames where individuals are involved, and shall assign to each plaintiff demanding a separate judgment a number to be used as a distinguishing subnumeral, *e.g.*, (1), (2), etc., to the docket number of the case. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief.

(1) To add additional plaintiff(s) to a pending action, counsel for plaintiff(s) shall file a Notice of Additional Plaintiff(s), listing the plaintiff(s). The notice shall utilize the caption of the original complaint. The plaintiff(s) to be added shall be listed alphabetically in the notice and assigned a subnumeral that continues the subnumerals of the complaint or preceding amended complaint, so that the subnumerals are consecutive throughout.

(2) The written consent of these individuals added to any pending action brought under the Fair Labor Standards Act shall accompany the notice.

(b) Separate Trials. The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense, and may order separate trials or make other orders to prevent delay or prejudice.

REFERENCES IN TEXT

The Fair Labor Standards Act, referred to in subd. (a)(2), probably means the Fair Labor Standards Act of

1938, act June 25, 1938, ch. 676, 52 Stat. 1060, as amended, which is classified principally to chapter 8 (§201 et seq.) of Title 29, Labor. For complete classification of this Act to the Code, see section 201 of Title 29 and Tables.

Rule 21. Misjoinder and Non-Joinder of Parties

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately. To add plaintiffs, see Rule 20(a)(1)–(2).

Rule 23. Class Actions

A motion to certify a class action shall be filed with the complaint and comply with Rule 3(c), with service to be made as provided in Rule 4. The court shall determine in each case whether a class action may be maintained and under what terms and conditions.

Rule 24. Intervention

(a) **Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) **Permissive Intervention.** Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) **Procedure.** A person desiring to intervene shall file with the court a motion to intervene. The motion shall: (1) state the grounds therefor; (2) be accompanied by a pleading setting forth the claim or defense for which intervention is sought; and (3) be served in accordance with Rule 5. The same procedure shall be followed when a statute of the United States gives a right to intervene.

Rule 25. Substitution of Parties

(a) **Death.** (1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party, and shall be served as provided in Rule 5. Unless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.

(2) In the event of the death of one or more of the plaintiffs in an action in which the right

sought to be enforced survives only to the surviving plaintiffs, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

(b) **Incompetency.** If a party becomes incompetent, the court upon motion served as provided in subdivision (a) of this rule may allow the action to be continued by or against the party's representative.

(c) **Transfer of Interest.** In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule.

(d) **Public Officers; Death or Separation from Office.** [Not used.]

TITLE V. DEPOSITIONS AND DISCOVERY

Rule 26. General Provisions Governing Discovery

(a) **Discovery Methods.** 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, for inspection and other purposes; physical and mental examinations; requests for admission; and calls.

(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 ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The frequency or extent of use of the discovery methods set forth in subdivision (a) of this 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, taking into account the needs of the case, the amount in controversy, the limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c) of this rule.

(2) *Trial Preparation: Materials.* Subject to the provisions of subdivision (b)(3) of this rule, a party may obtain discovery of documents and

tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including that other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(3) 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)(3)(C) of this rule, concerning fees and expenses as the court may deem appropriate.

(B) A party may 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 sub-

divisions (b)(3)(A)(ii) and (b)(3)(B) of this rule; and **(ii)** with respect to discovery obtained under subdivision (b)(3)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subdivision (b)(3)(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.

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, see Appendix G ¶8, and for good cause shown, the court 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 discovery not be had; **(2)** that the 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 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 or be disclosed only in a designated way; **(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 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 of Discovery. 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 Responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the party's response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement the party's 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 expert witness is expected to testify, and the substance of the expert witness' testimony.

(2) A party is under a duty seasonably to amend a prior response if the party 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.

(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) **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 may do so upon motion by the attorney for any party if the motion includes:

(1) A statement of the issues as they then appear;

(2) A proposed plan and schedule of discovery;

(3) Any limitations proposed to be placed on discovery;

(4) Any other proposed orders with respect to discovery; 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.

Following the discovery conference, the court may 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 Discovery Requests, Responses, and Objections.** Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by the attorney of record in such attorney's individual name, whose address shall be stated. A 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 attorney or party has read the request, response, or objection and that to the best of the attorney's or party's knowledge, information, and belief formed after a reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) 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) 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.

If a certification is made in violation of these rules, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the 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.

Rule 27. Discovery To Perfect Complaint or Pending Appeal

(a) **Preliminary Complaint.** (1) *Complaint.* When a plaintiff cannot state a case with the requisite particularity without an examination of documents or things or other information in the possession of the United States, and the plaintiff has been unable upon application to obtain a sufficient examination of such documents or things or other information, such plaintiff may file a complaint stating the plaintiff's claim as far as is in the plaintiff's power. The complaint shall state specifically: (A) that it is filed under this rule; (B) the subject matter of a claim cognizable by this court, with as much particularity as plaintiff can provide; and (C) a description of the documents or things or other information required as definite as plaintiff can provide. Within 30 days after filing such preliminary complaint, plaintiff shall file a motion for leave to take depositions upon oral examination or written questions, to submit requests for admission or written interrogatories, or for production of documents or things or permission to enter upon land or other property for inspection and other purposes, or such combination thereof as may be needed to obtain from the proper department or agency of the United States such documents or things or other information as may be deemed necessary.

(2) *Order.* If plaintiff's motion is allowed, the court by order shall designate the persons whose depositions may be taken, the subject matter of the examination, and whether the depositions shall be taken on oral examination or written interrogatories. The order shall specify the extent of other discovery permitted, and a date for completion of all discovery thereunder.

(3) *Amended Complaint.* Plaintiff shall file an amended complaint within 30 days after the discovery has been completed. Defendant need not respond to a preliminary complaint filed under this rule, but shall answer or otherwise respond to the amended complaint in accordance with these rules for answering an original complaint. If plaintiff's motion is not allowed, or if an amended complaint is not filed after the requested documents or things or other information is furnished or obtained, defendant shall file such responsive pleading or motion within such time as the court may direct.

(b) **Pending Appeal.** If an appeal has been taken from a judgment of the court or before

the taking of an appeal if the time therefor has not expired, on motion the court may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in this court. The party who desires to perpetuate the testimony may file a motion for leave to take the depositions that shows (1) the names and addresses of persons to be examined and the substance of the testimony which the party expects to elicit from each and (2) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken and may make orders of the character provided for by Rules 34 and 35, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions.

(c) **Perpetuation by Action.** [Not used.]

Rule 28. Persons Before Whom Depositions May Be Taken

(a) **Within the United States.** Within the United States or within a territory or insular possession subject to the jurisdiction of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held or before a person appointed by the court. A person so appointed has power to administer oaths and take testimony. The term officer as used in Rules 30, 31 and 32 includes a person appointed by the court or designated by the parties under Rule 29.

(b) **In Foreign Countries.** In a foreign country, depositions may be taken: (1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States; or (2) before a person commissioned by the court and a person so commissioned shall have the power by virtue of the person's commission to administer any necessary oath and take testimony; or (3) pursuant to a letter rogatory. A commission or a letter rogatory 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 that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory 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 may be addressed "To the Appropriate Authority in [here name the country]." Evidence obtained in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

(c) **Disqualification for Interest.** No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action.

(d) **Fees.** The party at whose instance the deposition is taken shall be responsible for the payment of the officer's fees for taking, transcribing, and returning the deposition.

Rule 29. Stipulations Regarding Discovery Procedure

Unless the court orders otherwise, 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 provided by these rules for other methods of discovery, except that stipulations extending the time provided in Rules 33, 34 and 36 for responses to discovery may be made only with the approval of the court.

Rule 30. Depositions upon Oral Examination

(a) **When Depositions May Be Taken.** After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. 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 complaint upon the United States. Leave is not required (1) if the United States 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.

(b) **Notice of Examination: General Requirements; Special Notice; Non-Stenographic 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 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 the party shows that when the party was served with notice under subdivision (b)(2) of this rule 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.

(3) The court may for cause shown enlarge or shorten the time for taking the deposition.

(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 or electronic means. The stipulation or order shall designate the person before whom the deposition shall be taken and the manner of recording, preserving and filing the deposition and may include other provisions to ensure that the recorded testimony will be accurate and trustworthy. A party may arrange to have a 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) of this rule, and the certification of the officer required by subdivision (f) of this rule shall be set forth in a writing to accompany a deposition recorded by non-stenographic means.

(5) The notice to a party deponent may be accompanied by a request made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 34 shall apply to the request.

(6) A party may in the party's notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which each person will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. Subdivision (b)(6) of this rule does not preclude taking a deposition by any other procedure authorized in these rules.

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

(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. The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under the officer's direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other

means ordered in accordance with subdivision (b)(4) 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 the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be 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 such party shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

(d) Motion To Terminate or Limit Examination. At any time during the taking of the 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 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 it is impractical to make such a motion personally or in writing, the moving party or deponent may do so by telephone, provided the opposing party has a fair opportunity to participate. If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court. 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 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 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.

(f) Certification and Filing by Officer; Exhibits; Copies; Notice of Completion. (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. The officer shall securely seal the deposition in an envelope endorsed with the title of the action and marked "Deposition of [here

insert name of witness]” and shall have it delivered or mailed by registered or certified mail to the party taking the deposition. Unless otherwise ordered by the court, the deposition shall not be filed with the court.

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 and returned with the deposition, pending final disposition of the case.

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

(3) The party taking the deposition shall serve prompt notice of the receipt of the deposition to all other parties.

(g) Failure To Attend or To Serve Subpoena; Expenses. (1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by such other party and such other party’s attorney in attending, including reasonable attorneys’ fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon the witness and the witness because of such failure does not attend, and if another party attends in person or by attorney because such party expects the deposition of that witness to be taken, the court may order the party giving the notice to pay such other party the reasonable expenses incurred by such other party and such other party’s attorney in attending, including reasonable attorneys’ fees.

REFERENCES IN TEXT

The Federal Rules of Evidence, referred to in subd. (c), are set out in this Appendix.

Rule 31. Depositions upon Written Questions

(a) Serving Questions; Notice. After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon written questions. 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.

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).

Within 30 days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within 10 days after being served with cross questions, a party may serve redirect questions upon all other parties. Within 10 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.

(b) Officer To Take Responses and Prepare Record. A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 30(c), (e) and (f), to take the testimony of the witness in response to the questions and to prepare, certify, and deliver or mail the deposition, attaching thereto the copy of the notice and the questions received by the officer.

(c) Notice of Receipt. When the deposition is received, the party taking it shall promptly give notice thereof to all other parties.

Rule 32. Use of Depositions in Court Proceedings

(a) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the Federal Rules of Evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions, in addition to Appendix G ¶12b, governing the use of depositions as substantive evidence:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness, or for any other purpose permitted by the Federal Rules of Evidence.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership, or association, or governmental agency which is a party may be used by an adverse party for any purpose.

(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 and the judge after timely request has refused to authorize a subpoena to the witness or to set a trial in closer proximity to the place of residence of the witness, 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, ill-

ness, 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.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require the offeror to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

Substitution of parties pursuant to Rule 25 does not affect the right to use depositions previously taken; and, when an action has been brought in any court of the United States or of any State and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor. A deposition previously taken may also be used as permitted by the Federal Rules of Evidence.

(b) Objections to Admissibility. Subject to the provisions of Rules 28(b) and 32(d)(3), objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(c) Effect of Taking or Using Depositions. [Not used.]

(d) Effect of Errors and Irregularities in Depositions. **(1) As to Notice.** All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(2) As to Disqualification of Officer. Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) As to Taking of Deposition. **(A)** Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(C) Objections to the form of written questions submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within 5

days after service of the last questions authorized.

(4) As to Completion and Return of Deposition. Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, delivered or mailed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

REFERENCES IN TEXT

The Federal Rules of Evidence, referred to in subd. (a), are set out in this Appendix.

Rule 33. Interrogatories to Parties

(a) Availability; Procedures for Use. Any party may serve upon any other party written interrogatories 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. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon the United States after service of the complaint. The form of interrogatories is governed by Appendix G ¶7.

Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. 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 the defendant may serve answers or objections within 45 days after service of the complaint upon the defendant. The court may allow a shorter or longer time. 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) Scope; Use at Trial. Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the extent permitted by the Federal 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 pretrial conference or other later time.

(c) Option To Produce Business Records. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit, or inspection of such business records, including a compilation, abstract, or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party

-serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit, or inspect such records and to make copies, compilations, abstracts, or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

REFERENCES IN TEXT

The Federal Rules of Evidence, referred to in subd. (b), are set out in this Appendix.

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

(a) **Scope.** Any party may serve on any other party a request: (1) to produce and permit the party making the request, or someone acting on such party's behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody, or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

(b) **Procedure.** The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon the United States after service of the complaint. The request shall set forth 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.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that the United States may serve a response within 45 days after service of the complaint. The court may allow a shorter or longer time. 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 objection shall be stated. If objection is made to part of an item or category, the part shall be specified. 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.

(c) **Persons Not Parties.** A person not a party to the action may be compelled to produce documents and things or to submit to an inspection as provided in Rule 45.

(d) **Calls.** (1) *Issuance.* Pursuant to 28 U.S.C. §2507(a), the court at any time (A) may call upon any department or agency of the United States for any information or papers it deems necessary to be filed with the clerk within a specified time, or

(B) in any case appropriate for a computation by a department or agency of the United States, the court, upon the motion of a party or on its own motion, may issue a call for the computation. Within 30 days after the clerk has served notice of the filing of the computation, each party shall file with the clerk its acceptance or rejection of the computation. A rejection shall be accompanied by a statement of the reasons therefor.

(2) *Refusal of Compliance.* The head of any department or agency of the United States may refuse to comply with such a call when, in the head of the department's or agency's opinion, compliance will be injurious to the public interest. Such refusal may be made known by a communication signed by the head of the department or agency and filed with the clerk.

Rule 35. Physical and Mental Examination of Persons

(a) **Order for Examination.** When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) **Report of Examiner.** (1) If requested by the party against whom an order is made under subdivision (a) of this rule or the person examined, the party causing the examination to be made shall deliver to the requesting party a copy of a detailed written report of the examiner setting out the examiner's findings, including results of all tests made, diagnoses, and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that the party is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if an examiner fails or refuses to make a report the court may exclude the examiner's testimony if offered at trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposi-

tion of the examiner, the party examined waives any privilege the party may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine the party in respect of the same mental or physical condition.

(3) Subdivision (b) of this rule applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. Subdivision (b) of this rule does not preclude discovery of a report of an examiner or the taking of a deposition of the examiner in accordance with the provisions of any other rule.

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) set forth in the request that relate to statements or opinions of fact or of the application of law to facts 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 the United States after service of the complaint. The form of requests for admission and answers is governed by Appendix G ¶7.

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, 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, the defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the complaint. 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 the party's 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 answering party states that the answering party has made reasonable inquiry and that the information known or readily obtainable by the answering party is insufficient to enable the answering 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(d), deny the matter or set forth reasons why the party cannot admit or deny it.

The party who has requested the admissions may move to determine the sufficiency of the

answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pretrial conference or at a designated time prior to trial. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(b) **Effect of Admission.** Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice the party in maintaining the party's action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission by the party for any other purpose nor may it be used against the party in any other proceeding.

Rule 37. Failure To Make or Cooperate in Discovery; Sanctions

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

(1) *Appropriate Court.* [Not Used.]

(2) *Motion.* If a deponent fails to answer a question propounded or submitted under Rule 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. See Appendix G ¶8. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before the proponent applies 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 Answer.* For purposes of subdivision (a) of this rule, an evasive or incomplete answer is to be treated as a failure to answer.

(4) *Award of Expenses of Motion.* If the motion is granted, the court shall, after opportunity for hearing, 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, including attorneys' fees, unless the court finds that the

opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising 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 attorneys' fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure To Comply with Order. (1) Sanctions Against a Deponent. If a deponent fails to be sworn or to answer a question after being directed to do so by the court, the failure may be considered a contempt of court.

(2) Sanctions Against a Party. 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 to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court may make such orders in regard to the failure as are just and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting such party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings unless the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring the party to produce another for examination, such orders as are listed in paragraphs (A), (B) and (C) of subdivision (b) of this rule, unless the party failing to comply shows that the party is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising such 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.

(c) Expenses on Failure To Admit. 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 admis-

sions thereafter proves the genuineness of the document or the truth of the matter, such party may apply to the court for an order requiring the other party to pay such party the reasonable expenses incurred in making that proof, including reasonable attorneys' fees. The court shall make the order unless it finds that **(1)** the request was held objectionable pursuant to Rule 36(a), or **(2)** the admission sought was of no substantial importance, or **(3)** the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or **(4)** 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 on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B) and (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising such party or both to pay the reasonable expenses, including attorneys' 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 for a protective order as provided by Rule 26(c).

(e) Subpoena of Person in Foreign Country. [Not used.]

(f) Expenses Against United States. [Not used.]

(g) Failure To Participate in the Framing of a Discovery Plan. If a party or a party's attorney fails to participate in good faith in the framing of a discovery plan by agreement as is required by Rule 26(f), the court may, after opportunity for hearing, require such party or such party's attorney to pay to any other party the reasonable expenses, including attorneys' fees, caused by the failure.

TITLE VI. TRIALS

Rule 39. Trial

(a) By the Court. All contested issues of fact and law shall be tried at a location selected by the court.

(b) Reporting Arrangements; Return of Transcript. (1) Record of Proceedings. The court will by contract furnish a reporter to take down the trial proceedings and transcribe the same in any trial held in any State of the United States or the District of Columbia. Unless otherwise ordered by the court for good cause shown, the court will not furnish a reporter at any trial held at any other place.

(2) *Reporter; Control.* The reporter shall be under the jurisdiction and control of the judge.

(3) *Return of Transcript and Exhibits.* Unless otherwise ordered by the judge, the reporter shall file the transcript of trial proceedings, including the exhibits admitted in evidence or designated to accompany the transcript, with the clerk within 30 days after the conclusion of the trial session at which such proceedings were had. The filing may be accomplished by personal delivery of the transcript and exhibits to the clerk's office or by enclosing them in a packet and transmitting them to the Clerk, United States Court of Federal Claims, 717 Madison Place, N.W., Washington, D.C. 20005, in sufficient time for the transcript and exhibits to be filed within the prescribed period. The obligation for the filing of the transcript and exhibits within the prescribed period rests upon the reporter.

(As amended Dec. 4, 1992.)

Rule 40. Assignment of Cases for Trial

Assignment of cases for trial is the responsibility of the judge to whom the case is assigned, and may be made (1) without request of the parties or (2) upon request of a party and notice to the other parties or (3) in such other manner as the court deems expedient. All trials shall be scheduled by the judge by order filed with the clerk. Precedence shall be given to actions entitled thereto by any statute of the United States.

Rule 41. Dismissal of Actions

(a) **Voluntary Dismissal; Effect Thereof.** (1) *By Plaintiff; by Stipulation.* Subject to the provisions of an order under Rule 23 and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (A) by filing a notice of dismissal at any time before service of the answer or a response, whichever first occurs, or (B) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in this court or in any court of the United States an action based on or including the same claim.

(2) *By Order of Court.* Except as provided in paragraph (1) of subdivision (a) of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by the United States prior to the service upon it of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) **Involuntary Dismissal; Effect Thereof.** For failure of the plaintiff to prosecute or to comply with these rules or any order of court, the court may dismiss on its own motion or defendant may move for dismissal of an action or any

claim. Unless the court in its order for dismissal otherwise specifies, a dismissal under subdivision (b) of this rule and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

(c) **Dismissal of Counterclaim or Third-Party Claim.** The provisions of this rule apply to the dismissal of any counterclaim or third-party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (1) of subdivision (a) of this rule shall be made before a response is served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) **Costs of Previously Dismissed Action.** If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

Rule 42. Consolidation; Separate Trials

(a) **Consolidation.** When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(b) **Separate Trials.** The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, counterclaims, third-party claims, or issues.

