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TITLE 28—APPENDIX

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JUDICIAL PERSONNEL FINANCIAL DISCLOSURE REQUIREMENTS

[Title III (§§ 301–309) of Pub. L. 95–521, Oct. 26, 1978, 92 Stat. 1851–1861, as amended by Pub. L. 96–19, §§ 2(a)(3), (c)(3), 3(a)(3), (b), 4(c), 6, 7(a)–(c), (d)(2), (e), (f), 8(c), 9(c)(3), (d), (j), (p)–(r), June 13, 1979, 93 Stat. 37–43; Pub. L. 96–417, title VI, § 601(9), Oct. 10, 1980, 94 Stat. 1744; Pub. L. 96–579, § 12(c), Dec. 23, 1980, 94 Stat. 3369; Pub. L. 97–164, title I, § 163(a)(6), Apr. 2, 1982, 96 Stat. 49; Pub. L. 98–150, § 10, Nov. 11, 1983, 97 Stat. 962; Pub. L. 99–514, § 2, Oct. 22, 1986, 100 Stat. 2095; Pub. L. 99–573, § 6, Oct. 28, 1986, 100 Stat. 3231; Pub. L. 101–237, title VI, § 602(a)(1), Dec. 18, 1989, 103 Stat. 2094, which related to judicial personnel financial disclosure requirements, was repealed by Pub. L. 101–194, title II, § 201, Nov. 30, 1989, 103 Stat. 1724. See title I of the Ethics in Government Act of 1978, Pub. L. 95–521, as amended, relating to financial disclosure requirements of Federal personnel, set out in the Appendix to Title 5, Government Organization and Employees.]

Effective Date of Repeal

Repeal effective Jan. 1, 1991, see section 204 of Pub. L. 101–194, set out as an Effective Date of 1989 Amendment note under section 101 of Pub. L. 95–521 in the Appendix to Title 5, Government Organization and Employees.

Provisions of title III of Pub. L. 95–521, as in effect prior to Nov. 30, 1989, effective until Jan. 1, 1991, as if Pub. L. 101–194 had not been enacted, and nothing in title II of Pub. L. 101–194 to be construed to prevent prosecution of civil actions against individuals for violations of title III of Pub. L. 95–521 before Jan. 1, 1991, see section 3(10)(C), (D) of Pub. L. 101–280, set out as an Effective Date of 1989 Amendment note under section 101 of Pub. L. 95–521 in the Appendix to Title 5.

DEVELOPMENT OF MECHANISMS FOR RESOLVING MINOR DISPUTES

CODIFICATION

Pub. L. 96–190, Feb. 12, 1980, 94 Stat. 17, known as the Dispute Resolution Act, provided for the establishment and maintenance of mechanisms for resolving minor disputes, established the Dispute Resolution Resource Center and Dispute Resolution Advisory Board, prescribed duties for the Center and Board, authorized appropriations for the Center and Board of $1,000,000 for each of the fiscal years 1980, 1981, 1982, 1983, and 1984, directed that financial assistance to eligible applicants be in the form of grants, prescribed conditions for such grants, authorized appropriations for such grants of $10,000,000 for each of the fiscal years 1981, 1982, 1983, and 1984, and required an annual report by the Attorney General to the President and Congress relating to the administration of Pub. L. 96–190.

FEDERAL RULES OF APPELLATE PROCEDURE

(As amended to January 3, 2007)

HISTORICAL NOTE

The Federal Rules of Appellate Procedure were adopted by order of the Supreme Court on Dec. 4, 1967, transmitted to Congress by the Chief Justice on Jan. 15, 1968, and became effective on July 1, 1968.

The Rules have been amended Mar. 30, 1970, eff. July 1, 1970; Mar. 1, 1971, eff. July 1, 1971; Apr. 24, 1972, eff. Oct. 1, 1972; Apr. 30, 1979, eff. Aug. 1, 1979; Oct. 12, 1984, Pub. L. 98–473, title II, §210, 98 Stat 1987; Mar. 10, 1986, eff. July 1, 1986; Nov. 18, 1988, Pub. L. 100–690, title VII, §7111, 102 Stat. 4419; Apr. 25, 1989, eff. Dec. 1, 1989; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 27, 1995, eff. Dec. 1, 1995; Apr. 23, 1996, eff. Dec. 1, 1996; Apr. 24, 1996, Pub. L. 104–132, title I, §103, 110 Stat. 1218; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002; Mar. 27, 2003, eff. Dec. 1, 2003; Apr. 25, 2005, eff. Dec. 1, 2005; Apr. 12, 2006, eff. Dec. 1, 2006.

TITLE I. APPLICABILITY OF RULES

Rule
1. Scope of Rules; Title.
2. Suspension of Rules.

TITLE II. APPEAL FROM A JUDGMENT OR ORDER OF A DISTRICT COURT

3. Appeal as of Right—How Taken.
[3.1. Abrogated.]
4. Appeal as of Right—When Taken.
5. Appeal by Permission.
[5.1. Abrogated.]
6. Appeal in a Bankruptcy Case from a Final Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel.
7. Bond for Costs on Appeal in a Civil Case.
8. Stay or Injunction Pending Appeal.
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10. The Record on Appeal.
11. Forwarding the Record.
12. Docketing the Appeal; Filing a Representation Statement; Filing the Record.

TITLE III. REVIEW OF A DECISION OF THE UNITED STATES TAX COURT

13. Review of a Decision of the Tax Court.
14. Applicability of Other Rules to the Review of a Tax Court Decision.

TITLE IV. REVIEW OR ENFORCEMENT OF AN ORDER OF AN ADMINISTRATIVE AGENCY, BOARD, COMMISSION, OR OFFICER

15. Review or Enforcement of an Agency Order—How Obtained; Intervention.
15.1. Briefs and Oral Argument in a National Labor Relations Board Proceeding.
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APPENDIX OF FORMS

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1. Notice of Appeal to a Court of Appeals From a Judgment or Order of a District Court.
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3. Petition for Review of Order of an Agency, Board, Commission or Officer.
4. Affidavit to Accompany Motion for Leave to Appeal in Forma Pauperis.
5. Notice of Appeal to a Court of Appeals from a Judgment or Order of a District Court or a Bankruptcy Appellate Panel.
6. Certificate of Compliance With Rule 32(a).

EFFECTIVE DATE AND APPLICATION OF RULES

Section 2 of the Order of the Supreme Court, dated Dec. 4, 1967, provided: ''That the foregoing rules shall take effect on July 1, 1968, and shall govern all proceedings in appeals and petitions for review or enforcement of orders thereafter brought in and in all such proceedings then pending, except to the extent that in the opinion of the court of appeals their application in a particular proceeding then pending would not be fea-

sible or would work injustice, in which case the former procedure may be followed.''

EFFECTIVE DATE OF 1970 AMENDMENT; TRANSMISSION TO CONGRESS

Sections 2 and 3 of the Order of the Supreme Court, dated Mar. 30, 1970, provided:

''2. That the foregoing amendments to the Federal Rules of Appellate Procedure shall take effect on July 1, 1970, and shall govern all proceedings in actions brought thereafter and also in all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action then pending would not be feasible or would work injustice, in which event the former procedure applies.

''3. That the Chief Justice be, and he hereby is, authorized to transmit to the Congress the foregoing amendments to existing rules, in accordance with the provisions of Title 18, U.S.C., §3372, and Title 28, U.S.C., §§2072 and 2075.''

TITLE I. APPLICABILITY OF RULES

Rule 1. Scope of Rules; Title

(a) SCOPE OF RULES.

(1) These rules govern procedure in the United States courts of appeals.

(2) When these rules provide for filing a motion or other document in the district court, the procedure must comply with the practice of the district court.

(b) [ABROGATED.]

(c) TITLE. These rules are to be known as the Federal Rules of Appellate Procedure.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Apr. 25, 1989, eff. Dec. 1, 1989; Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002.)

NOTES OF ADVISORY COMMITTEE ON RULES—1967

These rules are drawn under the authority of 28 U.S.C. §2072, as amended by the Act of November 6, 1966, 80 Stat. 1323 (1 U.S. Code Cong. & Ad. News, p. 1546 (1966)) (Rules of Civil Procedure); 28 U.S.C. §2075 (Bankruptcy Rules); and 18 U.S.C. §§3771 (Procedure to and including verdict) and 3772 (Procedure after verdict). Those statutes combine to give to the Supreme Court power to make rules of practice and procedure for all cases within the jurisdiction of the courts of appeals. By the terms of the statutes, after the rules have taken effect all laws in conflict with them are of no further force or effect. Practice and procedure in the eleven courts of appeals are now regulated by rules promulgated by each court under the authority of 28 U.S.C. §2071. Rule 47 expressly authorizes the courts of appeals to make rules of practice not inconsistent with these rules.

As indicated by the titles under which they are found, the following rules are of special application: Rules 3 through 12 apply to appeals from judgments and orders of the district courts; Rules 13 and 14 apply to appeals from decisions of the Tax Court (Rule 13 establishes an appeal as the mode of review of decisions of the Tax Court in place of the present petition for review); Rules 15 through 20 apply to proceedings for review or enforcement of orders of administrative agencies, boards, commissions and officers. Rules 22 through 24 regulate habeas corpus proceedings and appeals in forma pauperis. All other rules apply to all proceedings in the courts of appeals.

NOTES OF ADVISORY COMMITTEE ON RULES—1979 AMENDMENT

The Federal Rules of Appellate Procedure were designed as an integrated set of rules to be followed in appeals to the courts of appeals, covering all steps in the appellate process, whether they take place in the district court or in the court of appeals, and with their adoption Rules 72–76 of the F.R.C.P. were abrogated. In some instances, however, the F.R.A.P. provide that a motion or application for relief may, or must, be made in the district court. See Rules 4(a), 10(b), and 24. The proposed amendment would make it clear that when this is so the motion or application is to be made in the form and manner prescribed by the F.R.C.P. or F.R.Cr.P. and local rules relating to the form and presentation of motions and is not governed by Rule 27 of the F.R.A.P. See Rule 7(b) of the F.R.C.P. and Rule 47 of the F.R.Cr.P.

NOTES OF ADVISORY COMMITTEE ON RULES—1989 AMENDMENT

The amendment is technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1994 AMENDMENT

Subdivision (c). A new subdivision is added to the rule. The text of new subdivision (c) has been moved from Rule 48 to Rule 1 to allow the addition of new rules at the end of the existing set of appellate rules without burying the title provision among other rules. In a similar fashion the Bankruptcy Rules combine the provisions governing the scope of the rules and the title in the first rule.

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only. The Advisory Committee recommends deleting the language in subdivision (a) that describes the different types of proceedings that may be brought in a court of appeals. The Advisory Committee believes that the language is unnecessary and that its omission does not work any substantive change.

COMMITTEE NOTES ON RULES—2002 AMENDMENT

Subdivision (b). Two recent enactments make it likely that, in the future, one or more of the Federal Rules of Appellate Procedure (''FRAP'') will extend or limit the jurisdiction of the courts of appeals. In 1990, Congress amended the Rules Enabling Act to give the Supreme Court authority to use the federal rules of practice and procedure to define when a ruling of a district court is final for purposes of 28 U.S.C. §1291. *See* 28 U.S.C. §2072(c). In 1992, Congress amended 28 U.S.C. §1292 to give the Supreme Court authority to use the federal rules of practice and procedure to provide for appeals of interlocutory decisions that are not already authorized by 28 U.S.C. §1292. *See* 28 U.S.C. §1292(e). Both §1291 and §1292 are unquestionably jurisdictional statutes, and thus, as soon as FRAP is amended to define finality for purposes of the former or to authorize interlocutory appeals not provided for by the latter, FRAP will ''extend or limit the jurisdiction of the courts of appeals,'' and subdivision (b) will become obsolete. For that reason, subdivision (b) has been abrogated.

Changes Made After Publication and Comments. No changes were made to the text of the proposed amendment or to the Committee Note.

Rule 2. Suspension of Rules

On its own or a party's motion, a court of appeals may—to expedite its decision or for other good cause—suspend any provision of these rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b).

(As amended Apr. 24, 1998, eff. Dec. 1, 1998.)

NOTES OF ADVISORY COMMITTEE ON RULES—1967

The primary purpose of this rule is to make clear the power of the courts of appeals to expedite the determination of cases of pressing concern to the public or to the litigants by prescribing a time schedule other than that provided by the rules. The rule also contains a general authorization to the courts to relieve litigants of the consequences of default where manifest injustice would otherwise result. Rule 26(b) prohibits a court of appeals from extending the time for taking appeal or seeking review.

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The language of the rule is amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

TITLE II. APPEAL FROM A JUDGMENT OR ORDER OF A DISTRICT COURT

Rule 3. Appeal as of Right—How Taken

(a) FILING THE NOTICE OF APPEAL.

(1) An appeal permitted by law as of right from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk within the time allowed by Rule 4. At the time of filing, the appellant must furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d).

(2) An appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for the court of appeals to act as it considers appropriate, including dismissing the appeal.

(3) An appeal from a judgment by a magistrate judge in a civil case is taken in the same way as an appeal from any other district court judgment.

(4) An appeal by permission under 28 U.S.C. §1292(b) or an appeal in a bankruptcy case may be taken only in the manner prescribed by Rules 5 and 6, respectively.

(b) JOINT OR CONSOLIDATED APPEALS.

(1) When two or more parties are entitled to appeal from a district-court judgment or order, and their interests make joinder practicable, they may file a joint notice of appeal. They may then proceed on appeal as a single appellant.

(2) When the parties have filed separate timely notices of appeal, the appeals may be joined or consolidated by the court of appeals.

(c) CONTENTS OF THE NOTICE OF APPEAL.

(1) The notice of appeal must:

(A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as ''all plaintiffs,'' ''the defendants,'' ''the plaintiffs A, B, et al.,'' or ''all defendants except X'';

(B) designate the judgment, order, or part thereof being appealed; and

(C) name the court to which the appeal is taken.

(2) A pro se notice of appeal is considered filed on behalf of the signer and the signer's spouse and minor children (if they are parties), unless the notice clearly indicates otherwise.

(3) In a class action, whether or not the class has been certified, the notice of appeal is sufficient if it names one person qualified to bring the appeal as representative of the class.

(4) An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice.

(5) Form 1 in the Appendix of Forms is a suggested form of a notice of appeal.

(d) SERVING THE NOTICE OF APPEAL.

(1) The district clerk must serve notice of the filing of a notice of appeal by mailing a copy to each party's counsel of record—excluding the appellant's—or, if a party is proceeding pro se, to the party's last known address. When a defendant in a criminal case appeals, the clerk must also serve a copy of the notice of appeal on the defendant, either by personal service or by mail addressed to the defendant. The clerk must promptly send a copy of the notice of appeal and of the docket entries—and any later docket entries—to the clerk of the court of appeals named in the notice. The district clerk must note, on each copy, the date when the notice of appeal was filed.

(2) If an inmate confined in an institution files a notice of appeal in the manner provided by Rule 4(c), the district clerk must also note the date when the clerk docketed the notice.

(3) The district clerk's failure to serve notice does not affect the validity of the appeal. The clerk must note on the docket the names of the parties to whom the clerk mails copies, with the date of mailing. Service is sufficient despite the death of a party or the party's counsel.

(e) PAYMENT OF FEES. Upon filing a notice of appeal, the appellant must pay the district clerk all required fees. The district clerk receives the appellate docket fee on behalf of the court of appeals.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Mar. 10, 1986, eff. July 1, 1986; Apr. 25, 1989, eff. Dec. 1, 1989; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 24, 1998, eff. Dec. 1, 1998.)

NOTES OF ADVISORY COMMITTEE ON RULES—1967

General Note. Rule 3 and Rule 4 combine to require that a notice of appeal be filed with the clerk of the district court within the time prescribed for taking an appeal. Because the timely filing of a notice of appeal is ''mandatory and jurisdictional,'' *United States v. Robinson*, 361 U.S. 220, 224, 80 S.Ct. 282, 4 L.Ed.2d 259 (1960), compliance with the provisions of those rules is of the utmost importance. But the proposed rules merely restate, in modified form, provisions now found in the civil and criminal rules (FRCP 5(e), 73; FRCrP 37), and decisions under the present rules which dispense with literal compliance in cases in which it cannot fairly be exacted should control interpretation of these rules. Illustrative decisions are: *Fallen v. United States*, 378 U.S. 139, 84 S.Ct. 1689, 12 L.Ed.2d 760 (1964) (notice of appeal by a prisoner, in the form of a letter delivered, well within the time fixed for appeal, to prison authorities for mailing to the clerk of the district court held time-

ly filed notwithstanding that it was received by the clerk after expiration of the time for appeal; the appellant ''did all he could'' to effect timely filing); *Richey v. Wilkins*, 335 F.2d 1 (2d Cir. 1964) (notice filed in the court of appeals by a prisoner without assistance of counsel held sufficient); *Halfen v. United States*, 324 F.2d 52 (10th Cir. 1963) (notice mailed to district judge in time to have been received by him in normal course held sufficient); *Riffle v. United States*, 299 F.2d 802 (5th Cir. 1962) (letter of prisoner to judge of court of appeals held sufficient). Earlier cases evidencing ''a liberal view of papers filed by indigent and incarcerated defendants'' are listed in *Coppedge v. United States*, 369 U.S. 438, 442, n. 5, 82 S.Ct. 917, 8 L.Ed.2d 21 (1962).

Subdivision (a). The substance of this subdivision is derived from FRCP 73(a) and FRCrP 37(a)(1). The proposed rule follows those rules in requiring nothing other than the filing of a notice of appeal in the district court for the perfection of the appeal. The petition for allowance (except for appeals governed by Rules 5 and 6), citations, assignments of error, summons and severance—all specifically abolished by earlier modern rules—are assumed to be sufficiently obsolete as no longer to require pointed abolition.

Subdivision (b). The first sentence is derived from FRCP 74. The second sentence is added to encourage consolidation of appeals whenever feasible.

Subdivision (c). This subdivision is identical with corresponding provisions in FRCP 73(b) and FRCrP 37(a)(1).

Subdivision (d). This subdivision is derived from FRCP 73(b) and FRCrP 37(a)(1). The duty of the clerk to forward a copy of the notice of appeal and of the docket entries to the court of appeals in a criminal case extended to habeas corpus and 28 U.S.C. §2255 proceedings.

NOTES OF ADVISORY COMMITTEE ON RULES—1979 AMENDMENT

Subdivision (c). The proposed amendment would add the last sentence. Because of the fact that the timely filing of the notice of appeal has been characterized as jurisdictional (See, e.g., *Brainerd v. Beal* (C.A. 7th, 1974) 498 F.2d 901, in which the filing of a notice of appeal one day late was fatal), it is important that the right to appeal not be lost by mistakes of mere form. In a number of decided cases it has been held that so long as the function of notice is met by the filing of a paper indicating an intention to appeal, the substance of the rule has been complied with. See, e.g., *Cobb v. Lewis* (C.A. 5th, 1974) 488 F.2d 41; *Holley v. Capps* (C.A. 5th, 1972) 468 F.2d 1366. The proposed amendment would give recognition to this practice.

When a notice of appeal is filed, the clerk should ascertain whether any judgment designated therein has been entered in compliance with Rules 58 and 79(a) of the F.R.C.P. See Note to Rule 4(a)(6), infra.

Subdivision (d). The proposed amendment would extend to civil cases the present provision applicable to criminal cases, habeas corpus cases, and proceedings under 28 U.S.C. §2255, requiring the clerk of the district court to transmit to the clerk of the court of appeals a copy of the notice of appeal and of the docket entries, which should include reference to compliance with the requirements for payment of fees. See Note to (e), infra.

This requirement is the initial step in proposed changes in the rules to place in the court of appeals an increased practical control over the early steps in the appeal.

Subdivision (e). Proposed new Rule 3(e) represents the second step in shifting to the court of appeals the control of the early stages of an appeal. See Note to Rule 3(d) above. Under the present rules the payment of the fee prescribed by 28 U.S.C. 1917 is not covered. Under the statute, however, this fee is paid to the clerk of the district court at the time the notice of appeal is filed. Under present Rule 12, the ''docket fee'' fixed by the Judicial Conference of the United States under 28 U.S.C. §1913 must be paid to the clerk of the court of appeals within the time fixed for transmission of the record, ''. . . and the clerk shall thereupon enter the appeal upon the docket.''

Under the proposed new Rule 3(e) both fees would be paid to the clerk of the district court at the time the notice of appeal is filed, the clerk of the district court receiving the docket fee on behalf of the court of appeals.

In view of the provision in Rule 3(a) that ''[f]ailure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal,'' the case law indicates that the failure to prepay the statutory filing fee does not constitute a jurisdictional defect. See *Parissi v. Telechron*, 349 U.S. 46 (1955); *Gould v. Members of N. J. Division of Water Policy & Supply*, 555 F.2d 340 (3d Cir. 1977). Similarly, under present Rule 12, failure to pay the docket fee within the time prescribed may be excused by the court of appeals. See, e. g., *Walker v. Mathews*, 546 F.2d 814 (9th Cir. 1976). Proposed new Rule 3(e) adopts the view of these cases, requiring that both fees be paid at the time the notice of appeal is filed, but subject to the provisions of Rule 26(b) preserving the authority of the court of appeals to permit late payment.

NOTES OF ADVISORY COMMITTEE ON RULES—1986 AMENDMENT

The amendments to Rule 3(d) are technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1989 AMENDMENT

The amendment is technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1993 AMENDMENT

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

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

In class actions, naming each member of a class as an appellant may be extraordinarily burdensome or even impossible. In class actions if class certification has been denied, named plaintiffs may appeal the order denying the class certification on their own behalf and on behalf of putative class members, *United States Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980); or if the named

plaintiffs choose not to appeal the order denying the class certification, putative class members may appeal, *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977). If no class has been certified, naming each of the putative class members as an appellant would often be impossible. Therefore the amendment provides that in class actions, whether or not the class has been certified, it is sufficient for the notice to name one person qualified to bring the appeal as a representative of the class.

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

Note to subdivision (d). The amendment requires the district court clerk to send to the clerk of the court of appeals a copy of every docket entry in a case after the filing of a notice of appeal. This amendment accompanies the amendment to Rule 4(a)(4), which provides that when one of the posttrial motions enumerated in Rule 4(a)(4) is filed, a notice of appeal filed before the disposition of the motion becomes effective upon disposition of the motion. The court of appeals needs to be advised that the filing of a posttrial motion has suspended a notice of appeal. The court of appeals also needs to know when the district court has ruled on the motion. Sending copies of all docket entries after the filing of a notice of appeal should provide the courts of appeals with the necessary information.

NOTES OF ADVISORY COMMITTEE ON RULES—1994 AMENDMENT

Subdivision (a). The amendment requires a party filing a notice of appeal to provide the court with sufficient copies of the notice for service on all other parties.

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are generally intended to be stylistic only; in this rule, however, substantive changes are made in subdivisions (a), (b), and (d).

Subdivision (a). The provision in paragraph (a)(3) is transferred from former Rule 3.1(b). The Federal Courts Improvement Act of 1996, Pub. L. No. 104–317, repealed paragraphs (4) and (5) of 28 U.S.C. § 636(c). That statutory change made the continued separate existence of Rule 3.1 unnecessary. New paragraph (a)(3) of this rule simply makes it clear that an appeal from a judgment by a magistrate judge is taken in identical fashion to any other appeal from a district-court judgment.

Subdivision (b). A joint appeal is authorized only when two or more persons may appeal from a single judgment or order. A joint appeal is treated as a single appeal and the joint appellants file a single brief. Under existing Rule 3(b) parties decide whether to join their appeals. They may do so by filing a joint notice of appeal or by joining their appeals after filing separate notices of appeal.

In consolidated appeals the separate appeals do not merge into one. The parties do not proceed as a single appellant. Under existing Rule 3(b) it is unclear whether appeals may be consolidated without court order if the parties stipulate to consolidation. The language resolves that ambiguity by requiring court action.

The language also requires court action to join appeals after separate notices of appeal have been filed.

Subdivision (d). Paragraph (d)(2) has been amended to require that when an inmate files a notice of appeal by depositing the notice in the institution's internal mail system, the clerk must note the docketing date—rather than the receipt date—on the notice of appeal before serving copies of it. This change conforms to a change in Rule 4(c). Rule 4(c) is amended to provide that when an inmate files the first notice of appeal in a civil case by depositing the notice in an institution's internal mail system, the time for filing a cross-appeal runs from the date the district court dockets the inmate's notice of appeal. Existing Rule 4(c) says that in such a case the time for filing a cross-appeal runs from the date the district court receives the inmate's notice of appeal. A court may ''receive'' a paper when its mail is delivered to it even if the mail is not processed for a day or two, making the date of receipt uncertain. ''Docketing'' is an easily identified event. The change is made to eliminate the uncertainty.

[Rule 3.1. Appeal from a Judgment of a Magistrate Judge in a Civil Case] (Abrogated Apr. 24, 1998, eff. Dec. 1, 1998)

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The Federal Courts Improvement Act of 1996, Pub. L. No. 104–317, repealed paragraphs (4) and (5) of 28 U.S.C. § 636(c). That statutory change means that when parties consent to trial before a magistrate judge, appeal lies directly, and as a matter of right, to the court of appeals under § 636(c)(3). The parties may not choose to appeal first to a district judge and thereafter seek discretionary review in the court of appeals.

As a result of the statutory amendments, subdivision (a) of Rule 3.1 is no longer necessary. Since Rule 3.1 existed primarily because of the provisions in subdivision (a), subdivision (b) has been moved to Rule 3(a)(3) and Rule 3.1 has been abrogated.

Rule 4. Appeal as of Right—When Taken

(a) APPEAL IN A CIVIL CASE.

(1) *Time for Filing a Notice of Appeal.*

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

(B) When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.

(C) An appeal from an order granting or denying an application for a writ of error *coram nobis* is an appeal in a civil case for purposes of Rule 4(a).

(2) *Filing Before Entry of Judgment.* A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

(3) *Multiple Appeals.* If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

(4) *Effect of a Motion on a Notice of Appeal.*

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

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

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 10 days after the judgment is entered.

(B)(i) If a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment altered or amended upon such a motion, must file a notice of appeal, or an amended notice of appeal—in compliance with Rule 3(c)—within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.—

(iii) No additional fee is required to file an amended notice.

(5) *Motion for Extension of Time.*

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 10 days after the date when the order granting the motion is entered, whichever is later.

(6) *Reopening the Time to File an Appeal.* The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and

(C) the court finds that no party would be prejudiced.

(7) *Entry Defined.*

(A) A judgment or order is entered for purposes of this Rule 4(a):

(i) if Federal Rule of Civil Procedure 58(a)(1) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a); or

(ii) if Federal Rule of Civil Procedure 58(a)(1) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

- the judgment or order is set forth on a separate document, or
- 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79(a).

(B) A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58(a)(1) does not affect the validity of an appeal from that judgment or order.

(b) APPEAL IN A CRIMINAL CASE.

(1) *Time for Filing a Notice of Appeal.*

(A) In a criminal case, a defendant's notice of appeal must be filed in the district court within 10 days after the later of:

(i) the entry of either the judgment or the order being appealed; or

(ii) the filing of the government's notice of appeal.

(B) When the government is entitled to appeal, its notice of appeal must be filed in the district court within 30 days after the later of:

(i) the entry of the judgment or order being appealed; or

(ii) the filing of a notice of appeal by any defendant.

(2) *Filing Before Entry of Judgment.* A notice of appeal filed after the court announces a decision, sentence, or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

(3) *Effect of a Motion on a Notice of Appeal.*

(A) If a defendant timely makes any of the following motions under the Federal Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must be filed within 10 days after the entry of the order disposing of the last such remaining motion, or within 10 days after the entry of the judgment of conviction, whichever period ends later. This provision applies to a timely motion:

(i) for judgment of acquittal under Rule 29;

(ii) for a new trial under Rule 33, but if based on newly discovered evidence, only if the motion is made no later than 10 days after the entry of the judgment; or

(iii) for arrest of judgment under Rule 34.

(B) A notice of appeal filed after the court announces a decision, sentence, or order—but before it disposes of any of the motions referred to in Rule 4(b)(3)(A)—becomes effective upon the later of the following:

(i) the entry of the order disposing of the last such remaining motion; or

(ii) the entry of the judgment of conviction.

(C) A valid notice of appeal is effective—without amendment—to appeal from an order disposing of any of the motions referred to in Rule 4(b)(3)(A).

(4) *Motion for Extension of Time*. Upon a finding of excusable neglect or good cause, the district court may—before or after the time has expired, with or without motion and notice—extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b).

(5) *Jurisdiction*. The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Federal Rule of Criminal Procedure 35(a), nor does the filing of a motion under 35(a) affect the validity of a notice of appeal filed before entry of the order disposing of the motion. The filing of a motion under Federal Rule of Criminal Procedure 35(a) does not suspend the time for filing a notice of appeal from a judgment of conviction.

(6) *Entry Defined*. A judgment or order is entered for purposes of this Rule 4(b) when it is entered on the criminal docket.

(c) APPEAL BY AN INMATE CONFINED IN AN INSTITUTION.

(1) If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. §1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

(2) If an inmate files the first notice of appeal in a civil case under this Rule 4(c), the 14-day period provided in Rule 4(a)(3) for another party to file a notice of appeal runs from the date when the district court dockets the first notice.

(3) When a defendant in a criminal case files a notice of appeal under this Rule 4(c), the 30-day period for the government to file its notice of appeal runs from the entry of the judgment or order appealed from or from the district court's docketing of the defendant's notice of appeal, whichever is later.

(d) MISTAKEN FILING IN THE COURT OF APPEALS. If a notice of appeal in either a civil or a criminal case is mistakenly filed in the court of appeals, the clerk of that court must note on the notice the date when it was received and send it to the district clerk. The notice is then considered filed in the district court on the date so noted.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Nov. 18, 1988, Pub. L. 100–690, title VII, §7111, 102 Stat. 4419; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 27, 1995, eff. Dec. 1, 1995; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 25, 2005, eff. Dec. 1, 2005.)

NOTES OF ADVISORY COMMITTEE ON RULES—1967

Subdivision (a). This subdivision is derived from FRCP 73(a) without any change of substance. The requirement that a request for an extension of time for filing the notice of appeal made after expiration of the time be made by motion and on notice codifies the result reached under the present provisions of FRCP 73(a) and 6(b). *North Umberland Mining Co. v. Standard Accident Ins. Co.*, 193 F.2d 951 (9th Cir., 1952); *Cohen v. Plateau Natural Gas Co.*, 303 F.2d 273 (10th Cir., 1962); *Plant Economy, Inc. v. Mirror Insulation Co.*, 308 F.2d 275 (3d Cir., 1962).

Since this subdivision governs appeals in all civil cases, it supersedes the provisions of section 25 of the Bankruptcy Act (11 U.S.C. §48). Except in cases to which the United States or an officer or agency thereof is a party, the change is a minor one, since a successful litigant in a bankruptcy proceeding may, under section 25, oblige an aggrieved party to appeal within 30 days after entry of judgment—the time fixed by this subdivision in cases involving private parties only—by serving him with notice of entry on the day thereof, and by the terms of section 25 an aggrieved party must in any event appeal within 40 days after entry of judgment. No reason appears why the time for appeal in bankruptcy should not be the same as that in civil cases generally. Furthermore, section 25 is a potential trap for the uninitiated. The time for appeal which it provides is not applicable to all appeals which may fairly be termed appeals in bankruptcy. Section 25 governs only those cases referred to in section 24 as "proceedings in bankruptcy" and "controversies arising in proceedings in bankruptcy." *Lowenstein v. Reikes*, 54 F.2d 481 (2d Cir., 1931), *cert. den.*, 285 U.S. 539, 52 S.Ct. 311, 76 L.Ed. 932 (1932). The distinction between such cases and other cases which arise out of bankruptcy is often difficult to determine. See 2 Moore's Collier on Bankruptcy ¶24.12 through ¶24.36 (1962). As a result it is not always clear whether an appeal is governed by section 25 or by FRCP 73(a), which is applicable to such appeals in bankruptcy as are not governed by section 25.

In view of the unification of the civil and admiralty procedure accomplished by the amendments of the Federal Rules of Civil Procedure effective July 1, 1966, this subdivision governs appeals in those civil actions which involve admiralty or maritime claims and which prior to that date were known as suits in admiralty.

The only other change possibly effected by this subdivision is in the time for appeal from a decision of a district court on a petition for impeachment of an award of a board of arbitration under the Act of May 20, 1926, c. 347, §9 (44 Stat. 585), 45 U.S.C. §159. The act provides that a notice of appeal from such a decision shall be filed within 10 days of the decision. This singular provision was apparently repealed by the enactment in 1948 of 28 U.S.C. §2107, which fixed 30 days from the date of entry of judgment as the time for appeal in all actions of a civil nature except actions in admiralty or bankruptcy matters or those in which the United States is a party. But it was not expressly repealed, and its status is in doubt. See 7 Moore's Federal Practice ¶73.09[2] (1966). The doubt should be resolved, and no reason appears why appeals in such cases should not be taken within the time provided for civil cases generally.

Subdivision (b). This subdivision is derived from FRCrP 37(a)(2) without change of substance.

NOTES OF ADVISORY COMMITTEE ON RULES—1979 AMENDMENT

Subdivision (a)(1). The words "(including a civil action which involves an admiralty or maritime claim and a proceeding in bankruptcy or a controversy arising therein)," which appear in the present rule are struck out as unnecessary and perhaps misleading in suggest-

ing that there may be other categories that are not either civil or criminal within the meaning of Rule 4(a) and (b).

The phrases ''within 30 days of such entry'' and ''within 60 days of such entry'' have been changed to read ''after'' instead of ''or.'' The change is for clarity only, since the word ''of'' in the present rule appears to be used to mean ''after.'' Since the proposed amended rule deals directly with the premature filing of a notice of appeal, it was thought useful to emphasize the fact that except as provided, the period during which a notice of appeal may be filed is the 30 days, or 60 days as the case may be, following the entry of the judgment or order appealed from. See Notes to Rule 4(a)(2) and (4), below.

Subdivision (a)(2). The proposed amendment to Rule 4(a)(2) would extend to civil cases the provisions of Rule 4(b), dealing with criminal cases, designed to avoid the loss of the right to appeal by filing the notice of appeal prematurely. Despite the absence of such a provision in Rule 4(a) the courts of appeals quite generally have held premature appeals effective. See, e. g., *Matter of Grand Jury Empanelled Jan. 21, 1975*, 541 F.2d 373 (3d Cir. 1976); *Hodge v. Hodge*, 507 F.2d 87 (3d Cir. 1976); *Song Jook Suh v. Rosenberg*, 437 F.2d 1098 (9th Cir. 1971); *Ruby v. Secretary of the Navy*, 365 F.2d 385 (9th Cir. 1966); *Firchau v. Diamond Nat'l Corp.*, 345 F.2d 469 (9th Cir. 1965).

The proposed amended rule would recognize this practice but make an exception in cases in which a post trial motion has destroyed the finality of the judgment. See Note to Rule 4(a)(4) below.