(c) **Separate Determination of Liability.** Upon stipulation of the parties, approved by the court, or upon order of the court, a trial may be limited to the issues of law and fact relating to the right of a party to recover, reserving the determination of the amount of recovery, if any, for further proceedings. In any case, whether or not a stipulation or order has been made under subdivision (c) of this rule, the court, upon determining that a party is entitled to recover, may reserve determination of the amount of the recovery for further proceedings. Any motion for reconsideration shall be filed not later than 10 days after a separate determination of liability.

Rule 43. Taking of Testimony

(a) **Form.** In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an Act of Congress or by these rules or the Federal Rules of Evidence.

(b) **Affirmation in Lieu of Oath.** Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.

(c) **Evidence on Motions.** When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or deposition.

(d) Interpreters. The court may appoint an interpreter of its own selection and may fix the interpreter's reasonable compensation. The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct and may be taxed ultimately as costs, in the discretion of the court.

REFERENCES IN TEXT

The Federal Rules of Evidence, referred to in subd. (a), are set out in this Appendix.

Rule 44. Proof of Official Record

(a) Authentication. **(1) Domestic.** An official record kept within the United States, or any State, district, or commonwealth, or within a territory subject to the administrative or judicial jurisdiction of the United States, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by such officer's deputy, and accompanied by a certificate that such officer has the custody. The certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of such officer's office.

(2) Foreign. A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced as provided in any treaty or federal statute or by an official publication thereof or a copy thereof, attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the attesting person or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (A) admit an attested copy without final certification or (B) permit the foreign official record to be evidenced by an attested summary with or without a final certification. The final certification is unnecessary if the record and the attestation are certified as provided in a treaty or convention to which the United States and the foreign country in which the official record is located are parties.

(b) Lack of Record. A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement, authenticated as provided in subdivision (a)(1) of this rule in the case of a domestic record or complying with the requirements of subdivision (a)(2) of this rule for a summary in the case of a foreign record, is ad-

missible as evidence that the records contain no such record or entry.

(c) Other Proof. This rule does not prevent the proof of official records or of entry or lack of entry therein by any other method authorized by law.

(d) Proof of Rules and Regulations. In a trial, or in making or opposing a motion, a party relying on a rule or regulation shall submit the full authentic text thereof for inclusion in the record, unless it is published in the Federal Register or in the Code of Federal Regulations. A rule or regulation so furnished need not be certified. The court may require the appropriate party to furnish the full authentic texts of additional rules or regulations not published in the Federal Register or in the Code of Federal Regulations.

Rule 44.1. Determination of Foreign Law

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

REFERENCES IN TEXT

The Federal Rules of Evidence, referred to in text, are set out in this Appendix.

Rule 45. Subpoena

(a) Form; Issuance.

(1) Every subpoena shall

(A) state the name of the court; and

(B) state the title of the action and its docket number; and

(C) command each person to whom it is directed to attend and give testimony or to produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody and control of that person, or to permit inspection of premises, at a time and place therein specified; and

(D) set forth the test of subdivision (c) and (d) of this rule.

A command to produce evidence or to permit inspection may be joined with a command to appear at trial or hearing or at depositions, or may be issued separately. See Appendix L for subpoena forms.

(2) The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney as officer of the court may also issue and sign a subpoena on behalf of the Court of Federal Claims. See Appendix L.

(b) Service.

(1) A subpoena may be served by any person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and, if the person's attendance is commanded, by tendering to that person the fees for one day's attendance and the mileage allowed by law. See 28 U.S.C. §1821.

When the subpoena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered. Prior notice of any commanded production of documents and things or inspection of premises before trial shall be served on each party in the manner prescribed by Rule 5(b).

(2) Subject to the provisions of clause (ii) of subparagraph (c)(3)(A) of this rule, a subpoena may be served at any place that is within 100 miles of the place of the deposition, hearing, trial, production, or inspection specified in the subpoena; but the court upon proper application and good cause shown may authorize the service of a subpoena at any other place. A subpoena directed to a witness in a foreign country who is a national or resident of the United States shall issue under the circumstances and in the manner and be served as provided in Title 28 U.S.C. § 1783.

(3) Proof of service when necessary shall be made by filing with the clerk a statement of the date and manner of service and of the names of the persons served, certified by the person who made the service.

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance; or

(ii) requires disclosure of privileged or other protected matter and no exception or waiver applies; or

(iii) subjects a person to undue burden.

(B) If a subpoena

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

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute an resulting from the expert's study made not at the request of any party,

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party on whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents 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 demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(e) **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. An adequate cause for failure to obey exists when a subpoena purports to require a nonparty to attend or produce at a place not within the limits provided by clause (ii) of subparagraph (c)(3)(A).

(As amended Dec. 4, 1992.)

Rule 46. Exceptions Unnecessary

Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which the party desires the court to take or the party's objection to the action of the court and the party's grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice the party.

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

(a) **Effect.** In all actions tried upon the facts, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or

documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in subdivision (c) of this rule.

(b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment, the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. The question of the sufficiency of the evidence to support the findings may be raised whether or not the party raising the question has made in the court an objection to such findings or has made a motion to amend them or a motion for judgment.

(c) Judgment on Partial Findings. If during a trial a party has been fully heard 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 claim, counterclaim, cross-claim or third-party claim 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.

Rule 52.1. Unpublished Opinions.

(a) Citation. Unpublished opinions and orders of the court are binding on the parties, but have no precedential effect. Opinions and orders designated as unpublished shall not be employed as authority by this court and may not be cited by counsel as authority, except in support of a claim of *res judicata*, collateral estoppel, or law of the case.

(b) Request to Publish. Any person deeming an unpublished opinion or order to be of precedential value may file within 90 days of its issuance a Request for Publication.

Rule 53. Masters

(a) Appointment and Compensation. The court in which any action is pending may appoint a special master therein, subject to the approval of the chief judge. 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. 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. 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.

(c) Powers. The order of reference to the master may specify or limit the master’s powers and may direct the master to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master’s report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before the master and to do all acts and take all measures necessary or proper for the efficient performance of the master’s duties under the order. The master may require the production before the master of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. The master may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in the Federal Rules of Evidence for a court sitting without a jury.

(d) Proceedings. (1) Meetings. When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 20 days after the date of the order of reference and shall notify the parties or their attorneys. It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to the parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make the master’s report. If a party fails to appear at the time and place appointed, the master may proceed *ex parte* or, in the master’s discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

(2) Witnesses. The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas provided in Rule 45. If without adequate excuse a witness fails to appear or give evidence, the witness may be subjected to the consequences, penalties, and remedies provided in Rules 37 and 45.

(3) Statement of Accounts. When matters of accounting are in issue before the master, the master may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the master may require a different form of state-

ment to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as the master directs.

(e) Report. (1) Contents and Filing. The master shall prepare a report upon the matters submitted to the master by the order of reference and, if required to make findings of fact and conclusions of law, the master shall set them forth in the report. The master shall file the report with the clerk and serve on all parties notice of the filing unless otherwise directed by the order of reference, and shall file with it a transcript of the proceedings and of the evidence and the original exhibits. Unless otherwise directed by the order of reference, the master shall serve a copy of the report on each party.

(2) Acceptance of Report. The court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report, any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion. The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

(3) Stipulation as to Findings. The effect of a master's report is the same whether or not the parties have consented to the reference; but when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

(4) Draft Report. Before filing the report, a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

REFERENCES IN TEXT

The Federal Rules of Evidence, referred to in subd. (c), are set out in this Appendix.

TITLE VII. JUDGMENT

Rule 54. Judgments; Costs

(a) Definition; Form. Judgment as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, or the record of prior proceedings.

(b) Judgment upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adju-

dicating all the claims and the rights and liabilities of all parties.

(c) Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings.

(d) Costs. Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as a matter of course to the prevailing party in any action not dismissed for lack of subject matter jurisdiction, unless the court otherwise directs; but costs against the United States shall be imposed only to the extent permitted by law. See Rule 77.4.

Rule 55. Default

(a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter such party's default.

(b) Judgment. Judgment by default may be entered as follows:

(1) By the Clerk. When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if the defendant has been defaulted for failure to appear and if the defendant is not an infant or incompetent person.

(2) By the Court. In all other cases, the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, such party or, if appearing by representative, such party's representative, shall be served with written notice of the application for judgment at least 3 days prior to the hearing, if any, on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper.

(c) Setting Aside Default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

(d) Plaintiffs; Counterclaimants. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

(e) **Judgment Against the United States.** No judgment by default shall be entered against the United States unless the claimant establishes a claim or right to relief by evidence satisfactory to the court.

Rule 56. Summary Judgment

(a) **For Claimant.** A party seeking to recover upon a claim or counterclaim, or to obtain a declaratory judgment may, at any time after the expiration of 60 days from the commencement of the action in this court or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in such party's favor upon all or any part thereof.

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

(c) **Motion and Proceedings Thereon.** 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.

(d) **Procedures.** The following procedures shall be followed with respect to motions for summary judgment other than in actions seeking review of a decision on the basis of an administrative record:

(1) The moving or cross-moving party shall file, together with its motion, a separate document entitled Proposed Findings of Uncontroverted Fact. This document shall contain concise, separately numbered paragraphs setting forth all of the material facts upon which the party bases its motion and as to which the party believes there is no genuine dispute. Each paragraph shall contain citations to the opposing party's pleadings or to documentary evidence, such as affidavits or exhibits, filed with the motion or otherwise part of the record in the case.

(2) The opposing party shall file, together with its opposition or cross-motion, a separate document entitled Statement of Genuine Issues. This document shall respond by reference to specific paragraph numbers to those proposed findings of uncontroverted fact as to which it claims there is a genuine dispute. The party shall state the precise nature of its disagreement and give its version of the events, supported by record citations. The opposing party may also file proposed findings of uncontroverted fact as to any relevant matters not covered by the moving party's statement.

(3) The parties may dispense with the documents called for in subdivision (d)(1)–(2) of this rule if they file, no later than the time of the initial motion, a comprehensive stipulation of all of the material facts upon which they intend to rely.

In determining any motion for summary judgment, the court will, absent persuasive reason

to the contrary, deem the material facts claimed and adequately supported by the moving party to be established, except to the extent that such material facts are included in the Statement of Genuine Issues and are controverted by affidavit or other written or oral evidence.

(e) **Case Not Fully Adjudicated on Motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(f) **Form of Affidavits; Further Testimony; Defense Required.** See Appendix H ¶1. 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 such party's pleading, but such 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 such party does not so respond, summary judgment, if appropriate, shall be entered against such party.

(g) **When Affidavits are Unavailable.** Should it appear from the affidavits of a party opposing the motion that such party cannot for reasons stated present by affidavit facts essential to justify such party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

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

Rule 56.1. Review of Decision on the Basis of Administrative Record.

(a) **Standards.** Rule 56(a)–(b) apply.

(b) Procedures.

(1) The moving or cross-moving party shall file, together with its motion, a separate document entitled Statement of Facts setting forth the facts necessary to resolve the issues presented on review. This document shall contain concise, separately numbered paragraphs setting forth all of the facts upon which the party bases its motion and which are supported by the record. Each paragraph shall contain citations to the opposing party's pleadings or to documentary evidence in the record.

(2) The opposing party shall file, together with its cross-motion, a separate document entitled Counter-Statement of Facts. This document shall respond, by reference to specific paragraph numbers, to those statements of facts with which the party disagrees. The party shall state the precise nature of its disagreement and give its version of the events supported by record citations. The opposing party may also file Proposed Additional Facts as to any relevant matters not covered by the moving party's statement to which the movant shall respond.

Rule 57. Declaratory Judgments

The procedure for obtaining a declaratory judgment pursuant to 28 U.S.C. §§ 1491(a) and 1507 shall be in accordance with these rules. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

Rule 58. Entry of Judgment

Subject to the provisions of Rule 54(b): (1) 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, 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. Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course.

Rule 59. New Trials; Rehearings; Amendment of Judgments; Reconsideration

(a) **Grounds.** (1) A new trial or rehearing or reconsideration may be granted to all or any of the parties and on all or part of the issues, for any of the reasons established by the rules of common law or equity applicable as between private parties in the courts of the United States. On a motion under this rule, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(2) The court, at any time while a suit is pending before it, or after proceedings for review have been instituted, or within 2 years after the final disposition of the suit, may grant the United States a new trial and stay the payment of any judgment upon satisfactory evidence, cumulative or otherwise, that any fraud, wrong, or injustice has been done the United States.

(b) **Time for Motion and Response.** Except as provided in subdivision (a)(2) of this rule, a motion filed pursuant to this rule shall be filed not later than 10 days after the entry of the judgment. No response to such a motion may be filed. However, the court will not rule in favor of such a motion without first requesting by order a response to it.

(c) **On Initiative of Court.** Not later than 10 days after entry of judgment the court of its own initiative may order a new trial or rehearing for any reason for which it might have granted a new trial or rehearing on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial or rehearing, timely filed, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(d) **Motion To Alter or Amend a Judgment.** A motion to alter or amend the judgment shall be filed not later than 10 days after entry of the judgment.

Rule 60. Relief from Judgment or Order

(a) **Clerical Mistakes.** Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc.** On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud, whether denominated intrinsic or extrinsic, misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under subdivision (b) of this rule does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action or

relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Rule 60.1. Remand; Extension or Termination of Stay of Proceedings on Remand; Disposition of Case

(a) **Remand.** (1) *Issuance of Remand Order.* At the request of a party or on its own motion, the court may in any case within its jurisdiction by order remand appropriate matters to any administrative or executive body or official with such direction as may be deemed proper and just.

(2) *Content of Remand Order.* An order of remand shall (A) delineate the area of further consideration or action deemed warranted on the remand, and (B) fix the extent to which, and the duration of the period, not to exceed 6 months, during which court proceedings shall be stayed.

(3) *Service of Order.* A certified copy of any order issued pursuant to this rule shall be served by the clerk on the administrative or executive body or official to whom the order is directed. A copy of the order shall be served on each party in conformity with Rule 5.

(4) *Transmittal of Administrative Record.* Following service of the order as provided for in this rule, the clerk shall transmit the administrative record, if any, to the Department of Justice for return to the administrative or executive body or official to whom the order of remand is directed.

(5) *Advice of Administrative Action.* In every case in which an order of remand is entered pursuant to this rule, the attorney of record for the party so designated in the order of remand shall report to the court the status of proceedings on remand at intervals of 90 days or less, beginning with the date of the order.

(b) **Extension or Termination of Stay of Proceedings on Remand; Disposition of Case.** (1) *Extension.* If the administrative or executive body or official has not, during the period of stay provided for in an order of remand pursuant to subdivision (a) of this rule, rendered a decision on the matter remanded, the party to whom opportunity was afforded to obtain further administrative consideration shall, by motion pursuant to Rule 6, request an extension of the stay of proceedings, or, by motion pursuant to Rule 7, request the initiation of proceedings toward otherwise disposing of the case.

(2) *Disposition at Administrative Level.* If, during the period of the stay of proceedings as provided for in a remand order, the parties dispose of the case at the administrative level, the plaintiff shall file a motion to dismiss the case with prejudice.

(3) *Decision on Remand.* Upon completion of proceedings pursuant to an order of remand under subdivision (a) of this rule, the administrative or executive body or official to whom the order was directed shall forward to the clerk for filing 4 copies of the decision or final action on remand. A copy of such decision or action shall be served on each party by the clerk.

(4) *Action by the Parties.* Within 30 days after the filing of a decision or final action pursuant

to subdivision (3) of this rule, each party shall file with the clerk a notice, indicating whether or not the decision or final action on remand affords a satisfactory basis for disposition of the claim at the administrative level, or whether further proceedings before the court are deemed required, and, if such proceedings are desired, what those proceedings should be. A copy of such notice shall be served on each adverse party in conformity with Rule 5. Thereafter, the court will enter an order prescribing the procedure to be followed, either specially or pursuant to the rules of the court, or take such other action as may be deemed appropriate.

Rule 61. Harmless Error

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Rule 62. Stay of Proceedings To Enforce a Judgment

(a) **Automatic Stay; Exceptions—Injunctions and Patent Accountings.** Except as stated herein, no proceedings shall be taken for enforcement of a judgment until the expiration of 10 days after its entry. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction, or a judgment or order directing an accounting in an action pursuant to 28 U.S.C. §1498, shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal. The provisions of subdivision (c) of this rule govern the suspending, modifying, restoring, or granting of an injunction during the pendency of an appeal.

(b) **Stay on Motion for New Trial or for Judgment.** In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60, or of a motion for amendment to the findings or for additional findings made pursuant to Rule 52(b).

(c) **Injunction Pending Appeal.** When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

(d) **Stay upon Appeal.** When an appeal is taken, the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allow-

ing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.

(e) Stay in Favor of the United States or Agency Thereof. When an appeal is taken by the United States or an officer or agency thereof or by direction of any department of the Government of the United States and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant.

(f) Power of Appellate Court Not Limited. The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.

(g) Stay of Judgment as to Multiple Claims or Multiple Parties. When a court has ordered a final judgment under the conditions stated in Rule 54(b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

Rule 63. Inability of a Judge to Proceed

(a) Inability. If a trial or hearing has been commenced and the judge is unable to proceed, any other judge may proceed with it upon certifying familiarity with the record and determining that the proceedings in the case may be completed without prejudice to the parties. The successor judge shall at the request of a party recall any witness whose testimony is material and disputed and who is available to testify against without undue burden. The successor judge may also recall any other witness.

(b) Voluntary Disqualification. A judge shall withdraw from a case when required by 28 U.S.C. § 455, and, at any time, may withdraw from a case if otherwise such judge deems such judge disqualified by bias or prejudice.

(c) Affidavit of Bias or Prejudice. (1) Whenever a party to any proceeding makes and files an affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against such party or in favor of any adverse party, such judge, if such judge determines that the affidavit is sufficient and timely, shall proceed no further therein, but another judge shall be assigned to hear such proceeding. The ruling of the judge shall be by order.

(2) The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed as soon as practicable after the facts upon which the affidavit is based become known to the party, but not less than 10 days before a scheduled trial date, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

TITLE VIII. PROVISIONAL AND FINAL REMEDIES AND SPECIAL PROCEEDINGS

Rule 65. Injunctions

(a) Preliminary Injunction. (1) Notice. No preliminary injunction shall be issued without notice to the adverse party.

(2) Consolidation of Hearing with Trial on Merits. Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial.

(b) Temporary Restraining Order; Notice; Hearing; Duration. A temporary restraining order may be granted without written or oral notice to the adverse party or such party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or such party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the attorney's claim that notice should not be required. Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if such party does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(c) Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been

wrongfully enjoined or restrained. No such security shall be required of the United States, or of an officer or agency thereof.

The provisions of Rule 65.1 apply to a surety upon a bond or undertaking under this rule.

(d) Form and Scope of Injunction or Restraining Order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

(e) Employer and Employee. These rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee.

(f) Procedures. (1) An application for a temporary restraining order and/or preliminary injunction shall be filed with the clerk along with the complaint, unless the complaint has been filed previously. The application shall be accompanied by the proposed order(s), affidavits, supporting memoranda, and other documents upon which plaintiff intends to rely. The application shall also be accompanied by a statement of plaintiff's attorney that the attorney has hand delivered or caused to be hand delivered 2 copies of each of the foregoing documents to the office of the attorney in charge of the Commercial Litigation Branch, Civil Division, Department of Justice, Room 9030, Todd Building, 550 11th Street, N.W., Washington, D.C. 20530.

(2) If plaintiff's attorney knows the name and address of the apparently successful bidder, plaintiff's attorney shall give the attorney notice by telephone or telegram of the intended filing of the application, shall provide the apparently successful bidder with a copy of its application, served on the same day by hand delivery, facsimile, or overnight carrier, and shall certify in the application whether or not the plaintiff's attorney has done so, or state that the apparently successful bidder is unknown. With respect to notice to interested parties, see Rule 14(a).

(3) The apparently successful bidder may enter an appearance at any hearing on the application for temporary restraining order if it advises the court of its intention to move to intervene pursuant to Rule 24(a)(2) or has moved to intervene before the hearing.

(4) The clerk promptly will inform the parties personally or by telephone of the judge to whom the case has been assigned and the time and place for the hearing, if any, on the application for the restraining order.

(5) Except in an emergency, the court will not consider ex parte applications for a temporary restraining order.

Rule 65.1. Security: Proceedings Against Sureties

(a) Proceedings. Whenever these rules require or permit the giving of security by a party, and security is given in the form of a bond or stipulation or other undertaking with one or more

sureties, each surety submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as the surety's agent upon whom any papers affecting the surety's liability on the bond or undertaking may be served. The surety's liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the sureties if their addresses are known.

(b) Sureties. Acceptable sureties on bonds shall be those bonding companies holding certificates of authority from the Secretary of the Treasury. See the latest U.S. Treasury Dept. Circ. 570. When a court decision provides for the giving of security, the clerk will furnish counsel with the appropriate bond form.

Rule 68. Offer of Judgment

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the defending party's offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof, and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

TITLE IX. APPEALS

Rule 72. Notice of Appeal

Review of a decision of this court shall be obtained by filing an original and 4 copies of a notice of appeal with the clerk within the time and manner prescribed for appeals to United States courts of appeals from United States district courts as provided for in Rule 4(a) of the Federal Rules of Appellate Procedure, together with the fee provided in Rule 77(k)(2) of the Rules of the United States Court of Federal Claims. All parties participating in the appeal shall be named in the caption or their names included in an attachment.

(As amended Dec. 4, 1992.)

REFERENCES IN TEXT

The Federal Rules of Appellate Procedure, referred to in text, are set out in this Appendix.

TITLE X. COURT AND CLERK

Rule 77. Court and Clerk

(a) **Name.** The name of the court, as fixed by 28 U.S.C. §171, is the United States Court of Federal Claims.

(b) **Seal.** The seal of the court shall be the American eagle, similar to that represented in the arms of the United States, engraved on a circular piece of brass or steel, with these words in the margin: "United States Court of Federal Claims" on the upper part and "Reipublicae Civibusque" in the other part of the margin. Writs and process of this court shall be under the seal of the court and signed by the clerk.

(c) **Court Always Open.** The court will not hold formal terms, but shall be deemed always open for the purpose of filing any pleading or other proper paper, of issuing and returning process, and of making and directing all interlocutory motions, orders, and rules. The office of the clerk is open from the hours 8:45 a.m. to 5:15 p.m. on business days. A night box is provided for filing with the office of the clerk between the hours of 5:15 p.m. and 12:00 midnight on any business day for papers due that day. The night box will be locked promptly at midnight of each business day. The box is attached to the gate at the garage entrance on H Street. It is suggested that counsel telephone the clerk's office by 9:30 a.m. of the next day as to receipt, (202) 633-7261.

(d) **Citations.** Decisions published by the United States Court of Claims may be cited as statements of substantive law applicable to actions in this court.

(e) **Judicial Power.** The judicial power of the United States Court of Federal Claims with respect to any action, suit, or proceeding, except congressional reference cases, shall be exercised by a single judge, who may preside alone and hold a regular or special session of court at the same time other sessions are held by other judges.

(f) **Assignment of Cases.** (1) After a complaint has been served on the United States, or after recusal or disqualification of a judge to whom a case has been assigned, the case shall be assigned (or reassigned) forthwith to a judge. The chief judge may reassign any case if the chief judge deems such action necessary for the efficient administration of justice.

(2) At the time a complaint is filed, or as soon thereafter as the identity of an earlier related case becomes known, the filing attorney (or *pro se* plaintiff) shall file and serve on all parties who have appeared a Notice of Related Case(s). Cases are deemed related when an earlier-filed case and the action being filed:

(A) involve the same parties and are based on the same or similar claims; or

(B) involve the same contract, property or patent.

(g) **Signing of Orders for Absent Judges.** If the judge to whom the action is assigned is not available and there is an emergency necessitating an order, the matter shall be presented to the chief judge, or in the chief judge's absence, to another judge designated by the chief judge.

(h) **Trials and Hearings; Orders in Chambers.** All trials upon the merits shall be conducted in

open court and so far as convenient in a regular courtroom. All other acts or proceedings may be done or conducted by a judge in chambers, without the attendance of the clerk or other court officials and at any other place designated by order or with the consent of all parties affected thereby.

(i) **Clerk's Office and Orders by Clerk.** The clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Saturdays, Sundays, and the following holidays: New Year's Day, Inauguration Day, Martin Luther King's Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, and Christmas Day. All motions and applications in the clerk's office for issuing process, process to enforce and execute judgments, for entering defaults or judgments by default, and for other proceedings which do not require allowance or order of the court are grantable of course by the clerk; but the clerk's action may be suspended or altered or rescinded by the court upon cause shown.

(j) **Notice of Orders or Judgments.** Immediately upon the entry of an order or judgment, the clerk shall serve a notice of the entry in the manner provided for in Rule 5 upon each party who is not in default for failure to appear and shall make a note in the docket of the service. Any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure.

(k) **Fee Schedule.** (1) Fees for services rendered by the clerk are payable in advance; all checks are to be made payable to "Clerk, United States Court of Federal Claims."

(2) Fees are:

Admission to practice and certificate thereof	\$30.00
Duplicate certificate of admission or certificate of good standing	\$5.00
Filing complaint	\$120.00
Filing intervening complaint	\$120.00
Certifying any document or paper	\$5.00
Reproducing any record, entry or other paper for a maximum of 50 pages	\$.50 per page
Filing Notice of Appeal	\$105.00 (includes \$5.00 notice of appeal and \$100.00 Court of Appeals fees)
Receipt of monthly listing of court orders and opinions	\$10.00

Such other fees as authorized by the Judicial Conference of the United States, except that no fees are to be charged for services rendered on behalf of the United States.

(l) **Scheduling Courtrooms.** The clerk shall schedule the use of courtrooms in Washington,

D.C., and shall be responsible for all arrangements for courtrooms and other facilities required by the court at locations other than in Washington, D.C.

(m) Officers and Employees of the Court; Practice of Law. No person serving as a judge or in any other position with this court shall practice as an attorney or counselor in any court or before any agency of the United States, or otherwise engage in the practice of law, while continuing in that position, except when such person represents such person or some member of such person's immediate family; and neither a judge nor a secretary, law clerk or other person occupying a position with that judge, after separating from a position with this court, shall ever participate, by way of any form of professional consultation or assistance to anyone other than the court, in any case pending on that judge's docket during such person's term of service.

(As amended Dec. 4, 1992; Jan. 24, 1994.)

REFERENCES IN TEXT

The Federal Rules of Appellate Procedure, referred to in subd. (j), are set out in this Appendix.

General Order No. 7

The United States Claims Court [now United States Court of Federal Claims] Advisory Council is established to advise the judges on matters pertaining to the administration of the court and its relationship to the bar and the public. The council shall operate as follows:

A. Organization

(1) The council shall consist of 17 members who shall serve staggered three-year terms. The chief judge shall fill any vacancies.

(2) The chief judge may also appoint a senior adviser to the council who shall serve at the discretion of the chief judge.

(3) The chief judge shall designate one of the judges in active service as a liaison member between the court and the council.

(4) The council shall meet at such times and places as agreed upon by the members. All members of the council, including the senior adviser and the liaison member, may attend these meetings and participate in the discussions. The chief judge shall provide facilities at the court to accommodate meetings of the council.

(5) Council members shall elect a chairman and other officers, designate committees and take all other steps appropriate to the conduct of the council's business. Each member, except the liaison member and senior adviser, shall be entitled to vote on matters before the council.

B. Relationship to the court

(1) The council may consider any matters its members deem relevant to the operation of the court. The council may transmit its recommendations to the court informally or formally by letter from the chairman to the chief judge.

(2) The council shall promptly consider and make a recommendation on any matter referred to it by the court.

(3) The court may consider any recommendation of the council and take such action as it deems appropriate.

April 5, 1983

BY THE COURT
ALEX KOZINSKI
Chief Judge

Rule 77.1. Case Management

(a) Responsibility. Case management is the responsibility of the judge to whom the case is assigned, with the assistance of the clerk, where

appropriate. Each judge shall manage assigned cases so as to provide for the prompt dispatch of business. The judge may determine motions and cases on the merits without oral argument upon written statements of reasons in support and opposition. In the absence of the judge to whom a case is assigned, the chief judge, or, in the chief judge's absence, a delegate of the chief judge, may act on behalf of the assigned judge.

(b) Scheduling. (1) All conferences, oral arguments, trials, and other appearances shall be scheduled by the judge by order filed with the clerk. In an emergency, the judge may schedule conferences with counsel for the parties by such informal directions as may be appropriate.

(2) Each judge may establish regular times and places at intervals sufficiently frequent for the prompt dispatch of business, at which motions requiring notice and hearing may be heard and disposed of; but each judge at any time or place and on such notice, if any, as any judge considers reasonable may make orders for the advancement, conduct, and hearing of actions.

Rule 77.2. Clerk Authorized To Act on Certain Motions

(a) Motions Enumerated. Any motion for enlargement of time to answer or respond to the complaint, for substitution of counsel, for the permanent withdrawal of papers or exhibits theretofore filed by the parties, or for waiver of duplication requirements, which requires action by the court, may be acted upon by the clerk of the court if (1) the motion states that opposing counsel has no objection, (2) no opposition to the motion has been timely filed, or (3) opposing counsel files a consent.

(b) Maximum Time Allowable. In acting on motions for enlargement of time under subdivision (a) of this rule, the total enlargement of time allowed by the clerk with respect to any matter shall not exceed 30 days.

(c) Denial of Motions for Enlargement. The clerk may deny forthwith a motion requesting an enlargement of time if it requires action by the court, and fails to comply with the provisions of Rule 6(b); provided, that the denial shall state specifically that it is without prejudice to the filing, within 10 days after service of such denial, of a renewed motion for enlargement complying with the provisions of Rule 6(b).

(d) Review by the Court. Any action taken under this rule may be suspended, altered, or rescinded by the court for cause shown or sua sponte.

Rule 77.3. Withdrawal of Papers, Exhibits and In Camera Documents

(a) Temporary Withdrawal. The attorney of record for either party, or a party not represented by an attorney, may, except where the court otherwise directs, temporarily withdraw papers and exhibits on file in the clerk's office for a period not to exceed 30 days; provided, that upon notice from the clerk, the attorney or party may be required to return such papers and exhibits before the expiration of the 30-day period. The attorney or party withdrawing such papers and exhibits shall be required to sign and leave with the clerk a proper receipt describing the papers and exhibits so withdrawn.

(b) **Withdrawal for Trial.** The reporter engaged to transcribe the evidence may temporarily withdraw all papers and exhibits for use during any trial session. Upon the withdrawal of papers and exhibits for trial, the reporter shall sign a blanket receipt for such papers and exhibits, and they shall remain in the reporter's custody until returned to the clerk's office.

(c) **Permanent Withdrawal.** No papers or exhibits shall be permanently withdrawn from the clerk's office except on motion for good cause shown and upon such terms as the court may order.

(d) **Physical Exhibits and *In Camera* Documents.** All physical exhibits and *in camera* documents will be disposed of by the clerk after notice to the parties unless withdrawn by a party within 90 days after the final disposition of the case.

Rule 77.4. Taxation of Costs

(a) **Filing Bill of Costs.** A prevailing party may request the clerk to tax allowable costs by filing a Bill of Costs as set forth in Appendix I within 30 days after the date of the entry of judgment.

(b) **Objections to Bill of Costs.** (1) An adverse party may object to the Bill of Costs or any item claimed therein by filing objections within 14 days after the service of the Bill of Costs. Within 7 days after service of the objections, the prevailing party may file a reply. Unless a conference is scheduled by the clerk, the taxation of costs or any disallowance will be made by the clerk on the record.

(2) A party may request the court to review the clerk's action by filing a motion within 5 days after action by the clerk. The court's review of the clerk's action will be made on the existing record unless otherwise ordered.

(c) **Costs in Settlements.** The clerk will not tax costs on any action terminated by settlement wherein the judgment is entered pursuant to Rule 68 or is dismissed pursuant to Rule 41(a). Settlement agreements must resolve any issue relating to costs. In the absence of special agreement, parties will bear their own costs.

(d) **No Extensions.** No extensions of time under this rule will be permitted and the failure of a prevailing party to timely file a Bill of Costs shall constitute a waiver of any claim for costs.

Rule 78. Motions Day

A judge may establish by order in any case regular times and places, at intervals sufficiently frequent for the prompt dispatch of business, at which motions requiring notice and hearing may be heard and disposed of.

Rule 79. Books and Records Kept by the Clerk and Entries Therein

(a) **Docket.** The clerk shall keep a book known as "docket" of such form and style as may be prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States, and shall enter therein each action to which these rules are made applicable. Actions shall be assigned consecutive file numbers. The file number of each action shall be noted on the folio of the docket whereon the first entry of the

action is made. All papers filed with the clerk, all process issued and returns made thereon, except for subpoenas, all appearances, orders, and judgments shall be entered chronologically in the docket on the folio assigned to the action and shall be marked with its file number. These entries shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The entry of an order or judgment shall show the date the entry is made.

(b) **Judgments and Orders.** The clerk shall keep, in such form and manner as the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States may prescribe, a correct copy of every final judgment or appealable order, or order affecting title to or lien upon real or personal property, and any other order which the court may direct to be kept.

(c) **Indices; Calendars.** Suitable indices of the docket and of every judgment and order referred to in subdivision (b) of this rule shall be kept by the clerk under the direction of the court.

(d) **Other Books and Records of the Clerk.** The clerk shall also keep such other books and records as may be required from time to time by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States.

Rule 80. Reporter; Record or Transcript as Evidence

(a) **Reporter.** The clerk, as authorized by the Director of the Administrative Office of the United States Courts, by negotiated contract, will arrange for reporting services for all trial proceedings, and any other proceedings that require a verbatim transcript, held by the court.

(b) **Preparation of Transcript and Exhibits.** The preparation of the transcript of trial proceedings, including the exhibits, shall be in conformity with the Instructions to Reporters and Forms contained in Appendix A of these rules.

(c) **Copies of Transcript.** The parties may obtain copies of the transcript from the reporter at prices fixed in the reporting contract.

(d) **Report or Transcript as Evidence.** Whenever the testimony of a witness at a trial or hearing which was reported is admissible in evidence at a later trial, it may be proved by the transcript thereof as duly certified and filed.

TITLE XI. GENERAL PROVISIONS

Rule 81. Attorneys

(a) **Attorneys Eligible To Practice.** Only attorneys who are members of the bar of this court and who comply with these rules may enter an appearance, file pleadings, and practice in this court. All attorneys who were members in good standing of the bar of the United States Court of Claims are eligible to practice herein. As to the requirement for signing all papers, see Rule 81(d)(2).

(b) **Admission to Practice.** (1) *Qualifications; Oath.* Any person of good moral character who has been admitted to practice in the Supreme Court of the United States, or the highest court of any state, territory, possession, or the Dis-

trict of Columbia, or the United States Court of Appeals for the Federal Circuit and is in good standing therein, may be admitted to practice in this court upon oral motion or by verified application, as provided in this rule, and upon taking or subscribing to the following oath:

I, _____, do solemnly swear (or affirm) that I will support the Constitution of the United States and that I will demean myself in an upright manner as an attorney of this court, so help me God.

(2) *Upon Oral Motion.* (A) *In Washington, D.C.:* An oral motion for admission may be made by a member of the bar of this court before any judge, and the judge or the clerk shall administer the oath; (B) *Outside Washington, D.C.:* An oral motion for admission may be made by a member of the bar of this court before a judge outside Washington, D.C., who shall administer the oath. As a preliminary to the motion, the attorney who moves the admission shall submit to the judge the appropriate form obtained from the judge and completed by the applicant. In the absence of an oral motion for admission in conformity with this subdivision, the applicant may advise the judge of the applicant's qualifications as set forth in subdivision (b)(1) of this rule. Upon consideration thereof, and upon representation by the attorney that such attorney will promptly apply to the clerk for admission by verified application as provided in subdivision (b)(3) of this rule, the judge may permit the applicant to participate in the particular proceeding.

(3) *By Verified Application.* Without need for appearing in person, admission may be made upon presentation to the clerk of a verified application form, which may be obtained from the clerk, showing that the applicant is possessed of the qualifications described in subdivision (b)(1) of this rule. The application shall be accompanied by: (A) a certificate of a judge or of the clerk of any of the courts specified in subdivision (b)(1) of this rule that the applicant is a member of the bar of such court and is in good standing therein; (B) two letters or signed statements of members of the bar of this court or of the Supreme Court of the United States, not related to the applicant, stating that the applicant is personally known to them, that the applicant possesses all the qualifications required for admission to the bar of this court, that they have examined the applicant's application, and that they affirm that the applicant's personal and professional character and standing are good; and (C) an oath in the form prescribed in subdivision (b)(1) of this rule, signed by the applicant and administered by an officer authorized to administer oaths in the state, territory, possession, or the District of Columbia, where the oath is administered, or as permitted by 28 U.S.C. §1746.

(4) *Fee for Admission.* Unless the applicant is an attorney representing the United States before this court, an admission fee as provided for in Rule 77(k)(2) shall be paid in advance in cash or by check payable to "Clerk, United States Court of Federal Claims."

(5) *Admission of Foreign Attorneys.* An attorney, barrister, or advocate who is qualified to practice in the highest court of any foreign state

may be specially admitted for purposes limited to a particular case. Such attorney, barrister or advocate shall not, however, be authorized to act as attorney of record. In the case of such applicants, the oath shall not be required and there shall be no fee. Such admission shall be only on written motion of a member of the bar of this court, filed with the clerk at least 3 days prior to the consideration of the motion by the court.

(c) **Disbarment.** Superseded by Appendix F effective May 7, 1984.

(d) **Attorneys of Record.** (1) *One for Each Party.* There shall be but one attorney of record for a party in any case at any one time, and such attorney of record shall be an individual (and not a firm) who has been admitted to practice before this court. Any other attorneys assisting the attorney of record shall be designated as of counsel.

(2) *Authorization To Sign Filings.* Any other attorney who is a member of the bar of this court and who is a member or is an employee of the law firm listed as of counsel; agency; or department of the attorney of record may sign any filing in the attorney of record's name. An attorney who signs the name of the attorney of record shall so indicate by adding following the name of the attorney of record: "by [the signing attorney's own name]." Authorization to sign filings shall not relieve the attorney of record from the provisions of Rule 11.

(3) *Appearance.* For parties other than the United States, the attorney of record shall include on the initial pleading or paper said attorney's name, address, and telephone number. For the United States the attorney who is to appear as the attorney of record shall file with the clerk and serve on all other parties a notice of appearance setting forth the identical information. The attorneys of record for all parties shall promptly file with the clerk and serve on all other parties a notice of any change in address.