Subdivision (a)(4). The proposed amendment would make it clear that after the filing of the specified post trial motions, a notice of appeal should await disposition of the motion. Since the proposed amendments to Rules 3, 10, and 12 contemplate that immediately upon the filing of the notice of appeal the fees will be paid and the case docketed in the court of appeals, and the steps toward its disposition set in motion, it would be undesirable to proceed with the appeal while the district court has before it a motion the granting of which would vacate or alter the judgment appealed from. See, e. g., *Kieth v. Newcourt*, 530 F.2d 826 (8th Cir. 1976). Under the present rule, since docketing may not take place until the record is transmitted, premature filing is much less likely to involve waste effort. See, e. g., *Stokes v. Peyton's Inc.*, 508 F.2d 1287 (5th Cir. 1975). Further, since a notice of appeal filed before the disposition of a post trial motion, even if it were treated as valid for purposes of jurisdiction, would not embrace objections to the denial of the motion, it is obviously preferable to postpone the notice of appeal until after the motion is disposed of.

The present rule, since it provides for the ''termination'' of the ''running'' of the appeal time, is ambiguous in its application to a notice of appeal filed prior to a post trial motion filed within the 10 day limit. The amendment would make it clear that in such circumstances the appellant should not proceed with the appeal during pendency of the motion but should file a new notice of appeal after the motion is disposed of.

Subdivision (a)(5). Under the present rule it is provided that upon a showing of excusable neglect the district court at any time may extend the time for the filing of a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by the rule, but that if the application is made after the original time has run, the order may be made only on motion with such notice as the court deems appropriate.

A literal reading of this provision would require that the extension be ordered and the notice of appeal filed within the 30 day period, but despite the surface clarity of the rule, it has produced considerable confusion. See the discussion by Judge Friendly in *In re Orbitek*, 520 F.2d 358 (2d Cir. 1975). The proposed amendment would make it clear that a motion to extend the time must be filed no later than 30 days after the expiration of the original appeal time, and that if the motion is timely filed the district court may act upon the motion at a later date, and may extend the time not in excess of 10 days measured from the date on which the order granting the motion is entered.

Under the present rule there is a possible implication that prior to the time the initial appeal time has run, the district court may extend the time on the basis of an informal application. The amendment would require that the application must be made by motion, though the motion may be made ex parte. After the expiration of the initial time a motion for the extension of the time must be made in compliance with the F.R.C.P. and local rules of the district court. See Note to proposed amended Rule 1, supra. And see Rules 6(d), 7(b) of the F.R.C.P.

The proposed amended rule expands to some extent the standard for the grant of an extension of time. The present rule requires a ''showing of excusable neglect.'' While this was an appropriate standard in cases in which the motion is made after the time for filing the notice of appeal has run, and remains so, it has never fit exactly the situation in which the appellant seeks an extension before the expiration of the initial time. In such a case ''good cause,'' which is the standard that is applied in the granting of other extensions of time under Rule 26(b) seems to be more appropriate.

Subdivision (a)(6). The proposed amendment would call attention to the requirement of Rule 58 of the F.R.C.P. that the judgment constitute a separate document. See *United States v. Indrelunas*, 411 U.S. 216 (1973). When a notice of appeal is filed, the clerk should ascertain whether any judgment designated therein has been entered in compliance with Rules 58 and 79(a) and if not, so advise all parties and the district judge. While the requirement of Rule 48 is not jurisdictional (see *Bankers Trust Co. v. Mallis*, 431 U.S. 928 (1977)), compliance is important since the time for the filing of a notice of appeal by other parties is measured by the time at which the judgment is properly entered.

NOTES OF ADVISORY COMMITTEE ON RULES—1991 AMENDMENT

The amendment provides a limited opportunity for relief in circumstances where the notice of entry of a judgment or order, required to be mailed by the clerk of the district court pursuant to Rule 77(d) of the Federal Rules of Civil Procedure, is either not received by a party or is received so late as to impair the opportunity to file a timely notice of appeal. The amendment adds a new subdivision (6) allowing a district court to reopen for a brief period the time for appeal upon a finding that notice of entry of a judgment or order was not received from the clerk or a party within 21 days of its entry and that no party would be prejudiced. By ''prejudice'' the Committee means some adverse consequence other than the cost of having to oppose the appeal and encounter the risk of reversal, consequences that are present in every appeal. Prejudice might arise, for example, if the appellee had taken some action in reliance on the expiration of the normal time period for filing a notice of appeal.

Reopening may be ordered only upon a motion filed within 180 days of the entry of a judgment or order or within 7 days of receipt of notice of such entry, whichever is earlier. This provision establishes an outer time limit of 180 days for a party who fails to receive timely notice of entry of a judgment to seek additional time to appeal and enables any winning party to shorten the 180-day period by sending (and establishing proof of receipt of) its own notice of entry of a judgment, as authorized by Fed. R. Civ. P. 77(d). Winning parties are encouraged to send their own notice in order to lessen the chance that a judge will accept a claim of non-receipt in the face of evidence that notices were sent by both the clerk and the winning party. Receipt of a winning party's notice will shorten only the time for reopening the time for appeal under this subdivision, leaving the normal time periods for appeal unaffected.

If the motion is granted, the district court may reopen the time for filing a notice of appeal only for a pe-

riod of 14 days from the date of entry of the order reopening the time for appeal.

NOTES OF ADVISORY COMMITTEE ON RULES—1993 AMENDMENT

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

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

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

Note to Paragraph (a)(4). The 1979 amendment of this paragraph created a trap for an unsuspecting litigant who files a notice of appeal before a posttrial motion, or while a posttrial motion is pending. The 1979 amendment requires a party to file a new notice of appeal after the motion's disposition. Unless a new notice is filed, the court of appeals lacks jurisdiction to hear the appeal. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982). Many litigants, especially pro se litigants, fail to file the second notice of appeal, and several courts have expressed dissatisfaction with the rule. *See, e.g., Averhart v. Arrendondo*, 773 F.2d 919 (7th Cir. 1985); *Harcon Barge Co. v. D & G Boat Rentals, Inc.*, 746 F.2d 278 (5th Cir. 1984), *cert. denied*, 479 U.S. 930 (1986).

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

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

The amendment provides that a notice of appeal filed before the disposition of a posttrial tolling motion is sufficient to bring the underlying case, as well as any orders specified in the original notice, to the court of appeals. If the judgment is altered upon disposition of a posttrial motion, however, and if a party wishes to appeal from the disposition of the motion, the party must amend the notice to so indicate. When a party files an amended notice, no additional fees are required because the notice is an amendment of the original and not a new notice of appeal.

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

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

The proposed amendment also eliminates an ambiguity from the third sentence of this subdivision. Prior to this amendment, the third sentence provided that if one of the specified motions was filed, the time for filing an appeal would run from the entry of an order denying the motion. That sentence, like the parallel provision in Rule 4(a)(4), was intended to toll the running of time for appeal if one of the posttrial motions is timely filed. In a criminal case, however, the time for filing the motions runs not from entry of judgment (as it does in civil cases), but from the verdict or finding of guilt. Thus, in a criminal case, a posttrial motion may be disposed of more than 10 days before sentence is imposed, i.e. before the entry of judgment. *United States v. Hashagen*, 816 F.2d 899, 902 n.5 (3d Cir. 1987). To make it clear that a notice of appeal need not be filed before entry of judgment, the amendment states that an appeal may be taken within 10 days after the entry of an order disposing of the motion, or within 10 days after the entry of judgment, whichever is later. The amendment also changes the language in the third sentence providing that an appeal may be taken within 10 days after the entry of an order *denying* the motion; the amendment says instead that an appeal may be taken within 10 days after the entry of an order *disposing of the last such motion outstanding*. (Emphasis added) The change recognizes that there may be multiple posttrial motions filed and that, although one or more motions may be granted in whole or in part, a defendant may still wish to pursue an appeal.

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

Subdivision (b) is further amended in light of new Fed. R. Crim. P. 35(c), which authorizes a sentencing court to correct any arithmetical, technical, or other clear errors in sentencing within 7 days after imposing

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

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

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

NOTES OF ADVISORY COMMITTEE ON RULES—1995 AMENDMENT

Subdivision (a). Fed. R. Civ. P. 50, 52, and 59 were previously inconsistent with respect to whether certain postjudgment motions had to be filed or merely served no later than 10 days after entry of judgment. As a consequence Rule 4(a)(4) spoke of making or serving such motions rather than filing them. Civil Rules 50, 52, and 59, are being revised to require filing before the end of the 10-day period. As a consequence, this rule is being amended to provide that ''filing'' must occur within the 10 day period in order to affect the finality of the judgment and extend the period for filing a notice of appeal.

The Civil Rules require the filing of postjudgment motions ''no later than 10 days after entry of judgment''—rather than ''within'' 10 days—to include postjudgment motions that are filed before actual entry of the judgment by the clerk. This rule is amended, therefore, to use the same terminology.

The rule is further amended to clarify the fact that a party who wants to obtain review of an alteration or amendment of a judgment must file a notice of appeal or amend a previously filed notice to indicate intent to appeal from the altered judgment.

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only; in this rule, however, substantive changes are made in paragraphs (a)(6) and (b)(4), and in subdivision (c).

Subdivision (a), paragraph (1). Although the Advisory Committee does not intend to make any substantive changes in this paragraph, cross-references to Rules 4(a)(1)(B) and 4(c) have been added to subparagraph (a)(1)(A).

Subdivision (a), paragraph (4). Item (vi) in subparagraph (A) of Rule 4(a)(4) provides that filing a motion for relief under Fed. R. Civ. P. 60 will extend the time for filing a notice of appeal if the Rule 60 motion is filed no later than 10 days after judgment is entered. Again, the Advisory Committee does not intend to make any substantive change in this paragraph. But because Fed. R. Civ. P. 6(a) and Fed. R. App. P. 26(a) have different methods for computing time, one might be uncertain whether the 10-day period referred to in Rule 4(a)(4) is computed using Civil Rule 6(a) or Appellate Rule 26(a). Because the Rule 60 motion is filed in the district court, and because Fed. R. App. P. 1(a)(2) says that when the appellate rules provide for filing a motion in the district court, ''the procedure must comply with the practice of the district court,'' the rule provides that the 10-day period is computed using Fed. R. Civ. P. 6(a).

Subdivision (a), paragraph (6). Paragraph (6) permits a district court to reopen the time for appeal if a party has not received notice of the entry of judgment and no party would be prejudiced by the reopening. Before reopening the time for appeal, the existing rule requires the district court to find that the moving party was entitled to notice of the entry of judgment and did not receive it ''from the clerk or any party within 21 days of its entry.'' The Advisory Committee makes a substantive change. The finding must be that the movant did not receive notice ''from the district court or any party within 21 days after entry.'' This change broadens the type of notice that can preclude reopening the time for appeal. The existing rule provides that only notice from a party or from the clerk bars reopening. The new language precludes reopening if the movant has received notice from ''the court.''

Subdivision (b). Two substantive changes are made in what will be paragraph (b)(4). The current rule permits an extension of time to file a notice of appeal if there is a ''showing of excusable neglect.'' First, the rule is amended to permit a court to extend the time for ''good cause'' as well as for excusable neglect. Rule 4(a) permits extensions for both reasons in civil cases and the Advisory Committee believes that ''good cause'' should be sufficient in criminal cases as well. The amendment does not limit extensions for good cause to instances in which the motion for extension of time is filed before the original time has expired. The rule gives the district court discretion to grant extensions for good cause whenever the court believes it appropriate to do so provided that the extended period does not exceed 30 days after the expiration of the time otherwise prescribed by Rule 4(b). Second, paragraph (b)(4) is amended to require only a ''finding'' of excusable neglect or good cause and not a ''showing'' of them. Because the rule authorizes the court to provide an extension without a motion, a ''showing'' is obviously not required; a ''finding'' is sufficient.

Subdivision (c). Substantive amendments are made in this subdivision. The current rule provides that if an inmate confined in an institution files a notice of appeal by depositing it in the institution's internal mail system, the notice is timely filed if deposited on or before the last day for filing. Some institutions have special internal mail systems for handling legal mail; such systems often record the date of deposit of mail by an inmate, the date of delivery of mail to an inmate, etc. The Advisory Committee amends the rule to require an inmate to use the system designed for legal mail, if there is one, in order to receive the benefit of this subdivision.

When an inmate uses the filing method authorized by subdivision (c), the current rule provides that the time for other parties to appeal begins to run from the date the district court ''receives'' the inmate's notice of appeal. The rule is amended so that the time for other parties begins to run when the district court ''dockets'' the inmate's appeal. A court may ''receive'' a paper when its mail is delivered to it even if the mail is not processed for a day or two, making the date of receipt uncertain. ''Docketing'' is an easily identified event. The change eliminates uncertainty. Paragraph (c)(3) is further amended to make it clear that the time for the government to file its appeal runs from the later of the entry of the judgment or order appealed from or the district court's docketing of a defendant's notice filed under this paragraph (c).

COMMITTEE NOTES ON RULES—2002 AMENDMENT

Subdivision (a)(1)(C). The federal courts of appeals have reached conflicting conclusions about whether an

appeal from an order granting or denying an application for a writ of error *coram nobis* is governed by the time limitations of Rule 4(a) (which apply in civil cases) or by the time limitations of Rule 4(b) (which apply in criminal cases). *Compare United States v. Craig*, 907 F.2d 653, 655–57, *amended* 919 F.2d 57 (7th Cir. 1990); *United States v. Cooper*, 876 F.2d 1192, 1193–94 (5th Cir. 1989); and *United States v. Keogh*, 391 F.2d 138, 140 (2d Cir. 1968) (applying the time limitations of Rule 4(a)); *with Yasui v. United States*, 772 F.2d 1496, 1498–99 (9th Cir. 1985); and *United States v. Mills*, 430 F.2d 526, 527–28 (8th Cir. 1970) (applying the time limitations of Rule 4(b)). A new part (C) has been added to Rule 4(a)(1) to resolve this conflict by providing that the time limitations of Rule 4(a) will apply.

Subsequent to the enactment of Fed. R. Civ. P. 60(b) and 28 U.S.C. §2255, the Supreme Court has recognized the continued availability of a writ of error *coram nobis* in at least one narrow circumstance. In 1954, the Court permitted a litigant who had been convicted of a crime, served his full sentence, and been released from prison, but who was continuing to suffer a legal disability on account of the conviction, to seek a writ of error *coram nobis* to set aside the conviction. *United States v. Morgan*, 346 U.S. 502 (1954). As the Court recognized, in the *Morgan* situation an application for a writ of error *coram nobis* ''is of the same general character as [a motion] under 28 U.S.C. §2255.'' *Id.* at 506 n.4. Thus, it seems appropriate that the time limitations of Rule 4(a), which apply when a district court grants or denies relief under 28 U.S.C. §2255, should also apply when a district court grants or denies a writ of error *coram nobis*. In addition, the strong public interest in the speedy resolution of criminal appeals that is reflected in the shortened deadlines of Rule 4(b) is not present in the *Morgan* situation, as the party seeking the writ of error *coram nobis* has already served his or her full sentence.

Notwithstanding *Morgan*, it is not clear whether the Supreme Court continues to believe that the writ of error *coram nobis* is available in federal court. In civil cases, the writ has been expressly abolished by Fed. R. Civ. P. 60(b). In criminal cases, the Supreme Court has recently stated that it has become '''difficult to conceive of a situation'' in which the writ ''would be necessary or appropriate.''' *Carlisle v. United States*, 517 U.S. 416, 429 (1996) (quoting *United States v. Smith*, 331 U.S. 469, 475 n.4 (1947)). The amendment to Rule 4(a)(1) is not intended to express any view on this issue; rather, it is merely meant to specify time limitations for appeals.

Rule 4(a)(1)(C) applies only to motions that are in substance, and not merely in form, applications for writs of error *coram nobis*. Litigants may bring and label as applications for a writ of error *coram nobis* what are in reality motions for a new trial under Fed. R. Crim. P. 33 or motions for correction or reduction of a sentence under Fed. R. Crim. P. 35. In such cases, the time limitations of Rule 4(b), and not those of Rule 4(a), should be enforced.

Changes Made After Publication and Comments. No changes were made to the text of the proposed amendment or to the Committee Note.

Subdivision (a)(4)(A)(vi). Rule 4(a)(4)(A)(vi) has been amended to remove a parenthetical that directed that the 10-day deadline be ''computed using Federal Rule of Civil Procedure 6(a).'' That parenthetical has become superfluous because Rule 26(a)(2) has been amended to require that all deadlines under 11 days be calculated as they are under Fed. R. Civ. P. 6(a).

Changes Made After Publication and Comments. No changes were made to the text of the proposed amendment or to the Committee Note.

Subdivision (a)(5)(A)(ii). Rule 4(a)(5)(A) permits the district court to extend the time to file a notice of appeal if two conditions are met. First, the party seeking the extension must file its motion no later than 30 days after the expiration of the time originally prescribed by Rule 4(a). Second, the party seeking the extension must show either excusable neglect or good cause. The text of Rule 4(a)(5)(A) does not distinguish between motions filed prior to the expiration of the original deadline and those filed after the expiration of the original deadline. Regardless of whether the motion is filed before or during the 30 days after the original deadline expires, the district court may grant an extension if a party shows either excusable neglect or good cause.

Despite the text of Rule 4(a)(5)(A), most of the courts of appeals have held that the good cause standard applies only to motions brought prior to the expiration of the original deadline and that the excusable neglect standard applies only to motions brought during the 30 days following the expiration of the original deadline. *See Pontarelli v. Stone*, 930 F.2d 104, 109–10 (1st Cir. 1991) (collecting cases from the Second, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits). These courts have relied heavily upon the Advisory Committee Note to the 1979 amendment to Rule 4(a)(5). But the Advisory Committee Note refers to a draft of the 1979 amendment that was ultimately rejected. The rejected draft directed that the good cause standard apply only to motions filed prior to the expiration of the original deadline. Rule 4(a)(5), as actually amended, did not. *See* 16A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE §3950.3, at 148–49 (2d ed. 1996).

The failure of the courts of appeals to apply Rule 4(a)(5)(A) as written has also created tension between that rule and Rule 4(b)(4). As amended in 1998, Rule 4(b)(4) permits the district court to extend the time for filing a notice of appeal in a *criminal* case for an additional 30 days upon a finding of excusable neglect or good cause. Both Rule 4(b)(4) and the Advisory Committee Note to the 1998 amendment make it clear that an extension can be granted for either excusable neglect or good cause, regardless of whether a motion for an extension is filed before or during the 30 days following the expiration of the original deadline.

Rule 4(a)(5)(A)(ii) has been amended to correct this misunderstanding and to bring the rule in harmony in this respect with Rule 4(b)(4). A motion for an extension filed prior to the expiration of the original deadline may be granted if the movant shows either excusable neglect or good cause. Likewise, a motion for an extension filed during the 30 days following the expiration of the original deadline may be granted if the movant shows either excusable neglect or good cause.

The good cause and excusable neglect standards have ''different domains.'' *Lorenzen v. Employees Retirement Plan*, 896 F.2d 228, 232 (7th Cir. 1990). They are not interchangeable, and one is not inclusive of the other. The excusable neglect standard applies in situations in which there is fault; in such situations, the need for an extension is usually occasioned by something within the control of the movant. The good cause standard applies in situations in which there is no fault—excusable or otherwise. In such situations, the need for an extension is usually occasioned by something that is not within the control of the movant.

Thus, the good cause standard can apply to motions brought during the 30 days following the expiration of the original deadline. If, for example, the Postal Service fails to deliver a notice of appeal, a movant might have good cause to seek a post-expiration extension. It may be unfair to make such a movant prove that its ''neglect'' was excusable, given that the movant may not have been neglectful at all. Similarly, the excusable neglect standard can apply to motions brought prior to the expiration of the original deadline. For example, a movant may bring a pre-expiration motion for an extension of time when an error committed by the movant makes it unlikely that the movant will be able to meet the original deadline.

Changes Made After Publication and Comments. No changes were made to the text of the proposed amendment. The stylistic changes to the Committee Note suggested by Judge Newman were adopted. In addition, two paragraphs were added at the end of the Committee Note to clarify the difference between the good cause and excusable neglect standards.

Subdivision (a)(7). Several circuit splits have arisen out of uncertainties about how Rule 4(a)(7)'s definition

of when a judgment or order is ''entered'' interacts with the requirement in Fed. R. Civ. P. 58 that, to be ''effective,'' a judgment must be set forth on a separate document. Rule 4(a)(7) and Fed. R. Civ. P. 58 have been amended to resolve those splits.

1. The first circuit split addressed by the amendments to Rule 4(a)(7) and Fed. R. Civ. P. 58 concerns the extent to which orders that dispose of post-judgment motions must be set forth on separate documents. Under Rule 4(a)(4)(A), the filing of certain post-judgment motions tolls the time to appeal the underlying judgment until the ''entry'' of the order disposing of the last such remaining motion. Courts have disagreed about whether such an order must be set forth on a separate document before it is treated as ''entered.'' This disagreement reflects a broader dispute among courts about whether Rule 4(a)(7) independently imposes a separate document requirement (a requirement that is distinct from the separate document requirement that is imposed by the Federal Rules of Civil Procedure (''FRCP'')) or whether Rule 4(a)(7) instead incorporates the separate document requirement as it exists in the FRCP. Further complicating the matter, courts in the former ''camp'' disagree among themselves about the scope of the separate document requirement that they interpret Rule 4(a)(7) as imposing, and courts in the latter ''camp'' disagree among themselves about the scope of the separate document requirement imposed by the FRCP.

Rule 4(a)(7) has been amended to make clear that it simply incorporates the separate document requirement as it exists in Fed. R. Civ. P. 58. If Fed. R. Civ. P. 58 does not require that a judgment or order be set forth on a separate document, then neither does Rule 4(a)(7); the judgment or order will be deemed entered for purposes of Rule 4(a) when it is entered in the civil docket. If Fed. R. Civ. P. 58 requires that a judgment or order be set forth on a separate document, then so does Rule 4(a)(7); the judgment or order will not be deemed entered for purposes of Rule 4(a) until it is so set forth and entered in the civil docket (with one important exception, described below).

In conjunction with the amendment to Rule 4(a)(7), Fed. R. Civ. P. 58 has been amended to provide that orders disposing of the post-judgment motions listed in new Fed. R. Civ. P. 58(a)(1) (which post-judgment motions include, but are not limited to, the post-judgment motions that can toll the time to appeal under Rule 4(a)(4)(A)) do not have to be set forth on separate documents. *See* Fed. R. Civ. P. 58(a)(1). Thus, such orders are entered for purposes of Rule 4(a) when they are entered in the civil docket pursuant to Fed. R. Civ. P. 79(a). *See* Rule 4(a)(7)(A)(1).

2. The second circuit split addressed by the amendments to Rule 4(a)(7) and Fed. R. Civ. P. 58 concerns the following question: When a judgment or order is required to be set forth on a separate document under Fed. R. Civ. P. 58 but is not, does the time to appeal the judgment or order—or the time to bring post-judgment motions, such as a motion for a new trial under Fed. R. Civ. P. 59—ever begin to run? According to every circuit except the First Circuit, the answer is ''no.'' The First Circuit alone holds that parties will be deemed to have waived their right to have a judgment or order entered on a separate document three months after the judgment or order is entered in the civil docket. *See Fiore v. Washington County Community Mental Health Ctr.*, 960 F.2d 229, 236 (1st Cir. 1992) (en banc). Other circuits have rejected this cap as contrary to the relevant rules. *See, e.g., United States v. Haynes*, 158 F.3d 1327, 1331 (D.C. Cir. 1998); *Hammack v. Baroid Corp.*, 142 F.3d 266, 269–70 (5th Cir. 1998); *Rubin v. Schottenstein, Zox & Dunn*, 110 F.3d 1247, 1253 n.4 (6th Cir. 1997), *vacated on other grounds*, 143 F.3d 263 (6th Cir. 1998) (en banc). However, no court has questioned the wisdom of imposing such a cap as a matter of policy.

Both Rule 4(a)(7)(A) and Fed. R. Civ. P. 58 have been amended to impose such a cap. Under the amendments, a judgment or order is generally treated as entered when it is entered in the civil docket pursuant to Fed. R. Civ. P. 79(a). There is one exception: When Fed. R. Civ. P. 58(a)(1) requires the judgment or order to be set forth on a separate document, that judgment or order is not treated as entered until it is set forth on a separate document (in addition to being entered in the civil docket) or until the expiration of 150 days after its entry in the civil docket, whichever occurs first. This cap will ensure that parties will not be given forever to appeal (or to bring a post-judgment motion) when a court fails to set forth a judgment or order on a separate document in violation of Fed. R. Civ. P. 58(a)(1).

3. The third circuit split—this split addressed only by the amendment to Rule 4(a)(7)—concerns whether the appellant may waive the separate document requirement over the objection of the appellee. In *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 387 (1978) (per curiam), the Supreme Court held that the ''parties to an appeal may waive the separate-judgment requirement of Rule 58.'' Specifically, the Supreme Court held that when a district court enters an order and ''clearly evidence[s] its intent that the . . . order . . . represent[s] the final decision in the case,'' the order is a ''final decision'' for purposes of 28 U.S.C. §1291, even if the order has not been set forth on a separate document for purposes of Fed. R. Civ. P. 58. *Id.* Thus, the parties can choose to appeal without waiting for the order to be set forth on a separate document.

Courts have disagreed about whether the consent of all parties is necessary to waive the separate document requirement. Some circuits permit appellees to object to attempted *Mallis* waivers and to force appellants to return to the trial court, request that judgment be set forth on a separate document, and appeal a second time. *See, e.g., Selletti v. Carey*, 173 F.3d 104, 109–10 (2d Cir. 1999); *Williams v. Borg*, 139 F.3d 737, 739–40 (9th Cir. 1998); *Silver Star Enters., Inc. v. M/V Saramacca*, 19 F.3d 1008, 1013 (5th Cir. 1994). Other courts disagree and permit *Mallis* waivers even if the appellee objects. *See, e.g., Haynes*, 158 F.3d at 1331; *Miller v. Artistic Cleaners*, 153 F.3d 781, 783–84 (7th Cir. 1998); *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1006 n.8 (3d Cir. 1994).

New Rule 4(a)(7)(B) is intended both to codify the Supreme Court's holding in *Mallis* and to make clear that the decision whether to waive the requirement that the judgment or order be set forth on a separate document is the appellant's alone. It is, after all, the appellant who needs a clear signal as to when the time to file a notice of appeal has begun to run. If the appellant chooses to bring an appeal without waiting for the judgment or order to be set forth on a separate document, then there is no reason why the appellee should be able to object. All that would result from honoring the appellee's objection would be delay.

4. The final circuit split addressed by the amendment to Rule 4(a)(7) concerns the question whether an appellant who chooses to waive the separate document requirement must appeal within 30 days (60 days if the government is a party) from the entry in the civil docket of the judgment or order that should have been set forth on a separate document but was not. In *Townsend v. Lucas*, 745 F.2d 933 (5th Cir. 1984), the district court dismissed a 28 U.S.C. §2254 action on May 6, 1983, but failed to set forth the judgment on a separate document. The plaintiff appealed on January 10, 1984. The Fifth Circuit dismissed the appeal, reasoning that, if the plaintiff waived the separate document requirement, then his appeal would be from the May 6 order, and if his appeal was from the May 6 order, then it was untimely under Rule 4(a)(1). The Fifth Circuit stressed that the plaintiff could return to the district court, move that the judgment be set forth on a separate document, and appeal from that judgment within 30 days. *Id.* at 934. Several other cases have embraced the *Townsend* approach. *See, e.g., Armstrong v. Ahitow*, 36 F.3d 574, 575 (7th Cir. 1994) (per curiam); *Hughes v. Halifax County Sch. Bd.*, 823 F.2d 832, 835–36 (4th Cir. 1987); *Harris v. McCarthy*, 790 F.2d 753, 756 n.1 (9th Cir. 1986).

Those cases are in the distinct minority. There are numerous cases in which courts have heard appeals that were not filed within 30 days (60 days if the gov-

ernment was a party) from the judgment or order that should have been set forth on a separate document but was not. *See, e.g., Haynes*, 158 F.3d at 1330–31; *Clough v. Rush*, 959 F.2d 182, 186 (10th Cir. 1992); *McCalden v. California Library Ass'n*, 955 F.2d 1214, 1218–19 (9th Cir. 1990). In the view of these courts, the remand in *Townsend* was ''precisely the purposeless spinning of wheels abjured by the Court in the [*Mallis*] case.'' 15B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3915, at 259 n.8 (3d ed. 1992).

The Committee agrees with the majority of courts that have rejected the *Townsend* approach. In drafting new Rule 4(a)(7)(B), the Committee has been careful to avoid phrases such as ''otherwise timely appeal'' that might imply an endorsement of *Townsend*.

Changes Made After Publication and Comments. No changes were made to the text of proposed Rule 4(a)(7)(B) or to the third or fourth numbered sections of the Committee Note, except that, in several places, references to a judgment being ''entered'' on a separate document were changed to references to a judgment being ''set forth'' on a separate document. This was to maintain stylistic consistency. The appellate rules and the civil rules consistently refer to ''entering'' judgments on the civil docket and to ''setting forth'' judgments on separate documents.

Two major changes were made to the text of proposed Rule 4(a)(7)(A)—one substantive and one stylistic. The substantive change was to increase the ''cap'' from 60 days to 150 days. The Appellate Rules Committee and the Civil Rules Committee had to balance two concerns that are implicated whenever a court fails to enter its final decision on a separate document. On the one hand, potential appellants need a clear signal that the time to appeal has begun to run, so that they do not unknowingly forfeit their rights. On the other hand, the time to appeal cannot be allowed to run forever. A party who receives no notice whatsoever of a judgment has only 180 days to move to reopen the time to appeal from that judgment. *See* Rule 4(a)(6)(A). It hardly seems fair to give a party who *does* receive notice of a judgment an unlimited amount of time to appeal, merely because that judgment was not set forth on a separate piece of paper. Potential appellees and the judicial system need *some* limit on the time within which appeals can be brought.

The 150-day cap properly balances these two concerns. When an order is not set forth on a separate document, what signals litigants that the order is final and appealable is a lack of further activity from the court. A 60-day period of inactivity is not sufficiently rare to signal to litigants that the court has entered its last order. By contrast, 150 days of inactivity is much less common and thus more clearly signals to litigants that the court is done with their case.

The major stylistic change to Rule 4(a)(7) requires some explanation. In the published draft, proposed Rule 4(a)(7)(A) provided that ''[a] judgment or order is entered for purposes of this Rule 4(a) when it is entered for purposes of Rule 58(b) of the Federal Rules of Civil Procedure.'' In other words, Rule 4(a)(7)(A) told readers to look to FRCP 58(b) to ascertain when a judgment is entered for purposes of starting the running of time to appeal. Sending appellate lawyers to the civil rules to discover when time began to run for purposes of the appellate rules was itself somewhat awkward, but it was made more confusing by the fact that, when readers went to proposed FRCP 58(b), they found this introductory clause: ''Judgment is entered for purposes of Rules 50, 52, 54(d)(2)(B), 59, 60, and 62 when . . .''

This introductory clause was confusing for both appellate lawyers and trial lawyers. It was confusing for appellate lawyers because Rule 4(a)(7) informed them that FRCP 58(b) would tell them when the time begins to run for purposes of the *appellate* rules, but when they got to FRCP 58(b) they found a rule that, by its terms, dictated only when the time begins to run for purposes of certain *civil* rules. The introductory clause was confusing for trial lawyers because FRCP 58(b) described when judgment is entered for some purposes under the civil rules, but then was completely silent about when judgment is entered for other purposes.

To avoid this confusion, the Civil Rules Committee, on the recommendation of the Appellate Rules Committee, changed the introductory clause in FRCP 58(b) to read simply: ''Judgment is entered for purposes of *these Rules* when . . . .'' In addition, Rule 4(a)(7)(A) was redrafted [A redraft of Rule 4(a)(7) was faxed to members of the Appellate Rules Committee two weeks after our meeting in New Orleans. The Committee consented to the redraft without objection.] so that the triggering events for the running of the time to appeal (entry in the civil docket, and being set forth on a separate document or passage of 150 days) were incorporated directly into Rule 4(a)(7), rather than indirectly through a reference to FRCP 58(b). This eliminates the need for appellate lawyers to examine Rule 58(b) and any chance that Rule 58(b)'s introductory clause (even as modified) might confuse them.

We do not believe that republication of Rule 4(a)(7) or FRCP 58 is necessary. In *substance*, rewritten Rule 4(a)(7)(A) and FRCP 58(b) operate identically to the published versions, except that the 60-day cap has been replaced with a 150-day cap—a change that was suggested by some of the commentators and that makes the cap more forgiving.

Subdivision (b)(5). Federal Rule of Criminal Procedure 35(a) permits a district court, acting within 7 days after the imposition of sentence, to correct an erroneous sentence in a criminal case. Some courts have held that the filing of a motion for correction of a sentence suspends the time for filing a notice of appeal from the judgment of conviction. *See, e.g., United States v. Carmouche*, 138 F.3d 1014, 1016 (5th Cir. 1998) (per curiam); *United States v. Morillo*, 8 F.3d 864, 869 (1st Cir. 1993). Those courts establish conflicting timetables for appealing a judgment of conviction after the filing of a motion to correct a sentence. In the First Circuit, the time to appeal is suspended only for the period provided by Fed. R. Crim. P. 35(a) for the district court to correct a sentence; the time to appeal begins to run again once 7 days have passed after sentencing, even if the motion is still pending. By contrast, in the Fifth Circuit, the time to appeal does not begin to run again until the district court actually issues an order disposing of the motion.

Rule 4(b)(5) has been amended to eliminate the inconsistency concerning the effect of a motion to correct a sentence on the time for filing a notice of appeal. The amended rule makes clear that the time to appeal continues to run, even if a motion to correct a sentence is filed. The amendment is consistent with Rule 4(b)(3)(A), which lists the motions that toll the time to appeal, and notably omits any mention of a Fed. R. Crim. P. 35(a) motion. The amendment also should promote certainty and minimize the likelihood of confusion concerning the time to appeal a judgment of conviction.

If a district court corrects a sentence pursuant to Fed. R. Crim. P. 35(a), the time for filing a notice of appeal of the corrected sentence under Rule 4(b)(1) would begin to run when the court enters a new judgment reflecting the corrected sentence.

Changes Made After Publication and Comments. The reference to Federal Rule of Criminal Procedure 35(c) was changed to Rule 35(a) to reflect the pending amendment of Rule 35. The proposed amendment to Criminal Rule 35, if approved, will take effect at the same time that the proposed amendment to Appellate Rule 4 will take effect, if approved.

COMMITTEE NOTES ON RULES—2005 AMENDMENT

Rule 4(a)(6) has permitted a district court to reopen the time to appeal a judgment or order upon finding that four conditions were satisfied. First, the district court had to find that the appellant did not receive notice of the entry of the judgment or order from the district court or any party within 21 days after the judgment or order was entered. Second, the district court had to find that the appellant moved to reopen the

time to appeal within 7 days after the appellant received notice of the entry of the judgment or order. Third, the district court had to find that the appellant moved to reopen the time to appeal within 180 days after the judgment or order was entered. Finally, the district court had to find that no party would be prejudiced by the reopening of the time to appeal.

Rule 4(a)(6) has been amended to specify more clearly what type of ''notice'' of the entry of a judgment or order precludes a party from later moving to reopen the time to appeal. In addition, Rule 4(a)(6) has been amended to address confusion about what type of ''notice'' triggers the 7-day period to bring a motion to reopen. Finally, Rule 4(a)(6) has been reorganized to set forth more logically the conditions that must be met before a district court may reopen the time to appeal.

Subdivision (a)(6)(A). Former subdivision (a)(6)(B) has been redesignated as subdivision (a)(6)(A), and one substantive change has been made. As amended, the subdivision will preclude a party from moving to reopen the time to appeal a judgment or order only if the party receives (within 21 days) formal notice of the entry of that judgment or order under Civil Rule 77(d). No other type of notice will preclude a party.

The reasons for this change take some explanation. Prior to 1998, former subdivision (a)(6)(B) permitted a district court to reopen the time to appeal if it found ''that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry.'' The rule was clear that the ''notice'' to which it referred was the notice required under Civil Rule 77(d), which must be served by the clerk pursuant to Civil Rule 5(b) and may also be served by a party pursuant to that same rule. In other words, prior to 1998, former subdivision (a)(6)(B) was clear that, if a party did not receive formal notice of the entry of a judgment or order under Civil Rule 77(d), that party could later move to reopen the time to appeal (assuming that the other requirements of subdivision (a)(6) were met).

In 1998, former subdivision (a)(6)(B) was amended to change the description of the type of notice that would preclude a party from moving to reopen. As a result of the amendment, former subdivision (a)(6)(B) no longer referred to the failure of the moving party to receive ''*such* notice''—that is, the notice required by Civil Rule 77(d)—but instead referred to the failure of the moving party to receive ''*the* notice.'' And former subdivision (a)(6)(B) no longer referred to the failure of the moving party to receive notice from ''the *clerk* or any party,'' both of whom are explicitly mentioned in Civil Rule 77(d). Rather, former subdivision (a)(6)(B) referred to the failure of the moving party to receive notice from ''the *district court* or any party.''

The 1998 amendment meant, then, that the type of notice that precluded a party from moving to reopen the time to appeal was no longer limited to Civil Rule 77(d) notice. Under the 1998 amendment, *some* type of notice, in addition to Civil Rule 77(d) notice, precluded a party. But the text of the amended rule did not make clear what type of notice qualified. This was an invitation for litigation, confusion, and possible circuit splits.

To avoid such problems, former subdivision (a)(6)(B)—new subdivision (a)(6)(A)—has been amended to restore its pre-1998 simplicity. Under new subdivision (a)(6)(A), if the court finds that the moving party was not notified under Civil Rule 77(d) of the entry of the judgment or order that the party seeks to appeal within 21 days after that judgment or order was entered, then the court is authorized to reopen the time to appeal (if all of the other requirements of subdivision (a)(6) are met). Because Civil Rule 77(d) requires that notice of the entry of a Judgment or order be formally served under Civil Rule 5(b), any notice that is not so served will not operate to preclude the reopening of the time to appeal under new subdivision (a)(6)(A).

Subdivision (a)(6)(B). Former subdivision (a)(6)(A) required a party to move to reopen the time to appeal ''within 7 days after the moving party receives notice of the entry [of the judgment or order sought to be appealed].'' Former subdivision (a)(6)(A) has been redesignated as subdivision (a)(6)(B), and one important substantive change has been made: The subdivision now makes clear that only formal notice of the entry of a judgment or order under Civil Rule 77(d) will trigger the 7-day period to move to reopen the time to appeal.

The circuits have been split over what type of ''notice'' is sufficient to trigger the 7-day period. The majority of circuits that addressed the question held that only *written* notice was sufficient, although nothing in the text of the rule suggested such a limitation. *See, e.g., Bass v. United States Dep't of Agric.*, 211 F.3d 959, 963 (5th Cir. 2000). By contrast, the Ninth Circuit held that while former subdivision (a)(6)(A) did not require written notice, ''the quality of the communication [had to] rise to the functional equivalent of written notice.'' *Nguyen v. Southwest Leasing & Rental, Inc.*, 282 F.3d 1061, 1066 (9th Cir. 2002). Other circuits suggested in dicta that former subdivision (a)(6)(A) required only ''actual notice,'' which, presumably, could have included oral notice that was not ''the functional equivalent of written notice.'' *See, e.g., Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 464 (8th Cir. 2000). And still other circuits read into former subdivision (a)(6)(A) restrictions that appeared only in former subdivision (a)(6)(B) (such as the requirement that notice be received ''from the district court or any party,'' *see Benavides v. Bureau of Prisons*, 79 F.3d 1211, 1214 (D.C. Cir. 1996)) or that appeared in neither former subdivision (a)(6)(A) nor former subdivision (a)(6)(B) (such as the requirement that notice be served in the manner prescribed by Civil Rule 5, *see Ryan v. First Unum Life Ins. Co.*, 174 F.3d 302, 304–05 (2d Cir. 1999)).

Former subdivision (a)(6)(A)—new subdivision (a)(6)(B)—has been amended to resolve this circuit split by providing that only formal notice of the entry of a judgment or order under Civil Rule 77(d) will trigger the 7-day period. Using Civil Rule 77(d) notice as the trigger has two advantages: First, because Civil Rule 77(d) is clear and familiar, circuit splits are unlikely to develop over its meaning. Second, because Civil Rule 77(d) notice must be served under Civil Rule 5(b), establishing whether and when such notice was provided should generally not be difficult.

Using Civil Rule 77(d) notice to trigger the 7-day period will not unduly delay appellate proceedings. Rule 4(a)(6) applies to only a small number of cases—cases in which a party was not notified of a judgment or order by either the clerk or another party within 21 days after entry. Even with respect to those cases, an appeal cannot be brought more than 180 days after entry, no matter what the circumstances. In addition, Civil Rule 77(d) permits parties to serve notice of the entry of a judgment or order. The winning party can prevent Rule 4(a)(6) from even coming into play simply by serving notice of entry within 21 days. Failing that, the winning party can always trigger the 7-day deadline to move to reopen by serving belated notice.

Changes Made After Publication and Comments. No change was made to the text of subdivision (A)—regarding the type of notice that precludes a party from later moving to reopen the time to appeal—and only minor stylistic changes were made to the Committee Note to subdivision (A).

A substantial change was made to subdivision (B)—regarding the type of notice that triggers the 7-day deadline for moving to reopen the time to appeal. Under the published version of subdivision (B), the 7-day deadline would have been triggered when ''the moving party receives or observes written notice of the entry from any source.'' The Committee was attempting to implement an ''eyes/ears'' distinction: The 7-day period was triggered when a party learned of the entry of a judgment or order by reading about it (whether on a piece of paper or a computer screen), but was not triggered when a party merely heard about it.

Above all else, subdivision (B) should be clear and easy to apply; it should neither risk opening another circuit split over its meaning nor create the need for a

lot of factfinding by district courts. After considering the public comments—and, in particular, the comments of two committees of the California bar—the Committee decided that subdivision (B) could do better on both counts. The published standard—''receives or observes written notice of the entry from any source''—was awkward and, despite the guidance of the Committee Note, was likely to give courts problems. Even if the standard had proved to be sufficiently clear, district courts would still have been left to make factual findings about whether a particular attorney or party ''received'' or ''observed'' notice that was written or electronic.

The Committee concluded that the solution suggested by the California bar—using Civil Rule 77(d) notice to trigger the 7-day period—made a lot of sense. The standard is clear; no one doubts what it means to be served with notice of the entry of judgment under Civil Rule 77(d). The standard is also unlikely to give rise to many factual disputes. Civil Rule 77(d) notice must be formally served under Civil Rule 5(b), so establishing the presence or absence of such notice should be relatively easy. And, for the reasons described in the Committee Note, using Civil Rule 77(d) as the trigger will not unduly delay appellate proceedings.

For these reasons, the Committee amended subdivision (B) so that the 7-day deadline will be triggered only by notice of the entry of a judgment or order that is served under Civil Rule 77(d). (Corresponding changes were made to the Committee Note.) The Committee does not believe that the amendment needs to be published again for comment, as the issue of what type of notice should trigger the 7-day deadline has already been addressed by commentators, the revised version of subdivision (B) is far more forgiving than the published version, and it is highly unlikely that the revised version will be found ambiguous in any respect.

REFERENCES IN TEXT

The Federal Rules of Civil Procedure, referred to in subd. (a)(4), (6), and (7), are set out in this Appendix.

The Federal Rules of Criminal Procedure, referred to in subd. (b)(3), (5), are set out in the Appendix to Title 18, Crimes and Criminal Procedure.

AMENDMENT BY PUBLIC LAW

1988—Subd. (b). Pub. L. 100–690 inserted ''(i)'' and ''or (ii) a notice of appeal by the Government'' in first sentence, and ''(i)'' and ''or (ii) a notice of appeal by any defendant'' in fifth sentence.

Rule 5. Appeal by Permission

(a) PETITION FOR PERMISSION TO APPEAL.

(1) To request permission to appeal when an appeal is within the court of appeals' discretion, a party must file a petition for permission to appeal. The petition must be filed with the circuit clerk with proof of service on all other parties to the district-court action.

(2) The petition must be filed within the time specified by the statute or rule authorizing the appeal or, if no such time is specified, within the time provided by Rule 4(a) for filing a notice of appeal.

(3) If a party cannot petition for appeal unless the district court first enters an order granting permission to do so or stating that the necessary conditions are met, the district court may amend its order, either on its own or in response to a party's motion, to include the required permission or statement. In that event, the time to petition runs from entry of the amended order.

(b) CONTENTS OF THE PETITION; ANSWER OR CROSS-PETITION; ORAL ARGUMENT.

(1) The petition must include the following:

(A) the facts necessary to understand the question presented;

(B) the question itself;

(C) the relief sought;

(D) the reasons why the appeal should be allowed and is authorized by a statute or rule; and

(E) an attached copy of:

(i) the order, decree, or judgment complained of and any related opinion or memorandum, and

(ii) any order stating the district court's permission to appeal or finding that the necessary conditions are met.

(2) A party may file an answer in opposition or a cross-petition within 7 days after the petition is served.

(3) The petition and answer will be submitted without oral argument unless the court of appeals orders otherwise.

(c) FORM OF PAPERS; NUMBER OF COPIES. All papers must conform to Rule 32(c)(2). Except by the court's permission, a paper must not exceed 20 pages, exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Rule 5(b)(1)(E). An original and 3 copies must be filed unless the court requires a different number by local rule or by order in a particular case.

(d) GRANT OF PERMISSION; FEES; COST BOND; FILING THE RECORD.

(1) Within 10 days after the entry of the order granting permission to appeal, the appellant must:

(A) pay the district clerk all required fees; and

(B) file a cost bond if required under Rule 7.

(2) A notice of appeal need not be filed. The date when the order granting permission to appeal is entered serves as the date of the notice of appeal for calculating time under these rules.

(3) The district clerk must notify the circuit clerk once the petitioner has paid the fees. Upon receiving this notice, the circuit clerk must enter the appeal on the docket. The record must be forwarded and filed in accordance with Rules 11 and 12(c).

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002.)

NOTES OF ADVISORY COMMITTEE ON RULES—1967

This rule is derived in the main from Third Circuit Rule 11(2), which is similar to the rule governing appeals under 28 U.S.C. §1292(b) in a majority of the circuits. The second sentence of subdivision (a) resolves a conflict over the question of whether the district court can amend an order by supplying the statement required by §1292(b) at any time after entry of the order, with the result that the time fixed by the statute commences to run on the date of entry of the order as amended. Compare *Milbert v. Bison Laboratories*, 260 F.2d 431 (3d Cir., 1958) with *Sperry Rand Corporation v. Bell Telephone Laboratories*, 272 F.2d (2d Cir., 1959), *Hadjipateras v. Pacifica, S.A.*, 290 F.2d 697 (5th Cir., 1961), and *Houston Fearless Corporation v. Teter*, 313 F.2d 91 (10th Cir., 1962). The view taken by the Second, Fifth and Tenth Circuits seems theoretically and practically

sound, and the rule adopts it. Although a majority of the circuits now require the filing of a notice of appeal following the grant of permission to appeal, filing of the notice serves no function other than to provide a time from which the time for transmitting the record and docketing the appeal begins to run.

NOTES OF ADVISORY COMMITTEE ON RULES—1979 AMENDMENT

The proposed amendment adapts to the practice in appeals from interlocutory orders under 28 U.S.C. §1292(b) the provisions of proposed Rule 3(e) above, requiring payment of all fees in the district court upon the filing of the notice of appeal. See Note to proposed amended Rule 3(e), supra.

NOTES OF ADVISORY COMMITTEE ON RULES—1994 AMENDMENT

Subdivision (c). The amendment makes it clear that a court may require a different number of copies either by rule or by order in an individual case. The number of copies of any document that a court of appeals needs varies depending upon the way in which the court conducts business. The internal operation of the courts of appeals necessarily varies from circuit to circuit because of differences in the number of judges, the geographic area included within the circuit, and other such factors. Uniformity could be achieved only by setting the number of copies artificially high so that parties in all circuits file enough copies to satisfy the needs of the court requiring the greatest number. Rather than do that, the Committee decided to make it clear that local rules may require a greater or lesser number of copies and that, if the circumstances of a particular case indicate the need for a different number of copies in that case, the court may so order.

COMMITTEE NOTES ON RULES—1998 AMENDMENT

In 1992 Congress added subsection (e) to 28 U.S.C. §1292. Subsection (e) says that the Supreme Court has power to prescribe rules that ''provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for'' in section 1292. The amendment of Rule 5 was prompted by the possibility of new rules authorizing additional interlocutory appeals. Rather than add a separate rule governing each such appeal, the Committee believes it is preferable to amend Rule 5 so that is will govern all such appeals.

In addition the Federal Courts Improvement Act of 1996, Pub. L. 104–317, abolished appeals by permission under 28 U.S.C. §636(c)(5), making Rule 5.1 obsolete.

This new Rule 5 is intended to govern all discretionary appeals from district-court orders, judgments, or decrees. At this time that includes interlocutory appeals under 28 U.S.C. §1292(b), (c)(1), and (d)(1) & (2). If additional interlocutory appeals are authorized under §1292(e), the new Rule is intended to govern them if the appeals are discretionary.

Subdivision (a). Paragraph (a)(1) says that when granting an appeal is within a court of appeals' discretion, a party may file a petition for permission to appeal. The time for filing provision states only that the petition must be filed within the time provided in the statute or rule authorizing the appeal or, if no such time is specified, within the time provided by Rule 4(a) for filing a notice of appeal.

Section 1292(b), (c), and (d) provide that the petition must be filed within 10 days after entry of the order containing the statement prescribed in the statute. Existing Rule 5(a) provides that if a district court amends an order to contain the prescribed statement, the petition must be filed within 10 days after entry of the amended order. The new rule similarly says that if a party cannot petition without the district court's permission or statement that necessary circumstances are present, the district court may amend its order to include such a statement and the time to petition runs from the entry of the amended order.

The provision that the Rule 4(a) time for filing a notice of appeal should apply if the statute or rule is silent about the filing time was drawn from existing Rule 5.1.

Subdivision (b). The changes made in the provisions in paragraph (b)(1) are intended only to broaden them sufficiently to make them appropriate for all discretionary appeals.

In paragraph (b)(2) a uniform time—7 days—is established for filing an answer in opposition or cross-petition. Seven days is the time for responding under existing Rule 5 and is an appropriate length of time when dealing with an interlocutory appeal. Although existing Rule 5.1 provides 14 days for responding, the Committee does not believe that the longer response time is necessary.

Subdivision (c). Subdivision (c) is substantively unchanged.

Subdivision (d). Paragraph (d)(2) is amended to state that ''the date when the order granting permission to appeal is entered serves as the date of the notice of appeal'' for purposes of calculating time under the rules. That language simply clarifies existing practice.

COMMITTEE NOTES ON RULES—2002 AMENDMENT

Subdivision (c). A petition for permission to appeal, a cross-petition for permission to appeal, and an answer to a petition or cross-petition for permission to appeal are all ''other papers'' for purposes of Rule 32(c)(2), and all of the requirements of Rule 32(a) apply to those papers, except as provided in Rule 32(c)(2). During the 1998 restyling of the Federal Rules of Appellate Procedure, Rule 5(c) was inadvertently changed to suggest that only the requirements of Rule 32(a)(1) apply to such papers. Rule 5(c) has been amended to correct that error.

Rule 5(c) has been further amended to limit the length of papers filed under Rule 5.

Changes Made After Publication and Comments. No changes were made to the text of the proposed amendment or to the Committee Note.

[Rule 5.1. Appeal by Leave under 28 U.S.C. §636(c)(5)] (Abrogated Apr. 24, 1998, eff. Dec. 1, 1998)

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The Federal Courts Improvement Act of 1996, Pub. L. No. 104–317, abolished appeals by permission under 28 U.S.C. §636(c)(5), making Rule 5.1 obsolete. Rule 5.1 is, therefore, abrogated.

Rule 6. Appeal in a Bankruptcy Case from a Final Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel

(a) APPEAL FROM A JUDGMENT, ORDER, OR DECREE OF A DISTRICT COURT EXERCISING ORIGINAL JURISDICTION IN A BANKRUPTCY CASE. An appeal to a court of appeals from a final judgment, order, or decree of a district court exercising jurisdiction under 28 U.S.C. §1334 is taken as any other civil appeal under these rules.

(b) APPEAL FROM A JUDGMENT, ORDER, OR DECREE OF A DISTRICT COURT OR BANKRUPTCY APPELLATE PANEL EXERCISING APPELLATE JURISDICTION IN A BANKRUPTCY CASE.

(1) *Applicability of Other Rules.* These rules apply to an appeal to a court of appeals under 28 U.S.C. §158(d) from a final judgment, order, or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction under 28 U.S.C. §158(a) or (b). But there are 3 exceptions:

(A) Rules 4(a)(4), 4(b), 9, 10, 11, 12(b), 13–20, 22–23, and 24(b) do not apply;

(B) the reference in Rule 3(c) to ''Form 1 in the Appendix of Forms'' must be read as a reference to Form 5; and

(C) when the appeal is from a bankruptcy appellate panel, the term ''district court,'' as used in any applicable rule, means ''appellate panel.''

(2) *Additional Rules*. In addition to the rules made applicable by Rule 6(b)(1), the following rules apply:

(A) *Motion for Rehearing*.

(i) If a timely motion for rehearing under Bankruptcy Rule 8015 is filed, the time to appeal for all parties runs from the entry of the order disposing of the motion. A notice of appeal filed after the district court or bankruptcy appellate panel announces or enters a judgment, order, or decree—but before disposition of the motion for rehearing—becomes effective when the order disposing of the motion for rehearing is entered.

(ii) Appellate review of the order disposing of the motion requires the party, in compliance with Rules 3(c) and 6(b)(1)(B), to amend a previously filed notice of appeal. A party intending to challenge an altered or amended judgment, order, or decree must file a notice of appeal or amended notice of appeal within the time prescribed by Rule 4—excluding Rules 4(a)(4) and 4(b)—measured from the entry of the order disposing of the motion.

(iii) No additional fee is required to file an amended notice.

(B) *The Record on Appeal*.

(i) Within 10 days after filing the notice of appeal, the appellant must file with the clerk possessing the record assembled in accordance with Bankruptcy Rule 8006—and serve on the appellee—a statement of the issues to be presented on appeal and a designation of the record to be certified and sent to the circuit clerk.

(ii) An appellee who believes that other parts of the record are necessary must, within 10 days after being served with the appellant's designation, file with the clerk and serve on the appellant a designation of additional parts to be included.

(iii) The record on appeal consists of:

- the redesignated record as provided above;
- the proceedings in the district court or bankruptcy appellate panel; and
- a certified copy of the docket entries prepared by the clerk under Rule 3(d).

(C) *Forwarding the Record*.

(i) When the record is complete, the district clerk or bankruptcy appellate panel clerk must number the documents constituting the record and send them promptly to the circuit clerk together with a list of the documents correspondingly numbered and reasonably identified. Unless directed to do so by a party or the circuit clerk, the clerk will not send to the court of appeals documents of unusual bulk or weight, physical exhibits other than documents, or other parts of the record designated for omission by local rule of the court of appeals. If the exhibits are unusually bulky or heavy, a party must arrange with the clerks in advance for their transportation and receipt.

(ii) All parties must do whatever else is necessary to enable the clerk to assemble and forward the record. The court of appeals may provide by rule or order that a certified copy of the docket entries be sent in place of the redesignated record, but any party may request at any time during the pendency of the appeal that the redesignated record be sent.

(D) *Filing the Record*. Upon receiving the record—or a certified copy of the docket entries sent in place of the redesignated record—the circuit clerk must file it and immediately notify all parties of the filing date.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Apr. 25, 1989, eff. Dec. 1, 1989; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 24, 1998, eff. Dec. 1, 1998.)

NOTES OF ADVISORY COMMITTEE ON RULES—1967

This rule is substantially a restatement of present procedure. See D.C. Cir. Rule 34; 6th Cir. Rule 11; 7th Cir. Rule 10(d); 10th Cir. Rule 13.

Present circuit rules commonly provide that the petition for allowance of an appeal shall be filed within the time allowed by Section 25 of the Bankruptcy Act for taking appeals of right. For the reasons explained in the Note accompanying Rule 4, that rule makes the time for appeal in bankruptcy cases the same as that which obtains in other civil cases and thus supersedes Section 25. Thus the present rule simply continues the former practice of making the time for filing the petition in appeals by allowance the same as that provided for filing the notice of appeal in appeals of right.

NOTES OF ADVISORY COMMITTEE ON RULES—1979 AMENDMENT

The proposed amendment adapts to the practice in appeals by allowance in bankruptcy proceedings the provisions of proposed Rule 3(e) above, requiring payment of all fees in the district court at the time of the filing of the notice of appeal. See Note to Rule 3(e), supra.

NOTES OF ADVISORY COMMITTEE ON RULES—1989 AMENDMENT

A new Rule 6 is proposed. The Bankruptcy Reform Act of 1978, Pub. L. No. 95–598, 92 Stat. 2549, the Supreme Court decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), and the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98–353, 98 Stat. 333, have made the existing Rule 6 obsolete.

Subdivision (a). Subdivision (a) provides that when a district court exercises original jurisdiction in a bankruptcy matter, rather than referring it to a bankruptcy judge for a final determination, the appeal should be taken in identical fashion as appeals from district court decisions in other civil actions. A district court exercises original jurisdiction and this subdivision applies when the district court enters a final order or judgment upon consideration of a bankruptcy judge's proposed findings of fact and conclusions of law in a non-core proceeding pursuant to 28 U.S.C. §157(c)(1) or when a district court withdraws a proceeding pursuant to 28 U.S.C. §157(d). This subdivision is included to avoid uncertainty arising from the question of whether a bankruptcy case is a civil case. The rules refer at various points to the procedure ''in a civil case'', *see*, e.g. Rule 4(a)(1). Subdivision (a) makes it clear that such rules apply to an appeal from a district court bankruptcy decision.

Subdivision (b). Subdivision (b) governs appeals that follow intermediate review of a bankruptcy judge's decision by a district court or a bankruptcy appellate panel.

Subdivision (b)(1). Subdivision (b)(1) provides for the general applicability of the Federal Rules of Appellate Procedure, with specified exceptions, to appeals covered by subdivision (b) and makes necessary word adjustments.

Subdivision (b)(2). Paragraph (i) provides that the time for filing a notice of appeal shall begin to run anew from the entry of an order denying a rehearing or from the entry of a subsequent judgment. The Committee deliberately omitted from the rule any provision governing the validity of a notice of appeal filed prior to the entry of an order denying a rehearing; the Committee intended to leave undisturbed the current state of the law on that issue. Paragraph (ii) calls for a redesignation of the appellate record assembled in the bankruptcy court pursuant to Rule 8006 of the Rules of Bankruptcy Procedure. After an intermediate appeal, a party may well narrow the focus of its efforts on the second appeal and a redesignation of the record may eliminate unnecessary material. The proceedings during the first appeal are included to cover the possibility that independent error in the intermediate appeal, for example failure to follow appropriate procedures, may be assigned in the court of appeals. Paragraph (iii) provides for the transmission of the record and tracks the appropriate subsections of Rule 11. Paragraph (iv) provides for the filing of the record and notices to the parties. Paragraph (ii) and Paragraph (iv) both refer to ''a certified copy of the docket entries''. The ''docket entries'' referred to are the docket entries in the district court or the bankruptcy appellate panel, not the entire docket in the bankruptcy court.

NOTES OF ADVISORY COMMITTEE ON RULES—1993 AMENDMENT

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

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Subdivision (b). Language is added to Rule 6(b)(2)(A)(ii) to conform with the corresponding provision in Rule 4(a)(4). The new language is clarifying rather than substantive. The existing rule states that a party intending to challenge an alteration or amendment of a judgment must file an amended notice of appeal. Of course if a party has not previously filed a notice of appeal, the party would simply file a notice of appeal not an amended one. The new language states that the party must file ''a notice of appeal or amended notice of appeal.''

REFERENCES IN TEXT

The Bankruptcy Rules, referred to in subd. (b)(2)(A)(i), (B)(i), are set out in the Appendix to Title 11, Bankruptcy.

Rule 7. Bond for Costs on Appeal in a Civil Case

In a civil case, the district court may require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal. Rule 8(b) applies to a surety on a bond given under this rule.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Apr. 24, 1998, eff. Dec. 1, 1998.)

NOTES OF ADVISORY COMMITTEE ON RULES—1967

This rule is derived from FRCP 73(c) without change in substance.

NOTES OF ADVISORY COMMITTEE ON RULES—1979 AMENDMENT

The amendment would eliminate the provision of the present rule that requires the appellant to file a $250 bond for costs on appeal at the time of filing his notice of appeal. The $250 provision was carried forward in the F.R.App.P. from former Rule 73(c) of the F.R.Civ.P., and the $250 figure has remained unchanged since the adoption of that rule in 1937. Today it bears no relationship to actual costs. The amended rule would leave the question of the need for a bond for costs and its amount in the discretion of the court.

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The language of the rule is amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 8. Stay or Injunction Pending Appeal

(a) MOTION FOR STAY.

(1) *Initial Motion in the District Court.* A party must ordinarily move first in the district court for the following relief:

(A) a stay of the judgment or order of a district court pending appeal;

(B) approval of a supersedeas bond; or

(C) an order suspending, modifying, restoring, or granting an injunction while an appeal is pending.

(2) *Motion in the Court of Appeals; Conditions on Relief.* A motion for the relief mentioned in Rule 8(a)(1) may be made to the court of appeals or to one of its judges.

(A) The motion must:

(i) show that moving first in the district court would be impracticable; or

(ii) state that, a motion having been made, the district court denied the motion or failed to afford the relief requested and state any reasons given by the district court for its action.

(B) The motion must also include:

(i) the reasons for granting the relief requested and the facts relied on;

(ii) originals or copies of affidavits or other sworn statements supporting facts subject to dispute; and

(iii) relevant parts of the record.

(C) The moving party must give reasonable notice of the motion to all parties.

(D) A motion under this Rule 8(a)(2) must be filed with the circuit clerk and normally will be considered by a panel of the court. But in an exceptional case in which time requirements make that procedure impracticable, the motion may be made to and considered by a single judge.

(E) The court may condition relief on a party's filing a bond or other appropriate security in the district court.

(b) PROCEEDING AGAINST A SURETY. If a party gives security in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiction of the district court and irrevocably appoints the district clerk as the surety's agent on whom any papers affecting the surety's liability on the bond or undertaking may be served. On motion, a surety's liability may be enforced in the district court without the necessity of an independent action. The motion and any notice that the district court prescribes may be served on the district clerk, who must promptly mail a copy to each surety whose address is known.

(c) STAY IN A CRIMINAL CASE. Rule 38 of the Federal Rules of Criminal Procedure governs a stay in a criminal case.

(As amended Mar. 10, 1986, eff. July 1, 1986; Apr. 27, 1995, eff. Dec. 1, 1995; Apr. 24, 1998, eff. Dec. 1, 1998.)

NOTES OF ADVISORY COMMITTEE ON RULES—1967

Subdivision (a). While the power of a court of appeals to stay proceedings in the district court during the pendency of an appeal is not explicitly conferred by statute, it exists by virtue of the all writs statute, 28 U.S.C. §1651. *Eastern Greyhound Lines v. Fusco*, 310 F.2d 632 (6th Cir., 1962); *United States v. Lynd*, 301 F.2d 818 (5th Cir., 1962); *Public Utilities Commission of Dist. of Col. v. Capital Transit Co.*, 94 U.S.App.D.C. 140, 214 F.2d 242 (1954). And the Supreme Court has termed the power ''inherent'' (*In re McKenzie*, 180 U.S. 536, 551, 21 S.Ct. 468, 45 L.Ed. 657 (1901)) and ''part of its (the court of appeals) traditional equipment for the administration of justice.'' (*Scripps-Howard Radio v. F.C.C.*, 316 U.S. 4, 9–10, 62 S.Ct. 875, 86 L.Ed. 1229 (1942)). The power of a single judge of the court of appeals to grant a stay pending appeal was recognized in *In re McKenzie, supra. Alexander v. United States*, 173 F.2d 865 (9th Cir., 1949) held that a single judge could not stay the judgment of a district court, but it noted the absence of a rule of court authorizing the practice. FRCP 62(g) adverts to the grant of a stay by a single judge of the appellate court. The requirement that application be first made to the district court is the case law rule. *Cumberland Tel. & Tel. Co. v. Louisiana Public Service Commission*, 260 U.S. 212, 219, 43 S.Ct. 75, 67 L.Ed. 217 (1922); *United States v. El-O-Pathic Pharmacy*, 192 F.2d 62 (9th Cir., 1951); *United States v. Hansell*, 109 F.2d 613 (2d Cir., 1940). The requirement is explicitly stated in FRCrP 38(c) and in the rules of the First, Third, Fourth and Tenth Circuits. See also Supreme Court Rules 18 and 27.

The statement of the requirement in the proposed rule would work a minor change in present practice. FRCP 73(e) requires that if a bond for costs on appeal or a supersedeas bond is offered after the appeal is docketed, leave to file the bond must be obtained from the court of appeals. There appears to be no reason why matters relating to supersedeas and cost bonds should not be initially presented to the district court whenever they arise prior to the disposition of the appeal. The requirement of FRCP 73(e) appears to be a concession to the view that once an appeal is perfected, the district court loses all power over its judgment. See *In re Federal Facilities Trust*, 227 F.2d 651 (7th Cir., 1955) and cases—cited at 654–655. No reason appears why all questions related to supersedeas or the bond for costs on appeal should not be presented in the first instance to the district court in the ordinary case.

Subdivision (b). The provisions respecting a surety upon a bond or other undertaking are based upon FRCP 65.1.

NOTES OF ADVISORY COMMITTEE ON RULES—1986 AMENDMENT

The amendments to Rule 8(b) are technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1995 AMENDMENT

Subdivision (c). The amendment conforms subdivision (c) to previous amendments to Fed. R. Crim. P. 38. This amendment strikes the reference to subdivision (a) of Fed. R. Crim. P. 38 so that Fed. R. App. P. 8(c) refers instead to all of Criminal Rule 38. When Rule 8(c) was adopted Fed. R. Crim. P. 38(a) included the procedures for obtaining a stay of execution when the sentence in question was death, imprisonment, a fine, or probation. Criminal Rule 38 was later amended and now addresses those topics in separate subdivisions. Subdivision 38(a) now addresses only stays of death sentences. The proper cross reference is to all of Criminal Rule 38.

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

REFERENCES IN TEXT

Rule 38 of the Federal Rules of Criminal Procedure, referred to in subd. (c), are set out in the Appendix to Title 18, Crimes and Criminal Procedure.

Rule 9. Release in a Criminal Case

(a) RELEASE BEFORE JUDGMENT OF CONVICTION.

(1) The district court must state in writing, or orally on the record, the reasons for an order regarding the release or detention of a defendant in a criminal case. A party appealing from the order must file with the court of appeals a copy of the district court's order and the court's statement of reasons as soon as practicable after filing the notice of appeal. An appellant who questions the factual basis for the district court's order must file a transcript of the release proceedings or an explanation of why a transcript was not obtained.

(2) After reasonable notice to the appellee, the court of appeals must promptly determine the appeal on the basis of the papers, affidavits, and parts of the record that the parties present or the court requires. Unless the court so orders, briefs need not be filed.

(3) The court of appeals or one of its judges may order the defendant's release pending the disposition of the appeal.

(b) RELEASE AFTER JUDGMENT OF CONVICTION. A party entitled to do so may obtain review of a district-court order regarding release after a judgment of conviction by filing a notice of appeal from that order in the district court, or by filing a motion in the court of appeals if the party has already filed a notice of appeal from the judgment of conviction. Both the order and the review are subject to Rule 9(a). The papers filed by the party seeking review must include a copy of the judgment of conviction.

(c) CRITERIA FOR RELEASE. The court must make its decision regarding release in accordance with the applicable provisions of 18 U.S.C. §§3142, 3143, and 3145(c).

(As amended Apr. 24, 1972, eff. Oct. 1, 1972; Pub. L. 98–473, title II, §210, Oct. 12, 1984, 98 Stat. 1987; Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 24, 1998, eff. Dec. 1, 1998.)

NOTES OF ADVISORY COMMITTEE ON RULES—1967

Subdivision (a). The appealability of release orders entered prior to a judgment of conviction is determined

by the provisions of 18 U.S.C. §3147, as qualified by 18 U.S.C. §3148, and by the rule announced in *Stack v. Boyle*, 342 U.S. 1, 72 S.Ct. 1, 96 L.Ed. 3 (1951), holding certain orders respecting release appealable as final orders under 28 U.S.C. §1291. The language of the rule, ''(an)n appeal authorized by law from an order refusing or imposing conditions of release,'' is intentionally broader than that used in 18 U.S.C. §3147 in describing orders made appealable by that section. The summary procedure ordained by the rule is intended to apply to all appeals from orders respecting release, and it would appear that at least some orders not made appealable by 18 U.S.C. §3147 are nevertheless appealable under the *Stack v. Boyle* rationale. See, for example, *United States v. Foster*, 278 F.2d 567 (2d Cir., 1960), holding appealable an order refusing to extend bail limits. Note also the provisions of 18 U.S.C. §3148, which after withdrawing from persons charged with an offense punishable by death and from those who have been convicted of an offense the right of appeal granted by 18 U.S.C. §3147, expressly preserves ''other rights to judicial review of conditions of release or orders of detention.''

The purpose of the subdivision is to insure the expeditious determination of appeals respecting release orders, an expedition commanded by 18 U.S.C. §3147 and by the Court in *Stack v. Boyle*, supra. It permits such appeals to be heard on an informal record without the necessity of briefs and on reasonable notice. Equally important to the just and speedy disposition of these appeals is the requirement that the district court state the reasons for its decision. See *Jones v. United States*, 358 F.2d 543 (D.C. Cir., 1966); *Rhodes v. United States*, 275 F.2d 78 (4th Cir., 1960); *United States v. Williams*, 253 F.2d 144 (7th Cir., 1958).