(4) *Change by Parties Other than the United States.* A party other than the United States may by leave of court on motion change the party's attorney at any time. The motion may be signed by said party in person or by the newly designated attorney accompanied by an affidavit of appointment executed by such attorney. If the consent of the previous attorney of record is annexed to or endorsed on the motion, substitution shall be accomplished by an appropriate entry on the docket by the clerk. When the motion is not thus shown to have the consent of the previous attorney, such attorney shall be served with the motion, and shall have 14 days to show cause why the motion should not be allowed.

(5) *Change by the United States.* A new notice of appearance shall be filed and served on all parties by the United States whenever a case is reassigned to another attorney.

(6) *Withdrawal of Attorney.* No attorney of record for a plaintiff or a third party may withdraw such attorney's appearance except by leave of the court on motion and after notice is served on such attorney's client.

(7) *Death of Attorney.* If the attorney of record dies, a suggestion of such attorney's death shall be made, and a motion to substitute another at-

torney admitted to practice before this court may be made by the plaintiff.

(8) *Pro Se.* An individual may represent oneself or a member of one's immediate family as a party before the court. Any other party, however, must be represented by an attorney who is admitted to practice in this court. A corporation may only be represented by counsel. The terms counsel or attorney in these rules shall include pro se litigants.

(e) **Application for Attorneys' Fees and Expenses.** (1) *Applications.* Applications for fees and expenses shall be filed with the clerk within 30 days after final judgment, as defined in 28 U.S.C. §2412(d)(2)(G) for the payment of money, or for the dismissal of the complaint, or of a final order in a renegotiation case determining the amount, if any, of excessive profits, or of a declaratory judgment pursuant to 28 U.S.C. §§1491 or 1507. Any application subject to 28 U.S.C. §2412(d) shall include the information required by that section and any claim for fees and expenses incurred in the prosecution of the application, and shall include the completed form as shown in Appendix E to these rules. The application and supporting statements shall be under oath. Each item shall be separately stated and supported.

(2) *Response and Reply.* The responding party shall have 28 days from the service of an application pursuant to subdivision (e)(1) of this rule to file a response, to which plaintiff may reply within 14 days after service of the response.

(3) *Proceedings.* After the filing of an application, and response and reply, if any, the judge will enter an order prescribing the procedure to be followed, either specially or pursuant to the rules of the court, or take such other action as may be deemed appropriate.

(As amended Dec. 4, 1992.)

General Order No. 5

To assure that motions for admission to the bar of the court are heard on a regular basis, it is ordered as follows:

(1) Motions for admission will be heard every Thursday which is not a legal holiday as defined by RUSCC 6(a).

(2) Applicants for admission must appear in the clerk's office no later than 9:30 a.m. to pay the admission fee and fill out the necessary papers. See RUSCC 81(b).

(3) Motions will be heard promptly at 10:00 a.m. in Courtroom No. 4, Room 501, National Courts Building, 717 Madison Place, N.W., Washington, D.C. 20005.
December 20, 1982

By the Court
ALEX KOZINSKI
Chief Judge

Rule 81.1. Legal Assistance by Law Students

(a) **Appearance.** (1) *Entry of Appearance on Written Consent of Party.* Subject to the provisions of this rule, an eligible law student may enter an appearance in this court on behalf of any party provided the party on whose behalf the student appears has consented thereto in writing and a "supervising attorney," as defined in this rule, has also indicated approval of that appearance in writing. In each case, the written consent and approval shall be filed with the clerk.

(b) **Activities.** (1) *Appearance on Briefs and Other Written Pleadings, Participation in Oral Argument and Other Activities.* A law student who has entered an appearance in a case pursuant to paragraph (a) may:

(A) Appear on the brief(s) and other written pleadings, provided the supervising attorney has read, approved, and co-signed the brief(s);

(B) Participate in all proceedings ordered by a judge or special master provided the supervising attorney is present at such proceedings;

(C) Engage in all other activities on behalf of the client in all ways that a licensed attorney may, subject to the general direction of the supervising attorney. However, a student may make no binding commitments on behalf of a client absent prior approval of both the client and the supervising attorney. In any matter in which testimony is taken, including depositions, the student must be accompanied by the supervising attorney. Documents or papers filed with the court must be read, approved, and co-signed by the supervising attorney.

(2) *Limitations on Activities.* The court retains the authority to establish exceptions to the activities in paragraph (1), and also to limit a student's participation in any individual case.

(c) **Eligibility.** In order to be eligible to make an appearance pursuant to this rule, the law student must:

(1) Be a law student in good standing, enrolled in a law school approved by the American Bar Association;

(2) Have completed legal studies amounting to at least two semesters, or the equivalent if the school is on some basis other than a semester basis;

(3) Have knowledge of the Rules of the United States Court of Federal Claims, the Federal Rules of Evidence, and the American Bar Association Model Rules of Professional Conduct;

(4) Be enrolled for credit in a clinical program at an accredited law school that maintains malpractice insurance for its activities and conducts its activities under the direction of a faculty member of such law school;

(5) Be certified by the dean of the law school as being of good character and sufficient legal ability, and as being adequately trained, in accordance with paragraphs (1)–(4) above, to fulfill the responsibilities of a legal intern to both the client and the court. Such certification must be filed with the clerk and may be withdrawn at any time by the dean upon written notice to the clerk;

(6) Be certified by the chief judge to practice pursuant to this rule. This certification may be withdrawn at any time by the chief judge or, in a given case, by the judge or special master before whom the law student has entered an appearance, without notice of hearing and without any showing of cause; and

(7) Neither ask for nor receive any fee or compensation of any kind from the client on whose behalf service is rendered. However, this rule shall not prevent a lawyer, legal aid bureau, law school, or the Government from paying compensation to the eligible law student, nor shall it prevent any of them from making such charges for its services as may otherwise be proper, nor shall it prevent any clinical program

from receiving otherwise proper fees and expenses under rule 81(e).

(d) Supervising Attorneys. A supervising attorney referred to in this rule shall be deemed the attorney of record pursuant to rule 81(d) and must:

(1) Be a member in good standing of the bar of this court;

(2) Be an attorney whose service as a supervising attorney for the clinical program is approved by the dean of the law school in which the law student is enrolled;

(3) Be certified by this court as a student supervisor;

(4) Assist and counsel the student in activities allowed under this rule and review such activities with the student, all to the extent appropriate under the circumstances, for the proper practical training of the student and the protection of the client;

(5) Assist the student in his or her preparation of the case to the extent the supervising attorney considers necessary and be available for consultation with represented clients;

(6) Be present with the student in any proceeding before a judge or special master;

(7) Co-sign all pleadings and other documents filed with the court;

(8) Be responsible to supplement oral or written work of the student as necessary to ensure proper representation of the client;

(9) Assume full professional responsibility for the student's guidance in any work undertaken and for the quality of the student's work; and

(10) Agree to notify the dean of the appropriate law school of any alleged failure on the part of the student to abide by the letter and spirit of this rule.

(As added Sept. 3, 1993.)

Rule 82. Form, Size and Duplication of all Papers

(a) General. All papers to be filed with the clerk shall be duplicated and filed in conformity with these rules as to methods of duplication, form, size, and number of copies. The clerk shall refuse to file any paper which is not in substantial conformity with this rule or not in clear type.

(b) Duplication. All requirements of duplication may be satisfied by the use of any photocopy method capable of producing a clear black image on white paper, but not including ordinary carbon copy, provided, that in each instance the duplication shall conform to the requirements of subdivision (c) of this rule as to paper, size, form, and pagination.

(c) Form and Size. All papers pursuant to the provisions of this rule shall be duplicated on pages not exceeding 8½ by 11 inches, with type matter on all papers other than exhibits to be of letter quality not exceeding 6½ by 8½ inches. Papers duplicated shall be double spaced, except that quoted and indented material and footnotes may be single spaced, and, if covering both sides of the sheet, shall be duplicated on paper of sufficient quality that the duplication process does not bleed through the sheet; shall be bound or attached on the left margin and unfolded, in book form; and shall have legible margins when bound or attached. Such pages need not be justi-

fied on the right margin. The first page of each separate document shall be numbered 1. Page numbers shall be in large, distinct type and shall appear in the bottom center margin of the page.

(d) Date. Each paper shall bear the date it is signed on the signature page.

(e) Telephone Number. The telephone number (including area code) of the attorney of record must appear beneath the signature line of every pleading or other paper.

Rule 83. Number of Copies

Except as provided in Rule 3(c), the parties shall file an original and 2 copies of each other paper required by these rules to be filed with the clerk. In congressional reference cases, an original and 4 copies of each such paper shall be filed. All copies shall be identical, or otherwise conformed, to the original.

Rule 83.1. Content of Briefs or Memoranda; Length of Briefs or Memoranda

(a) Content of Briefs or Memoranda. (1) *Initial Brief or Memorandum.* Except in briefs or memoranda of 10 pages or less or pretrial filings under Appendix G, the first brief or memorandum due, normally the plaintiff's brief or memorandum, shall contain, under proper headings and arranged in the following order:

(A) a table of contents or index, including the specific contents of any appendix or appendices to the brief or memorandum, listing the various items in the appendix, including the number and description of every item and exhibit which is being reproduced, together with the number of the page at which the item appears. See also subdivision (G) of Rule 83.1(a)(1);

(B) a table of constitutional provisions, treaties, statutes, regulations, and cases cited, giving the volume and page in the official edition where they may be found, and arranging the cases in alphabetical order. All U.S. Court of Federal Claims orders and opinions published in the United States Court of Federal Claims Reporter shall be cited to that reporter;

(C) a succinct statement of the questions involved, setting forth each question separately;

(D) a concise statement of the case, containing all that is material to the consideration of the questions presented, with appropriate reference to specific findings, the stipulation of facts, or other pertinent portions of the record, and setting out verbatim in the brief or memorandum or in an appendix thereto the pertinent portions of constitutional provisions, treaties, statutes, and regulations, as well as the texts of all administrative decisions directly involved in the case, unless previously reproduced in or as an exhibit to the complaint; the appendix or appendices to the brief or memorandum shall be numbered consecutively within themselves so as to enable the court more easily to find and read the material in the appendix or appendices;

(E) the argument, exhibiting clearly the points of fact and of law being presented, and citing the authorities relied upon;

(F) a conclusion, indicating the relief sought; and

(G) if an appendix is used, there shall be, at the beginning of the brief or memorandum it-

self, a table of contents or index listing the various items in the appendix, including the number and description of every exhibit which is being reproduced, together with the number of the page of the appendix at which the item begins.

(2) *Opposing Brief or Memorandum.* An opposing or answering brief or memorandum, normally the defendant's brief or memorandum, shall conform to the requirements set out in subdivision (a)(1) of this rule, except that the items referred to in subdivisions (C) and (D) of that subdivision need not be included unless the party is dissatisfied with the presentation by the other side.

(3) *Reply Brief or Memorandum.* A reply brief or memorandum shall conform to the requirements of subdivision (a)(2) of this rule.

(4) *General.* Briefs or memoranda must be compact, concise, logically arranged, and free from burdensome, irrelevant, immaterial, and scandalous matter. Briefs or memoranda not complying with this rule may be disregarded by the court.

(b) **Length of Briefs or Memoranda.** (1) Except by leave of the court on motion, principal briefs or memoranda shall not exceed 40 pages by any process of duplicating or copying, exclusive of (A) pages containing tables of contents, citations to constitutional provisions, treaties, statutes, regulations, and cases, and (B) any appendix setting out verbatim the pertinent portions of constitutional provisions, treaties, statutes, regulations, agency or board decisions, court decisions, excerpts from transcripts of testimony, and documentary exhibits.

(2) Except by leave of the court on motion, reply briefs or memoranda shall not exceed 20 pages by any process of duplication or copying or 30 pages where an opposition to a motion is included.

(3) A brief or memorandum previously filed may not be incorporated by reference; any such incorporation will be disregarded. A party wishing to rely upon a previously filed brief or memorandum may do so by reproducing in an appendix either (A) excerpts thereof now relied upon, or (B) the entire brief or memorandum. In either event, the party shall identify the total number of pages considered pertinent in a footnote which is to appear on the first page of the brief or memorandum. The pages so identified shall be included in the maximum allowable length set forth in subdivisions (1) and (2) of this rule.

(4) A motion for leave to exceed the page limitation set forth in subdivisions (1) or (2) of this rule shall be filed with the clerk prior to the duplication of the brief or memorandum and at least 10 days in advance of the date for the filing of the brief or memorandum, and shall show good cause therefor. A response to such a motion for leave shall not be permitted.

(As amended Dec. 4, 1992.)

Rule 83.2. Time for Filing

(a) **Responses and Objections.** Unless otherwise provided in these rules or by order of the court, responses or objections to written motions shall be filed within 14 days after service of the motion.

(b) **Replies.** Replies to responses or objections shall be filed within 7 days after service of the response or objection.

(c) **Motions Under Rules 12(b), 12(c) and 56.** Responses to these motions shall be filed within 28 days after service of the motion and replies thereto within 14 days of the service of the response.

(d) **Leave of Court.** If the subject filing is pursuant to leave of court on motion by a party, time for any response runs from date of filing and not date of service.

(e) **Cross-motions.** Where the responding party files a cross-motion, it shall be contained in the same document as the response to the original motion; the response to the cross-motion shall be contained in the same document as the reply subject to page limitations in Rule 83.1(b)(2). Where a cross-motion is filed, the parties shall have the same times to respond and to reply to the cross-motion as to an original motion.

(f) **Reconsideration of Orders.** A motion for reconsideration of an order shall be filed not later than 10 days after the date thereof. No response may be filed to a motion for rehearing or reconsideration. However, the court will not rule in favor of such a motion without first requesting by order a response to it.

Rule 84. Transfers and Referrals

(a) **Transfers from Other Courts.** (1) *Filing and Fee.* When the transfer of a case from another court to this court is permitted by law, the case shall be filed in this court upon the receipt by the clerk of a certified copy of the record made in the other court, including the order of that court granting the transfer. The clerk shall serve a notice of this filing on the parties as provided in Rule 5. Where all required fees in the other court are shown to have been paid, no filing fee will be required.

(2) *Complaint; Copies.* Eight copies of the complaint, containing the necessary changes in the caption and duplicated in conformity with Rule 82, filed in the other court shall be filed with the clerk within 28 days after the filing required in subdivision (a)(1) of this rule. In lieu thereof and within the same time period, an original and 7 copies of an amended complaint may be filed in conformity with the rules of this court setting forth the claim or claims transferred. Service will be made on the United States as provided in Rule 4.

(3) *Procedure.* After the filing and service as provided for in subdivision (a)(2) of this rule, all further proceedings shall be in accordance with the rules prescribed for cases filed in this court in the first instance.

(b) **Referral of Cases by the Comptroller General.** (1) *Service of Notice; Time for Response.* Upon the filing of a case referred to the court by the Comptroller General, the clerk shall serve a notice, as provided in Rule 5, on each person whose name and address are shown by the papers transmitted and who appears to be interested in the subject matter of the reference, which notice shall set forth the filing of the reference and state that the person notified appears to have an interest therein and that such person shall have 90 days after such service within which to appear and assert such person's claim by filing a

complaint in accordance with Rule 3. At the same time, the clerk shall forward a copy of each such notice to the Attorney General.

(2) *Procedure After Notice.* After the service of notice upon the interested person or persons, all further proceedings for the disposition of the case shall be in accordance with the rules prescribed herein for other cases.

(3) *Failure of Party To Appear.* If no interested plaintiff appears and files his complaint within the time specified in the notice served by the clerk, the case shall be submitted to the court upon the papers filed and upon such evidence, if any, as may be produced by the Attorney General.

Rule 85. Title

These rules may be known as the Rules of the United States Court of Federal Claims.

(As amended Dec. 4, 1992.)

Rule 86. Effective Date

These rules as revised are effective on March 15, 1992.

APPENDIX A

INSTRUCTIONS TO REPORTERS; FORMS

Reference is made to Rules 39(b) and 80(b) for reporting arrangements, including the requirement for the recording of proceedings, the control of the reporter, and the return of the transcript and exhibits.

The following instructions and forms are intended to guide reporters in preparing the transcripts of testimony taken and proceedings had before the judges of the United States Court of Federal Claims.

1. Caption Page. There shall be stated on the caption page: (a) the style of the cause in which the testimony is taken; (b) the place and date of its taking; (c) the identity of the party by whom each witness is called; (d) the name of the judge; and (e) the appearances of counsel. See Form A.

2. Testimony. It shall appear in the transcript of the proceedings and testimony by whom each witness was examined and cross-examined. At the top of each page shall appear the name of the witness and the nature of his examination, such as Roe-direct, Roe-cross, Roe-redirect.

3. Preparation of Transcript. The reporter shall transcribe all testimony on nontransparent white paper, either 8½ inches wide by 11 inches long, or 8 inches wide by 10½ inches long, bound on the left margin. The pages shall be numbered consecutively, with a minimum of 25 lines per page.

It is not necessary for the witnesses to sign the transcripts of their testimony.

4. Exhibits. All exhibits offered by either of the parties shall bear the caption and number of the case, the exhibit numbers, in figures, whether for plaintiff or defendant unless the court provides for the offering parties to otherwise designate their exhibits, and the number of sheets in each exhibit. All exhibits admitted in evidence or designated to accompany the transcript shall accompany and be filed with the transcript of the testimony, but shall not be affixed thereto.

5. Certificate of Reporter. The reporter shall append to the transcript of the testimony a certificate similar to Form B. The certificate shall be signed by the reporter.

6. Index. At the beginning of each volume of the transcript of testimony, there shall be an index containing: (a) the names of the witnesses examined, citing the pages of the transcript where direct, cross-, redirect, or recross-examination of the respective witnesses began; and (b) the exhibits in the case, first for the plaintiff and then for the defendant, with a brief statement of the nature of each of the exhibits and with references to the pages of the transcript where said respective exhibits were (1) offered and (2) received in evidence. In addition, upon the preparation of the final transcript, where the number of pages exceeds 500, a master index containing the same information shall be prepared and bound separately.

FORM A

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. _____

John Doe, Plaintiff

v.

The United States, Defendant

Chicago, Illinois,

Monday, _____, 19____, 10 a.m.

Testimony for Plaintiff (or Defendant)

The parties met, pursuant to notice of the court, at the time above stated, in Room 1614, United States Courthouse and Federal Building, Chicago, Illinois.

Present: Hon. A. B. See, Judge; John A. Jones, Esq., counsel for plaintiff; and William B. Smith, Esq., counsel for defendant.

Testimony on behalf of the plaintiff (or defendant) was taken as follows:

Richard Roe, a witness produced on behalf of the plaintiff (or defendant), having first been duly sworn by said court, was examined, and in answer to interrogatories testified as follows:

Q. State your name, etc.

A. _____.

Q. Have you, etc.?

A. _____.

FORM B

Certificate of Reporter

I, X. Y. Zee, reporter, hereby certify that at the time and place aforesaid, I did cause to be taken down and transcribed the proceedings in this case, including the questions propounded to and the answers given by said witnesses so called by plaintiff (or defendant), and that the foregoing record is a correct transcript of the proceedings and testimony so had therein.

In witness whereof I have hereunto set my hand this _____ day of _____, 19____.

(Signed) X. Y. ZEE,

Reporter, 200 Equitable Building, Chicago, Ill.

(As amended Dec. 4, 1992.)

APPENDIX B

PROCEDURES FOR PROCESSING COMPLAINTS OF JUDICIAL MISCONDUCT PURSUANT TO 28 U.S.C. § 372(c)

The procedures for processing complaints of judicial misconduct pursuant to 28 U.S.C. § 372(c), previously set forth in this Appendix B, have been revised and updated and now appear in a separate booklet. A copy of these procedures is available, upon request, from the Office of the Clerk.