Subdivision (b). This subdivision regulates procedure for review of an order respecting release at a time when the jurisdiction of the court of appeals has already attached by virtue of an appeal from the judgment of conviction. Notwithstanding the fact that jurisdiction has passed to the court of appeals, both 18 U.S.C. §3148 and FRCrP 38(c) contemplate that the initial determination of whether a convicted defendant is to be released pending the appeal is to be made by the district court. But at this point there is obviously no need for a separate appeal from the order of the district court respecting release. The court of appeals or a judge thereof has power to effect release on motion as an incident to the pending appeal. See FRCrP 38(c) and 46(a)(2). But the motion is functionally identical with the appeal regulated by subdivision (a) and requires the same speedy determination if relief is to be effective. Hence the similarity of the procedure outlined in the two subdivisions.

NOTES OF ADVISORY COMMITTEE ON RULES—1972 AMENDMENT

Subdivision (c) is intended to bring the rule into conformity with 18 U.S.C. §3148 and to allocate to the defendant the burden of establishing that he will not flee and that he poses no danger to any other person or to the community. The burden is placed upon the defendant in the view that the fact of his conviction justifies retention in custody in situations where doubt exists as to whether he can be safely released pending disposition of his appeal. Release pending appeal may also be denied if ''it appears that an appeal is frivolous or taken for delay.'' 18 U.S.C. §3148. The burden of establishing the existence of these criteria remains with the government.

NOTES OF ADVISORY COMMITTEE ON RULES—1994 AMENDMENT

Rule 9 has been entirely rewritten. The basic structure of the rule has been retained. Subdivision (a) governs appeals from bail decisions made before the judgment of conviction is entered at the time of sentencing. Subdivision (b) governs review of bail decisions made after sentencing and pending appeal.

Subdivision (a). The subdivision applies to appeals from ''an order regarding release or detention'' of a criminal defendant before judgment of conviction, *i.e.*, before sentencing. *See* Fed.R.Crim.P. 32. The old rule applied only to a defendant's appeal from an order ''refusing or imposing conditions of release.'' The new broader language is needed because the government is now permitted to appeal bail decisions in certain circumstances. 18 U.S.C. §§3145 and 3731. For the same reason, the rule now requires a district court to state reasons for its decision in all instances, not only when it refuses release or imposes conditions on release.

The rule requires a party appealing from a district court's decision to supply the court of appeals with a copy of the district court's order and its statement of reasons. In addition, an appellant who questions the factual basis for the district court's decision must file a transcript of the release proceedings, if possible. The rule also permits a court to require additional papers. A court must act promptly to decide these appeals; lack of pertinent information can cause delays. The old rule left the determination of what should be filed entirely within the party's discretion; it stated that the court of appeals would hear the appeal ''upon such papers, affidavits, and portions of the record as the parties shall present.''

Subdivision (b). This subdivision applies to review of a district court's decision regarding release made after judgment of conviction. As in subdivision (a), the language has been changed to accommodate the government's ability to seek review.

The word ''review'' is used in this subdivision, rather than ''appeal'' because review may be obtained, in some instances, upon motion. Review may be obtained by motion if the party has already filed a notice of appeal from the judgment of conviction. If the party desiring review of the release decision has not filed such a notice of appeal, review may be obtained only by filing a notice of appeal from the order regarding release.

The requirements of subdivision (a) apply to both the order and the review. That is, the district court must state its reasons for the order. The party seeking review must supply the court of appeals with the same information required by subdivision (a). In addition, the party seeking review must also supply the court with information about the conviction and the sentence.

Subdivision (c). This subdivision has been amended to include references to the correct statutory provisions.

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

AMENDMENT BY PUBLIC LAW

1984—Subd. (c). Pub. L. 98–473 substituted ''3143'' for ''3148'' and inserted ''and that the appeal is not for purpose of delay and raises a substantial question of law or fact likely to result in reversal or in an order for a new trial'' after ''community''.

Rule 10. The Record on Appeal

(a) COMPOSITION OF THE RECORD ON APPEAL. The following items constitute the record on appeal:

(1) the original papers and exhibits filed in the district court;

(2) the transcript of proceedings, if any; and

(3) a certified copy of the docket entries prepared by the district clerk.

(b) THE TRANSCRIPT OF PROCEEDINGS.

(1) *Appellant's Duty to Order*. Within 10 days after filing the notice of appeal or entry of an order disposing of the last timely remaining motion of a type specified in Rule 4(a)(4)(A),

whichever is later, the appellant must do either of the following:

(A) order from the reporter a transcript of such parts of the proceedings not already on file as the appellant considers necessary, subject to a local rule of the court of appeals and with the following qualifications:

(i) the order must be in writing;

(ii) if the cost of the transcript is to be paid by the United States under the Criminal Justice Act, the order must so state; and

(iii) the appellant must, within the same period, file a copy of the order with the district clerk; or

(B) file a certificate stating that no transcript will be ordered.

(2) *Unsupported Finding or Conclusion*. If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant must include in the record a transcript of all evidence relevant to that finding or conclusion.

(3) *Partial Transcript*. Unless the entire transcript is ordered:

(A) the appellant must—within the 10 days provided in Rule 10(b)(1)—file a statement of the issues that the appellant intends to present on the appeal and must serve on the appellee a copy of both the order or certificate and the statement;

(B) if the appellee considers it necessary to have a transcript of other parts of the proceedings, the appellee must, within 10 days after the service of the order or certificate and the statement of the issues, file and serve on the appellant a designation of additional parts to be ordered; and

(C) unless within 10 days after service of that designation the appellant has ordered all such parts, and has so notified the appellee, the appellee may within the following 10 days either order the parts or move in the district court for an order requiring the appellant to do so.

(4) *Payment*. At the time of ordering, a party must make satisfactory arrangements with the reporter for paying the cost of the transcript.

(c) STATEMENT OF THE EVIDENCE WHEN THE PROCEEDINGS WERE NOT RECORDED OR WHEN A TRANSCRIPT IS UNAVAILABLE. If the transcript of a hearing or trial is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement must be served on the appellee, who may serve objections or proposed amendments within 10 days after being served. The statement and any objections or proposed amendments must then be submitted to the district court for settlement and approval. As settled and approved, the statement must be included by the district clerk in the record on appeal.

(d) AGREED STATEMENT AS THE RECORD ON APPEAL. In place of the record on appeal as defined in Rule 10(a), the parties may prepare, sign, and submit to the district court a statement of the case showing how the issues presented by the appeal arose and were decided in the district court. The statement must set forth only those facts averred and proved or sought to be proved that are essential to the courts resolution of the issues. If the statement is truthful, it—together with any additions that the district court may consider necessary to a full presentation of the issues on appeal—must be approved by the district court and must then be certified to the court of appeals as the record on appeal. The district clerk must then send it to the circuit clerk within the time provided by Rule 11. A copy of the agreed statement may be filed in place of the appendix required by Rule 30.

(e) CORRECTION OR MODIFICATION OF THE RECORD.

(1) If any difference arises about whether the record truly discloses what occurred in the district court, the difference must be submitted to and settled by that court and the record conformed accordingly.

(2) If anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected and a supplemental record may be certified and forwarded:

(A) on stipulation of the parties;

(B) by the district court before or after the record has been forwarded; or

(C) by the court of appeals.

(3) All other questions as to the form and content of the record must be presented to the court of appeals.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Mar. 10, 1986, eff. July 1, 1986; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 27, 1995, eff. Dec. 1, 1995; Apr. 24, 1998, eff. Dec. 1, 1998.)

NOTES OF ADVISORY COMMITTEE ON RULES—1967

This rule is derived from FRCP 75(a), (b), (c) and (d) and FRCP 76, without change in substance.

NOTES OF ADVISORY COMMITTEE ON RULES—1979 AMENDMENT

The proposed amendments to Rule 10(b) would require the appellant to place with the reporter a written order for the transcript of proceedings and file a copy with the clerk, and to indicate on the order if the transcript is to be provided under the Criminal Justice Act. If the appellant does not plan to order a transcript of any of the proceedings, he must file a certificate to that effect. These requirements make the appellant's steps in readying the appeal a matter of record and give the district court notice of requests for transcripts at the expense of the United States under the Criminal Justice Act. They are also the third step in giving the court of appeals some control over the production and transmission of the record. See Note to Rules 3(d)(e) above and Rule 11 below.

In the event the appellant orders no transcript, or orders a transcript of less than all the proceedings, the procedure under the proposed amended rule remains substantially as before. The appellant must serve on the appellee a copy of his order or in the event no order is placed, of the certificate to that effect, and a statement of the issues he intends to present on appeal, and the appellee may thereupon designate additional parts of the transcript to be included, and upon appellant's refusal to order the additional parts, may either order them himself or seek an order requiring the appellant to order them. The only change proposed in this procedure is to place a 10 day time limit on motions to require the appellant to order the additional portions.

Rule 10(b) is made subject to local rules of the courts of appeals in recognition of the practice in some circuits in some classes of cases, e. g., appeals by indigents in criminal cases after a short trial, of ordering immediate preparation of a complete transcript, thus making compliance with the rule unnecessary.

NOTES OF ADVISORY COMMITTEE ON RULES—1986 AMENDMENT

The amendments to Rules 10(b) and (c) are technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1993 AMENDMENT

The amendment is technical and no substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1995 AMENDMENT

Subdivision (b)(1). The amendment conforms this rule to amendments made in Rule 4(a)(4) in 1993. The amendments to Rule 4(a)(4) provide that certain postjudgment motions have the effect of suspending a filed notice of appeal until the disposition of the last of such motions. The purpose of this amendment is to suspend the 10-day period for ordering a transcript if a timely postjudgment motion is made and a notice of appeal is suspended under Rule 4(a)(4). The 10-day period set forth in the first sentence of this rule begins to run when the order disposing of the last of such postjudgment motions outstanding is entered.

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

REFERENCES IN TEXT

The Criminal Justice Act, referred to in subd. (b)(1)(A)(ii), probably means the Criminal Justice Act of 1964, Pub. L. 88–455, Aug. 20, 1964, 78 Stat. 552, as amended, which enacted section 3006A of Title 18, Crimes and Criminal Procedure, and provisions set out as notes under section 3006A of Title 18. For complete classification of this Act to the Code, see Short Title note set out under section 3006A of Title 18 and Tables.

Rule 11. Forwarding the Record

(a) APPELLANT'S DUTY. An appellant filing a notice of appeal must comply with Rule 10(b) and must do whatever else is necessary to enable the clerk to assemble and forward the record. If there are multiple appeals from a judgment or order, the clerk must forward a single record.

(b) DUTIES OF REPORTER AND DISTRICT CLERK.

(1) *Reporter's Duty to Prepare and File a Transcript.* The reporter must prepare and file a transcript as follows:

(A) Upon receiving an order for a transcript, the reporter must enter at the foot of the order the date of its receipt and the expected completion date and send a copy, so endorsed, to the circuit clerk.

(B) If the transcript cannot be completed within 30 days of the reporters receipt of the order, the reporter may request the circuit clerk to grant additional time to complete it. The clerk must note on the docket the action taken and notify the parties.

(C) When a transcript is complete, the reporter must file it with the district clerk and notify the circuit clerk of the filing.

(D) If the reporter fails to file the transcript on time, the circuit clerk must notify the district judge and do whatever else the court of appeals directs.

(2) *District Clerk's Duty to Forward.* When the record is complete, the district clerk must number the documents constituting the record and send them promptly to the circuit clerk together with a list of the documents correspondingly numbered and reasonably identified. Unless directed to do so by a party or the circuit clerk, the district clerk will not send to the court of appeals documents of unusual bulk or weight, physical exhibits other than documents, or other parts of the record designated for omission by local rule of the court of appeals. If the exhibits are unusually bulky or heavy, a party must arrange with the clerks in advance for their transportation and receipt.

(c) RETAINING THE RECORD TEMPORARILY IN THE DISTRICT COURT FOR USE IN PREPARING THE APPEAL. The parties may stipulate, or the district court on motion may order, that the district clerk retain the record temporarily for the parties to use in preparing the papers on appeal. In that event the district clerk must certify to the circuit clerk that the record on appeal is complete. Upon receipt of the appellee's brief, or earlier if the court orders or the parties agree, the appellant must request the district clerk to forward the record.

(d) [ABROGATED.]

(e) RETAINING THE RECORD BY COURT ORDER.

(1) The court of appeals may, by order or local rule, provide that a certified copy of the docket entries be forwarded instead of the entire record. But a party may at any time during the appeal request that designated parts of the record be forwarded.

(2) The district court may order the record or some part of it retained if the court needs it while the appeal is pending, subject, however, to call by the court of appeals.

(3) If part or all of the record is ordered retained, the district clerk must send to the court of appeals a copy of the order and the docket entries together with the parts of the original record allowed by the district court and copies of any parts of the record designated by the parties.

(f) RETAINING PARTS OF THE RECORD IN THE DISTRICT COURT BY STIPULATION OF THE PARTIES. The parties may agree by written stipulation filed in the district court that designated parts of the record be retained in the district court subject to call by the court of appeals or request by a party. The parts of the record so designated remain a part of the record on appeal.

(g) RECORD FOR A PRELIMINARY MOTION IN THE COURT OF APPEALS. If, before the record is forwarded, a party makes any of the following motions in the court of appeals:

- for dismissal;
- for release;
- for a stay pending appeal;
- for additional security on the bond on appeal or on a supersedeas bond; or
- for any other intermediate order—

the district clerk must send the court of appeals any parts of the record designated by any party.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Mar. 10, 1986, eff. July 1, 1986; Apr. 24, 1998, eff. Dec. 1, 1998.)

NOTES OF ADVISORY COMMITTEE ON RULES—1967

Subdivisions (a) and (b). These subdivisions are derived from FRCP 73(g) and FRCP 75(e). FRCP 75(e) presently directs the clerk of the district court to transmit the record within the time allowed or fixed for its filing, which, under the provisions of FRCP 73(g) is within 40 days from the date of filing the notice of appeal, unless an extension is obtained from the district court. The precise time at which the record must be transmitted thus depends upon the time required for delivery of the record from the district court to the court of appeals, since, to permit its timely filing, it must reach the court of appeals before expiration of the 40-day period of an extension thereof. Subdivision (a) of this rule provides that the record is to be transmitted within the 40-day period, or any extension thereof; subdivision (b) provides that transmission is effected when the clerk of the district court mails or otherwise forwards the record to the clerk of the court of appeals; Rule 12(b) directs the clerk of the court of appeals to file the record upon its receipt following timely docketing and transmittal. It can thus be determined with certainty precisely when the clerk of the district court must forward the record to the clerk of the court of appeals in order to effect timely filing: the final day of the 40-day period or of any extension thereof.

Subdivision (c). This subdivision is derived from FRCP 75(e) without change of substance.

Subdivision (d). This subdivision is derived from FRCP 73(g) and FRCrP 39(c). Under present rules the district court is empowered to extend the time for filing the record and docketing the appeal. Since under the proposed rule timely transmission now insures timely filing (see note to subdivisions (a) and (b) above) the power of the district court is expressed in terms of its power to extend the time for transmitting the record. Restriction of that power to a period of 90 days after the filing of the notice of appeal represents a change in the rule with respect to appeals in criminal cases. FRCrP 39(c) now permits the district court to extend the time for filing and docketing without restriction. No good reason appears for a difference between the civil and criminal rule in this regard, and subdivision (d) limits the power of the district court to extend the time for transmitting the record in all cases to 90 days from the date of filing the notice of appeal, just as its power is now limited with respect to docketing and filing in civil cases. Subdivision (d) makes explicit the power of the court of appeals to permit the record to be filed at any time. See *Pyramid Motor Freight Corporation v. Ispass*, 330, U.S. 695, 67 S.Ct. 954, 91 L.Ed. 1184 (1947).

Subdivisions (e), (f) and (g). These subdivisions are derived from FRCP 75(f), (a) and (g), respectively, without change of substance.

NOTES OF ADVISORY COMMITTEE ON RULES—1979 AMENDMENT

Under present Rule 11(a) it is provided that the record shall be transmitted to the court of appeals within 40 days after the filing of the notice of appeal. Under present Rule 11(d) the district court, on request made during the initial time or any extension thereof, and cause shown, may extend the time for the transmission of the record to a point not more than 90 days after the filing of the first notice of appeal. If the district court is without authority to grant a request to extend the time, or denies a request for extension, the appellant may make a motion for extension of time in the court of appeals. Thus the duty to see that the record is transmitted is placed on the appellant. Aside from ordering the transcript within the time prescribed the appellant has no control over the time at which the record is transmitted, since all steps beyond this point are in the hands of the reporter and the clerk. The proposed amendments recognize this fact and place the duty directly on the reporter and the clerk. After receiving the written order for the transcript (See Note to Rule 10(b) above), the reporter must acknowledge its receipt, indicate when he expects to have it completed, and mail the order so endorsed to the clerk of the court of appeals. Requests for extensions of time must be made by the reporter to the clerk of the court of appeals and action on such requests is entered on the docket. Thus from the point at which the transcript is ordered the clerk of the court of appeals is made aware of any delays. If the transcript is not filed on time, the clerk of the court of appeals will notify the district judge.

Present Rule 11(b) provides that the record shall be transmitted when it is ''complete for the purposes of the appeal.'' The proposed amended rule continues this requirement. The record is complete for the purposes of the appeal when it contains the original papers on file in the clerk's office, all necessary exhibits, and the transcript, if one is to be included. Cf. present Rule 11(c). The original papers will be in the custody of the clerk of the district court at the time the notice of appeal is filed. See Rule 5(e) of the F.R.C.P. The custody of exhibits is often the subject of local rules. Some of them require that documentary exhibits must be deposited with the clerk. See Local Rule 13 of the Eastern District of Virginia. Others leave exhibits with counsel, subject to order of the court. See Local Rule 33 of the Northern District of Illinois. If under local rules the custody of exhibits is left with counsel, the district court should make adequate provision for their preservation during the time during which an appeal may be taken, the prompt deposit with the clerk of such as under Rule 11(b) are to be transmitted to the court of appeals, and the availability of others in the event that the court of appeals should require their transmission. Cf. Local Rule 11 of the Second Circuit.

Usually the record will be complete with the filing of the transcript. While the proposed amendment requires transmission ''forthwith'' when the record is complete, it was not designed to preclude a local requirement by the court of appeals that the original papers and exhibits be transmitted when complete without awaiting the filing of the transcript.

The proposed amendments continue the provision in the present rule that documents of unusual bulk or weight and physical exhibits other than documents shall not be transmitted without direction by the parties or by the court of appeals, and the requirement that the parties make special arrangements for transmission and receipt of exhibits of unusual bulk or weight. In addition, they give recognition to local rules that make transmission of other record items subject to order of the court of appeals. See Local Rule 4 of the Seventh Circuit.

NOTES OF ADVISORY COMMITTEE ON RULES—1986 AMENDMENT

The amendments to Rule 11(b) are technical. No substantive change is intended.

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

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

(a) DOCKETING THE APPEAL. Upon receiving the copy of the notice of appeal and the docket entries from the district clerk under Rule 3(d), the circuit clerk must docket the appeal under the title of the district-court action and must identify the appellant, adding the appellant's name if necessary.

(b) FILING A REPRESENTATION STATEMENT. Unless the court of appeals designates another time, the attorney who filed the notice of appeal must, within 10 days after filing the notice, file a statement with the circuit clerk naming the parties that the attorney represents on appeal.

(c) FILING THE RECORD, PARTIAL RECORD, OR CERTIFICATE. Upon receiving the record, partial record, or district clerk's certificate as provided in Rule 11, the circuit clerk must file it and immediately notify all parties of the filing date.

(As amended Apr. 1, 1979, eff. Aug. 1, 1979; Mar. 10, 1986, eff. July 1, 1986; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 24, 1998, eff. Dec. 1, 1998.)

NOTES OF ADVISORY COMMITTEE ON RULES—1967

Subdivision (a). All that is involved in the docketing of an appeal is the payment of the docket fee. In practice, after the clerk of the court of appeals receives the record from the clerk of the district court he notifies the appellant of its receipt and requests payment of the fee. Upon receipt of the fee, the clerk enters the appeal upon the docket and files the record. The appellant is allowed to pay the fee at any time within the time allowed or fixed for transmission of the record and thereby to discharge his responsibility for docketing. The final sentence is added in the interest of facilitating future reference and citation and location of cases in indexes. Compare 3d Cir. Rule 10(2); 4th Cir. Rule 9(8); 6th Cir. Rule 14(1).

Subdivision (c). The rules of the circuits generally permit the appellee to move for dismissal in the event the appellant fails to effect timely filing of the record. See 1st Cir. Rule 21(3); 3d Cir. Rule 21(4); 5th Cir. Rule 16(1); 8th Cir. Rule 7(d).

NOTES OF ADVISORY COMMITTEE ON RULES—1979 AMENDMENT

Subdivision (a). Under present Rule 12(a) the appellant must pay the docket fee within the time fixed for the transmission of the record, and upon timely payment of the fee, the appeal is docketed. The proposed amendment takes the docketing out of the hands of the appellant. The fee is paid at the time the notice of appeal is filed and the appeal is entered on the docket upon receipt of a copy of the notice of appeal and of the docket entries, which are sent to the court of appeals under the provisions of Rule 3(d). This is designed to give the court of appeals control of its docket at the earliest possible time so that within the limits of its facilities and personnel it can screen cases for appropriately different treatment, expedite the proceedings through prehearing conferences or otherwise, and in general plan more effectively for the prompt disposition of cases.

Subdivision (b). The proposed amendment conforms the provision to the changes in Rule 11.

NOTES OF ADVISORY COMMITTEE ON RULES—1986 AMENDMENT

The amendment to Rule 12(a) is technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1993 AMENDMENT

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

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

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The language of the rule is amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

TITLE III. REVIEW OF A DECISION OF THE UNITED STATES TAX COURT

Rule 13. Review of a Decision of the Tax Court

(a) HOW OBTAINED; TIME FOR FILING NOTICE OF APPEAL.

(1) Review of a decision of the United States Tax Court is commenced by filing a notice of appeal with the Tax Court clerk within 90 days after the entry of the Tax Court's decision. At the time of filing, the appellant must furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d). If one party files a timely notice of appeal, any other party may file a notice of appeal within 120 days after the Tax Court's decision is entered.

(2) If, under Tax Court rules, a party makes a timely motion to vacate or revise the Tax Court's decision, the time to file a notice of appeal runs from the entry of the order disposing of the motion or from the entry of a new decision, whichever is later.

(b) NOTICE OF APPEAL; HOW FILED. The notice of appeal may be filed either at the Tax Court clerk's office in the District of Columbia or by mail addressed to the clerk. If sent by mail the notice is considered filed on the postmark date, subject to §7502 of the Internal Revenue Code, as amended, and the applicable regulations.

(c) CONTENTS OF THE NOTICE OF APPEAL; SERVICE; EFFECT OF FILING AND SERVICE. Rule 3 prescribes the contents of a notice of appeal, the manner of service, and the effect of its filing and service. Form 2 in the Appendix of Forms is a suggested form of a notice of appeal.

(d) THE RECORD ON APPEAL; FORWARDING; FILING.

(1) An appeal from the Tax Court is governed by the parts of Rules 10, 11, and 12 regarding the record on appeal from a district court, the time and manner of forwarding and filing, and the docketing in the court of appeals. References in those rules and in Rule 3 to the district court and district clerk are to be read as referring to the Tax Court and its clerk.

(2) If an appeal from a Tax Court decision is taken to more than one court of appeals, the original record must be sent to the court named in the first notice of appeal filed. In an appeal to any other court of appeals, the appellant must apply to that other court to make provision for the record.

(As amended Apr. 1, 1979, eff. Aug. 1, 1979; Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 24, 1998, eff. Dec. 1, 1998.)

NOTES OF ADVISORY COMMITTEE ON RULES—1967

Subdivision (a). This subdivision effects two changes in practice respecting review of Tax Court decisions: (1) Section 7483 of the Internal Revenue Code, 68A Stat. 891, 26 U.S.C. §7483, provides that review of a Tax Court decision may be obtained by filing a petition for review. The subdivision provides for review by the filing of the simple and familiar notice of appeal used to obtain review of district court judgments; (2) Section 7483, *supra*, requires that a petition for review be filed within 3 months after a decision is rendered, and provides that if a petition is so filed by one party, any other party may file a petition for review within 4 months after the decision is rendered. In the interest of fixing the time for review with precision, the proposed rule substitutes ''90 days'' and ''120 days'' for the statutory ''3 months'' and ''4 months'', respectively. The power of the Court to regulate these details of practice is clear. Title 28 U.S.C. §2072, as amended by the Act of November 6, 1966, 80 Stat. 1323 (1 U.S. Code Cong. & Ad. News, p. 1546 (1966)), authorizes the Court to regulate ''. . . practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States. . . .''

The second paragraph states the settled teaching of the case law. See *Robert Louis Stevenson Apartments, Inc. v. C.I.R.*, 337 F.2d 681, 10 A.L.R.3d 112 (8th Cir., 1964); *Denholm & McKay Co. v. C.I.R.*, 132 F.2d 243 (1st Cir., 1942); *Helvering v. Continental Oil Co.*, 63 App.D.C. 5, 68 F.2d 750 (1934); *Burnet v. Lexington Ice & Coal Co.*, 62 F.2d 906 (4th Cir., 1933); *Griffiths v. C.I.R.*, 50 F.2d 782 (7th Cir., 1931).

Subdivision (b). The subdivision incorporates the statutory provision (Title 26, U.S.C. §7502) that timely mailing is to be treated as timely filing. The statute contains special provisions respecting other than ordinary mailing. If the notice of appeal is sent by registered mail, registration is deemed prima facie evidence that the notice was delivered to the clerk of the Tax Court, and the date of registration is deemed the postmark date. If the notice of appeal is sent by certified mail, the effect of certification with respect to prima facie evidence of delivery and the postmark date depends upon regulations of the Secretary of the Treasury. The effect of a postmark made other than by the United States Post Office likewise depends upon regulations of the Secretary. Current regulations are found in 26 CFR §301.7502–1.

NOTES OF ADVISORY COMMITTEE ON RULES—1979 AMENDMENT

The proposed amendment reflects the change in the title of the Tax Court to ''United States Tax Court.'' See 26 U.S.C. §7441.

NOTES OF ADVISORY COMMITTEE ON RULES—1994 AMENDMENT

Subdivision (a). The amendment requires a party filing a notice of appeal to provide the court with sufficient copies of the notice for service on all other parties.

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

REFERENCES IN TEXT

Section 7502 of the Internal Revenue Code, referred to in subd. (b), is classified to section 112 of Title 26, Internal Revenue Code.

Rule 14. Applicability of Other Rules to the Review of a Tax Court Decision

All provisions of these rules, except Rules 4–9, 15–20, and 22–23, apply to the review of a Tax Court decision.

(As amended Apr. 24, 1998, eff. Dec. 1, 1998.)

NOTES OF ADVISORY COMMITTEE ON RULES—1967

The proposed rule continues the present uniform practice of the circuits of regulating review of decisions of the Tax Court by the general rules applicable to appeals from judgments of the district courts.

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The language of the rule is amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

TITLE IV. REVIEW OR ENFORCEMENT OF AN ORDER OF AN ADMINISTRATIVE AGENCY, BOARD, COMMISSION, OR OFFICER

Rule 15. Review or Enforcement of an Agency Order—How Obtained; Intervention

(a) PETITION FOR REVIEW; JOINT PETITION.

(1) Review of an agency order is commenced by filing, within the time prescribed by law, a petition for review with the clerk of a court of appeals authorized to review the agency order. If their interests make joinder practicable, two or more persons may join in a petition to the same court to review the same order.

(2) The petition must:

(A) name each party seeking review either in the caption or the body of the petition—using such terms as ''et al.,'' ''petitioners,'' or ''respondents'' does not effectively name the parties;

(B) name the agency as a respondent (even though not named in the petition, the United States is a respondent if required by statute); and

(C) specify the order or part thereof to be reviewed.

(3) Form 3 in the Appendix of Forms is a suggested form of a petition for review.

(4) In this rule ''agency'' includes an agency, board, commission, or officer; ''petition for review'' includes a petition to enjoin, suspend, modify, or otherwise review, or a notice of appeal, whichever form is indicated by the applicable statute.

(b) APPLICATION OR CROSS-APPLICATION TO ENFORCE AN ORDER; ANSWER; DEFAULT.

(1) An application to enforce an agency order must be filed with the clerk of a court of appeals authorized to enforce the order. If a petition is filed to review an agency order that the court may enforce, a party opposing the petition may file a cross-application for enforcement.

(2) Within 20 days after the application for enforcement is filed, the respondent must serve on the applicant an answer to the application and file it with the clerk. If the respondent fails to answer in time, the court will enter judgment for the relief requested.

(3) The application must contain a concise statement of the proceedings in which the order was entered, the facts upon which venue is based, and the relief requested.

(c) SERVICE OF THE PETITION OR APPLICATION. The circuit clerk must serve a copy of the peti-

tion for review, or an application or cross-application to enforce an agency order, on each respondent as prescribed by Rule 3(d), unless a different manner of service is prescribed by statute. At the time of filing, the petitioner must:

(1) serve, or have served, a copy on each party admitted to participate in the agency proceedings, except for the respondents;

(2) file with the clerk a list of those so served; and

(3) give the clerk enough copies of the petition or application to serve each respondent.

(d) INTERVENTION. Unless a statute provides another method, a person who wants to intervene in a proceeding under this rule must file a motion for leave to intervene with the circuit clerk and serve a copy on all parties. The motion—or other notice of intervention authorized by statute—must be filed within 30 days after the petition for review is filed and must contain a concise statement of the interest of the moving party and the grounds for intervention.

(e) PAYMENT OF FEES. When filing any separate or joint petition for review in a court of appeals, the petitioner must pay the circuit clerk all required fees.

(As amended Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 24, 1998, eff. Dec. 1, 1998.)

NOTES OF ADVISORY COMMITTEE ON RULES—1967

General Note. The power of the Supreme Court to prescribe rules of practice and procedure for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers is conferred by 28 U.S.C. §2072, as amended by the Act of November 6, 1966, §1, 80 Stat. 1323 (1 U.S. Code Cong. & Ad. News, p. 1546 (1966)). Section 11 of the Hobbs Administrative Orders Review Act of 1950, 64 Stat. 1132, reenacted as 28 U.S.C. §2352 (28 U.S.C.A. §2352 (Suppl. 1966)), repealed by the Act of November 6, 1966, §4, *supra*, directed the courts of appeals to adopt and promulgate, subject to approval by the Judicial Conference rules governing practice and procedure in proceedings to review the orders of boards, commissions and officers whose orders were made reviewable in the courts of appeals by the Act. Thereafter, the Judicial Conference approved a uniform rule, and that rule, with minor variations, is now in effect in all circuits. Third Circuit Rule 18 is a typical circuit rule, and for convenience it is referred to as the uniform rule in the notes which accompany rules under this Title.

Subdivision (a). The uniform rule (see General Note above) requires that the petition for review contain "a concise statement, in barest outline, of the nature of the proceedings as to which relief is sought, the facts upon which venue is based, the grounds upon which relief is sought, and the relief prayed." That language is derived from Section 4 of the Hobbs Administrative Orders Review Act of 1950, 64 Stat. 1130, reenacted as 28 U.S.C. §2344 (28 U.S.C.A. §2344 (Suppl. 1966)). A few other statutes also prescribe the content of the petition, but the great majority are silent on the point. The proposed rule supersedes 28 U.S.C. §2344 and other statutory provisions prescribing the form of the petition for review and permits review to be initiated by the filing of a simple petition similar in form to the notice of appeal used in appeals from judgments of district courts. The more elaborate form of petition for review now required is rarely useful either to the litigants or to the courts. There is no effective, reasonable way of obliging petitioners to come to the real issues before those issues are formulated in the briefs. Other provisions of this subdivision are derived from sections 1 and 2 of the uniform rule.

Subdivision (b). This subdivision is derived from sections 3, 4 and 5 of the uniform rule.

Subdivision (c). This subdivision is derived from section 1 of the uniform rule.

Subdivision (d). This subdivision is based upon section 6 of the uniform rule. Statutes occasionally permit intervention by the filing of a notice of intention to intervene. The uniform rule does not fix a time limit for intervention, and the only time limits fixed by statute are the 30-day periods found in the Communications Act Amendments, 1952, §402(e), 66 Stat. 719, 47 U.S.C. §402(e), and the Sugar Act of 1948, §205(d), 61 Stat. 927, 7 U.S.C. §1115(d).

NOTES OF ADVISORY COMMITTEE ON RULES—1993 AMENDMENT

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

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

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 15.1. Briefs and Oral Argument in a National Labor Relations Board Proceeding

In either an enforcement or a review proceeding, a party adverse to the National Labor Relations Board proceeds first on briefing and at oral argument, unless the court orders otherwise.

(As added Mar. 10, 1986, eff. July 1, 1986; amended Apr. 24, 1998, eff. Dec. 1, 1998.)

NOTES OF ADVISORY COMMITTEE ON RULES—1986

This rule simply confirms the existing practice in most circuits.

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The language of the rule is amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 16. The Record on Review or Enforcement

(a) COMPOSITION OF THE RECORD. The record on review or enforcement of an agency order consists of:

(1) the order involved;

(2) any findings or report on which it is based; and

(3) the pleadings, evidence, and other parts of the proceedings before the agency.

(b) OMISSIONS FROM OR MISSTATEMENTS IN THE RECORD. The parties may at any time, by stipu-

lation, supply any omission from the record or correct a misstatement, or the court may so direct. If necessary, the court may direct that a supplemental record be prepared and filed.

(As amended Apr. 24, 1998, eff. Dec. 1, 1998.)

NOTES OF ADVISORY COMMITTEE ON RULES—1967

Subdivision (a) is based upon 28 U.S.C. §2112(b). There is no distinction between the record compiled in the agency proceeding and the record on review; they are one and the same. The record in agency cases is thus the same as that in appeals from the district court—the original papers, transcripts and exhibits in the proceeding below. Subdivision (b) is based upon section 8 of the uniform rule (see General Note following Rule 15).

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 17. Filing the Record

(a) AGENCY TO FILE; TIME FOR FILING; NOTICE OF FILING. The agency must file the record with the circuit clerk within 40 days after being served with a petition for review, unless the statute authorizing review provides otherwise, or within 40 days after it files an application for enforcement unless the respondent fails to answer or the court orders otherwise. The court may shorten or extend the time to file the record. The clerk must notify all parties of the date when the record is filed.

(b) FILING—WHAT CONSTITUTES.

(1) The agency must file:

(A) the original or a certified copy of the entire record or parts designated by the parties; or

(B) a certified list adequately describing all documents, transcripts of testimony, exhibits, and other material constituting the record, or describing those parts designated by the parties.

(2) The parties may stipulate in writing that no record or certified list be filed. The date when the stipulation is filed with the circuit clerk is treated as the date when the record is filed.

(3) The agency must retain any portion of the record not filed with the clerk. All parts of the record retained by the agency are a part of the record on review for all purposes and, if the court or a party so requests, must be sent to the court regardless of any prior stipulation.

(As amended Apr. 24, 1998, eff. Dec. 1, 1998.)