APPENDIX C

PROCEDURE IN COMMON CARRIER CASES

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I. CARRIER'S REQUEST FOR ADMISSION OF FACTS

1. Time for Filing Request. In every suit filed by a common carrier for the recovery of freight and/or passenger transportation charges, the carrier shall, at the time the complaint is filed or within 30 days thereafter, file with the clerk a request for admission by the defendant of the genuineness of any relevant documents described in and exhibited with the request and of the truth of the material matters of fact relied on by the carrier for recovery in the action.

2. Form and Content of Request. The request shall conform to the following requirements:

(A) Duplication. The request, with accompanying schedules and documents, may be typewritten, or may be printed, or otherwise mechanically reproduced from a typewritten original, provided that all copies filed with the clerk shall be clearly legible and that the words and figures shown therein shall be in large enough type to be read without difficulty.

(B) Copies; Filing; Service. If the request accompanies the complaint, copies and service of such request shall be as provided in Rules 3(c) and 4. If the request is filed subsequent to the filing of the complaint, copies and service of such request shall be as provided in Rules 5, and 83, except that 5 copies shall be served on the defendant in lieu of a copy.

(C) Signature of Attorney. The request shall be signed by the attorney of record for the plaintiff.

(D) Numbered Paragraphs; Material Facts. The statements contained therein shall be properly separated and numbered and shall consist of specific statements of material facts which the plaintiff expects to prove as opposed to general allegations of the kind used in pleadings.

(E) Attachments. There shall be attached to the request copies of any contracts, letters, or other documents, excluding tariffs and other documents referred to in the schedules required by ¶¶2(G) and 2(I), which plaintiff proposes to offer in evidence, in order that the genuineness of such documents may be admitted by the defendant and the necessity of calling a witness to identify the same may be avoided.

(F) Nature of Dispute; Statement of Issues. The statement in the request shall be sufficiently explicit to show the nature of the dispute and the specific reason or reasons why the plaintiff believes it is entitled to recover higher rates or charges than those allowed by the Government. The word "dispute" as used in the preceding sentence, means the shipment or shipments with respect to which the General Accounting Office or other agency of the Government determined that the carrier's charges had been overpaid or refused to pay the carrier's supplemental bills covering such shipments, rather than subsequent shipments which are not in dispute except for the fact that the overpay-

ments determined as to the shipments in dispute have been deducted from the amount of the carrier's bills covering such subsequent shipments. In order to show the nature of the dispute there shall be attached to or included in plaintiff's request a statement of the issues which, with respect to each group of the carrier's bills involving the same issue, shall consist of a brief narrative statement of such issue with a reference to (1) court decisions involving the same issue, or (2) the tariffs or other authority relied upon by plaintiff, and the tariffs or other authority which plaintiff believes defendant relied upon in making deductions for claimed overpayments to the carrier or in refusing to pay the carrier's supplemental bills for claimed undercharges.

(G) Schedule: Claim for Transportation of Property. Where the claim is for the recovery of charges for the transportation of property for the Government, there shall be attached to the request a detailed schedule, prepared by or under the supervision of the general auditor, comptroller, or other principal accounting officer of the carrier. The schedule shall contain the following factual information:

- (1) List of Carrier's Bills in Dispute. The number of each of the carrier's bills for the shipments in dispute, as distinguished from the number of a subsequent bill from which the GSA made a deduction following its determination of an overpayment on the bill in dispute.
- (2) Detail for Each Bill of Lading. For each bill of lading in dispute, covered by each bill referred to in (1), the following facts:
 - (a) the number and symbol of each bill of lading;
 - (b) the date of the shipment;
 - (c) the origin and the destination of the shipment;
 - (d) a description of the commodity or commodities shipped, including a description of the packing where this affects the rate;
 - (e) car number and initial;
 - (f) the weight of the shipment, including the minimum carload weight when greater than the actual weight;
 - (g) when the shipment in dispute consists of one or more carloads of mixed commodities, a description of the different commodities, and the respective weight thereof loaded in each car, including minimum carload weights where such weights affect the rates;
 - (h) the rates claimed for each article in the shipment and for any accessorial services;
 - (i) the total freight charges on each bill of lading;
 - (j) amounts refunded by carrier, if any, and the dates thereof;
 - (k) if the overpayment determined by GSA or other agency has been deducted from the carrier's subsequent bill or bills, the number of such subsequent bill or bills, the amount deducted, and the date thereof;
 - (l) the total amount paid the carrier;
 - (m) the balance due;
 - (n) a specific reference to the item or items in designated tariffs authorizing the charges claimed, including the classification rating if necessary, and authorization for any accessorial charges claimed; or to a §22 quotation;
 - (o) the Government file reference number as obtained from GSA notice of overcharge, the Certificate of Indebtedness, or other document issued by the GSA, or, in the event there is no GSA reference number, the name of the Government paying agency and bureau, the disbursing office voucher number, and the date of payment;
 - (p) if the shipment in dispute consists in whole or in part of a through transit movement, (1) the through assessable charges from the original point of shipment to the final destination, including a description of the commodity, the transited weight, the through rate, the tariff or special authority for the through rate used, and, if local tonnage is involved, the weight thereof, the points between which local tonnage moved, and the rates and charges assessed against such tonnage; (2) details of the net amounts paid to and beyond the transit station, including references to the "inbound" and "outbound" shipments by bill of lading number and symbol; date of shipment, origin and destination, weight rate, and the net amounts paid to the respective "inbound" and "outbound" carriers, naming them and identifying the bill numbers on which such payments were made; and (3) the balance due, *i.e.*, the difference between the through assessable charges, including the charges on local tonnage, if any, and the respective net amounts paid on the inbound and outbound shipments; and
 - (q) a brief statement as to the basis for the claim or other brief statement which the carrier deems necessary to explain the peculiarities of the shipment.
- (3) Computation for Typical Bill of Lading. Following the listing of the information herein required with respect to each group of carrier's bills involving the same issue or basis of freight charge computation, the carrier shall either (i) include in the schedule a computation of the freight charges for that bill of lading, setting forth the basis or formula used, and referring to the specific items in particular tariffs or other authority which it relied upon for that purpose, or (ii) attach a worksheet showing such computation and information with respect to each typical bill of lading.

(H) Certification and Signature of Carrier: Property. The schedule shall be certified by the general auditor, comptroller, or principal accounting officer of the carrier, as follows:

I, _____, the _____
 (Name) (Title)
 _____, of the _____
 (Name of Carrier)

_____, do hereby certify that the above and foregoing schedule has been prepared from the books and records of said company for use in a suit in the United States Court of Federal Claims, entitled _____ v. The United States, No. _____, and that to the best of my knowledge, information, and belief the matters contained therein are true and correct.

To certify which, witness my hand at _____ this _____ day of _____, 19____.

(Signature of auditor, comptroller, or principal accounting officer.)

(I) Schedule: Claim for Transportation of Passengers. Where the claim is for the recovery of charges for the transportation of passengers for account of the Government, there shall be attached to the request a schedule, prepared by or under the supervision of the general auditor, comptroller, or other principal accounting officer of the carrier. The schedule shall contain the following factual information:

- (1) List of Carriers' Bills in Dispute. The number of each of the carrier's bills in dispute, as distinguished from the number of a subsequent bill from which the GSA made a deduction following its determination of an overpayment on the bill in dispute.
- (2) Detail: Each Transportation Request or Warrant. For each transportation request or warrant in dispute, covered by each bill referred to in ¶(1) the following facts:
 - (a) the symbol and number of each Government transportation request or warrant in dispute;
 - (b) the date of service;
 - (c) the origin and destination of the travel;
 - (d) the class or type of service;
 - (e) whether the travel was one way or round trip;
 - (f) the number of the special movement, if any;
 - (g) the route of travel;
 - (h) the number of persons that traveled;
 - (i) the gross per capita fare;
 - (j) the assessable passenger charges;
 - (k) the amount paid, and by what Government office and where located;
 - (l) amounts refunded by carrier, if any, and the dates thereof, and the Government office to which refunded and where located;
 - (m) where an overpayment was determined by the Government and deducted from a carrier's subsequent bill, the number of such subsequent bill, the amount of the deduction, and the date thereof;
 - (n) the total amount paid, and by what Government office and where located;
 - (o) the balance due;
 - (p) the tariff reference and item or special rate authority;
 - (q) the Government file reference; and
 - (r) a brief statement as to the basis for the claim, including, where appropriate, a brief explanation showing the extent to which the ticket issued by the carrier was not used, and the value of the unused part of the ticket.

(J) Certification and Signature of Carrier: Passengers. The schedule covering the transportation of passengers shall be certified in the same manner as provided in ¶(2)(H), except that where a request includes schedules pertaining to claims for both the transportation of passengers and freight, one certification shall suffice for all schedules.

3. Plaintiff's Noncompliance: Consequences. In the event a plaintiff in any action within the purview of this Appendix fails or refuses to comply with the provisions hereof, the judge may (1) refuse to allow it to support designated claims or prohibit it from introducing in evidence designated documents or items of testimony, or (2) take other appropriate action, which may include a dismissal of the complaint or any part thereof.

II. DEFENDANT'S RESPONSE

4. Time for Filing; Order. Promptly after the filing of the plaintiff's request, the judge to whom the case is assigned shall, by order filed with the clerk, fix a reasonable time within which the defendant shall file its response to the request. A copy of such order shall be served on the parties as provided in Rule 5.

5. Copies; Service; Signature. The defendant's response shall consist of an original and two copies to be filed with the clerk and with service to be made on plaintiff as provided in Rule 5. The response shall be signed by defendant's attorney of record and shall comply with the terms of ¶2(A).

6. Agreement; Modification; Denial. The defendant shall file such response within the time fixed by the order, agreeing to the separate items of fact, modifying the same in accordance with the facts known by the defendant, specifically denying the same, or setting forth in detail the reasons why it cannot truthfully admit or deny designated portions of the request.

7. Defendant's Statement of Issues. If defendant does not agree with plaintiff's statement of the issues, it shall attach to or include in the response its statement of the issues, which, with respect to each group of the carrier's bills involving the same issue, shall consist of a brief narrative statement of the issue, as defendant contends, with reference to (1) a court decision involving the same issue, or (2) the tariffs or other authority relied upon by defendant.

8. Verification of Carrier's Computations. If the defendant finds that the schedule attached to plaintiff's request, or any portion affecting the amount claimed, is incorrect on the basis of the tariffs, §22 quotations, or other authority relied on by plaintiff in its request, there shall be attached to the response a schedule prepared by the defendant, setting forth the facts and figures as to the amount of freight charges which defendant asserts would be due on each carrier's bill if the court holds that the tariffs or other authorities relied on by plaintiff in its request are applicable, and showing how the defendant arrived at any changes or corrections in the amounts claimed by plaintiff.

9. Schedule: Defendant's Basis for Applicable Charges. If the defendant claims that the tariffs, §22 quotations, or other authority relied on by plaintiff are inapplicable with respect to any of

the carrier's bills listed in plaintiff's request, there shall be attached to the response a schedule prepared by the defendant, setting forth the facts and figures in detail as to the amount of freight or passenger charges defendant claims is due on each disputed carrier's bill and containing a specific reference to the item or items in designated tariffs, §22 quotations, or other authority relied on by defendant in support of its contention. The schedule shall also comply with the terms of ¶2(G)(3).

10. Failure To Deny or Respond Within Specified Time: Consequences. Except where the response details the reasons why the defendant cannot admit or deny a particular statement in the request, any fact not so modified or denied in the response shall be deemed admitted, and the failure of the defendant to file its response within the time specified by the judge shall be taken as an admission of all of the facts as set forth in the request.

11. Qualified Denial of Facts Available to Defendant: Consequences. Where the request sets forth any facts that are within the knowledge of the General Services Administration or of the department or agency of the defendant for which the transportation was performed—and these specifically include but are not limited to the facts and figures which plaintiff, by this order, is directed to include in its schedules—a response stating that defendant cannot truthfully admit or deny such facts, or a denial based on a lack of knowledge by defendant's attorney of record, shall be deemed an admission thereof, provided, that such a response shall not be deemed an admission if accompanied by the sworn statement of the official in charge of the records that a search has been made for the necessary documents or information and that the documents or information cannot be found.

12. Relation to Pleadings; Time for Filing Answer or Counterclaim. In all cases to which this procedure applies, the time for filing defendant's answer and any counterclaim asserted by it may, without regard to the provisions of RCFC 12 and 13, be contemporaneous with the date fixed by the judge for filing defendant's response to plaintiff's request, provided, however, that the period of limitations provided by 49 U.S.C. §16(3)(d) within which the defendant may file a counterclaim is not extended by any rule set forth in this Appendix or by any order. At its option, the defendant may include the response in its answer or counterclaim, which pleadings, nevertheless, shall otherwise comply with the rules applicable to them.

III. ACCEPTANCE OF RESPONSE; PRETRIAL; JUDGMENT

13. Plaintiff's Acceptance of Response. If a plaintiff is willing to accept the amount shown to be due it in defendant's response, or, where a counterclaim has been filed, is willing to accept the net amount shown to be due plaintiff in the response after deducting the amount of defendant's counterclaim, plaintiff's attorney of record shall sign and file with the clerk within 30 days an original typewritten and 2 copies of a statement entitled Plaintiff's Acceptance of the Amount Defendant Admits is Due, stating therein that the response shows that a specified sum

is due plaintiff or, where a counterclaim has been filed, that the response shows that the net amount of the counterclaim is a specified sum, and that plaintiff consents to the entry of judgment in the amount specified in favor of plaintiff in full settlement and satisfaction of all claims asserted in the complaint and request for admission of facts.

14. Pretrial Conference; Fixing Amount of Recovery. When plaintiff does not file an acceptance of the amount shown to be due in the response, a pretrial conference shall be held for the purpose of (1) resolving all issues and recording an agreement for the entry of judgment or for a dismissal of the complaint or any part thereof, or (2) segregating the carrier's bills in dispute from those not in controversy and fixing the amount that either party would be entitled to recover in the event of a decision in its favor, and/or (3) taking any other action that may aid in the prompt disposition of the suit.

15. Entry of Judgment. Where all material issues are disposed of through the filing by plaintiff of its acceptance of the amount shown to be due in defendant's response, or at a pretrial conference, or by the defendant's failure to file its response within the time fixed by the judge, judgment may be entered without further proceedings.

IV. CASES WITHIN PRIMARY JURISDICTION OF INTERSTATE COMMERCE COMMISSION

16. Referral to Interstate Commerce Commission: Defendant's Motion for. In any suit subject to the terms of this order, if defendant contends, whether on the basis of the freight charge computations used by plaintiff or on the basis of the freight charge computations used by defendant, that any of the carrier's bills listed in the request raise issues within the primary jurisdiction of the Interstate Commerce Commission and intends to move the court to refer such issues to that agency, defendant shall file the motion with the clerk at the time fixed for the filing of its response under this order. The motion shall contain: (1) an identification of the carrier's bills involved unless all the bills in suit are included in the motion; (2) a description of the commodities shipped and a statement respecting any other factors which are pertinent to the issues covered by the motion; (3) a reference to the applicable tariffs and a copy of the pertinent provisions thereof; (4) a precise statement of the issue or issues to be referred; and (5) a statement as to whether the Interstate Commerce Commission has construed the cited tariffs in prior decisions or has clarified the facts underlying them, citing the pertinent decisions, if any.

17. Plaintiff's Response to Defendant's Motion for Referral. Plaintiff's response to the motion shall be filed within 30 days after service of the motion, and shall state whether plaintiff concurs in the motion. If plaintiff contends that the Interstate Commerce Commission has construed the tariffs referred to in defendant's motion or has clarified the factors underlying them in previous decisions, the response shall cite such decision.

18. Referral to Interstate Commerce Commission: Plaintiff's Motion for. If plaintiff, in any

case subject to the terms of this order, contends that any of the carrier's bills in suit raise issues within the primary jurisdiction of the Interstate Commerce Commission and intends to move the court to refer such issues to that agency, plaintiff's motion shall be filed not later than 30 days from the date defendant's response is filed and shall conform to the requirements of ¶16.

19. Defendant's Response to Plaintiff's Motion for Referral. Defendant's response to plaintiff's motion shall conform to the requirements of ¶17.

20. Effect of Filing Referral Motion. The trial of any case subject to the terms of this order in which a motion for referral is filed shall be deferred until final action on the motion.

21. Failure To File Referral Motion in Specified Time: Consequences. The failure of either party to file, within the time prescribed above, a motion requesting the court to refer a pending case or any part thereof to the Interstate Commerce Commission may be deemed good cause for denying any such motion thereafter filed.

(As amended Dec. 4, 1992.)

[Interstate Commerce Commission abolished and functions of Commission transferred, except as otherwise provided in Pub. L. 104-88, to Surface Transportation Board effective Jan. 1, 1996, by section 702 of Title 49, Transportation, and section 101 of Pub. L. 104-88, set out as a note under section 701 of Title 49. References to Interstate Commerce Commission deemed to refer to Surface Transportation Board, a member or employee of the Board, or Secretary of Transportation, as appropriate, see section 205 of Pub. L. 104-88, set out as a note under section 701 of Title 49.]

APPENDIX D

PROCEDURE IN CONGRESSIONAL REFERENCE CASES

(28 U.S.C. §§1492, 2509)

1. Purpose. The Federal Courts Improvement Act of 1982, amended 28 U.S.C. §§1492 and 2509, to authorize either House of Congress to refer bills to the chief judge of the United States Court of Federal Claims for investigation and report to the appropriate House. Procedures promulgated by the chief judge applicable to such congressional reference cases are specified herein. The RCFC, to the extent feasible, are to be applied in congressional reference cases.

2. Service of notice. Upon referral of a bill to the chief judge by either House of the Congress, the clerk shall docket the reference and serve a notice, as provided in Rule 5, on each person whose name and address is shown by the papers transmitted and who appears to have an interest in the subject matter of the reference. The notice shall set forth the filing of the reference and state that the person notified appears to have an interest therein and that such person shall have 90 days within which to file a complaint. The clerk shall forward a copy of each such notice to the Attorney General.

3. Complaint. Any person served with notice who desires to assert a claim may do so by filing a complaint in accordance with RCFC 3(c), 8 and 9 (or a preliminary complaint under RCFC 27(a)) of the rules of the court, except that the complaint shall be captioned as provided in ¶6.

4. Failure of party to appear. If no interested person files a complaint within the time specified in the notice served by the clerk, the case may be reported upon the papers filed and upon such evidence, if any, as may be produced by the Attorney General.

5. Hearing officer; review panel. Upon the filing of a complaint, the chief judge by order will designate a judge of the court to serve as hearing officer and a panel of three judges to serve as a reviewing body. One of the review panel members will be designated by the chief judge as presiding officer of the panel.

6. Captions. All pleadings, motions, and any other papers of the parties, and all subpoenas, orders and reports of a hearing officer and review panel, shall be captioned as follows:

CONGRESSIONAL REFERENCE

To The

UNITED STATES COURT OF FEDERAL
CLAIMS

Congressional Reference No. _____

7. Subpoenas. Each hearing officer and each review panel shall have authority to do and perform any acts which may be necessary or proper for the efficient performance of their duties, including the power of subpoena and the power to administer oaths and affirmations. Subpoenas requiring travel of more than 100 miles to place of trial must have attached thereto an order of approval by the hearing officer.

8. Hearing officer report. The hearing officer shall conduct such proceedings and utilize such rules of the United States Court of Federal Claims as may be required to determine the facts, including facts relating to delay or laches, facts bearing upon the question whether the bar of any statute of limitation should be removed, or facts claimed to excuse the claimant for not having resorted to any established legal remedy. The hearing officer shall find the facts specially. The hearing officer's findings shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the hearing officer to judge the credibility of witnesses. The hearing officer shall append to the findings of fact conclusions sufficient to inform Congress whether the demand is a legal or equitable claim or a gratuity, and the amount, if any, legally or equitably due from the United States to the claimant. The report shall be filed with the clerk, and served by the clerk on the parties.

9. Acceptance or exceptions. Within 30 days after service of the report, each party shall file either (a) a notice of intention to except to the report or (b) a notice accepting the report.

10. Review panel consideration and report. The findings and conclusions of the hearing officer, together with the record of the case, shall be considered by the review panel. When a party or parties have filed a notice of intention to except, the presiding officer by order shall establish a schedule for the parties to file briefs on exceptions to the hearing officer's findings and

conclusions and requests for oral argument before the panel. The chief judge will entertain no appeals or requests for review of any rulings or actions by a hearing officer or a review panel. No case shall be returned to the hearing officer unless so ordered by the review panel. On the basis of the entire record, the panel, by majority vote, shall adopt or modify the findings or the conclusions of the hearing officer and shall file its report with the clerk, for service on the parties.

11. Rehearing. Within 10 days after service of the report of the review panel, any party may file a motion for rehearing to alter or amend the report. The motion shall state with particularity any contention of law or fact which the movant believes has been overlooked or misapprehended, and shall contain argument in support thereof. Oral argument in support of the motion shall not be permitted. No response to a motion for rehearing is required, but will be considered if filed within 10 days from the date the motion for rehearing is served. No time extension shall be allowed for filing such a response. If the mo-

tion for rehearing is granted, the review panel shall take such further action as in its discretion may be required by the circumstances of the particular case.

12. Transmittal to Congress. When all proceedings are concluded, the report of the review panel shall be transmitted by the chief judge to the appropriate House of Congress.

13. Admission to practice. Any attorney representing a claimant in a congressional reference case may file and appear as attorney of record in the proceeding if such attorney is a member of the bar of the United States Court of Federal Claims or, if not, upon certification to the clerk that such attorney is a member in good standing of the bar of the highest court of any state in the Union or the District of Columbia. Any claimant, except a corporation, in a congressional reference case may proceed pro se.

14. Filing fees. Filing fees as set by RCFC 77(k) are required in congressional reference cases.

(As amended Dec. 4, 1992.)

APPENDIX E

T28AE.EPS

(As amended Dec. 4, 1992.)

ADMINISTRATIVE AGENCY CODES

(Use the following abbreviations for the U.S. Government Agency involved in claim (Item 5))

BENEFITS REVIEW BOARD	BRB
CIVIL AERONAUTICS BOARD	CAB
CIVIL SERVICE COMMISSION (U.S.)	CSC
CONSUMER PRODUCTS SAFETY COMMISSION	CPSC
COPYRIGHT ROYALTY TRIBUNAL	CRT
DEPARTMENT OF AGRICULTURE	AGRI
DEPARTMENT OF COMMERCE	COMM
DEPARTMENT OF DEFENSE	DOD
DEPARTMENT OF EDUCATION	EDUC
DEPARTMENT OF ENERGY	DOE
DEPARTMENT OF HEALTH, EDUCATION & WELFARE	HEW
DEPARTMENT OF HEALTH & HUMAN SERVICES	HHS
DEPARTMENT OF HOUSING & URBAN DEVELOPMENT	HUD
DEPARTMENT OF INTERIOR	DOI
DEPARTMENT OF JUSTICE	DOJ
DEPARTMENT OF LABOR (Except OSHA)	LABR
DEPARTMENT OF TRANSPORTATION, NATIONAL TRANSPORTATION SAFETY BOARD	TRAN
DEPARTMENT OF THE TREASURY (Except IRS)	TREA
DRUG ENFORCEMENT AGENCY	DEA
ENVIRONMENTAL PROTECTION AGENCY	EPA
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION	EEOC
FEDERAL AVIATION AGENCY	FAA
FEDERAL COAL MINE SAFETY BOARD	FCMS
FEDERAL COMMUNICATIONS COMMISSION	FCC
FEDERAL DEPOSIT INSURANCE CORPORATION	FDIC
FEDERAL ELECTION COMMISSION	FEC
FEDERAL ENERGY AGENCY	FEA
FEDERAL ENERGY REGULATORY COMMISSION	FERC
FEDERAL HOME LOAN BANK BOARD	FHLB
FEDERAL LABOR RELATIONS AUTHORITY	FLRA
FEDERAL MARITIME BOARD	FMBD
FEDERAL MARITIME COMMISSION	FMC
FEDERAL MINE SAFETY & HEALTH ADMINISTRATION	MSHA
FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION	MSHR
FEDERAL RESERVE SYSTEM	FRS
FEDERAL TRADE COMMISSION	FTC
FOOD & DRUG ADMINISTRATION	FDA
GENERAL SERVICES ADMINISTRATION	GSA
IMMIGRATION & NATURALIZATION SERVICE	INS
INTERNAL REVENUE SERVICE (Except TAX COURT)	IRS
INTERSTATE COMMERCE COMMISSION	ICC
MERIT SYSTEMS PROTECTION BOARD	MSPB
NATIONAL LABOR RELATIONS BOARD	NLRB
NUCLEAR REGULATORY COMMISSION	NRC
OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION	OSHA
OCCUPATIONAL SAFETY & HEALTH REVIEW COMMISSION	OSHC
OFFICE OF MANAGEMENT & BUDGET	OMB
OFFICE OF PERSONNEL MANAGEMENT	OPM
OFFICE OF WORKERS COMPENSATION PROGRAM	OWCP
PATENT OFFICE	PATO
POSTAL RATE COMMISSION (U.S.)	PRC
POSTAL SERVICE (U.S.)	USPS
RR RETIREMENT BOARD	RRRB
SECURITIES & EXCHANGE COMMISSION	SEC
SMALL BUSINESS ADMINISTRATION	SBA
TAX COURT, INTERNAL REVENUE SERVICE	TXC

APPENDIX F

UNITED STATES COURT OF FEDERAL CLAIMS RULES OF DISCIPLINARY ENFORCEMENT

The United States Court of Federal Claims, in furtherance of its inherent power and responsibility to supervise the conduct of attorneys who are admitted to practice before it, or admitted for the purpose of a particular proceeding pursuant to RCFC 81(b)(5), promulgates the following Rules of Disciplinary Enforcement superseding all of its other rules pertaining to disciplinary enforcement heretofore promulgated.

Rule I. Attorneys Convicted of Crimes

A. Upon the filing with the court of a certified copy of a judgment of conviction demonstrating that any attorney admitted to practice before the court has been convicted in any court of the United States, or the District of Columbia, or of any state, territory, commonwealth or possession of the United States of a serious crime as hereinafter defined, the court shall enter an order immediately suspending that attorney, whether the conviction resulted from a plea of guilty or nolo contendere or from a verdict after trial or otherwise, and regardless of the pendency of any appeal, until final disposition of a disciplinary proceeding to be commenced upon such conviction. A copy of such order shall immediately be served upon the attorney. Upon good cause shown, the court may set aside such order when it appears in the interest of justice so to do.

B. The term serious crime shall include any felony and any lesser crime a necessary element of which, as determined by the statutory or common law definition of such crime in the jurisdiction where the judgment was entered, involves false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy or solicitation of another to commit a serious crime.

C. A certified copy of a judgment of conviction of an attorney for any crime shall be conclusive evidence of the commission of that crime in any disciplinary proceeding instituted against that attorney based upon the conviction.

D. Upon the filing of a certified copy of a judgment of conviction of an attorney for a serious crime, the court shall, in addition to suspending that attorney in accordance with the provisions of this Appendix, refer the matter to counsel for the institution of a disciplinary proceeding before the court in which the sole issue to be determined shall be the extent of the final discipline to be imposed as a result of the conduct resulting in the conviction, provided that a disciplinary proceeding so instituted will not be brought to final hearing until all appeals from the conviction are concluded.

E. Upon the filing of a certified copy of a judgment of conviction of an attorney for a crime not constituting a serious crime, the court may refer the matter to counsel for whatever action counsel may deem warranted, including the institution of a disciplinary proceeding before the court; provided, however, that the court may in its discretion make no reference with respect to convictions for minor offenses.

F. An attorney suspended under the provisions of this Appendix will be reinstated immediately upon the filing of a certificate demonstrating that the underlying conviction of a serious crime has been reversed, but the reinstatement will not terminate any disciplinary proceeding then pending against the attorney, the disposition of which shall be determined by the court on the basis of all available evidence pertaining to both guilt and the extent of discipline to be imposed.

Rule II. Discipline Imposed by Other Courts; Disbarment on Consent or Representation in Other Courts

A. Any attorney admitted to practice before the court shall, upon being subjected to public discipline by any other court of the United States or District of Columbia, or by a court of any state, territory, commonwealth or possession of the United States, promptly inform the clerk of such action.

B. Any attorney admitted to practice before the court shall, upon being disbarred on consent or resigning from the bar of any other court of the United States or the District of Columbia, or from the bar of any state, territory, commonwealth, or possession of the United States while an investigation into allegations of misconduct is pending, promptly inform the clerk of such disbarment on consent or resignation.

C. Upon the filing of a certified copy of a judgment or order demonstrating that an attorney admitted to practice before the court has been disciplined by another court or upon accepting disbarment on consent or resignation, the court shall forthwith issue a notice directed to the attorney containing:

1. a copy of the judgment or order from the other court or a copy of the communication indicating disbarment on consent or resignation; and
2. an order to show cause directing that the attorney inform the court within 30 days after service of that order upon the attorney, personally or by mail of any claim by the attorney predicated upon the grounds set forth in ¶E. That the imposition of the identical discipline by the court would be unwarranted and the reasons therefor.

D. In the event the discipline imposed in the other jurisdiction has been stayed there, any reciprocal discipline imposed in the court shall be deferred until such stay expires.

E. Upon the expiration of 30 days from service of the notice issued pursuant to the provisions of ¶C, the court shall impose the identical discipline unless the respondent-attorney demonstrates, or the court finds, that upon the face of the record upon which the discipline in another jurisdiction is predicated it clearly appears:

1. that the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or
2. that there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that the court could not, consistent with its duty, accept as final the conclusion on that subject; or

3. that the imposition of the same discipline by the court would result in grave injustice; or
4. that the misconduct established is deemed by the court to warrant substantially different discipline.

Where the court determines that any of said elements exist, it shall enter such other order as it deems appropriate.

F. In all other respects, a final adjudication in another court that an attorney has been guilty of misconduct shall establish conclusively the misconduct for purposes of a disciplinary proceeding in the court.

G. The court may at any stage appoint counsel to prosecute the disciplinary proceedings.

Rule III. Standards for Professional Conduct

A. For misconduct defined in this Appendix and after notice and opportunity to be heard, any attorney admitted to practice before the court may be disbarred, suspended from practice before the court, publicly reprimanded, or subjected to such other disciplinary action as the circumstances may warrant.

B. Acts or omissions by an attorney admitted to practice before the court, individually or in concert with any other person or persons, which violate the Code of Professional Responsibility adopted by the court shall constitute misconduct and shall be grounds for discipline, whether or not the act or omission occurred in the course of an attorney-client relationship. The Code of Professional Responsibility adopted by the court is the American Bar Association Model Rules of Professional Conduct, as amended from time to time by the Association, except as otherwise provided by specific rule of the court.

Rule IV. Disciplinary Proceedings

A. When misconduct or allegations of misconduct which, if substantiated, would warrant discipline on the part of an attorney admitted to practice before the court shall come to the attention of a judge of the court, whether by complaint or otherwise, and the applicable procedure is not otherwise mandated by this Appendix, the judge shall refer the matter to the chief judge for determination whether the matter should be referred to counsel for investigation and the prosecution of a formal disciplinary proceeding or the formulation of such other recommendation as may be appropriate.

B. Should counsel conclude after investigation and review that a formal disciplinary proceeding should not be initiated against the respondent-attorney because sufficient evidence is not present, or because there is pending another proceeding against the respondent-attorney the disposition of which in the judgment of the counsel should be awaited before further action by the court is considered or for any other valid reason, counsel shall file with the court a recommendation for disposition of the matter, whether by dismissal, admonition, deferral, or otherwise setting forth the reasons therefor.

C. To initiate formal disciplinary proceedings, counsel shall obtain an order of the court upon a showing of probable cause requiring the respondent-attorney to show cause within 30 days

after service of that order upon that attorney, personally, or by mail, why the attorney should not be disciplined.

D. Upon the respondent-attorney's answer to the order to show cause, if any issue of fact is raised or the respondent-attorney wishes to be heard in mitigation, the chief judge shall set the matter for prompt hearing before one or more judges of the court.

Rule V. Disbarment on Consent While Under Disciplinary Investigation or Prosecution

A. Any attorney admitted to practice before the court who is the subject of an investigation into or a pending proceeding involving allegations of misconduct may consent to disbarment, but only by delivering to the court an affidavit stating that the attorney desires to consent to disbarment and that:

1. the attorney's consent is freely and voluntarily rendered; the attorney is not being subjected to coercion or duress; the attorney is fully aware of the implications of so consenting;
2. the attorney is aware that there is a presently pending investigation or proceeding involving allegations that there exist grounds for the attorney's discipline the nature of which the attorney shall specifically set forth;
3. the attorney acknowledges that the material facts so alleged are true; and
4. the attorney so consents because the attorney knows that if charges were predicated upon the matters under investigation, or if the proceeding were prosecuted, the attorney could not successfully defend himself.

B. Upon receipt of the required affidavit, the court shall enter an order disbarring the attorney.

C. The order disbarring the attorney on consent shall be a matter of public record. However, the affidavit required under the provisions of this Appendix shall not be publicly disclosed or made available for use in any other proceeding except upon order of the court.

Rule VI. Reinstatement

A. After Disbarment or Suspension. An attorney suspended for three months or less shall be automatically reinstated at the end of the period of suspension upon the filing with the court of an affidavit of compliance with the provisions of the order. An attorney suspended for more than three months or disbarred may not resume practice until reinstated by order of the court, except as provided in Rule I ¶ F of the Appendix.

B. Time of Application Following Disbarment. A person who has been disbarred after hearing or by consent may not apply for reinstatement until the expiration of at least one year from the effective day of the disbarment.

C. Hearing on Application. Petitions for reinstatement by a disbarred or suspended attorney under this Appendix shall be filed with the chief judge of the court. Upon receipt of the petition, the chief judge shall promptly refer the petition to counsel and shall assign the matter for prompt hearing before one or more judges of the court. The judge or judges assigned to the mat-

ter shall within 30 days after referral schedule a hearing at which the petitioner shall have the burden of demonstrating by clear and convincing evidence that the petitioner has the moral qualifications, competency and learning in the law required for admission to practice law before the court and that the petitioner's resumption of the practice of law will not be detrimental to the integrity and standing of the bar or to the administration of justice, or subversive of the public interest.

D. Deposit for Costs of Proceeding. Petitions for reinstatement under this Appendix shall be accompanied by an advance cost deposit in an amount to be set from time to time by the court to cover anticipated costs of the reinstatement proceeding.

E. Conditions of Reinstatement. If the petitioner is found unfit to resume the practice of law, the petition shall be dismissed. If the petitioner is found fit to resume the practice of law, the judgment shall reinstate the petitioner, provided that the judgment may make reinstatement conditional upon the payment of all or part of the costs of the proceedings, and upon the making of partial or complete restitution to parties harmed by the petitioner whose conduct led to the suspension or disbarment. Provided further, that if the petitioner has been suspended or disbarred for 5 years or more, reinstatement may be conditioned, in the discretion of the judge or judges before whom the matter is heard, upon the furnishing of proof of competency and learning in law, which proof may include certification by the bar examiners of a state or other jurisdiction of the attorney's successful completion of an examination for admission to practice subsequent to the date of suspension or disbarment.

F. Successive Petitions. No petition for reinstatement under this Appendix shall be filed within one year following an adverse judgment upon a petition for reinstatement filed by or on behalf of the same person.

Rule VII. Attorneys Specially Admitted

Whenever an attorney applies to be admitted or is admitted to the court for purposes of a particular proceeding pursuant to RCFC 81(b)(5), the attorney shall be deemed thereby to have conferred disciplinary jurisdiction upon the court for any alleged misconduct of that attorney arising in the course of or in the preparation for such proceeding.

(As amended Dec. 4, 1992.)

Rule VIII. Service of Papers and Other Notices

A. Service of an order to show cause instituting a formal disciplinary proceeding shall be made by personal service or by registered or certified mail addressed to the respondent-attorney at such attorney's last known address. If service by registered or certified mail is ineffective, the court shall enter an order as appropriate to effect service.

B. Service of any other papers or notices required by this Appendix shall be deemed to have been made if such paper or notice is addressed to the respondent-attorney at such attorney's last known address or the respondent-attorney at the address indicated in the most recent plead-

ing or other document filed in the course of any proceeding.

Rule IX. Appointment of Counsel

The court shall appoint as counsel one or more members of the bar of the court to investigate allegations of misconduct or to prosecute disciplinary proceedings under this Appendix, provided, however, that the respondent-attorney may move to disqualify an attorney so appointed who is or has been engaged as an adversary of the respondent-attorney in any matter. Counsel, once appointed, may not resign unless permission to do so is given by the court.

Rule X. Payment of Fees and Costs

At the conclusion of any disciplinary investigation or prosecution, if any, under this Appendix, counsel may make application to the court for an order awarding reasonable fees and reimbursing costs expended in the course of such disciplinary investigation or prosecution. Any such order shall be submitted to the clerk who shall pay the amount required thereunder from the funds collected pursuant to Rule XI ¶E.

Rule XI. Duties of the Clerk

A. Upon being informed that an attorney admitted to practice before the court has been convicted of any crime, the clerk shall determine whether the clerk in which such conviction occurred has forwarded a certificate of such conviction to the court. If a certificate has not been so forwarded, the clerk shall promptly obtain a certificate and file it with the court.

B. Upon being informed that an attorney admitted to practice before the court has been subjected to discipline by another court, the clerk shall determine whether a certified copy of the disciplinary judgment or order has been filed with the court, and, if not, the clerk shall promptly obtain a certified copy of the disciplinary judgment or order and file it with the court.

C. Whenever it appears that any person disbarred or suspended or censured or disbarred on consent by the court is admitted to practice law in any other jurisdiction or before any other court, the clerk shall, within 10 days of that disbarment, suspension, censure, or disbarment on consent, transmit to the disciplinary authority in such other jurisdiction, or for such other court, a certified copy of the judgment or order of disbarment, suspension, censure, or disbarment on consent, as well as the last known office and residence address of the defendant or respondent-attorney.

D. The clerk shall, likewise, notify the National Discipline Data Bank operated by the American Bar Association of any order imposing public discipline upon any attorney admitted to practice before the court.

E. The clerk shall utilize a portion of the fee for admission required by RCFC 81(b)(4) to defray the payment of fees and costs under Rule X of this Appendix and any other costs incurred by the administration of this Appendix.

Rule XII. Jurisdiction

Nothing contained in this Appendix shall be construed to deny to the court such powers as are necessary for the court to maintain control

over proceedings conducted before it, such as proceedings for contempt, issuance of public reprimands, or imposition of fines of not more than \$1,000.00.

APPENDIX G

PROCEDURES BEFORE TRIAL

I. GENERAL

1. The judge may modify these procedures as appropriate in the circumstances of the case, or the parties may suggest such modification of these procedures.