NOTES OF ADVISORY COMMITTEE ON RULES—1967

Subdivision (a). This subdivision is based upon section 7 of the uniform rule (see General Note following Rule 15). That rule does not prescribe a time for filing the record in enforcement cases. Forty days are allowed in order to avoid useless preparation of the record or certified list in cases where the application for enforcement is not contested.

Subdivision (b). This subdivision is based upon 28 U.S.C. §2112 and section 7 of the uniform rule. It permits the agency to file either the record itself or a certified list of its contents. It also permits the parties to stipulate against transmission of designated parts of the record without the fear that an inadvertent stipulation may ''diminish'' the record. Finally, the parties may, in cases where consultation of the record is unnecessary, stipulate that neither the record nor a certified list of its contents be filed.

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only; a substantive change is made, however, in subdivision (b).

Subdivision (b). The current rule provides that when a court of appeals is asked to review or enforce an agency order, the agency must file either ''the entire record or such parts thereof as the parties may designate by stipulation filed with the agency'' or a certified list describing the documents, transcripts, exhibits, and other material constituting the record. If the agency is not filing a certified list, the current rule requires the agency to file the entire record unless the parties file a ''stipulation'' designating only parts of the record. Such a ''stipulation'' presumably requires agreement of the parties as to the parts to be filed. The amended language in subparagraph (b)(1)(A) permits the agency to file the entire record or ''parts designated by the parties.'' The new language permits the filing of less than the entire record even when the parties do not agree as to which parts should be filed. Each party can designate the parts that it wants filed; the agency can then forward the parts designated by each party. In contrast, paragraph (b)(2) continues to require stipulation, that is agreement of the parties, that the agency need not file either the record or a certified list.

Rule 18. Stay Pending Review

(a) MOTION FOR A STAY.

(1) *Initial Motion Before the Agency.* A petitioner must ordinarily move first before the agency for a stay pending review of its decision or order.

(2) *Motion in the Court of Appeals.* A motion for a stay may be made to the court of appeals or one of its judges.

(A) The motion must:

(i) show that moving first before the agency would be impracticable; or

(ii) state that, a motion having been made, the agency denied the motion or failed to afford the relief requested and state any reasons given by the agency for its action.

(B) The motion must also include:

(i) the reasons for granting the relief requested and the facts relied on;

(ii) originals or copies of affidavits or other sworn statements supporting facts subject to dispute; and

(iii) relevant parts of the record.

(C) The moving party must give reasonable notice of the motion to all parties.

(D) The motion must be filed with the circuit clerk and normally will be considered by a panel of the court. But in an exceptional case in which time requirements make that procedure impracticable, the motion may be made to and considered by a single judge.

(b) BOND. The court may condition relief on the filing of a bond or other appropriate security.

(As amended Apr. 24, 1998, eff. Dec. 1, 1998.)

NOTES OF ADVISORY COMMITTEE ON RULES—1967

While this rule has no counterpart in present rules regulating review of agency proceedings, it merely assimilates the procedure for obtaining stays in agency proceedings with that for obtaining stays in appeals from the district courts. The same considerations which justify the requirement of an initial application to the district court for a stay pending appeal support the requirement of an initial application to the agency pending review. See Note accompanying Rule 8. Title 5, U.S.C. §705 (5 U.S.C.A. §705 (1966 Pamphlet)) confers general authority on both agencies and reviewing courts to stay agency action pending review. Many of the statutes authorizing review of agency action by the courts of appeals deal with the question of stays, and at least one, the Act of June 15, 1936, 49 Stat. 1499 (7 U.S.C. §10a), prohibits a stay pending review. The proposed rule in nowise affects such statutory provisions respecting stays. By its terms, it simply indicates the procedure to be followed when a stay is sought.

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 19. Settlement of a Judgment Enforcing an Agency Order in Part

When the court files an opinion directing entry of judgment enforcing the agency's order in part, the agency must within 14 days file with the clerk and serve on each other party a proposed judgment conforming to the opinion. A party who disagrees with the agency's proposed judgment must within 7 days file with the clerk and serve the agency with a proposed judgment that the party believes conforms to the opinion. The court will settle the judgment and direct entry without further hearing or argument.

(As amended Mar. 10, 1986, eff. July 1, 1986; Apr. 24, 1998, eff. Dec. 1, 1998.)

NOTES OF ADVISORY COMMITTEE ON RULES—1967

This is section 12 of the uniform rule (see General Note following Rule 15) with changes in phraseology.

NOTES OF ADVISORY COMMITTEE ON RULES—1986 AMENDMENT

The deletion of the words ''in whole or'' is designed to eliminate delay in the issuance of a judgment when the court of appeals has either enforced completely the order of an agency or denied completely such enforcement. In such a clear-cut situation, it serves no useful purpose to delay the issuance of the judgment until a proposed judgment is submitted by the agency and reviewed by the respondent. This change conforms the Rule to the existing practice in most circuits. Other amendments are technical and no substantive change is intended.

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The language of the rule is amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 20. Applicability of Rules to the Review or Enforcement of an Agency Order

All provisions of these rules, except Rules 3–14 and 22–23, apply to the review or enforcement of an agency order. In these rules, ''appellant'' includes a petitioner or applicant, and ''appellee'' includes a respondent.

(As amended Apr. 24, 1998, eff. Dec. 1, 1998.)

NOTES OF ADVISORY COMMITTEE ON RULES—1967

The proposed rule continues the present uniform practice of the circuits of regulating agency review or enforcement proceedings by the general rules applicable to appeals from judgments of the district courts.

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The language of the rule is amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

TITLE V. EXTRAORDINARY WRITS

Rule 21. Writs of Mandamus and Prohibition, and Other Extraordinary Writs

(a) MANDAMUS OR PROHIBITION TO A COURT: PETITION, FILING, SERVICE, AND DOCKETING.

(1) A party petitioning for a writ of mandamus or prohibition directed to a court must file a petition with the circuit clerk with proof of service on all parties to the proceeding in the trial court. The party must also provide a copy to the trial-court judge. All parties to the proceeding in the trial court other than the petitioner are respondents for all purposes.

(2)(A) The petition must be titled ''In re [name of petitioner].''

(B) The petition must state:

(i) the relief sought;

(ii) the issues presented;

(iii) the facts necessary to understand the issue presented by the petition; and

(iv) the reasons why the writ should issue.

(C) The petition must include a copy of any order or opinion or parts of the record that may be essential to understand the matters set forth in the petition.

(3) Upon receiving the prescribed docket fee, the clerk must docket the petition and submit it to the court.

(b) DENIAL; ORDER DIRECTING ANSWER; BRIEFS; PRECEDENCE.

(1) The court may deny the petition without an answer. Otherwise, it must order the respondent, if any, to answer within a fixed time.

(2) The clerk must serve the order to respond on all persons directed to respond.

(3) Two or more respondents may answer jointly.

(4) The court of appeals may invite or order the trial-court judge to address the petition or may invite an amicus curiae to do so. The trial-court judge may request permission to address the petition but may not do so unless invited or ordered to do so by the court of appeals.

(5) If briefing or oral argument is required, the clerk must advise the parties, and when appropriate, the trial-court judge or amicus curiae.

(6) The proceeding must be given preference over ordinary civil cases.

(7) The circuit clerk must send a copy of the final disposition to the trial-court judge.

(c) OTHER EXTRAORDINARY WRITS. An application for an extraordinary writ other than one provided for in Rule 21(a) must be made by filing a petition with the circuit clerk with proof of service on the respondents. Proceedings on the application must conform, so far as is practicable, to the procedures prescribed in Rule 21(a) and (b).

(d) FORM OF PAPERS; NUMBER OF COPIES. All papers must conform to Rule 32(c)(2). Except by the court's permission, a paper must not exceed 30 pages, exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Rule 21(a)(2)(C). An original and 3 copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.

(As amended Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 23, 1996, eff. Dec. 1, 1996; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002.)

NOTES OF ADVISORY COMMITTEE ON RULES—1967

The authority of courts of appeals to issue extraordinary writs is derived from 28 U.S.C. §1651. Subdivisions (a) and (b) regulate in detail the procedure surrounding the writs most commonly sought—mandamus or prohibition directed to a judge or judges. Those subdivisions are based upon Supreme Court Rule 31, with certain changes which reflect the uniform practice among the circuits (Seventh Circuit Rule 19 is a typical circuit rule). Subdivision (c) sets out a very general procedure to be followed in applications for the variety of other writs which may be issued under the authority of 28 U.S.C. §1651.

NOTES OF ADVISORY COMMITTEE ON RULES—1994 AMENDMENT

Subdivision (d). The amendment makes it clear that a court may require a different number of copies either by rule or by order in an individual case. The number of copies of any document that a court of appeals needs varies depending upon the way in which the court conducts business. The internal operation of the courts of appeals necessarily varies from circuit to circuit because of differences in the number of judges, the geographic area included within the circuit, and other such factors. Uniformity could be achieved only by setting the number of copies artificially high so that parties in all circuits file enough copies to satisfy the needs of the court requiring the greatest number. Rather than do that, the Committee decided to make it clear that local rules may require a greater or lesser number of copies and that, if the circumstances of a particular case indicate the need for a different number of copies in that case, the court may so order.

NOTES OF ADVISORY COMMITTEE ON RULES—1996 AMENDMENT

In most instances, a writ of mandamus or prohibition is not actually directed to a judge in any more personal way than is an order reversing a court's judgment. Most often a petition for a writ of mandamus seeks review of the intrinsic merits of a judge's action and is in reality an adversary proceeding between the parties. See, *e.g.*, *Walker v. Columbia Broadcasting System, Inc.*, 443 F.2d 33 (7th Cir. 1971). In order to change the tone of the rule and of mandamus proceedings generally, the rule is amended so that the judge is not treated as a respondent. The caption and subdivision (a) are amended by deleting the reference to the writs as being ''directed to a judge or judges.''

Subdivision (a). Subdivision (a) applies to writs of mandamus or prohibition directed to a court, but it is amended so that a petition for a writ of mandamus or prohibition does not bear the name of the judge. The amendments to subdivision (a) speak, however, about mandamus or prohibition ''directed to a court.'' This language is inserted to distinguish subdivision (a) from subdivision (c). Subdivision (c) governs all other extraordinary writs, including a writ of mandamus or prohibition directed to an administrative agency rather than to a court and a writ of habeas corpus.

The amendments require the petitioner to provide a copy of the petition to the trial court judge. This will alert the judge to the filing of the petition. This is necessary because the trial court judge is not treated as a respondent and, as a result, is not served. A companion amendment is made in subdivision (b). It requires the circuit clerk to send a copy of the disposition of the petition to the trial court judge.

Subdivision (b). The amendment provides that even if relief is requested of a particular judge, although the judge may request permission to respond, the judge may not do so unless the court invites or orders a response.

The court of appeals ordinarily will be adequately informed not only by the opinions or statements made by the trial court judge contemporaneously with the entry of the challenged order but also by the arguments made on behalf of the party opposing the relief. The latter does not create an attorney-client relationship between the party's attorney and the judge whose action is challenged, nor does it give rise to any right to compensation from the judge.

If the court of appeals desires to hear from the trial court judge, however, the court may invite or order the judge to respond. In some instances, especially those involving court administration or the failure of a judge to act, it may be that no one other than the judge can provide a thorough explanation of the matters at issue. Because it is ordinarily undesirable to place the trial court judge, even temporarily, in an adversarial posture with a litigant, the rule permits a court of appeals to invite an *amicus curiae* to provide a response to the petition. In those instances in which the respondent does not oppose issuance of the writ or does not have sufficient perspective on the issue to provide an adequate response, participation of an *amicus* may avoid the need for the trial judge to participate.

Subdivision (c). The changes are stylistic only. No substantive changes are intended.

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

COMMITTEE NOTES ON RULES—2002 AMENDMENT

Subdivision (d). A petition for a writ of mandamus or prohibition, an application for another extraordinary writ, and an answer to such a petition or application are all ''other papers'' for purposes of Rule 32(c)(2), and all of the requirements of Rule 32(a) apply to those papers, except as provided in Rule 32(c)(2). During the 1998 restyling of the Federal Rules of Appellate Procedure, Rule 21(d) was inadvertently changed to suggest that only the requirements of Rule 32(a)(1) apply to such papers. Rule 21(d) has been amended to correct that error.

Rule 21(d) has been further amended to limit the length of papers filed under Rule 21.

Changes Made After Publication and Comments. No changes were made to the text of the proposed amendment or to the Committee Note, except that the page limit was increased from 20 pages to 30 pages. The Committee was persuaded by some commentators that petitions for extraordinary writs closely resemble principal briefs on the merits and should be allotted more than 20 pages.

TITLE VI. HABEAS CORPUS; PROCEEDINGS IN FORMA PAUPERIS

Rule 22. Habeas Corpus and Section 2255 Proceedings

(a) APPLICATION FOR THE ORIGINAL WRIT. An application for a writ of habeas corpus must be made to the appropriate district court. If made to a circuit judge, the application must be transferred to the appropriate district court. If a district court denies an application made or transferred to it, renewal of the application before a circuit judge is not permitted. The applicant may, under 28 U.S.C. §2253, appeal to the court of appeals from the district court's order denying the application.

(b) CERTIFICATE OF APPEALABILITY.

(1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. §2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. §2253(c). If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue. The district clerk must send the certificate or statement to the court of appeals with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate.

(2) A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes. If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals.

(3) A certificate of appealability is not required when a state or its representative or the United States or its representative appeals.

(As amended Pub. L. 104–132, title I, §103, Apr. 24, 1996, 110 Stat. 1218; Apr. 24, 1998, eff. Dec. 1, 1998.)

NOTES OF ADVISORY COMMITTEE ON RULES—1967

Subdivision (a). Title 28 U.S.C. §2241(a) authorizes circuit judges to issue the writ of habeas corpus. Section 2241(b), however, authorizes a circuit judge to decline to entertain an application and to transfer it to the appropriate district court, and this is the usual practice. The first two sentences merely make present practice explicit. Title 28 U.S.C. §2253 seems clearly to contemplate that once an application is presented to a district judge and is denied by him, the remedy is an appeal from the order of denial. But the language of 28 U.S.C. §2241 seems to authorize a second original application to a circuit judge following a denial by a district judge. *In re Gersing*, 79 U.S.App.D.C. 245, 145 F.2d 481 (D.C. Cir., 1944) and *Chapman v. Teets*, 241 F.2d 186 (9th Cir., 1957) acknowledge the availability of such a procedure. But the procedure is ordinarily a waste of time for all involved, and the final sentence attempts to discourage it.

A court of appeals has no jurisdiction as a court to grant an original writ of habeas corpus, and courts of appeals have dismissed applications addressed to them. *Loum v. Alvis*, 263 F.2d 836 (6th Cir., 1959); *In re Berry*, 221 F.2d 798 (9th Cir., 1955); *Posey v. Dowd*, 134 F.2d 613 (7th Cir., 1943). The fairer and more expeditious practice is for the court of appeals to regard an application addressed to it as being addressed to one of its members, and to transfer the application to the appropriate district court in accordance with the provisions of this rule. Perhaps such a disposition is required by the rationale of *In re Burwell*, 350 U.S. 521, 76 S.Ct. 539, 100 L.Ed. 666 (1956).

Subdivision (b). Title 28 U.S.C. §2253 provides that an appeal may not be taken in a habeas corpus proceeding where confinement is under a judgment of a state court unless the judge who rendered the order in the habeas corpus proceeding, or a circuit justice or judge, issues a certificate of probable cause. In the interest of insuring that the matter of the certificate will not be overlooked and that, if the certificate is denied, the reasons for denial in the first instance will be available on any subsequent application, the proposed rule requires the district judge to issue the certificate or to state reasons for its denial.

While 28 U.S.C. §2253 does not authorize the court of appeals as a court to grant a certificate of probable cause, *In re Burwell*, 350 U.S. 521, 76 S.Ct. 539, 100 L.Ed. 666 (1956) makes it clear that a court of appeals may not decline to consider a request for the certificate addressed to it as a court but must regard the request as made to the judges thereof. The fourth sentence incorporates the Burwell rule.

Although 28 U.S.C. §2253 appears to require a certificate of probable cause even when an appeal is taken by a state or its representative, the legislative history strongly suggests that the intention of Congress was to require a certificate only in the case in which an appeal is taken by an applicant for the writ. See *United States ex rel. Tillery v. Cavell*, 294 F.2d 12 (3d Cir., 1960). Four of the five circuits which have ruled on the point have so interpreted section 2253. *United States ex rel. Tillery v. Cavell*, supra; *Buder v. Bell*, 306 F.2d 71 (6th Cir., 1962); *United States ex rel. Calhoun v. Pate*, 341 F.2d 885 (7th Cir., 1965); *State of Texas v. Graves*, 352 F.2d 514 (5th Cir., 1965). Cf. *United States ex rel. Carrol v. LaVallee*, 342 F.2d 641 (2d Cir., 1965). The final sentence makes it clear that a certificate of probable cause is not required of a state or its representative.

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only; in this rule, however, substantive changes are made in paragraphs (b)(1) and (b)(3).

Subdivision (b), paragraph (1). Two substantive changes are made in this paragraph. First, the paragraph is made applicable to 28 U.S.C. §2255 proceedings. This brings the rule into conformity with 28 U.S.C. §2253 as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132. Second, the rule states that a certificate of appealability may be issued by "a circuit justice or a circuit or district judge." That language adds a reference to the circuit justice which also brings the rule into conformity with section 2253. The language continues to state that in addition to the circuit justice, both a circuit and a district judge may issue a certificate of appealability. The language of section 2253 is ambiguous; it states that a certificate of appealability may be issued by "a circuit justice or judge." Since the enactment of the Anti-Terrorism and Effective Death Penalty Act, three circuits have held that both district and circuit judges, as well as the circuit justice, may issue a certificate of appealability. *Else v. Johnson*, 104 F.3d 82 (5th Cir. 1997); *Lyons v. Ohio Adult Parole Authority*, 105 F.3d 1063 (6th Cir. 1997); and *Hunter v. United States*, 101 F.3d 1565 (11th Cir. 1996). The approach taken by the rule is consistent with those decisions.

Subdivision (b), paragraph (3). The Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, amended 28 U.S.C. §2253 to make it applicable to §2255

proceedings. Accordingly, paragraph (3) is amended to provide that when the United States or its representative appeals, a certificate of appealability is not required.

AMENDMENT BY PUBLIC LAW

1996—Pub. L. 104–132 inserted ''and section 2255'' after ''corpus'' in catchline and amended text generally. Prior to amendment, text read as follows:

''(a) *Application for the original writ.*—An application for a writ of habeas corpus shall be made to the appropriate district court. If application is made to a circuit judge, the application will ordinarily be transferred to the appropriate district court. If an application is made to or transferred to the district court and denied, renewal of the application before a circuit judge is not favored; the proper remedy is by appeal to the court of appeals from the order of the district court denying the writ.

''(b) *Necessity of certificate of probable cause for appeal.*—In a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court, an appeal by the applicant for the writ may not proceed unless a district or a circuit judge issues a certificate of probable cause. If an appeal is taken by the applicant, the district judge who rendered the judgment shall either issue a certificate of probable cause or state the reasons why such a certificate should not issue. The certificate or the statement shall be forwarded to the court of appeals with the notice of appeal and the file of the proceedings in the district court. If the district judge has denied the certificate, the applicant for the writ may then request issuance of the certificate by a circuit judge. If such a request is addressed to the court of appeals, it shall be deemed addressed to the judges thereof and shall be considered by a circuit judge or judges as the court deems appropriate. If no express request for a certificate is filed, the notice of appeal shall be deemed to constitute a request addressed to the judges of the court of appeals. If an appeal is taken by a state or its representative, a certificate of probable cause is not required.''

Rule 23. Custody or Release of a Prisoner in a Habeas Corpus Proceeding

(a) TRANSFER OF CUSTODY PENDING REVIEW. Pending review of a decision in a habeas corpus proceeding commenced before a court, justice, or judge of the United States for the release of a prisoner, the person having custody of the prisoner must not transfer custody to another unless a transfer is directed in accordance with this rule. When, upon application, a custodian shows the need for a transfer, the court, justice, or judge rendering the decision under review may authorize the transfer and substitute the successor custodian as a party.

(b) DETENTION OR RELEASE PENDING REVIEW OF DECISION NOT TO RELEASE. While a decision not to release a prisoner is under review, the court or judge rendering the decision, or the court of appeals, or the Supreme Court, or a judge or justice of either court, may order that the prisoner be:

(1) detained in the custody from which release is sought;

(2) detained in other appropriate custody; or

(3) released on personal recognizance, with or without surety.

(c) RELEASE PENDING REVIEW OF DECISION ORDERING RELEASE. While a decision ordering the release of a prisoner is under review, the prisoner must—unless the court or judge rendering the decision, or the court of appeals, or the Supreme Court, or a judge or justice of either court orders otherwise—be released on personal recognizance, with or without surety.

(d) MODIFICATION OF THE INITIAL ORDER ON CUSTODY. An initial order governing the prisoner's custody or release, including any recognizance or surety, continues in effect pending review unless for special reasons shown to the court of appeals or the Supreme Court, or to a judge or justice of either court, the order is modified or an independent order regarding custody, release, or surety is issued.

(As amended Mar. 10, 1986, eff. July 1, 1986; Apr. 24, 1998, eff. Dec. 1, 1998.)

NOTES OF ADVISORY COMMITTEE ON RULES—1967

The rule is the same as Supreme Court Rule 49, as amended on June 12, 1967, effective October 2, 1967.

NOTES OF ADVISORY COMMITTEE ON RULES—1986 AMENDMENT

The amendments to Rules 23(b) and (c) are technical. No substantive change is intended.

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Subdivison (d). The current rule states that the initial order governing custody or release ''shall govern review'' in the court of appeals. The amended language says that the initial order generally ''continues in effect'' pending review.

When Rule 23 was adopted it used the same language as Supreme Court Rule 49, which then governed custody of prisoners in habeas corpus proceedings. The ''shall govern review'' language was drawn from the Supreme Court Rule. The Supreme Court has since amended its rule, now Rule 36, to say that the initial order ''shall continue in effect'' unless for reasons shown it is modified or a new order is entered. Rule 23 is amended to similarly state that the initial order ''continues in effect.'' The new language is clearer. It removes the possible implication that the initial order created law of the case, a strange notion to attach to an order regarding custody or release.

Rule 24. Proceeding in Forma Pauperis

(a) LEAVE TO PROCEED IN FORMA PAUPERIS.

(1) *Motion in the District Court.* Except as stated in Rule 24(a)(3), a party to a district-court action who desires to appeal in forma pauperis must file a motion in the district court. The party must attach an affidavit that:

(A) shows in the detail prescribed by Form 4 of the Appendix of Forms the party's inability to pay or to give security for fees and costs;

(B) claims an entitlement to redress; and

(C) states the issues that the party intends to present on appeal.

(2) *Action on the Motion.* If the district court grants the motion, the party may proceed on appeal without prepaying or giving security for fees and costs, unless a statute provides otherwise. If the district court denies the motion, it must state its reasons in writing.

(3) *Prior Approval.* A party who was permitted to proceed in forma pauperis in the district-court action, or who was determined to

be financially unable to obtain an adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization, unless:

(A) the district court—before or after the notice of appeal is filed—certifies that the appeal is not taken in good faith or finds that the party is not otherwise entitled to proceed in forma pauperis and states in writing its reasons for the certification or finding; or

(B) a statute provides otherwise.

(4) *Notice of District Court's Denial.* The district clerk must immediately notify the parties and the court of appeals when the district court does any of the following:

(A) denies a motion to proceed on appeal in forma pauperis;

(B) certifies that the appeal is not taken in good faith; or

(C) finds that the party is not otherwise entitled to proceed in forma pauperis.

(5) *Motion in the Court of Appeals.* A party may file a motion to proceed on appeal in forma pauperis in the court of appeals within 30 days after service of the notice prescribed in Rule 24(a)(4). The motion must include a copy of the affidavit filed in the district court and the district court's statement of reasons for its action. If no affidavit was filed in the district court, the party must include the affidavit prescribed by Rule 24(a)(1).

(b) LEAVE TO PROCEED IN FORMA PAUPERIS ON APPEAL OR REVIEW OF AN ADMINISTRATIVE-AGENCY PROCEEDING. When an appeal or review of a proceeding before an administrative agency, board, commission, or officer (including for the purpose of this rule the United States Tax Court) proceeds directly in a court of appeals, a party may file in the court of appeals a motion for leave to proceed on appeal in forma pauperis with an affidavit prescribed by Rule 24(a)(1).

(c) LEAVE TO USE ORIGINAL RECORD. A party allowed to proceed on appeal in forma pauperis may request that the appeal be heard on the original record without reproducing any part.

(As amended Apr. 1, 1979, eff. Aug. 1, 1979; Mar. 10, 1986, eff. July 1, 1986; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002.)

NOTES OF ADVISORY COMMITTEE ON RULES—1967

Subdivision (a). Authority to allow prosecution of an appeal in forma pauperis is vested in "[a]ny court of the United States" by 28 U.S.C. §1915(a). The second paragraph of section 1915(a) seems to contemplate initial application to the district court for permission to proceed in forma pauperis, and although the circuit rules are generally silent on the question, the case law requires initial application to the district court. *Hayes v. United States*, 258 F.2d 400 (5th Cir., 1958), *cert. den.* 358 U.S. 856, 79 S.Ct. 87, 3 L.Ed.2d 89 (1958); *Elkins v. United States*, 250 F.2d 145 (9th Cir., 1957) see 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960); *United States v. Farley*, 238 F.2d 575 (2d Cir., 1956) see 354 U.S. 521, 77 S.Ct. 1371, 1 L.Ed.2d 1529 (1957). D.C. Cir. Rule 41(a) requires initial application to the district court. The content of the affidavit follows the language of the statute; the requirement of a statement of the issues comprehends the statutory requirement of a statement of "the nature of the . . . appeal. . . ." The second sentence is in accord with the decision in *McGann v. United States*, 362 U.S. 309, 80 S.Ct. 725, 4 L.Ed.2d 734 (1960). The requirement contained in the third sentence has no counterpart in present circuit rules, but it has been imposed by decision in at least two circuits. *Ragan v. Cox*, 305 F.2d 58 (10th Cir., 1962); *United States ex rel. Breedlove v. Dowd*, 269 F.2d 693 (7th Cir., 1959).

The second paragraph permits one whose indigency has been previously determined by the district court to proceed on appeal in forma pauperis without the necessity of a redetermination of indigency, while reserving to the district court its statutory authority to certify that the appeal is not taken in good faith, 28 U.S.C. §1915(a), and permitting an inquiry into whether the circumstances of the party who was originally entitled to proceed in forma pauperis have changed during the course of the litigation. Cf. Sixth Circuit Rule 26.

The final paragraph establishes a subsequent motion in the court of appeals, rather than an appeal from the order of denial or from the certification of lack of good faith, as the proper procedure for calling in question the correctness of the action of the district court. The simple and expeditious motion procedure seems clearly preferable to an appeal. This paragraph applies only to applications for leave to appeal in forma pauperis. The order of a district court refusing leave to initiate an action in the district court in forma pauperis is reviewable on appeal. See *Roberts v. United States District Court*, 339 U.S. 844, 70 S.Ct. 954, 94 L.Ed. 1326 (1950).

Subdivision (b). Authority to allow prosecution in forma pauperis is vested only in a "court of the United States" (see Note to subdivision (a), above). Thus in proceedings brought directly in a court of appeals to review decisions of agencies or of the Tax Court, authority to proceed in forma pauperis should be sought in the court of appeals. If initial review of agency action is had in a district court, an application to appeal to a court of appeals in forma pauperis from the judgment of the district court is governed by the provisions of subdivision (a).

NOTES OF ADVISORY COMMITTEE ON RULES—1979 AMENDMENT

The proposed amendment reflects the change in the title of the Tax Court to "United States Tax Court." See 26 U.S.C. §7441.

NOTES OF ADVISORY COMMITTEE ON RULES—1986 AMENDMENT

The amendments to Rule 24(a) are technical. No substantive change is intended.

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only. The Advisory Committee deletes the language in subdivision (c) authorizing a party proceeding in forma pauperis to file papers in typewritten form because the authorization is unnecessary. The rules permit all parties to file typewritten documents.

COMMITTEE NOTES ON RULES—2002 AMENDMENT

Subdivision (a)(2). Section 804 of the Prison Litigation Reform Act of 1995 ("PLRA") amended 28 U.S.C. §1915 to require that prisoners who bring civil actions or appeals from civil actions must "pay the full amount of a filing fee." 28 U.S.C. §1915(b)(1). Prisoners who are unable to pay the full amount of the filing fee at the time that their actions or appeals are filed are generally required to pay part of the fee and then to pay the remainder of the fee in installments. 28 U.S.C. §1915(b). By contrast, Rule 24(a)(2) has provided that, after the district court grants a litigant's motion to proceed on appeal in forma pauperis, the litigant may proceed "without prepaying or giving security for fees and costs." Thus, the PLRA and Rule 24(a)(2) appear to be in conflict.

Rule 24(a)(2) has been amended to resolve this conflict. Recognizing that future legislation regarding prisoner litigation is likely, the Committee has not attempted to incorporate into Rule 24 all of the requirements of the current version of 28 U.S.C. §1915. Rather, the Committee has amended Rule 24(a)(2) to clarify that the rule is not meant to conflict with anything required by the PLRA or any other statute.

Subdivision (a)(3). Rule 24(a)(3) has also been amended to eliminate an apparent conflict with the PLRA. Rule 24(a)(3) has provided that a party who was permitted to proceed in forma pauperis in the district court may continue to proceed in forma pauperis in the court of appeals without further authorization, subject to certain conditions. The PLRA, by contrast, provides that a prisoner who was permitted to proceed in forma pauperis in the district court and who wishes to continue to proceed in forma pauperis on appeal may not do so ''automatically,'' but must seek permission. *See, e.g., Morgan v. Haro*, 112 F.3d 788, 789 (5th Cir. 1997) (''A prisoner who seeks to proceed IFP on appeal must obtain leave to so proceed despite proceeding IFP in the district court.'').

Rule 24(a)(3) has been amended to resolve this conflict. Again, recognizing that future legislation regarding prisoner litigation is likely, the Committee has not attempted to incorporate into Rule 24 all of the requirements of the current version of 28 U.S.C. §1915. Rather, the Committee has amended Rule 24(a)(3) to clarify that the rule is not meant to conflict with anything required by the PLRA or any other statute.

Changes Made After Publication and Comments. No changes were made to the text of the proposed amendment or to the Committee Note, except that ''a statute provides otherwise'' was substituted in place of ''the law requires otherwise'' in the text of the rule and conforming changes (as well as a couple of minor stylistic changes) were made to the Committee Note.

TITLE VII. GENERAL PROVISIONS

Rule 25. Filing and Service

(a) FILING.

(1) *Filing with the Clerk.* A paper required or permitted to be filed in a court of appeals must be filed with the clerk.

(2) *Filing: Method and Timeliness.*

(A) *In General.* Filing may be accomplished by mail addressed to the clerk, but filing is not timely unless the clerk receives the papers within the time fixed for filing.

(B) *A Brief or Appendix.* A brief or appendix is timely filed, however, if on or before the last day for filing, it is:

(i) mailed to the clerk by First-Class Mail, or other class of mail that is at least as expeditious, postage prepaid; or

(ii) dispatched to a third-party commercial carrier for delivery to the clerk within 3 calendar days.

(C) *Inmate Filing.* A paper filed by an inmate confined in an institution is timely if deposited in the institution's internal mailing system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. §1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

(D) *Electronic Filing.* A court of appeals may by local rule permit or require papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A local rule may require filing by electronic means only if reasonable exceptions are allowed. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules.

(3) *Filing a Motion with a Judge.* If a motion requests relief that may be granted by a single judge, the judge may permit the motion to be filed with the judge; the judge must note the filing date on the motion and give it to the clerk.

(4) *Clerk's Refusal of Documents.* The clerk must not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or by any local rule or practice.

(b) SERVICE OF ALL PAPERS REQUIRED. Unless a rule requires service by the clerk, a party must, at or before the time of filing a paper, serve a copy on the other parties to the appeal or review. Service on a party represented by counsel must be made on the party's counsel.

(c) MANNER OF SERVICE.

(1) Service may be any of the following:

(A) personal, including delivery to a responsible person at the office of counsel;

(B) by mail;

(C) by third-party commercial carrier for delivery within 3 calendar days; or

(D) by electronic means, if the party being served consents in writing.

(2) If authorized by local rule, a party may use the court's transmission equipment to make electronic service under Rule 25(c)(1)(D).

(3) When reasonable considering such factors as the immediacy of the relief sought, distance, and cost, service on a party must be by a manner at least as expeditious as the manner used to file the paper with the court.

(4) Service by mail or by commercial carrier is complete on mailing or delivery to the carrier. Service by electronic means is complete on transmission, unless the party making service is notified that the paper was not received by the party served.

(d) PROOF OF SERVICE.

(1) A paper presented for filing must contain either of the following:

(A) an acknowledgment of service by the person served; or

(B) proof of service consisting of a statement by the person who made service certifying:

(i) the date and manner of service;

(ii) the names of the persons served; and

(iii) their mail or electronic addresses, facsimile numbers, or the addresses of the places of delivery, as appropriate for the manner of service.

(2) When a brief or appendix is filed by mailing or dispatch in accordance with Rule 25(a)(2)(B), the proof of service must also state the date and manner by which the document was mailed or dispatched to the clerk.

(3) Proof of service may appear on or be affixed to the papers filed.

(e) NUMBER OF COPIES. When these rules require the filing or furnishing of a number of copies, a court may require a different number by local rule or by order in a particular case.

(As amended Mar. 10, 1986, eff. July 1, 1986; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 23, 1996, eff. Dec. 1, 1996; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 12, 2006, eff. Dec. 1, 2006.)

NOTES OF ADVISORY COMMITTEE ON RULES—1967

The rule that filing is not timely unless the papers filed are received within the time allowed is the familiar one. *Ward v. Atlantic Coast Line R.R. Co.*, 265 F.2d 75 (5th Cir., 1959), rev'd on other grounds 362 U.S. 396, 80 S.Ct. 789, 4 L.Ed.2d 820 (1960); *Kahler-Ellis Co. v. Ohio Turnpike Commission*, 225 F.2d 922 (6th Cir., 1955). An exception is made in the case of briefs and appendices in order to afford the parties the maximum time for their preparation. By the terms of the exception, air mail delivery must be used whenever it is the most expeditious manner of delivery.

A majority of the circuits now require service of all papers filed with the clerk. The usual provision in present rules is for service on ''adverse'' parties. In view of the extreme simplicity of service by mail, there seems to be no reason why a party who files a paper should not be required to serve all parties to the proceeding in the court of appeals, whether or not they may be deemed adverse. The common requirement of proof of service is retained, but the rule permits it to be made by simple certification, which may be endorsed on the copy which is filed.

NOTES OF ADVISORY COMMITTEE ON RULES—1986 AMENDMENT

The amendments to Rules 25(a) and (b) are technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1991 AMENDMENT

Subdivision (a). The amendment permits, but does not require, courts of appeals to adopt local rules that allow filing of papers by electronic means. However, courts of appeals cannot adopt such local rules until the Judicial Conference of the United States authorizes filing by facsimile or other electronic means.