II. EARLY MEETING OF COUNSEL

2. Within 15 days after the date defendant's answer is served or 15 days after a reply to a counterclaim is served, plaintiff's counsel shall communicate with defense counsel, and the counsel shall confer:

a. To initiate preparation of the joint preliminary status report pursuant to ¶¶3-4, and

b. Unless exempted by ¶6, to:

(1) identify each party's factual and legal contentions;

(2) discuss each party's discovery needs and discovery schedule, including providing access to documents that are to be the subject of discovery, *e.g.*, determine what is needed; the objections, if any, to supplying it; and where it is available, with follow-up letters to provide a record. Agreement to informal discovery is encouraged; and

(3) discuss settlement of the action.

Participating counsel shall be counsel of record and such other attorneys as are necessary so that participating counsel for each party are knowledgeable about the case and the identity of witnesses and location of documents.

III. JOINT PRELIMINARY STATUS REPORT

3. No later than 30 days after the early meeting of counsel, the parties shall file with the clerk a Joint Preliminary Status Report, signed by both parties, setting forth answers to the following questions. Separate views may be set forth on any point on which parties cannot agree.

a. Does the court have jurisdiction over the action?

b. Should the case be consolidated with any other case and the reasons therefor;

c. Should trial of liability and damages be bifurcated and the reasons therefor;

d. Should further proceedings in this case be deferred pending consideration of another case before this court or any other tribunal and the reasons therefor;

e. In cases other than tax refund actions, will a remand or suspension be sought and the reasons therefor and the proposed duration;

f. Will additional parties be joined and, if so, a statement describing such parties, their relationship to the case, and the efforts to effect joinder and the schedule proposed to effect joinder;

g. Does either party intend to file a motion pursuant to RCFC 12(b), 12(c) or 56 and, if so, a schedule for the intended filing;

h. What are the relevant issues?

i. What is the likelihood of settlement?

j. Do the parties anticipate proceeding to trial. Does any party or do the parties jointly, request expedited trial scheduling, see ¶6b, and, if so, the reasons why the case is appropriate therefor. A request for expedited trial scheduling is generally appropriate when the parties anticipate that discovery, if any, can be completed within a 90-day period, the case may be tried within 3 days, no dispositive motion is anticipated, and a bench ruling is sought. The requested place of trial shall be stated. Before such a request is made, the parties shall confer specifically on this subject;

k. Is there any other information of which the court should be aware at this time?

4. If discovery is required, the Joint Preliminary Status Report should set forth a proposed discovery plan, see ¶6b, including a proposed deadline.

5. The Joint Preliminary Status Report shall be deferred indefinitely if on or before the date the Joint Preliminary Status Report is due a dispositive motion addressing all issues is filed.

6. Scheduling Orders.

a. *In Standard Cases.* After the Joint Preliminary Status Report is filed or after a status conference is held after the report is filed, the judge promptly shall enter the scheduling order called for by RCFC 16(b). If the judge does not accept the parties' proposed discovery deadline, the judge shall set a deadline or take other appropriate action to monitor the progress of discovery until a deadline can be set. Scheduling of the pretrial conference, ¶9, and submissions due in ¶¶11-15 may be scheduled at a later time.

b. *In Expedited Trial Cases.* If the judge grants a request for expedited trial scheduling, a scheduling order shall be entered promptly. The scheduling order shall set a deadline for discovery, the date for the pretrial conference, and the trial date. A date shall be set for trial to commence as soon as practicable. Except by agreement of the parties or leave of court, each party shall be limited to 5 discovery depositions and 30 interrogatories, including subparts. Within 30 days after issuance of the scheduling order, each party shall deliver to the other a list of all witnesses and exhibits described in ¶10a, b. These lists may be supplemented pursuant to RCFC 26(e)(1). The meeting of counsel called for by ¶10 shall be held not later than 7 days before the pretrial conference. The filings required by ¶¶12 and 13 shall be filed by the date of the pretrial conference. The requirements of ¶¶9, 11 and 14 shall not apply.

IV. DISCOVERY

7. **Form of Interrogatories, Requests for Admission, Responses.** A party shall number interrogatories and requests for admission sequentially without repeating the numbers it has used in any prior set of interrogatories or requests for admission. Each interrogatory and request for admission shall be started at the top of a new page. Answers or objections must be typed by the opposing party on the page containing the interrogatory or request for admission. If additional space is required, the answering party may add pages immediately succeeding the page

on which the interrogatory or request for admission is written, denominating the pages by the same number but adding a sequential letter designation, *e.g.*, 10a, 10b, etc. By counsel's signature to the answers and pursuant to RCFC 11, counsel for the responding party shall certify that counsel has made diligent effort to provide answers to all portions of interrogatories or requests for admission not specifically objected to.

8. Discovery Motions. A motion to compel or protect from discovery shall contain a statement by the movant that the parties have consulted in good faith to resolve the matters in dispute.

V. PRETRIAL CONFERENCE

9. Scheduling. Prior to or promptly upon the close of discovery, the judge shall enter a pretrial scheduling order. The judge shall also set the dates by which the memoranda called for by ¶¶ 11–15 are due. The attorneys appearing at the pretrial conference shall be the attorneys who will try the case, are thoroughly familiar with it, and are authorized to act for their principals.

10. Meeting of Counsel. No later than 60 days before the pretrial conference, counsel for the parties shall:

a. Exchange all exhibits to be used at trial, unless previously exchanged, except those to be used for impeachment. Failure to list an exhibit or to amend the list to add an exhibit at the earliest possible practicable time, if the existence or relevance of the exhibit did not become apparent until after exchange of the exhibit list, shall result, absent a showing of a compelling reason for the failure, in an exclusion of the exhibit at trial. Each exhibit shall be identified by an exhibit number and description.

b. Exchange a final list of names and addresses of witnesses, including expert witnesses and telephone numbers of third-party witnesses to be called at trial, except those to be used for impeachment, unless previously exchanged. Failure of a party to list a witness, or to amend the list to add a witness at the earliest practicable time if the existence or relevance of the witness did not become apparent until after the exchange of the witness list, shall result, absent agreement of the parties or a showing of a compelling reason for the failure, in the exclusion of that witness' testimony at trial. Any witness whose identity has not been previously disclosed shall be subject to discovery. As to each witness, the party shall indicate the specific topics to be addressed in the expected testimony. If expert witnesses are to be called, the parties shall exchange a short narrative statement of the qualifications of the expert, if this information has not already been obtained through discovery. If reports of experts to be called at trial have been prepared, and not yet exchanged, they shall be exchanged by this date, but shall not take the place of the narrative statement.

The parties shall also confer in order:

c. To disclose to opposing counsel the intention to file a motion pursuant to ¶ 16 leave to file transcript of deposition for introduction at trial;

d. To resolve, if possible, any objections to the admission of oral or documentary evidence;

e. To disclose to opposing counsel all contentions as to applicable facts and law, unless previously disclosed;

f. To engage in good-faith, diligent efforts to stipulate and agree to facts about which the parties know, or have reason to know, there can be no dispute for the purpose of simplifying the issues at trial; and

g. To exhaust all possibilities of settlement.

11. Memorandum of Contentions of Fact and Law. Unless the judge orders the filing of simultaneous memoranda or requires filing of proposed findings of fact, see ¶ 11a–b, in addition to the other memoranda called for, no later than 45 days before the pretrial conference, plaintiff shall file a Memorandum of Contentions of Fact and Law containing a summary of plaintiff's basic factual contentions together with any applicable legal authority. The memorandum shall contain a full but concise exposition of plaintiff's theory of the case and a statement in narrative form of what plaintiff expects to prove. The memorandum shall also address all anticipated legal questions, including evidentiary problems, that plaintiff expects may arise during the course of trial. If plaintiff believes bifurcation of issues for trial is appropriate, the memorandum shall contain a request therefor, together with a statement of reasons. No later than 21 days before the pretrial conference, defendant shall file its responsive memorandum with the same form and contents as plaintiff's.

a. *Plaintiff's Proposed Findings of Fact.* The judge may order plaintiff to file proposed findings of fact in lieu of the memorandum of factual contentions. Each proposed finding shall be listed on a separate page.

b. *Defendant's Proposed Findings of Fact.* If the judge orders proposed findings of fact, defendant shall respond to each of plaintiff's proposed findings on the same page. Defendant may propose additional findings of fact, on a separate page, to which plaintiff shall respond on the same page.

12. Witness List. a. Each party shall file, together with the Memorandum of Contentions of Fact and Law, a separate statement setting forth a list of witnesses to be called at trial, other than those to be used exclusively for impeachment. As to each witness, the party shall indicate the specific topics to be addressed in the expected testimony and the time needed for direct examination. Absent agreement of the parties or a showing of a compelling reason for the failure timely to identify the witness, no witness, expert or otherwise, will be permitted to testify, other than for impeachment, who has not been identified in time to allow the witness' deposition to be taken or the substance of the witness' knowledge ascertained, or, in the case of an expert, to allow the facts relief upon and opinions held by the expert to be obtained by RCFC 26(b)(3)(A) or deposition.

b. Any party intending to present substantive evidence by way of deposition testimony, other than as provided by Federal Rules of Evidence 801(d), shall serve and file a separate motion for leave to file the transcript of this testimony. The motion shall show cause why the deposition testimony should be admitted and identify specifically the portions of the transcript the party

intends to use at trial. If the motion is granted, only those portions of the transcript may be filed.

13. Exhibit List. Each party shall file, together with the Memorandum of Contentions of Fact and Law, a separate statement setting forth a list of exhibits it expects to offer at trial, other than those to be used exclusively for impeachment. In addition, any party intending to introduce more than 50 document exhibits shall provide as to each document, following its description, a short synopsis of the relevant portion of its contents and a brief statement of the document's significance to issues at trial. For multiple-page documents, reference shall be made to specific page numbers.

14. Stipulations. The judge may direct the parties before or after the pretrial conference to file a stipulation setting forth all matters to which the parties stipulate.

15. Issues of Fact and Law. No later than the date for filing the defendant's Memorandum of Contentions of Fact and Law, the parties shall also file a joint statement setting forth the issues of fact and the issues of law to be resolved by the court. Issues should be set forth in sufficient detail to enable the court to resolve the case in its entirety by addressing each of the issues listed. The statement of issues shall control the admissibility of evidence at trial and evidence will be deemed to be irrelevant unless it pertains to one or more of the issues.

16. Responses. The parties are expected to cooperate in the preparation of the documents specified in ¶¶11-15. Any responses to matters raised by the opposing party should therefore be included in each party's initial submission. However, if anything new or unexpected is discovered, it may be addressed in a brief response which must be filed under cover of motion for leave immediately upon learning of it.

VI. OTHER MATTERS

17. Post-Trial Briefing. The judge may order the filing of post-trial briefs. Post-trial briefing is not a matter of right.

(As amended Dec. 4, 1992.)

APPENDIX H

MOTIONS

1. Factual Matters. Factual representations, other than those pertaining to procedural aspects of the case which are personally known to the signatory attorney, will be disregarded unless supported by:

- a. A witness' affidavit or a declaration under penalty of perjury, pursuant to 28 U.S.C. §1746, attached to the motion or found in the pleadings or elsewhere in the record;
- b. The transcript of a deposition or of trial testimony;
- c. The testimony of a witness who appears at the hearing on the motion;
- d. Any of the other submissions referred to in RCFC 56(c); or
- e. Any other evidence that would be admissible at trial.

2. Oral Argument. Oral argument ordinarily shall be heard on all contested motions, other

than motions to amend, for enlargement, to shorten time limits, to file documents out of time or in excess of page limits, to reschedule oral arguments, to substitute counsel, or to reconsider matters, as to which one of the parties requests to be heard by so stating in its initial brief.

(As amended Dec. 4, 1992.)

APPENDIX I

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

BILL OF COSTS

No. _____

vs.

THE UNITED STATES

Judgment with costs having been entered in the above-entitled action on the _____ day of _____, 199_, against _____, the clerk is requested to tax the following as costs:

Fees of the clerk	\$ _____
Fees of the reporter for all or any part of the trial or hearing transcript necessarily obtained for use in the case	_____
Fees for witnesses; for statutory fees, see 28 U.S.C. § 1821 (attach itemized listing)	_____
Costs for certification or duplication of papers necessarily obtained for use in case, provide number of copies, total pages and cost per page*	_____
Costs incident to taking of depositions (if not of record, then attach statement as to need) ...	_____
Costs pursuant to FRAP 39(e)	_____
Other costs (itemize on attachment)	_____
Total	\$ _____

*Allowable duplication costs are restricted to briefs on dispositive matters for a total of 5 copies; additional copies allowable where third parties are present.

CERTIFICATION

State/District of _____, ss.
County of _____,

I certify under penalty of perjury that the foregoing costs are correct and were necessarily incurred in this action and that the services for which fees have been charged were actually and necessarily performed and that a copy hereof was this day mailed to _____ with postage fully prepaid thereon. Executed on _____

(Date)

(28 U.S.C. §1746)

(Signature of Attorney of Record)

(Address)

(As amended Dec. 4, 1992.)

APPENDIX J

VACCINE RULES OF THE OFFICE OF SPECIAL MASTERS OF THE UNITED STATES COURT OF FEDERAL CLAIMS

TITLE I. SCOPE OF RULES—
COMMENCEMENT OF PROCEEDINGS**1. Scope of Rules.**

These rules govern all proceedings before the United States Court of Federal Claims Office of Special Masters pursuant to the National Vaccine Injury Compensation Program established by 42 U.S.C. §300aa-10 (West Supp. 1991) (Vaccine Act). These rules are to be cited as the Vaccine Rules. In all matters not specifically provided for by the Vaccine Rules, the special master may regulate the applicable practice, consistent with these rules and with the purpose of the Vaccine Act, to decide cases promptly and efficiently. The RCFC apply only to the extent referenced.

(As amended Dec. 4, 1992.)

2. Commencement of Proceedings.

(a) **Petition.** A proceeding for compensation under the Vaccine Act shall be commenced by the filing of a petition, accompanied by the documents required under 42 U.S.C. §300aa-11(c) and the Vaccine Rules, in the United States Court of Federal Claims. Petitioner shall forward an original and 2 copies of the petition, by mail or other delivery, to Clerk, United States Court of Federal Claims, 717 Madison Place, N.W., Washington, D.C. 20005.

(b) **Fee.** The petition shall be accompanied by a \$120.00 filing fee.

(c) **Service upon Respondent.** (1) Petitioner shall serve one copy of the petition and accompanying documents upon the Secretary of Health and Human Services, by first class or certified mail, c/o Director, Bureau of Health Professionals, 5600 Fishers Lane, Suite 8-05, Rockville, Maryland 20857. An executed certificate of such service shall accompany the petition filed with the clerk.

(2) The clerk shall serve one copy of the petition on the Attorney General.

(d) **Content of the Petition.** (1) The petition shall set forth a short and plain statement of the grounds for an award of compensation. The petition shall set forth to whom, when and where the vaccine in question was administered and further shall describe specifically the alleged injury. If an injury within the Vaccine Act's Vaccine Injury Table, 42 U.S.C. §300aa-14(a), is claimed, the particular injury shall be set forth. The petition shall also contain a specific demand for relief to which petitioner asserts entitlement or a statement that such demand will be deferred pursuant to 42 U.S.C. §300aa-11(e).

(2) Only one petition may be filed with respect to each administration of a vaccine.

(e) **Documents Required with the Petition.** (1) As required by 42 U.S.C. §300aa-11(c), every petition shall be accompanied by the following: (i) medical records and detailed affidavit(s) supporting all elements of the allegations made in the petition. If petitioner's claim does not rely on medical records alone, but is based in part on

the observations or testimony of any persons, the substance of each person's proposed testimony in the form of an affidavit executed by the affiant must accompany the petition. (ii) All available physician and hospital records relating to (1) the vaccination itself; (2) the injury or death, including, if applicable, any autopsy reports or death certificate; (3) any post-vaccination treatment of the injured person, including all in-patient and out-patient records, provider notes, test results and medication records; and, if the person was younger than 5 years old when vaccinated, (4) the mother's pregnancy and delivery and the infant's lifetime, including physicians' and nurses' notes and test results and all well baby visit records, as well as, growth charts, until the date of the vaccination. (iii) If any records required by the rules are not submitted, an affidavit detailing the efforts made to obtain such records and the reasons for their unavailability.

(2) If filed on behalf of a deceased person, or if filed by someone other than the injured person or a parent of an injured minor, the petition shall also be accompanied by documents establishing the authority to file the petition in a representative capacity or a statement explaining when such documentation will be available.

(3) All documents accompanying the petition shall be assembled into one or more bound volumes or three-ring notebooks. Each bound volume or notebook must contain the caption of the case and a table of contents, and all pages of all documents shall be numbered consecutively.

(4) Petitions not accompanied by all the documents required by statute and the Vaccine Rules, or an affidavit explaining why any missing required documents are unavailable, will not be filed by the clerk.

(As amended Dec. 4, 1992.)

TITLE II. PROCEEDINGS BEFORE THE
SPECIAL MASTER**3. Role of the Special Master—Generally.**

(a) **Assignment.** Once a petition has been filed by the clerk, the case shall be assigned by the chief special master to a special master to conduct proceedings in accordance with the Vaccine Rules. All proceedings prior to the issuance of the special master's decision are to be conducted exclusively by the special master.

(b) **Duties.** The special master shall be responsible for conducting all proceedings, including requiring such evidence as may be appropriate, in order to prepare a decision, including findings of fact and conclusions of law, determining whether an award of compensation should be made under the Vaccine Act and the amount of any such award. The special master shall determine the nature of the proceedings, with the goal of making the proceedings expeditious, flexible, and less adversarial, while at the same time affording each party a full and fair opportunity to present its case and creating a record sufficient to allow review of the special master's decision.

(c) **Absence; Reassignment.** In the absence of the special master to whom a case is assigned, the chief special master may act on behalf of the assigned special master, or designate another

special master to act. When necessary, the chief special master may reassign a case to another special master.

4. Respondent's Review and Report.

(a) Respondent's Review of Completeness of the Records. Within 30 days of the filing of a petition, respondent shall review the medical and other records to determine whether, in respondent's view, all records necessary to enable respondent to evaluate the merits of the claim have been supplied with the petition. If respondent considers that relevant records are missing, petitioner's counsel shall immediately be notified. If the parties disagree about the completeness of the records filed or the relevance of requested records, either party may request that the special master resolve the matter. If the special master concludes that records called for by Vaccine Rule 2(e) have not been submitted, the petition may be subject to dismissal, without prejudice, under Vaccine Rule 21(c).

(b) Respondent's Report. Within 90 days after the filing of the petition, respondent shall file a report that shall set forth a full and complete statement of respondent's position as to why an award should or should not be granted. The report shall contain respondent's medical analysis of petitioner's claims. It shall also present any legal arguments that respondent may have in opposition to the petition. General denials are not sufficient.

5. Informal Review and Tentative Findings and Conclusions.

The special master shall schedule an off-the-record conference to be held within 30 days of the filing of respondent's report pursuant to Vaccine Rule 4(b). At this conference, after affording the parties an opportunity to address each other's positions, the special master will review the materials submitted, evaluate the respective positions, and orally present tentative findings and conclusions. If necessary, the special master shall schedule a subsequent status conference to be held within 15 days at which petitioner and respondent shall advise whether either party requests further proceedings, including filing of dispositive motions or a hearing, or whether the special master should enter a decision consistent with the tentative findings and conclusions.

6. Status Conferences.

The special master shall conduct conferences from time to time in order to expedite the processing of the case. The conferences will be informal in nature and ordinarily will be conducted by telephone conference call. Either party may request a status conference at any time. At such conferences, counsel for both parties will have the opportunity to propose procedures by which to process the case in the least adversarial, most efficient way possible.

7. Discovery.

There shall be no discovery as a matter of right.

(a) Informal Discovery Preferred. The informal and cooperative exchange of information is the ordinary and preferred practice.