NOTES OF ADVISORY COMMITTEE ON RULES—1993 AMENDMENT

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

NOTES OF ADVISORY COMMITTEE ON RULES—1994 AMENDMENT

Subdivision (a). Several circuits have local rules that authorize the office of the clerk to refuse to accept for filing papers that are not in the form required by these rules or by local rules. This is not a suitable role for the office of the clerk and the practice exposes litigants to the hazards of time bars; for these reasons, such rules are proscribed by this rule. This provision is similar to Fed.R.Civ.P. 5(e) and Fed.R.Bankr.P. 5005.

The Committee wishes to make it clear that the provision prohibiting a clerk from refusing a document does not mean that a clerk's office may no longer screen documents to determine whether they comply with the rules. A court may delegate to the clerk authority to inform a party about any noncompliance with the rules and, if the party is willing to correct the document, to determine a date by which the corrected document must be resubmitted. If a party refuses to take the steps recommended by the clerk or if in the clerk's judgment the party fails to correct the noncompliance, the clerk must refer the matter to the court for a ruling.

Subdivision (d). Two changes have been made in this subdivision. Subdivision (d) provides that a paper presented for filing must contain proof of service.

The last sentence of subdivision (d) has been deleted as unnecessary. That sentence stated that a clerk could permit papers to be filed without acknowledgment or proof of service but must require that it be filed promptly thereafter. In light of the change made in subdivision (a) which states that a clerk may not refuse to accept for filing a document because it is not in the proper form, there is no further need for a provision stating that a clerk may accept a paper lacking a proof of service. The clerk must accept such a paper. That portion of the deleted sentence stating that the clerk must require that proof of service be filed promptly after the filing of the document if the proof is not filed concurrently with the document is also unnecessary.

The second amendment requires that the certificate of service must state the addresses to which the papers were mailed or at which they were delivered. The Federal Circuit has a similar local rule, Fed.Cir.R. 25.

Subdivision (e). Subdivision (e) is a new subdivision. It makes it clear that whenever these rules require a party to file or furnish a number of copies a court may require a different number of copies either by rule or by order in an individual case. The number of copies of any document that a court of appeals needs varies depending upon the way in which the court conducts business. The internal operation of the courts of appeals necessarily varies from circuit to circuit because of differences in the number of judges, the geographic area included within the circuit, and other such factors. Uniformity could be achieved only by setting the number of copies artificially high so that parties in all circuits file enough copies to satisfy the needs of the court requiring the greatest number. Rather than do that, the Committee decided to make it clear that local rules may require a greater or lesser number of copies and that, if the circumstances of a particular case indicate the need for a different number of copies in that case, the court may so order.

A party must consult local rules to determine whether the court requires a different number than that specified in these national rules. The Committee believes it would be helpful if each circuit either: 1) included a chart at the beginning of its local rules showing the number of copies of each document required to be filed with the court along with citation to the controlling rule; or 2) made available such a chart to each party upon commencement of an appeal; or both. If a party fails to file the required number of copies, the failure does not create a jurisdictional defect. Rule 3(a) states: ''Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate. . . .''

NOTES OF ADVISORY COMMITTEE ON RULES—1996 AMENDMENT

Subdivision (a). The amendment deletes the language requiring a party to use ''the most expeditious form of delivery by mail, except special delivery'' in order to file a brief using the mailbox rule. That language was adopted before the Postal Service offered Express Mail and other expedited delivery services. The amendment makes it clear that it is sufficient to use First-Class Mail. Other equally or more expeditious classes of mail service, such as Express Mail, also may be used. In addition, the amendment permits the use of commercial carriers. The use of private, overnight courier services has become commonplace in law practice. Expedited services offered by commercial carriers often provide faster delivery than First-Class Mail; therefore, there should be no objection to the use of commercial carriers as long as they are reliable. In order to make use of the mailbox rule when using a commercial carrier, the amendment requires that the filer employ a carrier who undertakes to deliver the document in no more

than three calendar days. The three-calendar-day period coordinates with the three-day extension provided by Rule 26(c).

Subdivision (c). The amendment permits service by commercial carrier if the carrier is to deliver the paper to the party being served within three days of the carrier's receipt of the paper. The amendment also expresses a desire that when reasonable, service on a party be accomplished by a manner as expeditious as the manner used to file the paper with the court. When a brief or motion is filed with the court by hand delivering the paper to the clerk's office, or by overnight courier, the copies should be served on the other parties by an equally expeditious manner—meaning either by personal service, if distance permits, or by overnight courier, if mail delivery to the party is not ordinarily accomplished overnight. The reasonableness standard is included so that if a paper is hand delivered to the clerk's office for filing but the other parties must be served in a different city, state, or region, personal service on them ordinarily will not be expected. If use of an equally expeditious manner of service is not reasonable, use of the next most expeditious manner may be. For example, if the paper is filed by hand delivery to the clerk's office but the other parties reside in distant cities, service on them need not be personal but in most instances should be by overnight courier. Even that may not be required, however, if the number of parties that must be served would make the use of overnight service too costly. A factor that bears upon the reasonableness of serving parties expeditiously is the immediacy of the relief requested.

Subdivision (d). The amendment adds a requirement that when a brief or appendix is filed by mail or commercial carrier, the certificate of service state the date and manner by which the document was mailed or dispatched to the clerk. Including that information in the certificate of service avoids the necessity for a separate certificate concerning the date and manner of filing.

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only; a substantive amendment is made, however, in subdivision (a).

Subdivision (a). The substantive amendment in this subdivision is in subparagraph (a)(2)(C) and is a companion to an amendment in Rule 4(c). Currently Rule 25(a)(2)(C) provides that if an inmate confined in an institution files a document by depositing it in the institution's internal mail system, the document is timely filed if deposited on or before the last day for filing. Some institutions have special internal mail systems for handling legal mail; such systems often record the date of deposit of mail by an inmate, the date of delivery of mail to an inmate, etc. The Advisory Committee amends the rule to require an inmate to use the system designed for legal mail, if there is one, in order to receive the benefit of this subparagraph.

COMMITTEE NOTES ON RULES—2002 AMENDMENT

Rule 25(a)(2)(D) presently authorizes the courts of appeals to permit papers to be *filed* by electronic means. Rule 25 has been amended in several respects to permit papers also to be *served* electronically. In addition, Rule 25(c) has been reorganized and subdivided to make it easier to understand.

Subdivision (c)(1)(D). New subdivision (c)(1)(D) has been added to permit service to be made electronically, such as by e-mail or fax. No party may be served electronically, either by the clerk or by another party, unless the party has consented in writing to such service.

A court of appeals may not, by local rule, forbid the use of electronic service on a party that has consented to its use. At the same time, courts have considerable discretion to use local rules to regulate electronic service. Difficult and presently unforeseeable questions are likely to arise as electronic service becomes more common. Courts have the flexibility to use their local rules to address those questions. For example, courts may use local rules to set forth specific procedures that a party must follow before the party will be deemed to have given written consent to electronic service.

Parties also have the flexibility to define the terms of their consent; a party's consent to electronic service does not have to be ''all-or-nothing.'' For example, a party may consent to service by facsimile transmission, but not by electronic mail; or a party may consent to electronic service only if ''courtesy'' copies of all transmissions are mailed within 24 hours; or a party may consent to electronic service of only documents that were created with Corel WordPerfect.

Subdivision (c)(2). The courts of appeals are authorized under Rule 25(a)(2)(D) to permit papers to be filed electronically. Technological advances may someday make it possible for a court to forward an electronically filed paper to all parties automatically or semi-automatically. When such court-facilitated service becomes possible, courts may decide to permit parties to use the courts' transmission facilities to serve electronically filed papers on other parties who have consented to such service. Court personnel would use the court's computer system to forward the papers, but the papers would be considered served by the filing parties, just as papers that are carried from one address to another by the United States Postal Service are considered served by the sending parties. New subdivision (c)(2) has been added so that the courts of appeals may use local rules to authorize such use of their transmission facilities, as well as to address the many questions that court-facilitated electronic service is likely to raise.

Subdivision (c)(4). The second sentence of new subdivision (c)(4) has been added to provide that electronic service is complete upon transmission. Transmission occurs when the sender performs the last act that he or she must perform to transmit a paper electronically; typically, it occurs when the sender hits the ''send'' or ''transmit'' button on an electronic mail program. There is one exception to the rule that electronic service is complete upon transmission: If the sender is notified—by the sender's e-mail program or otherwise—that the paper was not received, service is not complete, and the sender must take additional steps to effect service. A paper has been ''received'' by the party on which it has been served as long as the party has the ability to retrieve it. A party cannot defeat service by choosing not to access electronic mail on its server.

Changes Made After Publication and Comments. No changes were made to the text of the proposed amendment. A paragraph was added to the Committee Note to clarify that consent to electronic service is not an ''all-or-nothing'' matter.

Subdivision (d)(1)(B)(iii). Subdivision (d)(1)(B)(iii) has been amended to require that, when a paper is served electronically, the proof of service of that paper must include the electronic address or facsimile number to which the paper was transmitted.

Changes Made After Publication and Comments. The text of the proposed amendment was changed to refer to ''electronic'' addresses (instead of to ''e-mail'' addresses), to include ''facsimile numbers,'' and to add the concluding phrase ''as appropriate for the manner of service.'' Conforming changes were made to the Committee Note.

COMMITTEE NOTES ON RULES—2006 AMENDMENT

Subdivision (a)(2)(D). Amended Rule 25(a)(2)(D) acknowledges that many courts have required electronic filing by means of a standing order, procedures manual, or local rule. These local practices reflect the advantages that courts and most litigants realize from electronic filing. Courts that mandate electronic filing recognize the need to make exceptions when requiring electronic filing imposes a hardship on a party. Under Rule 25(a)(2)(D), a local rule that requires electronic fil-

ing must include reasonable exceptions, but Rule 25(a)(2)(D) does not define the scope of those exceptions. Experience with the local rules that have been adopted and that will emerge will aid in drafting new local rules and will facilitate gradual convergence on uniform exceptions, whether in local rules or in an amended Rule 25(a)(2)(D).

A local rule may require that both electronic and ''hard'' copies of a paper be filed. Nothing in the last sentence of Rule 25(a)(2)(D) is meant to imply otherwise.

Changes Made After Publication and Comment. Rule 25(a)(2)(D) has been changed in one significant respect: It now authorizes the courts of appeals to require electronic filing only ''if reasonable exceptions are allowed.''[1] The published version of Rule 25(a)(2)(D) did not require ''reasonable exceptions.'' The change was made in response to the argument of many commentators that the national rule should require that the local rules include exceptions for those for whom mandatory electronic filing would pose a hardship.

Although Rule 25(a)(2)(D) requires that hardship exceptions be included in any local rules that mandate electronic filing, it does not attempt to define the scope of those exceptions. Commentators were largely in agreement that the local rules should include hardship exceptions of some type. But commentators did not agree about the perimeters of those exceptions. The Advisory Committee believes that, at this point, it does not have enough experience with mandatory electronic filing to impose specific hardship exceptions on the circuits. Rather, the Advisory Committee believes that the circuits should be free for the time being to experiment with different formulations.

The Committee Note has been changed to reflect the addition of the ''reasonable exceptions'' clause to the text of the rule. The Committee Note has also been changed to add the final two sentences. Those sentences were added at the request of Judge Sandra L. Lynch, a member of CACM [the Court Administration and Case Management Committee]. Judge Lynch believes that there will be few appellate judges who will want to receive only electronic copies of briefs, but there will be many who will want to receive electronic copies in addition to hard copies. Thus, the local rules of most circuits are likely to require a ''written'' copy or ''paper'' copy, in addition to an electronic copy. The problem is that the last sentence of Rule 25(a)(2)(D) provides that ''[a] paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules.'' Judge Lynch's concern is that this sentence may leave attorneys confused as to whether a local rule requiring a ''written'' or ''paper'' copy of a brief requires anything in addition to the electronic copy. The final two sentences of the Committee Note are intended to clarify the matter.

Rule 26. Computing and Extending Time

(a) COMPUTING TIME. The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute:

(1) Exclude the day of the act, event, or default that begins the period.

(2) Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days, unless stated in calendar days.

(3) Include the last day of the period unless it is a Saturday, Sunday, legal holiday, or—if the act to be done is filing a paper in court—a day on which the weather or other conditions make the clerk's office inaccessible.

(4) As used in this rule, ''legal holiday'' means New Year's Day, Martin Luther King, Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, Christmas Day, and any other day declared a holiday by the President, Congress, or the state in which is located either the district court that rendered the challenged judgment or order, or the circuit clerk's principal office.

(b) EXTENDING TIME. For good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires. But the court may not extend the time to file:

(1) a notice of appeal (except as authorized in Rule 4) or a petition for permission to appeal; or

(2) a notice of appeal from or a petition to enjoin, set aside, suspend, modify, enforce, or otherwise review an order of an administrative agency, board, commission, or officer of the United States, unless specifically authorized by law.

(c) ADDITIONAL TIME AFTER SERVICE. When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service. For purposes of this Rule 26(c), a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service.

(As amended Mar. 1, 1971, eff. July 1, 1971; Mar. 10, 1986, eff. July 1, 1986; Apr. 25, 1989, eff. Dec. 1, 1989; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 23, 1996, eff. Dec. 1, 1996; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 25, 2005, eff. Dec. 1, 2005.)

NOTES OF ADVISORY COMMITTEE ON RULES—1967

The provisions of this rule are based upon FRCP 6(a), (b) and (e). See also Supreme Court Rule 34 and FRCrP 45. Unlike FRCP 6(b), this rule, read with Rule 27, requires that every request for enlargement of time be made by motion, with proof of service on all parties. This is the simplest, most convenient way of keeping all parties advised of developments. By the terms of Rule 27(b) a motion for enlargement of time under Rule 26(b) may be entertained and acted upon immediately, subject to the right of any party to seek reconsideration. Thus the requirement of motion and notice will not delay the granting of relief of a kind which a court is inclined to grant as of course. Specifically, if a court is of the view that an extension of time sought before expiration of the period originally prescribed or as extended by a previous order ought to be granted in effect ex parte, as FRCP 6(b) permits, it may grant motions seeking such relief without delay.

NOTES OF ADVISORY COMMITTEE ON RULES—1971 AMENDMENT

The amendment adds Columbus Day to the list of legal holidays to conform the subdivision to the Act of June 28, 1968, 82 Stat. 250, which constituted Columbus Day a legal holiday effective after January 1, 1971.

The Act, which amended Title 5, U.S.C. §6103(a), changes the day on which certain holidays are to be ob-

[1] At its June 15–16, 2005, meeting, the Standing Rules Committee with the concurrence of the advisory committee chair agreed to set out the ''reasonable exception'' clause as a separate sentence in the rule, consistent with drafting conventions of the Style Project.

served. Washington's Birthday, Memorial Day and Veterans Day are to be observed on the third Monday in February, the last Monday in May and the fourth Monday in October, respectively, rather than, as heretofore, on February 22, May 30, and November 11, respectively. Columbus Day is to be observed on the second Monday in October. New Year's Day, Independence Day, Thanksgiving Day and Christmas continue to be observed on the traditional days.

NOTES OF ADVISORY COMMITTEE ON RULES—1986 AMENDMENT

The Birthday of Martin Luther King, Jr., is added to the list of national holidays in Rule 26(a). The amendment to Rule 26(c) is technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1989 AMENDMENT

The proposed amendment brings Rule 26(a) into conformity with the provisions of Rule 6(a) of the Rules of Civil Procedure, Rule 45(a) of the Rules of Criminal Procedure, and Rule 9006(a) of the Rules of Bankruptcy Procedure which allow additional time for filing whenever a clerk's office is inaccessible on the last day for filing due to weather or other conditions.

NOTES OF ADVISORY COMMITTEE ON RULES—1996 AMENDMENT

The amendment is a companion to the proposed amendments to Rule 25 that permit service on a party by commercial carrier. The amendments to subdivision (c) of this rule make the three-day extension applicable not only when service is accomplished by mail, but whenever delivery to the party being served occurs later than the date of service stated in the proof of service. When service is by mail or commercial carrier, the proof of service recites the date of mailing or delivery to the commercial carrier. If the party being served receives the paper on a later date, the three-day extension applies. If the party being served receives the paper on the same date as the date of service recited in the proof of service, the three-day extension is not available.

The amendment also states that the three-day extension is three calendar days. Rule 26(a) states that when a period prescribed or allowed by the rules is less than seven days, intermediate Saturdays, Sundays, and legal holidays do not count. Whether the three-day extension in Rule 26(c) is such a period, meaning that three-days could actually be five or even six days, is unclear. The D.C. Circuit recently held that the parallel three-day extension provided in the Civil Rules is not such a period and that weekends and legal holidays do count. *CNPq v. Inter-Trade, 50 F.3d 56 (D.C. Cir. 1995)*. The Committee believes that is the right result and that the issue should be resolved. Providing that the extension is three calendar days means that if a period would otherwise end on Thursday but the three-day extension applies, the paper must be filed on Monday. Friday, Saturday, and Sunday are the extension days. Because the last day of the period as extended is Sunday, the paper must be filed the next day, Monday.

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only; two substantive changes are made, however, in subdivision (a).

Subdivision (a). First, the amendments make the computation method prescribed in this rule applicable to any time period imposed by a local rule. This means that if a local rule establishing a time limit is permitted, the national rule will govern the computation of that period.

Second, paragraph (a)(2) includes language clarifying that whenever the rules establish a time period in "calendar days," weekends and legal holidays are counted.

COMMITTEE NOTES ON RULES—2002 AMENDMENT

Subdivision (a)(2). The Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure compute time differently than the Federal Rules of Appellate Procedure. Fed. R. Civ. P. 6(a) and Fed. R. Crim. P. 45(a) provide that, in computing any period of time, "[w]hen the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation." By contrast, Rule 26(a)(2) provides that, in computing any period of time, a litigant should "[e]xclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 7 days, unless stated in calendar days." Thus, deadlines of 7, 8, 9, and 10 days are calculated differently under the rules of civil and criminal procedure than they are under the rules of appellate procedure. This creates a trap for unwary litigants. No good reason for this discrepancy is apparent, and thus Rule 26(a)(2) has been amended so that, under all three sets of rules, intermediate Saturdays, Sundays, and legal holidays will be excluded when computing deadlines under 11 days but will be counted when computing deadlines of 11 days and over.

Changes Made After Publication and Comments. No changes were made to the text of the proposed amendment or to the Committee Note.

Subdivision (c). Rule 26(c) has been amended to provide that when a paper is served on a party by electronic means, and that party is required or permitted to respond to that paper within a prescribed period, 3 calendar days are added to the prescribed period. Electronic service is usually instantaneous, but sometimes it is not, because of technical problems. Also, if a paper is electronically transmitted to a party on a Friday evening, the party may not realize that he or she has been served until two or three days later. Finally, extending the "3-day rule" to electronic service will encourage parties to consent to such service under Rule 25(c).

Changes Made After Publication and Comments. No changes were made to the text of the proposed amendment or to the Committee Note.

COMMITTEE NOTES ON RULES—2005 AMENDMENT

Subdivision (a)(4). Rule 26(a)(4) has been amended to refer to the third Monday in February as "Washington's Birthday." A federal statute officially designates the holiday as "Washington's Birthday," reflecting the desire of Congress specially to honor the first president of the United States. *See* 5 U.S.C. §6103(a). During the 1998 restyling of the Federal Rules of Appellate Procedure, references to "Washington's Birthday" were mistakenly changed to "Presidents' Day." The amendment corrects that error.

Changes Made After Publication and Comments. No changes were made to the text of the proposed amendment or to the Committee Note.

Rule 26.1. Corporate Disclosure Statement

(a) WHO MUST FILE. Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation.

(b) TIME FOR FILING; SUPPLEMENTAL FILING. A party must file the Rule 26.1(a) statement with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief must include the statement before the table of

contents. A party must supplement its statement whenever the information that must be disclosed under Rule 26.1(a) changes.

(c) NUMBER OF COPIES. If the Rule 26.1(a) statement is filed before the principal brief, or if a supplemental statement is filed, the party must file an original and 3 copies unless the court requires a different number by local rule or by order in a particular case.

(As added Apr. 25, 1989, eff. Dec. 1, 1989; amended Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002.)

NOTES OF ADVISORY COMMITTEE ON RULES—1989

The purpose of this rule is to assist judges in making a determination of whether they have any interests in any of a party's related corporate entities that would disqualify the judges from hearing the appeal. The committee believes that this rule represents minimum disclosure requirements. If a Court of Appeals wishes to require additional information, a court is free to do so by local rule. However, the committee requests the courts to consider the desirability of uniformity and the burden that varying circuit rules creates on attorneys who practice in many circuits.

NOTES OF ADVISORY COMMITTEE ON RULES—1994 AMENDMENT

The amendment requires a party to file three copies of the disclosure statement whenever the statement is filed before the party's principal brief. Because the statement is included in each copy of the party's brief, there is no need to require the filing of additional copies at that time. A court of appeals may require the filing of a different number of copies by local rule or by order in a particular case.

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only; a substantive change is made, however, in subdivision (a).

Subdivison [sic] (a). The amendment deletes the requirement that a corporate party identify subsidiaries and affiliates that have issued shares to the public. Although several circuit rules require identification of such entities, the Committee believes that such disclosure is unnecessary.

A disclosure statement assists a judge in ascertaining whether or not the judge has an interest that should cause the judge to recuse himself or herself from the case. Given that purpose, disclosure of entities that would not be adversely affected by a decision in the case is unnecessary.

Disclosure of a party's parent corporation is necessary because a judgment against a subsidiary can negatively impact the parent. A judge who owns stock in the parent corporation, therefore, has an interest in litigation involving the subsidiary. The rule requires disclosure of all of a party's parent corporations meaning grandparent and great grandparent corporations as well. For example, if a party is a closely held corporation, the majority shareholder of which is a corporation formed by a publicly traded corporation for the purpose of acquiring and holding the shares of the party, the publicly traded grandparent corporation should be disclosed. Conversely, disclosure of a party's subsidiaries or affiliated corporations is ordinarily unnecessary. For example, if a party is a part owner of a corporation in which a judge owns stock, the possibility is quite remote that the judge might be biased by the fact that the judge and the litigant are co-owners of a corporation.

The amendment, however, adds a requirement that the party lists all its stockholders that are publicly held companies owning 10% or more of the stock of the party. A judgment against a corporate party can adversely affect the value of the company's stock and, therefore, persons owning stock in the party have an interest in the outcome of the litigation. A judge owning stock in a corporate party ordinarily recuses himself or herself. The new requirement takes the analysis one step further and assumes that if a judge owns stock in a publicly held corporation which in turn owns 10% or more of the stock in the party, the judge may have sufficient interest in the litigation to require recusal. The 10% threshold ensures that the corporation in which the judge may own stock is itself sufficiently invested in the party that a judgment adverse to the party could have an adverse impact upon the investing corporation in which the judge may own stock. This requirement is modeled on the Seventh Circuit's disclosure requirement.

Subdivision (b). The language requiring inclusion of the disclosure statement in a party's principal brief is moved to this subdivision because it deals with the time for filing the statement.

COMMITTEE NOTES ON RULES—2002 AMENDMENT

a. Alternative One [At its June 7–8, 2001, meeting, the Committee on Rules of Practice and Procedure voted to reject Alternative One.]

Subdivision (a). Rule 26.1(a) presently requires nongovernmental corporate parties to file a ''corporate disclosure statement.'' In that statement, a nongovernmental corporate party is required to identify all of its parent corporations and all publicly held corporations that own 10% or more of its stock. The corporate disclosure statement is intended to assist judges in determining whether they must recuse themselves by reason of ''a financial interest in the subject matter in controversy.'' Code of Judicial Conduct, Canon 3C(1)(c) (1972).

Rule 26.1(a) has been amended to require that nongovernmental corporate parties who currently do not have to file a corporate disclosure statement—that is, nongovernmental corporate parties who do not have any parent corporations and at least 10% of whose stock is not owned by any publicly held corporation—inform the court of that fact. At present, when a corporate disclosure statement is not filed, courts do not know whether it has not been filed because there was nothing to report or because of ignorance of Rule 26.1(a).

Rule 26.1(a) does not require the disclosure of all information that could conceivably be relevant to a judge who is trying to decide whether he or she has a ''financial interest'' in a case. Experience with divergent disclosure practices and improving technology may provide the foundation for more comprehensive disclosure requirements. The Judicial Conference, supported by the committees that work regularly with the Code of Judicial Conduct and by the Administrative Office of the United States Courts, is in the best position to develop any additional requirements and to adjust those requirements as technology and other developments warrant. Thus, Rule 26.1(a) has been amended to authorize the Judicial Conference to promulgate more detailed financial disclosure requirements—requirements that might apply beyond nongovernmental corporate parties.

As has been true in the past, Rule 26.1(a) does not forbid the promulgation of local rules that require disclosures in addition to those required by Rule 26.1(a) itself. However, along with the authority provided to the Judicial Conference to require additional disclosures is the authority to preempt any local rulemaking on the topic of financial disclosure.

Subdivision (b). Rule 26.1(b) has been amended to require parties to file supplemental disclosure statements whenever there is a change in the information that Rule 26.1(a) requires the parties to disclose. For example, if a publicly held corporation acquires 10% or

more of a party's stock after the party has filed its disclosure statement, the party should file a supplemental statement identifying that publicly held corporation.

Subdivision (c). Rule 26.1(c) has been amended to provide that a party who is required to file a supplemental disclosure statement must file an original and 3 copies, unless a local rule or an order entered in a particular case provides otherwise.

b. Alternative Two [At its June 7–8, 2001, meeting, the Committee on Rules of Practice and Procedure voted to approve Alternative Two.]

Subdivision (a). Rule 26.1(a) requires nongovernmental corporate parties to file a ''corporate disclosure statement.'' In that statement, a nongovernmental corporate party is required to identify all of its parent corporations and all publicly held corporations that own 10% or more of its stock. The corporate disclosure statement is intended to assist judges in determining whether they must recuse themselves by reason of ''a financial interest in the subject matter in controversy.'' Code of Judicial Conduct, Canon 3C(1)(c) (1972).

Rule 26.1(a) has been amended to require that nongovernmental corporate parties who have not been required to file a corporate disclosure statement—that is, nongovernmental corporate parties who do not have any parent corporations and at least 10% of whose stock is not owned by any publicly held corporation—inform the court of that fact. At present, when a corporate disclosure statement is not filed, courts do not know whether it has not been filed because there was nothing to report or because of ignorance of Rule 26.1.

Subdivision (b). Rule 26.1(b) has been amended to require parties to file supplemental disclosure statements whenever there is a change in the information that Rule 26.1(a) requires the parties to disclose. For example, if a publicly held corporation acquires 10% or more of a party's stock after the party has filed its disclosure statement, the party should file a supplemental statement identifying that publicly held corporation.

Subdivision (c). Rule 26.1(c) has been amended to provide that a party who is required to file a supplemental disclosure statement must file an original and 3 copies, unless a local rule or an order entered in a particular case provides otherwise.

Changes Made After Publication and Comments. The Committee is submitting two versions of proposed Rule 26.1 for the consideration of the Standing Committee.

The first version—''Alternative One''—is the same as the version that was published, except that the rule has been amended to refer to ''any information that may be *publicly designated* by the Judicial Conference'' instead of to ''any information that may be *required* by the Judicial Conference.'' At its April meeting, the Committee gave unconditional approval to all of ''Alternative One,'' except the Judicial Conference provisions. The Committee conditioned its approval of the Judicial Conference provisions on the Standing Committee's assuring itself that lawyers would have ready access to any standards promulgated by the Judicial Conference and that the Judicial Conference provisions were consistent with the Rules Enabling Act.

The second version—''Alternative Two''—is the same as the version that was published, except that the Judicial Conference provisions have been eliminated. The Civil Rules Committee met several days after the Appellate Rules Committee and joined the Bankruptcy Rules Committee in disapproving the Judicial Conference provisions. Given the decreasing likelihood that the Judicial Conference provisions will be approved by the Standing Committee, I asked Prof. Schiltz to draft, and the Appellate Rules Committee to approve, a version of Rule 26.1 that omitted those provisions. ''Alternative Two'' was circulated to and approved by the Committee in late April.

I should note that, at its April meeting, the Appellate Rules Committee discussed the financial disclosure provision that was approved by the Bankruptcy Rules Committee. That provision defines the scope of the financial disclosure obligation much differently than the provisions approved by the Appellate, Civil, and Criminal Rules Committees, which are based on existing Rule 26.1. For example, the bankruptcy provision requires disclosure when a party ''directly or indirectly'' owns 10 percent or more of ''any class'' of a publicly *or* privately held corporation's ''equity interests.'' Members of the Appellate Rules Committee expressed several concerns about the provision approved by the Bankruptcy Rules Committee, objecting both to its substance and to its ambiguity.

Rule 27. Motions

(a) IN GENERAL.

(1) *Application for Relief.* An application for an order or other relief is made by motion unless these rules prescribe another form. A motion must be in writing unless the court permits otherwise.

(2) *Contents of a Motion.*

(A) *Grounds and Relief Sought.* A motion must state with particularity the grounds for the motion, the relief sought, and the legal argument necessary to support it.

(B) *Accompanying Documents.*

(i) Any affidavit or other paper necessary to support a motion must be served and filed with the motion.

(ii) An affidavit must contain only factual information, not legal argument.

(iii) A motion seeking substantive relief must include a copy of the trial court's opinion or agency's decision as a separate exhibit.

(C) *Documents Barred or Not Required.*

(i) A separate brief supporting or responding to a motion must not be filed.

(ii) A notice of motion is not required.

(iii) A proposed order is not required.

(3) *Response.*

(A) *Time to File.* Any party may file a response to a motion; Rule 27(a)(2) governs its contents. The response must be filed within 8 days after service of the motion unless the court shortens or extends the time. A motion authorized by Rules 8, 9, 18, or 41 may be granted before the 8-day period runs only if the court gives reasonable notice to the parties that it intends to act sooner.

(B) *Request for Affirmative Relief.* A response may include a motion for affirmative relief. The time to respond to the new motion, and to reply to that response, are governed by Rule 27(a)(3)(A) and (a)(4). The title of the response must alert the court to the request for relief.

(4) *Reply to Response.* Any reply to a response must be filed within 5 days after service of the response. A reply must not present matters that do not relate to the response.

(b) DISPOSITION OF A MOTION FOR A PROCEDURAL ORDER. The court may act on a motion for a procedural order—including a motion under Rule 26(b)—at any time without awaiting a response, and may, by rule or by order in a particular case, authorize its clerk to act on specified types of procedural motions. A party adversely affected by the court's, or the clerk's, action may file a motion to reconsider, vacate, or modify that action. Timely opposition filed after the motion is granted in whole or in part

does not constitute a request to reconsider, vacate, or modify the disposition; a motion requesting that relief must be filed.

(c) POWER OF A SINGLE JUDGE TO ENTERTAIN A MOTION. A circuit judge may act alone on any motion, but may not dismiss or otherwise determine an appeal or other proceeding. A court of appeals may provide by rule or by order in a particular case that only the court may act on any motion or class of motions. The court may review the action of a single judge.

(d) FORM OF PAPERS; PAGE LIMITS; AND NUMBER OF COPIES.

(1) *Format*.

(A) *Reproduction*. A motion, response, or reply may be reproduced by any process that yields a clear black image on light paper. The paper must be opaque and unglazed. Only one side of the paper may be used.

(B) *Cover*. A cover is not required, but there must be a caption that includes the case number, the name of the court, the title of the case, and a brief descriptive title indicating the purpose of the motion and identifying the party or parties for whom it is filed. If a cover is used, it must be white.

(C) *Binding*. The document must be bound in any manner that is secure, does not obscure the text, and permits the document to lie reasonably flat when open.

(D) *Paper Size, Line Spacing, and Margins*. The document must be on 8½ by 11 inch paper. The text must be double-spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. Margins must be at least one inch on all four sides. Page numbers may be placed in the margins, but no text may appear there.

(E) *Typeface and Type Styles*. The document must comply with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6).

(2) *Page Limits*. A motion or a response to a motion must not exceed 20 pages, exclusive of the corporate disclosure statement and accompanying documents authorized by Rule 27(a)(2)(B), unless the court permits or directs otherwise. A reply to a response must not exceed 10 pages.

(3) *Number of Copies*. An original and 3 copies must be filed unless the court requires a different number by local rule or by order in a particular case.

(e) ORAL ARGUMENT. A motion will be decided without oral argument unless the court orders otherwise.

(As amended Apr. 1, 1979, eff. Aug. 1, 1979; Apr. 25, 1989, eff. Dec. 1, 1989; Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 25, 2005, eff. Dec. 1, 2005.)

NOTES OF ADVISORY COMMITTEE ON RULES—1967

Subdivisions (a) and (b). Many motions seek relief of a sort which is ordinarily unopposed or which is granted as of course. The provision of subdivision (a) which permits any party to file a response in opposition to a motion within 7 days after its service upon him assumes that the motion is one of substance which ought not be acted upon without affording affected parties an opportunity to reply. A motion to dismiss or otherwise determine an appeal is clearly such a motion. Motions authorized by Rules 8, 9, 18 and 41 are likewise motions of substance; but in the nature of the relief sought, to afford an adversary an automatic delay of at least 7 days is undesirable, thus such motions may be acted upon after notice which is reasonable under the circumstances.

The term ''motions for procedural orders'' is used in subdivision (b) to describe motions which do not substantially affect the rights of the parties or the ultimate disposition of the appeal. To prevent delay in the disposition of such motions, subdivision (b) provides that they may be acted upon immediately without awaiting a response, subject to the right of any party who is adversely affected by the action to seek reconsideration.

Subdivision (c). Within the general consideration of procedure on motions is the problem of the power of a single circuit judge. Certain powers are granted to a single judge of a court of appeals by statute. Thus, under 28 U.S.C. §2101(f) a single judge may stay execution and enforcement of a judgment to enable a party aggrieved to obtain certiorari; under 28 U.S.C. §2251 a judge before whom a habeas corpus proceeding involving a person detained by state authority is pending may stay any proceeding against the person; under 28 U.S.C. §2253 a single judge may issue a certificate of probable cause. In addition, certain of these rules expressly grant power to a single judge. See Rules 8, 9 and 18.

This subdivision empowers a single circuit judge to act upon virtually all requests for intermediate relief which may be made during the course of an appeal or other proceeding. By its terms he may entertain and act upon any motion other than a motion to dismiss or otherwise determine an appeal or other proceeding. But the relief sought must be ''relief which under these rules may properly be sought by motion.''

Examples of the power conferred on a single judge by this subdivision are: to extend the time for transmitting the record or docketing the appeal (Rules 11 and 12); to permit intervention in agency cases (Rule 15), or substitution in any case (Rule 43); to permit an appeal in forma pauperis (Rule 24); to enlarge any time period fixed by the rules other than that for initiating a proceeding in the court of appeals (Rule 26(b)); to permit the filing of a brief by amicus curiae (Rule 29); to authorize the filing of a deferred appendix (Rule 30(c)), or dispense with the requirement of an appendix in a specific case (Rule 30(f)), or permit carbon copies of briefs or appendices to be used (Rule 32(a)); to permit the filing of additional briefs (Rule 28(c)), or the filing of briefs of extraordinary length (Rule 28(g)); to postpone oral argument (Rule 34(a)), or grant additional time therefor (Rule 34(b)).

Certain rules require that application for the relief or orders which they authorize be made by petition. Since relief under those rules may not properly be sought by motion, a single judge may not entertain requests for such relief. Thus a single judge may not act upon requests for permission to appeal (see Rules 5 and 6); or for mandamus or other extraordinary writs (see Rule 21), other than for stays or injunctions *pendente lite*, authority to grant which is ''expressly conferred by these rules'' on a single judge under certain circumstances (see Rules 8 and 18); or upon petitions for rehearing (see Rule 40).

A court of appeals may by order or rule abridge the power of a single judge if it is of the view that a motion or a class of motions should be disposed of by a panel. Exercise of any power granted a single judge is discretionary with the judge. The final sentence in this subdivision makes the disposition of any matter by a single judge subject to review by the court.

NOTES OF ADVISORY COMMITTEE ON RULES—1979 AMENDMENT

The proposed amendment would give sanction to local rules in a number of circuits permitting the clerk to dispose of specified types of procedural motions.

NOTES OF ADVISORY COMMITTEE ON RULES—1989 AMENDMENT

The amendment is technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1994 AMENDMENT

Subdivision (d). The amendment makes it clear that a court may require a different number of copies either by rule or by order in an individual case. The number of copies of any document that a court of appeals needs varies depending upon the way in which the court conducts business. The internal operation of the courts of appeals necessarily varies from circuit to circuit because of differences in the number of judges, the geographic area included within the circuit, and other such factors. Uniformity could be achieved only by setting the number of copies artificially high so that parties in all circuits file enough copies to satisfy the needs of the court requiring the greatest number. Rather than do that, the Committee decided to make it clear that local rules may require a greater or lesser number of copies and that, if the circumstances of a particular case indicate the need for a different number of copies in that case, the court may so order.

COMMITTEE NOTES ON RULES—1998 AMENDMENT

In addition to amending Rule 27 to conform to uniform drafting standards, several substantive amendments are made. The Advisory Committee had been working on substantive amendments to Rule 27 just prior to completion of this larger project.

Subdivision (a). Paragraph (1) retains the language of the existing rule indicating that an application for an order or other relief is made by filing a motion unless another form is required by some other provision in the rules.

Paragraph (1) also states that a motion must be in writing unless the court permits otherwise. The writing requirement has been implicit in the rule; the Advisory Committee decided to make it explicit. There are, however, instances in which a court may permit oral motions. Perhaps the most common such instance would be a motion made during oral argument in the presence of opposing counsel; for example, a request for permission to submit a supplemental brief on an issue raised by the court for the first time at oral argument. Rather than limit oral motions to those made during oral argument or, conversely, assume the propriety of making even extremely complex motions orally during argument, the Advisory Committee decided that it is better to leave the determination of the propriety of an oral motion to the court's discretion. The provision does not disturb the practice in those circuits that permit certain procedural motions, such as a motion for extension of time for filing a brief, to be made by telephone and ruled upon by the clerk.

Paragraph (2) outlines the contents of a motion. It begins with the general requirement from the current rule that a motion must state with particularity the grounds supporting it and the relief requested. It adds a requirement that all legal arguments should be presented in the body of the motion; a separate brief or memorandum supporting or responding to a motion must not be filed. The Supreme Court uses this single document approach. Sup. Ct. R. 21.1. In furtherance of the requirement that all legal argument must be contained in the body of the motion, paragraph (2) also states that an affidavit that is attached to a motion should contain only factual information and not legal argument.

Paragraph (2) further states that whenever a motion requests substantive relief, a copy of the trial court's opinion or agency's decision must be attached.

Although it is common to present a district court with a proposed order along with the motion requesting relief, that is not the practice in the courts of appeals. A proposed order is not required and is not expected or desired. Nor is a notice of motion required.

Paragraph (3) retains the provisions of the current rule concerning the filing of a response to a motion except that the time for responding has been expanded to 10 days rather than 7 days. Because the time periods in the rule apply to a substantive motion as well as a procedural motion, the longer time period may help reduce the number of motions for extension of time, or at least provide a more realistic time frame within which to make and dispose of such a motion.

A party filing a response in opposition to a motion may also request affirmative relief. It is the Advisory Committee's judgment that it is permissible to combine the response and the new motion in the same document. Indeed, because there may be substantial overlap of arguments in the response and in the request for affirmative relief, a combined document may be preferable. If a request for relief is combined with a response, the caption of the document must alert the court to the request for relief. The time for a response to such a new request and for reply to that response are governed by the general rules regulating responses and replies.

Paragraph (4) is new. Two circuits currently have rules authorizing a reply. As a general matter, a reply should not reargue propositions presented in the motion or present matters that do not relate to the response. Sometimes matters relevant to the motion arise after the motion is filed; treatment of such matters in the reply is appropriate even though strictly speaking it may not relate to the response.

Subdivision (b). The material in this subdivision remains substantively unchanged except to clarify that one may file a motion for reconsideration, etc., of a disposition by either the court or the clerk. A new sentence is added indicating that if a motion is granted in whole or in part before the filing of timely opposition to the motion, the filing of the opposition is not treated as a request for reconsideration, etc. A party wishing to have the court reconsider, vacate, or modify the disposition must file a new motion that addresses the order granting the motion.

Although the rule does not require a court to do so, it would be helpful if, whenever a motion is disposed of before receipt of any response from the opposing party, the ruling indicates that it was issued without awaiting a response. Such a statement will aid the opposing party in deciding whether to request reconsideration. The opposing party may have mailed a response about the time of the ruling and be uncertain whether the court has considered it.

Subdivision (c). The changes in this subdivision are stylistic only. No substantive changes are intended.

Subdivision (d). This subdivision has been substantially revised.

The format requirements have been moved from Rule 32(b) to paragraph (1) of this subdivision. No cover is required, but a caption is needed as well as a descriptive title indicating the purpose of the motion and identifying the party or parties for whom it is filed. Spiral binding or secure stapling at the upper left-hand corner satisfies the binding requirement. But they are not intended to be the exclusive methods of binding.

Paragraph (2) establishes page limits; twenty pages for a motion or a response, and ten pages for a reply. Three circuits have established page limits by local rule. This rule does not establish special page limits for those instances in which a party combines a response to a motion with a new request for affirmative relief. Because a combined document most often will be used when there is substantial overlap in the argument in opposition to the motion and in the argument for the affirmative relief, twenty pages may be sufficient in most instances. If it is not, the party may request additional pages. If ten pages is insufficient for the original movant to both reply to the response, and respond to the new request for affirmative relief, two separate documents may be used or a request for additional pages may be made.

The changes in paragraph (4) are stylistic only. No substantive changes are intended.

Subdivision (e). This new provision makes it clear that there is no right to oral argument on a motion. Seven circuits have local rules stating that oral argument of motions will not be held unless the court orders it.

COMMITTEE NOTES ON RULES—2002 AMENDMENT

Subdivision (a)(3)(A). Subdivision (a)(3)(A) presently requires that a response to a motion be filed within 10 days after service of the motion. Intermediate Saturdays, Sundays, and legal holidays are counted in computing that 10-day deadline, which means that, except when the 10-day deadline ends on a weekend or legal holiday, parties generally must respond to motions within 10 actual days.

Fed. R. App. P. 26(a)(2) has been amended to provide that, in computing any period of time, a litigant should ''[e]xclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days, unless stated in calendar days.'' This change in the method of computing deadlines means that 10-day deadlines (such as that in subdivision (a)(3)(A)) have been lengthened as a practical matter. Under the new computation method, parties would never have less than 14 actual days to respond to motions, and legal holidays could extend that period to as much as 18 days.

Permitting parties to take two weeks or more to respond to motions would introduce significant and unwarranted delay into appellate proceedings. For that reason, the 10-day deadline in subdivision (a)(3)(A) has been reduced to 8 days. This change will, as a practical matter, ensure that every party will have at least 10 actual days—but, in the absence of a legal holiday, no more than 12 actual days—to respond to motions. The court continues to have discretion to shorten or extend that time in appropriate cases.

Changes Made After Publication and Comments. In response to the objections of commentators, the time to respond to a motion was increased from the proposed 7 days to 8 days. No other changes were made to the text of the proposed amendment or to the Committee Note.

Subdivision (a)(4). Subdivision (a)(4) presently requires that a reply to a response to a motion be filed within 7 days after service of the response. Intermediate Saturdays, Sundays, and legal holidays are counted in computing that 7-day deadline, which means that, except when the 7-day deadline ends on a weekend or legal holiday, parties generally must reply to responses to motions within one week.

Fed. R. App. P. 26(a)(2) has been amended to provide that, in computing any period of time, a litigant should ''[e]xclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days, unless stated in calendar days.'' This change in the method of computing deadlines means that 7-day deadlines (such as that in subdivision (a)(4)) have been lengthened as a practical matter. Under the new computation method, parties would never have less than 9 actual days to reply to responses to motions, and legal holidays could extend that period to as much as 13 days.

Permitting parties to take 9 or more days to reply to a response to a motion would introduce significant and unwarranted delay into appellate proceedings. For that reason, the 7-day deadline in subdivision (a)(4) has been reduced to 5 days. This change will, as a practical matter, ensure that every party will have 7 actual days to file replies to responses to motions (in the absence of a legal holiday).

Changes Made After Publication and Comments. No changes were made to the text of the proposed amendment or to the Committee Note.

Subdivision (d)(1)(B). A cover is not required on motions, responses to motions, or replies to responses to motions. However, Rule 27(d)(1)(B) has been amended to provide that if a cover is nevertheless used on such a paper, the cover must be white. The amendment is intended to promote uniformity in federal appellate practice.

Changes Made After Publication and Comments. No changes were made to the text of the proposed amendment or to the Committee Note.

COMMITTEE NOTES ON RULES—2005 AMENDMENT

Subdivision (d)(1)(E). A new subdivision (E) has been added to Rule 27(d)(1) to provide that a motion, a response to a motion, and a reply to a response to a motion must comply with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6). The purpose of the amendment is to promote uniformity in federal appellate practice and to prevent the abuses that might occur if no restrictions were placed on the size of typeface used in motion papers.

Changes Made After Publication and Comments. No changes were made to the text of the proposed amendment or to the Committee Note.

Rule 28. Briefs

(a) APPELLANT'S BRIEF. The appellant's brief must contain, under appropriate headings and in the order indicated:

(1) a corporate disclosure statement if required by Rule 26.1;

(2) a table of contents, with page references;

(3) a table of authorities—cases (alphabetically arranged), statutes, and other authorities—with references to the pages of the brief where they are cited;

(4) a jurisdictional statement, including:

(A) the basis for the district court's or agency's subject-matter jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;

(B) the basis for the court of appeals' jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;

(C) the filing dates establishing the timeliness of the appeal or petition for review; and

(D) an assertion that the appeal is from a final order or judgment that disposes of all parties' claims, or information establishing the court of appeals' jurisdiction on some other basis;

(5) a statement of the issues presented for review;

(6) a statement of the case briefly indicating the nature of the case, the course of proceedings, and the disposition below;

(7) a statement of facts relevant to the issues submitted for review with appropriate references to the record (see Rule 28(e));

(8) a summary of the argument, which must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief, and which must not merely repeat the argument headings;

(9) the argument, which must contain:

(A) appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies; and

(B) for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues);

(10) a short conclusion stating the precise relief sought; and

(11) the certificate of compliance, if required by Rule 32(a)(7).

(b) APPELLEE'S BRIEF. The appellee's brief must conform to the requirements of Rule

28(a)(1)–(9) and (11), except that none of the following need appear unless the appellee is dissatisfied with the appellant's statement:

(1) the jurisdictional statement;
(2) the statement of the issues;
(3) the statement of the case;
(4) the statement of the facts; and
(5) the statement of the standard of review.

(c) REPLY BRIEF. The appellant may file a brief in reply to the appellee's brief. Unless the court permits, no further briefs may be filed. A reply brief must contain a table of contents, with page references, and a table of authorities—cases (alphabetically arranged), statutes, and other authorities—with references to the pages of the reply brief where they are cited.

(d) REFERENCES TO PARTIES. In briefs and at oral argument, counsel should minimize use of the terms ''appellant'' and ''appellee.'' To make briefs clear, counsel should use the parties' actual names or the designations used in the lower court or agency proceeding, or such descriptive terms as ''the employee,'' ''the injured person,'' ''the taxpayer,'' ''the ship,'' ''the stevedore.''

(e) REFERENCES TO THE RECORD. References to the parts of the record contained in the appendix filed with the appellant's brief must be to the pages of the appendix. If the appendix is prepared after the briefs are filed, a party referring to the record must follow one of the methods detailed in Rule 30(c). If the original record is used under Rule 30(f) and is not consecutively paginated, or if the brief refers to an unreproduced part of the record, any reference must be to the page of the original document. For example:

- Answer p. 7;
- Motion for Judgment p. 2;
- Transcript p. 231.

Only clear abbreviations may be used. A party referring to evidence whose admissibility is in controversy must cite the pages of the appendix or of the transcript at which the evidence was identified, offered, and received or rejected.

(f) REPRODUCTION OF STATUTES, RULES, REGULATIONS, ETC. If the court's determination of the issues presented requires the study of statutes, rules, regulations, etc., the relevant parts must be set out in the brief or in an addendum at the end, or may be supplied to the court in pamphlet form.

(g) [RESERVED]

(h) [RESERVED]

(i) BRIEFS IN A CASE INVOLVING MULTIPLE APPELLANTS OR APPELLEES. In a case involving more than one appellant or appellee, including consolidated cases, any number of appellants or appellees may join in a brief, and any party may adopt by reference a part of another's brief. Parties may also join in reply briefs.

(j) CITATION OF SUPPLEMENTAL AUTHORITIES. If pertinent and significant authorities come to a party's attention after the party's brief has been filed—or after oral argument but before decision—a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations. The letter must state the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. The body of the letter must not exceed 350 words. Any response must be made promptly and must be similarly limited.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Mar. 10, 1986, eff. July 1, 1986; Apr. 25, 1989, eff. Dec. 1, 1989; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 25, 2005, eff. Dec. 1, 2005.)

NOTES OF ADVISORY COMMITTEE ON RULES—1967

This rule is based upon Supreme Court Rule 40. For variations in present circuit rules on briefs see 2d Cir. Rule 17, 3d Cir. Rule 24, 5th Cir. Rule 24, and 7th Cir. Rule 17. All circuits now limit the number of pages of briefs, a majority limiting the brief to 50 pages of standard typographic printing. Fifty pages of standard typographic printing is the approximate equivalent of 70 pages of typewritten text, given the page sizes required by Rule 32 and the requirement set out there that text produced by a method other than standard typographic must be double spaced.

NOTES OF ADVISORY COMMITTEE ON RULES—1979
AMENDMENT

The proposed amendment eliminates the distinction appearing in the present rule between the permissible length in pages of printed and typewritten briefs, investigation of the matter having disclosed that the number of words on the printed page is little if any larger than the number on a page typed in standard elite type.

The provision is made subject to local rule to permit the court of appeals to require that typewritten briefs be typed in larger type and permit a correspondingly larger number of pages.

Subdivision (j). Proposed new Rule 28(j) makes provision for calling the court's attention to authorities that come to the party's attention after the brief has been filed. It is patterned after the practice under local rule in some of the circuits.

NOTES OF ADVISORY COMMITTEE ON RULES—1986
AMENDMENT

While Rule 28(g) can be read as requiring that tables of authorities be included in a reply brief, such tables are often not included. Their absence impedes efficient use of the reply brief to ascertain the appellant's response to a particular argument of the appellee or to the appellee's use of a particular authority. The amendment to Rule 28(c) is intended to make it clear that such tables are required in reply briefs.

The amendment to Rule 28(j) is technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1989
AMENDMENT

The amendment provides that the corporate disclosure statement required by new rule 26.1 shall be treated similarly to tables of contents and tables of citations and shall not be counted for purposes of the number of pages allowed in a brief.

NOTES OF ADVISORY COMMITTEE ON RULES—1991
AMENDMENT

Subdivision (a). The amendment adds a new subparagraph (2) that requires an appellant to include a specific jurisdictional statement in the appellant's brief to aid the court of appeals in determining whether it has both federal subject matter and appellate jurisdiction.

Subdivision (b). The amendment requires the appellee to include a jurisdictional statement in the appellee's brief except that the appellee need not include the statement if the appellee is satisfied with the appellant's jurisdictional statement.

Subdivision (h). The amendment provides that when more than one party appeals from a judgment or order, the party filing the first appeal is normally treated as the appellant for purposes of this rule and Rules 30 and 31. The party who first files an appeal usually is the principal appellant and should be treated as such. Parties who file a notice of appeal after the first notice

often bring protective appeals and they should be treated as cross appellants. Local rules in the Fourth and Federal Circuits now take that approach. If notices of appeal are filed on the same day, the rule follows the old approach of treating the plaintiff below as the appellant. For purposes of this rule, in criminal cases ''the plaintiff'' means the United States. In those instances where the designations provided by the rule are inappropriate, they may be altered by agreement of the parties or by an order of the court.

NOTES OF ADVISORY COMMITTEE ON RULES—1993 AMENDMENT

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

NOTES OF ADVISORY COMMITTEE ON RULES—1994 AMENDMENT

Subdivision (a). The amendment adds a requirement that an appellant's brief contain a summary of the argument. A number of circuits have local rules requiring a summary and the courts report that they find the summary useful. *See*, D.C. Cir. R. 11(a)(5); 5th Cir. R. 28.2.2; 8th Cir. R. 28A(i)(6); 11th Cir. R. 28–2(i); and Fed. Cir. R. 28.

Subdivision (b). The amendment adds a requirement that an appellee's brief contain a summary of the argument.

Subdivision (g). The amendment adds proof of service to the list of items in a brief that do not count for purposes of the page limitation. The concurrent amendment to Rule 25(d) requires a certificate of service to list the addresses to which a paper was mailed or at which it was delivered. When a number of parties must be served, the listing of addresses may run to several pages and those pages should not count for purposes of the page limitation.

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The language and organization of the rule are amended to make the rule more easily understood. In additional to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Several substantive changes are made in this rule, however. Most of them are necessary to conform Rule 28 with changes recommended in Rule 32.

Subdivision (a). The current rule requires a brief to include a statement of the case which includes a description of the nature of the case, the course of proceedings, the disposition of the case—all of which might be described as the procedural history—as well as a statement of the facts. The amendments separate this into two statements: one procedural, called the statement of the case; and one factual, called the statement of the facts. The Advisory Committee believes that the separation will be helpful to the judges. The table of contents and table of authorities have also been separated into two distinct items.

An additional amendment of subdivision (a) is made to conform it with an amendment being made to Rule 32. Rule 32(a)(7) generally requires a brief to include a certificate of compliance with type-volume limitations contained in that rule. (No certificate is required if a brief does not exceed 30 pages, or 15 pages for a reply brief.) Rule 28(a) is amended to include that certificate in the list of items that must be included in a brief whenever it is required by Rule 32.

Subdivision (g). The amendments delete subdivision (g) that limited a principal brief to 50 pages and a reply brief to 25 pages. The length limitations have been moved to Rule 32. Rule 32 deals generally with the format for a brief or appendix.

Subdivision (h). The amendment requires an appellee's brief to comply with Rule 28(a)(1) through (11) with regard to a cross-appeal. The addition of separate paragraphs requiring a corporate disclosure statement, table of authorities, statement of facts, and certificate of compliance increased the relevant paragraphs of subdivision (a) from (7) to (11). The other changes are stylistic; no substantive changes are intended.

COMMITTEE NOTES ON RULES—2002 AMENDMENT

Subdivision (j). In the past, Rule 28(j) has required parties to describe supplemental authorities ''without argument.'' Enforcement of this restriction has been lax, in part because of the difficulty of distinguishing ''state[ment] . . . [of] the reasons for the supplemental citations,'' which is required, from ''argument'' about the supplemental citations, which is forbidden.

As amended, Rule 28(j) continues to require parties to state the reasons for supplemental citations, with reference to the part of a brief or oral argument to which the supplemental citations pertain. But Rule 28(j) no longer forbids ''argument.'' Rather, Rule 28(j) permits parties to decide for themselves what they wish to say about supplemental authorities. The only restriction upon parties is that the body of a Rule 28(j) letter—that is, the part of the letter that begins with the first word after the salutation and ends with the last word before the complimentary close—cannot exceed 350 words. All words found in footnotes will count toward the 350-word limit.

Changes Made After Publication and Comments. No changes were made to the text of the proposed amendment or to the Committee Note, except that the word limit was increased from 250 to 350 in response to the complaint of some commentators that parties would have difficulty bringing multiple supplemental authorities to the attention of the court in one 250-word letter.

COMMITTEE NOTES ON RULES—2005 AMENDMENT

Subdivision (c). Subdivision (c) has been amended to delete a sentence that authorized an appellee who had cross-appealed to file a brief in reply to the appellant's response. All rules regarding briefing in cases involving cross-appeals have been consolidated into new Rule 28.1.

Subdivision (h). Subdivision (h)—regarding briefing in cases involving cross-appeals—has been deleted. All rules regarding such briefing have been consolidated into new Rule 28.1.

Rule 28.1. Cross-Appeals

(a) APPLICABILITY. This rule applies to a case in which a cross-appeal is filed. Rules 28(a)–(c), 31(a)(1), 32(a)(2), and 32(a)(7)(A)–(B) do not apply to such a case, except as otherwise provided in this rule.

(b) DESIGNATION OF APPELLANT. The party who files a notice of appeal first is the appellant for the purposes of this rule and Rules 30 and 34. If notices are filed on the same day, the plaintiff in the proceeding below is the appellant. These designations may be modified by the parties' agreement or by court order.

(c) BRIEFS. In a case involving a cross-appeal:

(1) *Appellant's Principal Brief*. The appellant must file a principal brief in the appeal. That brief must comply with Rule 28(a).

(2) *Appellee's Principal and Response Brief*. The appellee must file a principal brief in the cross-appeal and must, in the same brief, respond to the principal brief in the appeal. That appellee's brief must comply with Rule 28(a), except that the brief need not include a statement of the case or a statement of the facts unless the appellee is dissatisfied with the appellant's statement.

(3) *Appellant's Response and Reply Brief*. The appellant must file a brief that responds to the principal brief in the cross-appeal and may, in the same brief, reply to the response in the appeal. That brief must comply with Rule 28(a)(2)–(9) and (11), except that none of the following need appear unless the appellant is dissatisfied with the appellee's statement in the cross-appeal:

(A) the jurisdictional statement;

(B) the statement of the issues;

(C) the statement of the case;

(D) the statement of the facts; and

(E) the statement of the standard of review.

(4) *Appellee's Reply Brief*. The appellee may file a brief in reply to the response in the cross-appeal. That brief must comply with Rule 28(a)(2)–(3) and (11) and must be limited to the issues presented by the cross-appeal.

(5) *No Further Briefs*. Unless the court permits, no further briefs may be filed in a case involving a cross-appeal.

(d) COVER. Except for filings by unrepresented parties, the cover of the appellant's principal brief must be blue; the appellee's principal and response brief, red; the appellant's response and reply brief, yellow; the appellee's reply brief, gray; an intervenor's or amicus curiae's brief, green; and any supplemental brief, tan. The front cover of a brief must contain the information required by Rule 32(a)(2).

(e) LENGTH.

(1) *Page Limitation*. Unless it complies with Rule 28.1(e)(2) and (3), the appellant's principal brief must not exceed 30 pages; the appellee's principal and response brief, 35 pages; the appellant's response and reply brief, 30 pages; and the appellee's reply brief, 15 pages.

(2) *Type-Volume Limitation*.

(A) The appellant's principal brief or the appellant's response and reply brief is acceptable if:

(i) it contains no more than 14,000 words; or

(ii) it uses a monospaced face and contains no more than 1,300 lines of text.

(B) The appellee's principal and response brief is acceptable if:

(i) it contains no more than 16,500 words; or

(ii) it uses a monospaced face and contains no more than 1,500 lines of text.

(C) The appellee's reply brief is acceptable if it contains no more than half of the type volume specified in Rule 28.1(e)(2)(A).

(3) *Certificate of Compliance*. A brief submitted under Rule 28.1(e)(2) must comply with Rule 32(a)(7)(C).

(f) TIME TO SERVE AND FILE A BRIEF. Briefs must be served and filed as follows:

(1) the appellant's principal brief, within 40 days after the record is filed;

(2) the appellee's principal and response brief, within 30 days after the appellant's principal brief is served;

(3) the appellant's response and reply brief, within 30 days after the appellee's principal and response brief is served; and

(4) the appellee's reply brief, within 14 days after the appellant's response and reply brief is served, but at least 3 days before argument unless the court, for good cause, allows a later filing.

(As added Apr. 25, 2005, eff. Dec. 1, 2005.)

COMMITTEE NOTES ON RULES—2005

The Federal Rules of Appellate Procedure have said very little about briefing in cases involving cross-appeals. This vacuum has frustrated judges, attorneys, and parties who have sought guidance in the rules. More importantly, this vacuum has been filled by conflicting local rules regarding such matters as the number and length of briefs, the colors of the covers of briefs, and the deadlines for serving and filing briefs. These local rules have created a hardship for attorneys who practice in more than one circuit.

New Rule 28.1 provides a comprehensive set of rules governing briefing in cases involving cross-appeals. The few existing provisions regarding briefing in such cases have been moved into new Rule 28.1, and several new provisions have been added to fill the gaps in the existing rules. The new provisions reflect the practices of the large majority of circuits and, to a significant extent, the new provisions have been patterned after the requirements imposed by Rules 28, 31, and 32 on briefs filed in cases that do not involve cross-appeals.

Subdivision (a). Subdivision (a) makes clear that, in a case involving a cross-appeal, briefing is governed by new Rule 28.1, and not by Rules 28(a), 28(b), 28(c), 31(a)(1), 32(a)(2), 32(a)(7)(A), and 32(a)(7)(B), except to the extent that Rule 28.1 specifically incorporates those rules by reference.

Subdivision (b). Subdivision (b) defines who is the ''appellant'' and who is the ''appellee'' in a case involving a cross-appeal. Subdivision (b) is taken directly from former Rule 28(h), except that subdivision (b) refers to a party being designated as an appellant ''for the purposes of this rule and Rules 30 and 34,'' whereas former Rule 28(h) also referred to Rule 31. Because the matter addressed by Rule 31(a)(1)—the time to serve and file briefs—is now addressed directly in new Rule 28.1(f), the cross-reference to Rule 31 is no longer necessary. In Rule 31 and in all rules other than Rules 28.1, 30, and 34, references to an ''appellant'' refer both to the appellant in an appeal and to the cross-appellant in a cross-appeal, and references to an ''appellee'' refer both to the appellee in an appeal and to the cross-appellee in a cross-appeal. Cf. Rule 31(c).

Subdivision (c). Subdivision (c) provides for the filing of four briefs in a case involving a cross-appeal. This reflects the practice of every circuit except the Seventh. *See* 7th Cir. R. 28(d)(1)(a).

The first brief is the ''appellant's principal brief.'' That brief—like the appellant's principal brief in a case that does not involve a cross-appeal—must comply with Rule 28(a).

The second brief is the ''appellee's principal and response brief.'' Because this brief serves as the appellee's principal brief on the merits of the cross-appeal, as well as the appellee's response brief on the merits of the appeal, it must also comply with Rule 28(a), with the limited exceptions noted in the text of the rule.

The third brief is the ''appellant's response and reply brief.'' Like a response brief in a case that does not involve a cross-appeal—that is, a response brief that does not also serve as a principal brief on the merits of a cross-appeal—the appellant's response and reply brief must comply with Rule 28(a)(2)–(9) and (11), with the exceptions noted in the text of the rule. *See* Rule 28(b). The one difference between the appellant's response and reply brief, on the one hand, and a response brief filed in a case that does not involve a cross-appeal, on the other, is that the latter must include a corporate disclosure statement. *See* Rule 28(a)(1) and (b). An appellant filing a response and reply brief in a case involving a cross-appeal has already filed a corporate dis-

closure statement with its principal brief on the merits of the appeal.

The fourth brief is the ''appellee's reply brief.'' Like a reply brief in a case that does not involve a cross-appeal, it must comply with Rule 28(c), which essentially restates the requirements of Rule 28(a)(2)–(3) and (11). (Rather than restating the requirements of Rule 28(a)(2)–(3) and (11), as Rule 28(c) does, Rule 28.1(c)(4) includes a direct cross-reference.) The appellee's reply brief must also be limited to the issues presented by the cross-appeal.

Subdivision (d). Subdivision (d) specifies the colors of the covers on briefs filed in a case involving a cross-appeal. It is patterned after Rule 32(a)(2), which does not specifically refer to cross-appeals.

Subdivision (e). Subdivision (e) sets forth limits on the length of the briefs filed in a case involving a cross-appeal. It is patterned after Rule 32(a)(7), which does not specifically refer to cross-appeals. Subdivision (e) permits the appellee's principal and response brief to be longer than a typical principal brief on the merits because this brief serves not only as the principal brief on the merits of the cross-appeal, but also as the response brief on the merits of the appeal. Likewise, subdivision (e) permits the appellant's response and reply brief to be longer than a typical reply brief because this brief serves not only as the reply brief in the appeal, but also as the response brief in the cross-appeal. For purposes of determining the maximum length of an amicus curiae's brief filed in a case involving a cross-appeal, Rule 29(d)'s reference to ''the maximum length authorized by these rules for a party's principal brief'' should be understood to refer to subdivision (e)'s limitations on the length of an appellant's principal brief.

Subdivision (f). Subdivision (f) provides deadlines for serving and filing briefs in a cross-appeal. It is patterned after Rule 31(a)(1), which does not specifically refer to cross-appeals.

Changes Made After Publication and Comments. The Committee adopted the recommendation of the Style Subcommittee that the text of Rule 28.1 be changed in a few minor respects to improve clarity. (That recommendation is described below.) The Committee also adopted three suggestions made by the Department of Justice: (1) A sentence was added to the Committee Note to Rule 28.1(b) to clarify that the term ''appellant'' (and ''appellee'') as used by rules other than Rules 28.1, 30, and 34, refers to both the appellant in an appeal and the cross-appellant in a cross-appeal (and to both the appellee in an appeal and the cross-appellee in a cross-appeal). (2) Rule 28.1(d) was amended to prescribe cover colors for supplemental briefs and briefs filed by an intervenor or amicus curiae. (3) A few words were added to the Committee Note to Rule 28.1(e) to clarify the length of an amicus curiae's brief.

Rule 29. Brief of an Amicus Curiae

(a) WHEN PERMITTED. The United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing.

(b) MOTION FOR LEAVE TO FILE. The motion must be accompanied by the proposed brief and state:

(1) the movant's interest; and

(2) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.

(c) CONTENTS AND FORM. An amicus brief must comply with Rule 32. In addition to the requirements of Rule 32, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. If an amicus curiae is a corporation, the brief must include a disclosure statement like that required of parties by Rule 26.1. An amicus brief need not comply with Rule 28, but must include the following:

(1) a table of contents, with page references;

(2) a table of authorities—cases (alphabetically arranged), statutes and other authorities—with references to the pages of the brief where they are cited;

(3) a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file;

(4) an argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review; and

(5) a certificate of compliance, if required by Rule 32(a)(7).

(d) LENGTH. Except by the court's permission, an amicus brief may be no more than one-half the maximum length authorized by these rules for a party's principal brief. If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief.

(e) TIME FOR FILING. An amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the principal brief of the party being supported is filed. An amicus curiae that does not support either party must file its brief no later than 7 days after the appellant's or petitioner's principal brief is filed. A court may grant leave for later filing, specifying the time within which an opposing party may answer.

(f) REPLY BRIEF. Except by the court's permission, an amicus curiae may not file a reply brief.

(g) ORAL ARGUMENT. An amicus curiae may participate in oral argument only with the court's permission.

(As amended Apr. 24, 1998, eff. Dec. 1, 1998.)

NOTES OF ADVISORY COMMITTEE ON RULES—1967

Only five circuits presently regulate the filing of the brief of an amicus curiae. See D.C. Cir. Rule 18(j); 1st Cir. Rule 23(10); 6th Cir. Rule 17(4); 9th Cir. Rule 18(9); 10th Cir. Rule 20. This rule follows the practice of a majority of circuits in requiring leave of court to file an amicus brief except under the circumstances stated therein. Compare Supreme Court Rule 42.

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Several substantive changes are made in this rule, however.

Subdivision (a). The major change in this subpart is that when a brief is filed with the consent of all parties, it is no longer necessary to obtain the parties' written consent and to file the consents with the brief. It is sufficient to obtain the parties' oral consent and to state in the brief that all parties have consented. It is sometimes difficult to obtain all the written consents by the filing deadline and it is not unusual for counsel to represent that parties have consented; for example, in a motion for extension of time to file a brief it is not unusual for the movant to state that the

other parties have been consulted and they do not object to the extension. If a party's consent has been misrepresented, the party will be able to take action before the court considers the amicus brief.

The District of Columbia is added to the list of entities allowed to file an amicus brief without consent of all parties. The other changes in this material are stylistic.

Subdivision (b). The provision in the former rule, granting permission to conditionally file the brief with the motion, is changed to one requiring that the brief accompany the motion. Sup. Ct. R. 37.4 requires that the proposed brief be presented with the motion.

The former rule only required the motion to identify the applicant's interest and to generally state the reasons why an amicus brief is desirable. The amended rule additionally requires that the motion state the relevance of the matters asserted to the disposition of the case. As Sup. Ct. R. 37.1 states:

> An *amicus curiae* brief which brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties is of considerable help to the Court. An *amicus curiae* brief which does not serve this purpose simply burdens the staff and facilities of the Court and its filing is not favored.

Because the relevance of the matters asserted by an amicus is ordinarily the most compelling reason for granting leave to file, the Committee believes that it is helpful to explicitly require such a showing.

Subdivision (c). The provisions in this subdivision are entirely new. Previously there was confusion as to whether an amicus brief must include all of the items listed in Rule 28. Out of caution practitioners in some circuits included all those items. Ordinarily that is unnecessary.

The requirement that the cover identify the party supported and indicate whether the amicus supports affirmance or reversal is an administrative aid.

Paragraph (c)(3) requires an amicus to state the source of its authority to file. The amicus simply must identify which of the provisions in Rule 29(a) provides the basis for the amicus to file its brief.

Subdivision (d). This new provision imposes a shorter page limit for an amicus brief than for a party's brief. This is appropriate for two reasons. First, an amicus may omit certain items that must be included in a party's brief. Second, an amicus brief is supplemental. It need not address all issues or all facets of a case. It should treat only matter not adequately addressed by a party.

Subdivision (e). The time limit for filing is changed. An amicus brief must be filed no later than 7 days after the principal brief of the party being supported is filed. Occasionally, an amicus supports neither party; in such instances, the amendment provides that the amicus brief must be filed no later than 7 days after the appellant's or petitioner's principal brief is filed. Note that in both instances the 7-day period runs from when a brief is filed. The passive voice—''is filed''—is used deliberately. A party or amicus can send its brief to a court for filing and, under Rule 25, the brief is timely if mailed within the filing period. Although the brief is timely if mailed within the filing period, it is not ''filed'' until the court receives it and file stamps it. ''Filing'' is done by the court, not by the party. It may be necessary for an amicus to contact the court to ascertain the filing date.