(b) Formal Discovery. If a party considers that informal discovery is not sufficient, that party may seek to utilize the discovery procedures provided in RCFC 26-36 by filing a motion indi-

cating the discovery sought and stating with particularity the reasons therefor, including an explanation why informal techniques have not been sufficient. Such a motion may also be made orally at a status conference.

(c) Subpoena. When necessary, the special master upon request by a party may approve the issuance of a subpoena. In so doing, the procedures of RCFC 45 shall apply. See Appendix L.

(As amended Dec. 4, 1992.)

8. Taking of Evidence and Argument; Decision.

(a) General. The special master in each case, based on the specific circumstances thereof, shall determine the format for taking evidence and hearing argument. The particular format for each case will be ordered after consultation with the parties.

(b) Evidence. In receiving evidence, the special master will not be bound by common law or statutory rules of evidence. The special master will consider all relevant, reliable evidence, governed by principles of fundamental fairness to both parties. Evidence may be taken in the form of documents, affidavits, oral testimony at a hearing in person or via telephone; or even, in appropriate circumstances, video tape. Sworn written testimony may be submitted in lieu of oral testimony.

(c) Argument. Argument may be received by telephone conference call or at a hearing or in written submissions. The special master may establish requirements for such filings, *e.g.*, contents or page limitations, as appropriate.

(d) Decision Without Evidentiary Hearing. The special master may decide a case on the basis of written filings without an evidentiary hearing. In addition, the special master may decide a case on summary judgment, adopting procedures set forth in RCFC 56 modified to the needs of the case.

(e) Hearing. When necessary, the special master may conduct an evidentiary hearing. The special master will determine the format for such a hearing. The special master may permit testimony at such a hearing via telephone. The special master may permit direct examination of a witness or may permit or require that the direct testimony be submitted in written form. The special master may question a witness and may, on request, permit questioning by opposing counsel. The clerk or counsel, may issue a subpoena requiring the attendance of a witness at such hearing. A transcript of the hearing shall be prepared in conformity with RCFC 59(b) and 80 and Appendix A.

(f) Waiver of Argument. Any fact or argument not raised specifically in the record before the special master shall be considered waived and cannot be raised by either party in proceedings on review of a special master's decision. This rule shall not apply to legal arguments raised by the party that stands in the role of the appellee on review.

(As amended Dec. 4, 1992.)

9. Suspension of Proceedings.

(a) General. On the motion of a party, for good cause shown, the special master may suspend proceedings on the petition. The special master shall grant one such suspension for 30 days on

the motion of either party. Further motions by either party for the suspension may be granted, totalling not more than 150 additional days, in the special master's discretion.

(b) Chief Special Master. On motion of a party in a case involving the administration of a vaccine before October 1, 1988, or on the chief special master's own motion, the chief special master may, in the interest of justice, suspend proceedings on any petition for up to 540 days in addition to the period of suspension allowable under Vaccine Rule 9(a).

(c) Effect. Such periods of suspension shall be excluded for purposes of the time limitations of 42 U.S.C. §300aa-12(d)(3) and Vaccine Rules 4(b) and 10.

(d) Transition Rule. All periods of suspension prior to December 20, 1989, shall be excluded pursuant to Vaccine Rule 9(b). However, if such periods of suspension total more than 90 days in a given case, in computing the 180-day limit of Vaccine Rule 9(a), only 90 of such days shall be counted.

10. Special Master's Decision.

(a) General. The special master shall issue a final decision determining whether or not an award of compensation shall be made, and, if so, the amount thereof. This decision shall be filed within 240 days of the date on which the petition was filed, exclusive of periods of suspension pursuant to Vaccine Rule 9.

(b) Certain Retrospective Cases. In cases in which the vaccination in question occurred prior to October 1, 1988, and in which the vaccine recipient is not deceased, the special master shall defer ruling on the limited issue of the amount of any compensation for lost earnings and pain and suffering, 42 U.S.C. §300aa-15(a)(3) and (4), and combine that ruling with the decision under Vaccine Rule 13.

TITLE III. JUDGMENT AND FURTHER PROCEEDINGS

11. Judgment.

(a) In Absence of Motion for Review. In the absence of the filing of a motion for review within 30 days of the filing of the special master's decision, or if prior to the expiration of such period each party files a notice stating that it will not seek such review, the clerk shall forthwith enter judgment in accordance with the special master's decision.

(b) Stipulation for Judgment. Any stipulation for a money judgment shall be signed by authorized representatives of the Secretary of Health and Human Services and the Attorney General.

12. Election.

(a) General. When no motion for review by the Court of Federal Claims of a decision pursuant to Vaccine Rule 10 is filed by either party, see RCFC Appendix J, Review of Decision of Special Masters rendered pursuant to the National Vaccine Injury Compensation Program, petitioner shall, within 90 days after the entry of judgment, file with the clerk an election in writing either (1) to accept the judgment or (2) to file a civil action for damages for the alleged injury or death. Upon failure to file an election within the time prescribed, petitioner shall be deemed to have filed an election to accept the judgment.

(b) Declining Award. An election to decline an award of compensation may be accompanied by

a motion for the limited compensation provided by 42 U.S.C. §300aa-15(f)(2). If such a motion has not been filed by the time the election is filed, petitioner will be deemed to have waived that limited compensation. Such motion shall be forwarded to the special master for a decision thereon. The decision of the special master on the motion shall be considered a separate decision for purposes of Vaccine Rules 11 and 18.

(As amended Dec. 4, 1992.)

13. Attorneys' Fees and Costs.

Any request for attorneys' fees and costs pursuant to 42 U.S.C. §300aa-15(e) shall be filed no later than 21 days following the filing of an election pursuant to Vaccine Rule 12. The clerk shall forward the fee request to the special master to whom the case was assigned for consideration and decision. The decision of the special master on the fee request shall be considered a separate decision for purposes of Vaccine Rules 11 and 18.

TITLE IV. GENERAL PROVISIONS

14. Attorneys.

(a) Attorneys Eligible to Practice. Only attorneys who are members of the bar of the United States Court of Federal Claims and who comply with the Vaccine Rules may enter an appearance, file pleadings, and practice before the Office of Special Masters. The clerk's office will not accept for filing any pleading, motion, or other paper that is not signed by the attorney of record in the case or by member of this bar authorized to sign the attorney of record's name on the attorney of record's behalf. For admission to the bar of the court, RCFC 81(b) shall apply.

(b) Attorneys of Record. There shall be but one attorney of record for a party in any case at any one time, and such attorney of record shall be an individual, and not a firm, who has been admitted to practice before the Court of Federal Claims. Any other attorneys assisting the attorney of record shall be designated as of counsel. The attorney of record shall include on all filings the attorney's name, address, and telephone number. The attorney of record for each party shall promptly file with the clerk a notice of any change in address.

(c) Change of Attorneys. RCFC 81(d) shall apply.

(d) Pro Se. An individual may represent himself or herself or a member of the individual's immediate family as a party before the Office of Special Masters. Any other party, however, must be represented by an attorney who is admitted to practice before the Court of Federal Claims. The terms counsel or attorney in the Vaccine Rules shall include *pro se* litigants.

(As amended Dec. 4, 1992.)

15. Third Parties.

No person may intervene in a vaccine injury compensation proceeding. However, the special master shall afford all interested persons an opportunity to submit relevant written information. Such information may be submitted within 60 days of publication of notice of the petition in the Federal Register, or later with leave of the special master.

16. Caption of All Filings.

The petition and other filings before the Office of Special Masters shall be captioned with the appropriate title, as follows:

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS
OFFICE OF SPECIAL MASTERS

)	
)	
Petitioner[s],)	
v.)	No.
)	_____ V
)	
SECRETARY OF HEALTH AND HUMAN SERVICES,)	
)	
Respondent)	
)	

[TITLE OF FILING]

In pleadings and papers other than the petition, the name of the special master assigned to the case shall appear under the docket number. (As amended July 15, 1992; Dec. 4, 1992.)

17. Filing and Service of Papers After the Petition.

(a) Filing with the Clerk Defined. All pleadings and other papers required to be filed with the clerk by the Vaccine Rules or by order of the special master shall be forwarded to the clerk of the court at the address noted in Vaccine Rule 2. A document is filed with the Office of Special Masters when actually received and marked filed by the clerk, not when mailed. All matters shall be brought to the attention of the Office of Special Masters through filings with the clerk rather than by correspondence.

(b) Service. A copy of every document filed by any party with the clerk shall be served on the opposing party's attorney or the opposing party *pro se*, if no appearance of attorney has been entered. A certificate of service showing date of service shall be appended to the original and copies thereof.

(c) Date. Each filing shall bear on the signature page the date on which it is signed.

(d) Number of Copies. The parties shall file an original and 2 copies of each paper required by the Vaccine Rules to be filed with the clerk.

18. Availability of Filings.

(a) General. All filings with the clerk pursuant to the Vaccine Rules are to be made available only to the special master, judge, and parties, with the exception of certain court-produced documents as set forth in part (b) of this rule. A transcript prepared pursuant to Rule 8(e) shall be considered a filing for purposes of this rule.

(b) Decisions and Certain Substantive Orders. All decisions of special masters, and any other substantive orders of a special master that the special master designates to be of precedential

value, will be made available to the public, unless the document contains (1) trade secret or commercial or financial information that is privileged and confidential or (2) medical or similar information, the disclosure of which would constitute a clearly unwarranted invasion of privacy. When such a decision or designated substantive order is filed with the clerk, the petitioner will be afforded 14 days to identify and move to delete such information prior to disclosure of the document. If, upon review, the special master agrees that the identified material fits the above description, such material shall be deleted for the purpose of public access.

19. Time.

(a) Computation. In computing any period of time, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a federal holiday or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the clerk's office inaccessible, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a holiday. When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and holidays shall be excluded in the computation. Service by mail is complete upon mailing, but filing is not.

(b) Enlargement. Motions for enlargement of time may be granted for good cause shown. A motion shall set forth the reason or reasons upon which the motion is based. Such motion must contain a representation that the moving party has discussed the motion with opposing counsel and a statement whether an opposition will be filed or, if opposing counsel cannot be consulted, an explanation of the efforts made to do so.

(c) Additional Time After Service by Mail. Whenever a party has the right or is required to do some act within a prescribed period after the service of a paper, and the service is made by mail, 3 calendar days shall be added to the prescribed period, unless the special master orders otherwise.

20. Motions.

(a) Motions. A motion to the special master, unless made orally, shall be made in writing, shall state with particularity the grounds therefor, shall set forth the relief or order sought, and shall be filed with the clerk. Any motion, objection, or response may be accompanied by a memorandum, and, if necessary, by supporting affidavits. Any motion may be accompanied by a proposed order.

(b) Responses and Replies. Unless otherwise provided by the special master, any response or objection to a written motion shall be filed within 14 days after service of the motion, and any reply shall be filed within 7 days after service of the response or objection.

(c) Oral Argument. Oral argument on a motion may be scheduled by the special master. A party desiring oral argument on a motion shall so request in the motion or response.

21. Dismissal of Petitions.

(a) Voluntary Dismissal; Effect Thereof. A petition may be dismissed by petitioner without

order of the special master (1) by filing a notice of dismissal at any time before service of respondent's report or (2) by filing a stipulation of dismissal signed by all parties who have appeared in the proceeding. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal may, in the discretion of the special master, be deemed to operate as an adjudication upon the merits when filed by a petitioner who has previously dismissed the same claim in the Office of Special Masters of the Court of Federal Claims or in the court itself.

(b) Failure To Prosecute or Participate. If petitioner fails to prosecute, the petition may be dismissed pursuant to Vaccine Rule 21(c). No judgment shall be entered against respondent despite any failure of participation unless petitioner introduces evidence establishing a right to compensation.

(c) Involuntary Dismissal. For failure of petitioner to prosecute or to comply with the Vaccine Rules or any order of the special master, the special master may dismiss a petition or any claim therein.

(As amended Dec. 4, 1992.)

TITLE V. REVIEW OF DECISIONS OF SPECIAL MASTERS RENDERED PURSUANT TO THE NATIONAL VACCINE INJURY COMPENSATION PROGRAM

22. General. The following procedures apply to motions filed with the United States Court of Federal Claims seeking review of decisions from the Office of Special Masters of the United States Court of Federal Claims in actions filed pursuant to the National Vaccine Injury Compensation Program, 42 U.S.C. §300aa-10 (West Supp. 1991). The RCFC apply except as provided hereinafter.

(As amended Dec. 4, 1992.)

TITLE VI. OBTAINING REVIEW OF A DECISION BY A SPECIAL MASTER

23. Motion for Review and Objections.

To obtain review of a special master's decision, within 30 days after the date on which the decision is filed, a party must file with the clerk a motion for review of the decision. No extensions of time under this rule will be permitted, and the failure of a party to timely file such a motion shall constitute a waiver of the right to obtain review.

24. Memorandum of Objections.

The motion for review must be accompanied by a memorandum of numbered objections to the decision. This memorandum must fully and specifically state and support each objection to the decision. The memorandum shall cite specifically to the record created by the special master, *e.g.*, to specific page numbers of the transcript, exhibits, etc., and should also fully set forth any legal argument the party desires to present to the reviewing judge. The memorandum shall be limited to 20 pages and must conform to the provisions of RCFC 82.

(As amended Dec. 4, 1992.)

25. Response.

a. If a motion for review is filed, the other party may file a response thereto within 30 days

of the filing of the motion. No extensions of time under this rule will be permitted, and the failure of a party timely to file such a response shall constitute a waiver of the right to respond. The response shall be in memorandum form and shall fully respond to each numbered objection. The memorandum shall cite specifically to the record created by the special master, *e.g.*, to specific page numbers of the transcript, exhibits, etc., and should also fully set forth any legal argument the party desires to present to the reviewing judge. The memorandum shall be limited to 20 pages and must conform to the provisions of RCFC 82.

b. If both parties file motions for review, each party may file a response to the other party's motion.

(As amended Dec. 4, 1992.)

TITLE VII. JUDGE'S REVIEW

26. Assignment.

When a motion for review is filed with the clerk, the case will be assigned to a Court of Federal Claims judge to conduct the review.

(As amended Dec. 4, 1992.)

27. Review.

The assigned judge shall undertake a review of the objections raised and may thereafter:

a. uphold the findings of fact and conclusions of law and sustain the special master's decision;

b. set aside any finding of fact or conclusion of law found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law and issue the judge's own decision; or

c. remand the case to the special master for further action in accordance with the judge's direction.

28. Time for Review.

The judge shall complete the review within 120 days of the last date for the filing of a response under ¶3, excluding any days the case is before a special master on remand. If the judge remands the case to a special master, the total period for any remands shall not exceed 90 days.

29. Withdrawal of Petition.

If the judge fails to direct entry of judgment within 420 days after the date on which a petition was filed, excluding any periods of suspension pursuant to Vaccine Rule 9 or remands pursuant to ¶5c, after the date on which a petition was filed, the petitioner may file a notice to continue or withdraw the petition. Such a notice shall be filed within 90 days after the expiration of the 420-day period.

TITLE VIII. JUDGMENT AND FURTHER PROCEEDINGS

30. Judgment.

a. After Review. After review and decision by a judge, the clerk shall forthwith enter judgment in accordance with the judge's decision.

b. Stipulation for Judgment. Any stipulation for a money judgment shall be signed by authorized representatives of the Secretary of Health and Human Services and the Attorney General.

31. Reconsideration.

If a party seeks reconsideration of a judge's decision, RCFC 59 shall apply.

(As amended Dec. 4, 1992.)

32. Notice of Appeal.

Review of a Court of Federal Claims judgment by the United States Court of Appeals for the Federal Circuit may be obtained by filing with the clerk of the Federal Circuit a petition for review within 60 days of the date of the entry of judgment.

(As amended Dec. 4, 1992.)

33. Election.

a. General. After judgment on the merits is entered pursuant to ¶8a, the petitioner shall within 90 days file with the clerk an election in writing either (1) to accept the judgment or (2) to file a civil action for damages for the alleged injury or death. Upon failure to file an election within the time prescribed, the petitioner shall be deemed to have filed an election to accept judgment.

b. Declining Award. An election to decline an award of compensation may be accompanied by a motion for the limited compensation provided by 42 U.S.C. §300aa-15(f)(2). If such a motion has not been filed by the time the election is filed, the petitioner will be deemed to have waived that limited compensation. Such motion shall be forwarded to the special master for a decision thereon. The decision of the special master on the motion shall be considered a separate decision for purposes of ¶¶1, 6, 8a and 13, except that, upon review of such a decision, the time limitations of ¶¶6-7 shall not apply, and memoranda filed pursuant to ¶¶2-3 shall be limited to 20 pages.

c. When Appeal Is Taken. If a petition for review is taken to the Federal Circuit, the election is to be made within 90 days of the issuance of the appellate court's mandate or of a subsequent judgment of the Court of Federal Claims if the appellate court should order a remand.

(As amended Dec. 4, 1992.)

34. Attorneys' Fees and Costs. Any request for attorneys' fees and costs pursuant to 42 U.S.C. §300aa-15(e) shall be filed no later than 21 days following the filing of an election pursuant to ¶11a. The clerk shall forward the fee request to the special master to whom the case was assigned for consideration and decision. The decision of the special master on the fee request shall be considered a separate decision for purposes of ¶¶1, 6, 8a and 13, except that upon review of a fee decision, the time limitations of ¶¶6-7 shall not apply, and memoranda filed pursuant to ¶¶2-3 shall be limited to 15 pages.

35. Availability of Filings.

a. General. All filings with the clerk pursuant to these rules are to be made available only to the court and parties with the exception of certain court-produced documents as set forth in ¶b.

b. Decisions and Certain Substantive Orders. All decisions of the court and any other substantive orders which the court designates to be of precedential value, will be made available to the public unless the document contains (1) trade secret or commercial or financial information that is privileged and confidential or (2) medical or similar information, the disclosure of which would constitute a clearly unwarranted invasion of privacy. When such a decision or designated substantive order is filed with the clerk, the petitioner will be afforded 14 days to identify and move to delete such information prior to disclosure of the document. If, upon review, the court agrees that the identified material fits the above description, such material shall be deleted from public access.

T28AKP1.EPS

T28AKP2.EPS

T28AKP3.EPS

(As amended Dec. 4, 1992.)

T28ALP1.EPS

T28ALP2.EPS

(As amended Dec. 4, 1992.)

T28ALP3.EPS

T28ALP4.EPS

(As amended Dec. 4, 1992.)

RULES OF THE UNITED STATES COURT OF INTERNATIONAL TRADE

(Effective November 1, 1980, as amended to January 5, 1999)

	Rule		
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Rule			
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TITLE II—COMMENCEMENT OF ACTION; AMENDMENT OF SUMMONS; SERVICE OF SUMMONS, PLEADINGS, MOTIONS AND ORDERS			(b) Motions—Consultation.
3.1.	Actions Transferred to the Court of International Trade from a Binational Panel or Committee Pursuant to 19 U.S.C. §1516a(g)(12)(B) or (D).		(c) Oral Argument.
	(a) Filing of Request for Transfer.		(d) Time to Respond.
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	(d) Documents in an Action Transferred Under 19 U.S.C. §1516a(g)(12).		(g) Dispositive Motions Defined.
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	(e) Service Upon Individuals Within a Judicial District of the United States.	9.	Pleading Special Matters.
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	(k) Territorial Limits of Effective Service.		(f) Time and Place.
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	(h) Filings Containing Business Proprietary Information in an Action Described in 28 U.S.C. §1581(c).		(a) When Presented.
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			(c) Counterclaim Against the United States.
			(d) Counterclaim Maturing or Acquired After Pleading.
			(e) Omitted Counterclaim.
			(f) Cross-Claim Against Co-Party.
			(g) Joinder of Additional Parties.