The 7-day stagger was adopted because it is long enough to permit an amicus to review the completed brief of the party being supported and avoid repetitious argument. A 7-day period also is short enough that no adjustment need be made in the opposing party's briefing schedule. The opposing party will have sufficient time to review arguments made by the amicus and address them in the party's responsive pleading. The timetable for filing the parties' briefs is unaffected by this change.

A court may grant permission to file an amicus brief in a context in which the party does not file a ''principal brief''; for example, an amicus may be permitted to file in support of a party's petition for rehearing. In such instances the court will establish the filing time for the amicus.

The former rule's statement that a court may, for cause shown, grant leave for later filing is unnecessary. Rule 26(b) grants general authority to enlarge the time prescribed in these rules for good cause shown. This new rule, however, states that when a court grants permission for later filing, the court must specify the period within which an opposing party may answer the arguments of the amicus.

Subdivision (f). This subdivision generally prohibits the filing a a reply brief by an amicus curiae. Sup. Ct. R. 37 and local rules of the D.C., Ninth, and Federal Circuits state that an amicus may not file a reply brief. The role of an amicus should not require the use of a reply brief.

Subdivision (g). The language of this subdivision stating that an amicus will be granted permission to participate in oral argument ''only for extraordinary reasons'' has been deleted. The change is made to reflect more accurately the current practice in which it is not unusual for a court to permit an amicus to argue when a party is willing to share its argument time with the amicus. The Committee does not intend, however, to suggest that in other instances an amicus will be permitted to argue absent extraordinary circumstances.

Rule 30. Appendix to the Briefs

(a) APPELLANT'S RESPONSIBILITY.

(1) *Contents of the Appendix.* The appellant must prepare and file an appendix to the briefs containing:

(A) the relevant docket entries in the proceeding below;

(B) the relevant portions of the pleadings, charge, findings, or opinion;

(C) the judgment, order, or decision in question; and

(D) other parts of the record to which the parties wish to direct the court's attention.

(2) *Excluded Material.* Memoranda of law in the district court should not be included in the appendix unless they have independent relevance. Parts of the record may be relied on by the court or the parties even though not included in the appendix.

(3) *Time to File; Number of Copies.* Unless filing is deferred under Rule 30(c), the appellant must file 10 copies of the appendix with the brief and must serve one copy on counsel for each party separately represented. An unrepresented party proceeding in forma pauperis must file 4 legible copies with the clerk, and one copy must be served on counsel for each separately represented party. The court may by local rule or by order in a particular case require the filing or service of a different number.

(b) ALL PARTIES' RESPONSIBILITIES.

(1) *Determining the Contents of the Appendix.* The parties are encouraged to agree on the contents of the appendix. In the absence of an agreement, the appellant must, within 10 days after the record is filed, serve on the appellee a designation of the parts of the record the appellant intends to include in the appendix and a statement of the issues the appellant intends to present for review. The appellee may, within 10 days after receiving the designation, serve on the appellant a designation of additional parts to which it wishes to direct the

court's attention. The appellant must include the designated parts in the appendix. The parties must not engage in unnecessary designation of parts of the record, because the entire record is available to the court. This paragraph applies also to a cross-appellant and a cross-appellee.

(2) *Costs of Appendix*. Unless the parties agree otherwise, the appellant must pay the cost of the appendix. If the appellant considers parts of the record designated by the appellee to be unnecessary, the appellant may advise the appellee, who must then advance the cost of including those parts. The cost of the appendix is a taxable cost. But if any party causes unnecessary parts of the record to be included in the appendix, the court may impose the cost of those parts on that party. Each circuit must, by local rule, provide for sanctions against attorneys who unreasonably and vexatiously increase litigation costs by including unnecessary material in the appendix.

(c) DEFERRED APPENDIX.

(1) *Deferral Until After Briefs Are Filed*. The court may provide by rule for classes of cases or by order in a particular case that preparation of the appendix may be deferred until after the briefs have been filed and that the appendix may be filed 21 days after the appellee's brief is served. Even though the filing of the appendix may be deferred, Rule 30(b) applies; except that a party must designate the parts of the record it wants included in the appendix when it serves its brief, and need not include a statement of the issues presented.

(2) *References to the Record*.

(A) If the deferred appendix is used, the parties may cite in their briefs the pertinent pages of the record. When the appendix is prepared, the record pages cited in the briefs must be indicated by inserting record page numbers, in brackets, at places in the appendix where those pages of the record appear.

(B) A party who wants to refer directly to pages of the appendix may serve and file copies of the brief within the time required by Rule 31(a), containing appropriate references to pertinent pages of the record. In that event, within 14 days after the appendix is filed, the party must serve and file copies of the brief, containing references to the pages of the appendix in place of or in addition to the references to the pertinent pages of the record. Except for the correction of typographical errors, no other changes may be made to the brief.

(d) FORMAT OF THE APPENDIX. The appendix must begin with a table of contents identifying the page at which each part begins. The relevant docket entries must follow the table of contents. Other parts of the record must follow chronologically. When pages from the transcript of proceedings are placed in the appendix, the transcript page numbers must be shown in brackets immediately before the included pages. Omissions in the text of papers or of the transcript must be indicated by asterisks. Immaterial formal matters (captions, subscriptions, acknowledgments, etc.) should be omitted.

(e) REPRODUCTION OF EXHIBITS. Exhibits designated for inclusion in the appendix may be reproduced in a separate volume, or volumes, suitably indexed. Four copies must be filed with the appendix, and one copy must be served on counsel for each separately represented party. If a transcript of a proceeding before an administrative agency, board, commission, or officer was used in a district-court action and has been designated for inclusion in the appendix, the transcript must be placed in the appendix as an exhibit.

(f) APPEAL ON THE ORIGINAL RECORD WITHOUT AN APPENDIX. The court may, either by rule for all cases or classes of cases or by order in a particular case, dispense with the appendix and permit an appeal to proceed on the original record with any copies of the record, or relevant parts, that the court may order the parties to file.

(As amended Mar. 30, 1970, eff. July 1, 1970; Mar. 10, 1986, eff. July 1, 1986; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 24, 1998, eff. Dec. 1, 1998.)

NOTES OF ADVISORY COMMITTEE ON RULES—1967

Subdivision (a). Only two circuits presently require a printed record (5th Cir. Rule 23(a); 8th Cir. Rule 10 (in civil appeals only)), and the rules and practice in those circuits combine to make the difference between a printed record and the appendix, which is now used in eight circuits and in the Supreme Court in lieu of the printed record, largely nominal. The essential characteristics of the appendix method are: (1) the entire record may not be reproduced; (2) instead, the parties are to set out in an appendix to the briefs those parts of the record which in their judgment the judges must consult in order to determine the issues presented by the appeal; (3) the appendix is not the record but merely a selection therefrom for the convenience of the judges of the court of appeals; the record is the actual trial court record, and the record itself is always available to supply inadvertent omissions from the appendix. These essentials are incorporated, either by rule or by practice, in the circuits that continue to require the printed record rather than the appendix. See 5th Cir. Rule 23(a)(9) and 8th Cir. Rule 10(a)–(d).

Subdivision (b). Under the practice in six of the eight circuits which now use the appendix method, unless the parties agree to use a single appendix, the appellant files with his brief an appendix containing the parts of the record which he deems it essential that the court read in order to determine the questions presented. If the appellee deems additional parts of the record necessary he must include such parts as an appendix to his brief. The proposed rules differ from that practice. By the new rule a single appendix is to be filed. It is to be prepared by the appellant, who must include therein those parts which he deems essential and those which the appellee designates as essential.

Under the practice by which each party files his own appendix the resulting reproduction of essential parts of the record is often fragmentary; it is not infrequently necessary to piece several appendices together to arrive at a usable reproduction. Too, there seems to be a tendency on the part of some appellants to reproduce less than what is necessary for a determination of the issues presented (see *Moran Towing Corp. v. M. A. Gammino Construction Co.*, 363 F.2d 108 (1st Cir. 1966); *Walters v. Shari Music Publishing Corp.*, 298 F.2d 206 (2d Cir. 1962) and cases cited therein; *Morrison v. Texas Co.*, 289 F.2d 382 (7th Cir. 1961) and cases cited therein), a tendency which is doubtless encouraged by the requirement in present rules that the appellee reproduce in his separately prepared appendix such necessary parts of the record as are not included by the appellant.

Under the proposed rule responsibility for the preparation of the appendix is placed on the appellant. If the

appellee feels that the appellant has omitted essential portions of the record, he may require the appellant to include such portions in the appendix. The appellant is protected against a demand that he reproduce parts which he considers unnecessary by the provisions entitling him to require the appellee to advance the costs of reproducing such parts and authorizing denial of costs for matter unnecessarily reproduced.

Subdivision (c). This subdivision permits the appellant to elect to defer the production of the appendix to the briefs until the briefs of both sides are written, and authorizes a court of appeals to require such deferred filing by rule or order. The advantage of this method of preparing the appendix is that it permits the parties to determine what parts of the record need to be reproduced in the light of the issues actually presented by the briefs. Often neither side is in a position to say precisely what is needed until the briefs are completed. Once the argument on both sides is known, it should be possible to confine the matter reproduced in the appendix to that which is essential to a determination of the appeal or review. This method of preparing the appendix is presently in use in the Tenth Circuit (Rule 17) and in other circuits in review of agency proceedings, and it has proven its value in reducing the volume required to be reproduced. When the record is long, use of this method is likely to result in substantial economy to the parties.

Subdivision (e). The purpose of this subdivision is to reduce the cost of reproducing exhibits. While subdivision (a) requires that 10 copies of the appendix be filed, unless the court requires a lesser number, subdivision (e) permits exhibits necessary for the determination of an appeal to be bound separately, and requires only 4 copies of such a separate volume or volumes to be filed and a single copy to be served on counsel.

Subdivision (f). This subdivision authorizes a court of appeals to dispense with the appendix method of reproducing parts of the record and to hear appeals on the original record and such copies of it as the court may require.

Since 1962 the Ninth Circuit has permitted all appeals to be heard on the original record and a very limited number of copies. Under the practice as adopted in 1962, any party to an appeal could elect to have the appeal heard on the original record and two copies thereof rather than on the printed record theretofore required. The resulting substantial saving of printing costs led to the election of the new practice in virtually all cases, and by 1967 the use of printed records had ceased. By a recent amendment, the Ninth Circuit has abolished the printed record altogether. Its rules now provide that all appeals are to be heard on the original record, and it has reduced the number of copies required to two sets of copies of the transmitted original papers (excluding copies of exhibits, which need not be filed unless specifically ordered). See 9 Cir. Rule 10, as amended June 2, 1967, effective September 1, 1967. The Eighth Circuit permits appeals in criminal cases and in habeas corpus and 28 U.S.C. §2255 proceedings to be heard on the original record and two copies thereof. See 8 Cir. Rule 8 (i)–(j). The Tenth Circuit permits appeals in all cases to be heard on the original record and four copies thereof whenever the record consists of two hundred pages or less. See 10 Cir. Rule 17(a). This subdivision expressly authorizes the continuation of the practices in the Eighth, Ninth and Tenth Circuits.

The judges of the Court of Appeals for the Ninth Circuit have expressed complete satisfaction with the practice there in use and have suggested that attention be called to the advantages which it offers in terms of reducing cost.

Notes of Advisory Committee on Rules—1970 Amendment

Subdivision (a). The amendment of subdivision (a) is related to the amendment of Rule 31(a), which authorizes a court of appeals to shorten the time for filing briefs. By virtue of this amendment, if the time for filing the brief of the appellant is shortened the time for filing the appendix is likewise shortened.

Subdivision (c). As originally written, subdivision (c) permitted the appellant to elect to defer filing of the appendix until 21 days after service of the brief of the appellee. As amended, subdivision (c) requires that an order of court be obtained before filing of the appendix can be deferred, unless a court permits deferred filing by local rule. The amendment should not cause use of the deferred appendix to be viewed with disfavor. In cases involving lengthy records, permission to defer filing of the appendix should be freely granted as an inducement to the parties to include in the appendix only matter that the briefs show to be necessary for consideration by the judges. But the Committee is advised that appellants have elected to defer filing of the appendix in cases involving brief records merely to obtain the 21 day delay. The subdivision is amended to prevent that practice.

Notes of Advisory Committee on Rules—1986 Amendment

Subdivision (a). During its study of the separate appendix [see Report on the Advisory Committee on the Federal Appellate Rules on the Operation of Rule 30, — FRD — (1985)], the Advisory Committee found that this document was frequently encumbered with memoranda submitted to the trial court. *United States v. Noall,* 587 F.2d 123, 125 n. 1 (2nd Cir. 1978). See generally *Drewett v. Aetna Cas. & Sur. Co.,* 539 F.2d 496, 500 (5th Cir. 1976); *Volkswagenwerk Aktiengesellschaft v. Church,* 413 F.2d 1126, 1128 (9th Cir. 1969). Inclusion of such material makes the appendix more bulky and therefore less useful to the appellate panel. It also can increase significantly the costs of litigation.

There are occasions when such trial court memoranda have independent relevance in the appellate litigation. For instance, there may be a dispute as to whether a particular point was raised or whether a concession was made in the district court. In such circumstances, it is appropriate to include pertinent sections of such memoranda in the appendix.

Subdivision (b). The amendment to subdivision (b) is designed to require the circuits, by local rule, to establish a procedural mechanism for the imposition of sanctions against those attorneys who conduct appellate litigation in bad faith. Both 28 U.S.C. §1927 and the inherent power of the court authorized such sanctions. See *Brennan v. Local 357, International Brotherhood of Teamsters,* 709 F.2d 611 (9th Cir. 1983). See generally *Roadway Express, Inc. v. Piper,* 447 U.S. 752 (1980). While considerations of uniformity are important and doubtless will be taken into account by the judges of the respective circuits, the Advisory Committee believes that, at this time, the circuits need the flexibility to tailor their approach to the conditions of local practice. The local rule shall provide for notice and opportunity to respond before the imposition of any sanction.

Technical amendments also are made to subdivisions (a), (b) and (c) which are not intended to be substantive changes.

Taxation of Fees in Appeals in Which the Requirement of an Appendix Is Dispensed With

The Judicial Conference of the United States at its session on October 28th and 29th approved the following resolution relating to fees to be taxed in the courts of appeals as submitted by the Judicial Council of the Ninth Circuit with the proviso that its application to any court of appeals shall be at the election of each such court:

For some time it has been the practice in the Ninth Circuit Court of Appeals to dispense with an appendix in an appellate record and to hear the appeal on the original record, with a number of copies thereof being supplied (Rule 30f, Federal Rules of Appellate Procedure). It has been the practice of the Court to tax a fee of $5 in small records and $10 in large records for the time of the clerk involved in preparing such appeals and by way of reimbursement for postage expense. Ju-

dicial Conference approval heretofore has not been secured and the Judicial Council of the Ninth Circuit now seeks to fix a flat fee of $15 to be charged as fees for costs to be charged by *any* court of appeals ''in any appeal in which the requirement of an appendix is dispensed with pursuant to Rule 30f, Federal Rules of Appellate Procedure.''

NOTES OF ADVISORY COMMITTEE ON RULES—1991 AMENDMENT

Subdivision (b). The amendment requires a cross appellant to serve the appellant with a statement of the issues that the cross appellant intends to pursue on appeal. No later than ten days after the record is filed, the appellant and cross appellant must serve each other with a statement of the issues each intends to present for review and with a designation of the parts of the record that each wants included in the appendix. Within the next ten days, both the appellee and the cross appellee may designate additional materials for inclusion in the appendix. The appellant must then include in the appendix the parts thus designated for both the appeal and any cross appeals. The Committee expects that simultaneous compliance with this subdivision by an appellant and a cross appellant will be feasible in most cases. If a cross appellant cannot fairly be expected to comply until receipt of the appellant's statement of issues, relief may be sought by motion in the court of appeals.

NOTES OF ADVISORY COMMITTEE ON RULES—1994 AMENDMENT

Subdivision (a). The only substantive change is to allow a court to require the filing of a greater number of copies of an appendix as well as a lesser number.

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Subdivision (a). Paragraph (a)(3) is amended so that it is consistent with Rule 31(b). An unrepresented party proceeding in forma pauperis is only required to file 4 copies of the appendix rather than 10.

Subdivision (c). When a deferred appendix is used, a brief must make reference to the original record rather than to the appendix because it does not exist when the briefs are prepared. Unless a party later files an amended brief with direct references to the pages of the appendix (as provided in subparagraph (c)(2)(B)), the material in the appendix must indicate the pages of the original record from which it was drawn so that a reader of the brief can make meaningful use of the appendix. The instructions in the current rule for cross-referencing the appendix materials to the original record are unclear. The language in paragraph (c)(2) has been amended to try to clarify the procedure.

Subdivision (d). In recognition of the fact that use of a typeset appendix is exceedingly rare in the courts of appeals, the last sentence—permitting a question and answer (as from a transcript) to be in a single paragraph—has been omitted.

Rule 31. Serving and Filing Briefs

(a) TIME TO SERVE AND FILE A BRIEF.

(1) The appellant must serve and file a brief within 40 days after the record is filed. The appellee must serve and file a brief within 30 days after the appellant's brief is served. The appellant may serve and file a reply brief within 14 days after service of the appellee's brief but a reply brief must be filed at least 3 days before argument, unless the court, for good cause, allows a later filing.

(2) A court of appeals that routinely considers cases on the merits promptly after the briefs are filed may shorten the time to serve and file briefs, either by local rule or by order in a particular case.

(b) NUMBER OF COPIES. Twenty-five copies of each brief must be filed with the clerk and 2 copies must be served on each unrepresented party and on counsel for each separately represented party. An unrepresented party proceeding in forma pauperis must file 4 legible copies with the clerk, and one copy must be served on each unrepresented party and on counsel for each separately represented party. The court may by local rule or by order in a particular case require the filing or service of a different number.

(c) CONSEQUENCE OF FAILURE TO FILE. If an appellant fails to file a brief within the time provided by this rule, or within an extended time, an appellee may move to dismiss the appeal. An appellee who fails to file a brief will not be heard at oral argument unless the court grants permission.

(As amended Mar. 30, 1970, eff. July 1, 1970; Mar. 10, 1986, eff. July 1, 1986; Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002.)

NOTES OF ADVISORY COMMITTEE ON RULES—1967

A majority of the circuits now require the brief of the appellant to be filed within 30 days from the date on which the record is filed. But in those circuits an exchange of designations is unnecessary in the preparation of the appendix. The appellant files with his brief an appendix containing the parts of the record which he deems essential. If the appellee considers other parts essential, he includes those parts in his own appendix. Since the proposed rule requires the appellant to file with his brief an appendix containing necessary parts of the record as designated by both parties, the rule allows the appellant 40 days in order to provide time for the exchange of designations respecting the content of the appendix (see Rule 30(b)).

NOTES OF ADVISORY COMMITTEE ON RULES—1970 AMENDMENT

The time prescribed by Rule 31(a) for preparing briefs—40 days to the appellant, 30 days to the appellee—is well within the time that must ordinarily elapse in most circuits before an appeal can be reached for consideration. In those circuits, the time prescribed by the Rule should not be disturbed. But if a court of appeals maintains a current calendar, that is, if an appeal can be heard as soon as the briefs have been filed, or if the practice of the court permits the submission of appeals for preliminary consideration as soon as the briefs have been filed, the court should be free to prescribe shorter periods in the interest of expediting decision.

NOTES OF ADVISORY COMMITTEE ON RULES—1986 AMENDMENT

The amendments to Rules 31(a) and (c) are technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1994 AMENDMENT

Subdivision (b). The amendment allows a court of appeals to require the filing of a greater, as well as a lesser, number of copies of briefs. The amendment also allows the required number to be prescribed by local rule as well as by order in a particular case.

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The language and organization of the rule are amended to make the rule more easily understood. In addition

to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only; a substantive change is made, however, in subdivision (b).

Subdivision (a). Paragraph (a)(2) explicitly authorizes a court of appeals to shorten a briefing schedule if the court routinely considers cases on the merits promptly after the briefs are filed. Extensions of the briefing schedule, by order, are permitted under the general provisions of Rule 26(b).

Subdivision (b). The current rule says that a party who is permitted to file ''typewritten ribbon and carbon copies of the brief'' need only file an original and three copies of the brief. The quoted language, in conjunction with current rule 24(c), means that a party allowed to proceed in forma pauperis need not file 25 copies of the brief. Two changes are made in this subdivision. First, it is anachronistic to refer to a party who is allowed to file a typewritten brief as if that would distinguish the party from all other parties; any party is permitted to file a typewritten brief. The amended rule states directly that it applies to a party permitted to proceed in forma pauperis. Second, the amended rule does not generally permit parties who are represented by counsel to file the lesser number of briefs. Inexpensive methods of copying are generally available. Unless it would impose hardship, in which case a motion to file a lesser number should be filed, a represented party must file the usual number of briefs.

COMMITTEE NOTES ON RULES—2002 AMENDMENT

Subdivision (b). In requiring that two copies of each brief ''must be served on counsel for each separately represented party,'' Rule 31(b) may be read to imply that copies of briefs need not be served on unrepresented parties. The Rule has been amended to clarify that briefs must be served on all parties, including those who are not represented by counsel.

Changes Made After Publication and Comments. No changes were made to the text of the proposed amendment or to the Committee Note.

Rule 32. Form of Briefs, Appendices, and Other Papers

(a) FORM OF A BRIEF.

(1) *Reproduction.*

(A) A brief may be reproduced by any process that yields a clear black image on light paper. The paper must be opaque and unglazed. Only one side of the paper may be used.

(B) Text must be reproduced with a clarity that equals or exceeds the output of a laser printer.

(C) Photographs, illustrations, and tables may be reproduced by any method that results in a good copy of the original; a glossy finish is acceptable if the original is glossy.

(2) *Cover.* Except for filings by unrepresented parties, the cover of the appellant's brief must be blue; the appellee's, red; an intervenor's or amicus curiae's, green; any reply brief, gray; and any supplemental brief, tan. The front cover of a brief must contain:

(A) the number of the case centered at the top;

(B) the name of the court;

(C) the title of the case (see Rule 12(a));

(D) the nature of the proceeding (e.g., Appeal, Petition for Review) and the name of the court, agency, or board below;

(E) the title of the brief, identifying the party or parties for whom the brief is filed; and

(F) the name, office address, and telephone number of counsel representing the party for whom the brief is filed.

(3) *Binding.* The brief must be bound in any manner that is secure, does not obscure the text, and permits the brief to lie reasonably flat when open.

(4) *Paper Size, Line Spacing, and Margins.* The brief must be on 8½ by 11 inch paper. The text must be double-spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. Margins must be at least one inch on all four sides. Page numbers may be placed in the margins, but no text may appear there.

(5) *Typeface.* Either a proportionally spaced or a monospaced face may be used.

(A) A proportionally spaced face must include serifs, but sans-serif type may be used in headings and captions. A proportionally spaced face must be 14-point or larger.

(B) A monospaced face may not contain more than 10½ characters per inch.

(6) *Type Styles.* A brief must be set in a plain, roman style, although italics or boldface may be used for emphasis. Case names must be italicized or underlined.

(7) *Length.*

(A) *Page Limitation.* A principal brief may not exceed 30 pages, or a reply brief 15 pages, unless it complies with Rule 32(a)(7)(B) and (C).

(B) *Type-Volume Limitation.*

(i) A principal brief is acceptable if:

- it contains no more than 14,000 words; or
- it uses a monospaced face and contains no more than 1,300 lines of text.

(ii) A reply brief is acceptable if it contains no more than half of the type volume specified in Rule 32(a)(7)(B)(i).

(iii) Headings, footnotes, and quotations count toward the word and line limitations. The corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, any addendum containing statutes, rules or regulations, and any certificates of counsel do not count toward the limitation.

(C) *Certificate of Compliance.*

(i) A brief submitted under Rules 28.1(e)(2) or 32(a)(7)(B) must include a certificate by the attorney, or an unrepresented party, that the brief complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the brief. The certificate must state either:

- the number of words in the brief; or
- the number of lines of monospaced type in the brief.

(ii) Form 6 in the Appendix of Forms is a suggested form of a certificate of compliance. Use of Form 6 must be regarded as sufficient to meet the requirements of Rules 28.1(e)(3) and 32(a)(7)(C)(i).

(b) FORM OF AN APPENDIX. An appendix must comply with Rule 32(a)(1), (2), (3), and (4), with the following exceptions:

(1) The cover of a separately bound appendix must be white.

(2) An appendix may include a legible photocopy of any document found in the record or of a printed judicial or agency decision.

(3) When necessary to facilitate inclusion of odd-sized documents such as technical drawings, an appendix may be a size other than 8½ by 11 inches, and need not lie reasonably flat when opened.

(c) FORM OF OTHER PAPERS.

(1) *Motion*. The form of a motion is governed by Rule 27(d).

(2) *Other Papers*. Any other paper, including a petition for panel rehearing and a petition for hearing or rehearing en banc, and any response to such a petition, must be reproduced in the manner prescribed by Rule 32(a), with the following exceptions:

(A) A cover is not necessary if the caption and signature page of the paper together contain the information required by Rule 32(a)(2). If a cover is used, it must be white.

(B) Rule 32(a)(7) does not apply.

(d) SIGNATURE. Every brief, motion, or other paper filed with the court must be signed by the party filing the paper or, if the party is represented, by one of the party's attorneys.

(e) LOCAL VARIATION. Every court of appeals must accept documents that comply with the form requirements of this rule. By local rule or order in a particular case a court of appeals may accept documents that do not meet all of the form requirements of this rule.

(As amended Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 25, 2005, eff. Dec. 1, 2005.)

NOTES OF ADVISORY COMMITTEE ON RULES—1967

Only two methods of printing are now generally recognized by the circuits—standard typographic printing and the offset duplicating process (multilith). A third, mimeographing, is permitted in the Fifth Circuit. The District of Columbia, Ninth, and Tenth Circuits permit records to be reproduced by copying processes. The Committee feels that recent and impending advances in the arts of duplicating and copying warrant experimentation with less costly forms of reproduction than those now generally authorized. The proposed rule permits, in effect, the use of any process other than the carbon copy process which produces a clean, readable page. What constitutes such is left in first instance to the parties and ultimately to the court to determine. The final sentence of the first paragraph of subdivision (a) is added to allow the use of multilith, mimeograph, or other forms of copies of the reporter's original transcript whenever such are available.

COMMITTEE NOTES ON RULES—1998 AMENDMENT

In addition to amending Rule 32 to conform to uniform drafting standards, several substantive amendments are made. The Advisory Committee had been working on substantive amendments to Rule 32 for some time prior to completion of this larger project.

Subdivison (a). Form of a Brief.

Paragraph (a)(1). Reproduction.

The rule permits the use of ''light'' paper, not just ''white'' paper. Cream and buff colored paper, including recycled paper, are acceptable. The rule permits printing on only one side of the paper. Although some argue that paper could be saved by allowing double-sided printing, others argue that in order to preserve legibility a heavier weight paper would be needed, resulting in little, if any, paper saving. In addition, the blank sides of a brief are commonly used by judges and their clerks for making notes about the case.

Because photocopying is inexpensive and widely available and because use of carbon paper is now very rare, all references to the use of carbon copies have been deleted.

The rule requires that the text be reproduced with a clarity that equals or exceeds the output of a laser printer. That means that the method used must have a print resolution of 300 dots per inch (dpi) or more. This will ensure the legibility of the brief. A brief produced by a typewriter or a daisy wheel printer, as well as one produced by a laser printer, has a print resolution of 300 dpi or more. But a brief produced by a dot-matrix printer, fax machine, or portable printer that uses heat or dye transfer methods does not. Some ink jet printers are 300 dpi or more, but some are 216 dpi and would not be sufficient.

Photographs, illustrations, and tables may be reproduced by any method that results in a good copy.

Paragraph (a)(2). Cover.

The rule requires that the number of the case be centered at the top of the front cover of a brief. This will aid in identification of the brief. The idea was drawn from a local rule. The rule also requires that the title of the brief identify the party or parties on whose behalf the brief is filed. When there are multiple appellants or appellees, the information is necessary to the court. If, however, the brief is filed on behalf of all appellants or appellees, it may so indicate. Further, it may be possible to identify the class of parties on whose behalf the brief is filed. Otherwise, it may be necessary to name each party. The rule also requires that attorney's telephone numbers appear on the front cover of a brief or appendix.

Paragraph (a)(3). Binding.

The rule requires a brief to be bound in any manner that is secure, does not obscure the text, and that permits the brief to lie reasonably flat when open. Many judges and most court employees do much of their work at computer keyboards and a brief that lies flat when open is significantly more convenient. One circuit already has such a requirement and another states a preference for it. While a spiral binding would comply with this requirement, it is not intended to be the exclusive method of binding. Stapling a brief at the upper left-hand corner also satisfies this requirement as long as it is sufficiently secure.

Paragraph (a)(4). Paper Size, Line Spacing, and Margins.

The provisions for pamphlet-size briefs are deleted because their use is so rare. If a circuit wishes to authorize their use, it has authority to do so under subdivision (d) of this rule.

Paragraph (a)(5). Typeface.

This paragraph and the next one, governing type style, are new. The existing rule simply states that a brief produced by the standard typographic process must be printed in at least 11 point type, or if produced in any other manner, the lines of text must be double spaced. Today few briefs are produced by commercial printers or by typewriters; most are produced on and printed by computer. The availability of computer fonts in a variety of sizes and styles has given rise to local rules limiting type styles. The Advisory Committee believes that some standards are needed both to ensure that all litigants have an equal opportunity to present their material and to ensure that the briefs are easily legible.

With regard to typeface there are two options: proportionally-spaced typeface or monospaced typeface.

A proportionally-spaced typeface gives a different amount of horizontal space to characters depending upon the width of the character. A capital ''M'' is given more horizontal space than a lower case ''i.'' The rule requires that a proportionally-spaced typeface have serifs. Serifs are small horizontal or vertical strokes at the ends of the lines that make up the letters and numbers. Studies have shown that long passages of serif

type are easier to read and comprehend than long passages of sans-serif type. The rule accordingly limits the principal sections of submissions to serif type, although sans-serif type may be used in headings and captions. This is the same approach magazines, newspapers, and commercial printers take. Look at a professionally printed brief; you will find sans-serif type confined to captions, if it is used at all. The next line shows two characters enlarged for detail. The first has serifs, the second does not.

Y Y

So that the type is easily legible, the rule requires a minimum type size of 14 points for proportionally-spaced typeface.

A monospaced typeface is one in which all characters have the same advance width. That means that each character is given the same horizontal space on the line. A wide letter such as a capital ''M'' and a narrow letter such as a lower case ''i'' are given the same space. Most typewriters produce mono-spaced type, and most computers also can do so using fonts with names such as ''Courier.''

This sentence is in a proportionally spaced font; as you can see, the m and i have different widths.

`This sentence is in a monospaced font; as you can see, the m and i have the same width.`

The rule requires use of a monospaced typeface that produces no more than 10½ characters per inch. A standard typewriter with pica type produces a monospaced typeface with 10 characters per inch (cpi). That is the ideal monospaced typeface. The rule permits up to 10½ cpi because some computer software programs contain monospaced fonts that purport to produce 10 cpi but that in fact produce slightly more than 10 cpi. In order to avoid the need to reprint a brief produced in good faith reliance upon such a program, the rule permits a bit of leeway. A monospace typeface with no more than 10 cpi is preferred.

Paragraph (a)(6). Type Styles.

The rule requires use of plain roman, that is not italic or script, type. Italics and boldface may be used for emphasis. Italicizing case names is preferred but underlining may be used.

Paragraph (a)(7). Type-Volume Limitation.

Subparagraph (a)(7)(A) contains a safe-harbor provision. A principal brief that does not exceed 30 pages complies with the type-volume limitation without further question or certification. A reply brief that does not exceed 15 pages is similarly treated. The current limit is 50 pages but that limit was established when most briefs were produced on typewriters. The widespread use of personal computers has made a multitude of printing options available to practitioners. Use of a proportional typeface alone can greatly increase the amount of material per page as compared with use of a monospace typeface. Even though the rule requires use of 14-point proportional type, there is great variation in the x-height of different 14-point typefaces. Selection of a typeface with a small x-height increases the amount of text per page. Computers also make possible fine gradations in spacing between lines and tight tracking between letters and words. All of this, and more, have made the 50-page limit virtually meaningless. Establishing a safe-harbor of 50 pages would permit a person who makes use of the multitude of printing ''tricks'' available with most personal computers to file a brief far longer than the ''old'' 50-page brief. Therefore, as to those briefs not subject to any other volume control than a page limit, a 30-page limit is imposed.

The limits in subparagraph (B) approximate the current 50-page limit and compliance with them is easy even for a person without a personal computer. The aim of these provisions is to create a level playing field. The rule gives every party an equal opportunity to make arguments, without permitting those with the best in-house typesetting an opportunity to expand their submissions.

The length can be determined either by counting words or lines. That is, the length of a brief is determined not by the number of pages but by the number of words or lines in the brief. This gives every party the same opportunity to present an argument without regard to the typeface used and eliminates any incentive to use footnotes or typographical ''tricks'' to squeeze more material onto a page.

The word counting method can be used with any typeface.

A monospaced brief can meet the volume limitation by using the word or a line count. If the line counting method is used, the number of lines may not exceed 1,300—26 lines per page in a 50-page brief. The number of lines is easily counted manually. Line counting is not sufficient if a proportionally spaced typeface is used, because the amount of material per line can vary widely.

A brief using the type-volume limitations in subparagraph (B) must include a certificate by the attorney, or party proceeding pro se, that the brief complies with the limitation. The rule permits the person preparing the certification to rely upon the word or line count of the word-processing system used to prepare the brief.

Currently, Rule 28(g) governs the length of a brief. Rule 28(g) begins with the words ''[e]xcept by permission of the court,'' signaling that a party may file a motion to exceed the limits established in the rule. The absence of similar language in Rule 32 does not mean that the Advisory Committee intends to prohibit motions to deviate from the requirements of the rule. The Advisory Committee does not believe that any such language is needed to authorize such a motion.

Subdivision (b). Form of an Appendix.

The provisions governing the form of a brief generally apply to an appendix. The rule recognizes, however, that an appendix is usually produced by photocopying existing documents. The rule requires that the photocopies be legible.

The rule permits inclusion not only of documents from the record but also copies of a printed judicial or agency decision. If a decision that is part of the record in the case has been published, it is helpful to provide a copy of the published decision in place of a copy of the decision from the record.

Subdivision (c). Form of Other Papers.

The old rule required a petition for rehearing to be produced in the same manner as a brief or appendix. The new rule also requires that a petition for rehearing en banc and a response to either a petition for panel rehearing or a petition for rehearing en banc be prepared in the same manner. But the length limitations of paragraph (a)(7) do not apply to those documents and a cover is not required if all the information needed by the court to properly identify the document and the parties is included in the caption or signature page.

Existing subdivision (b) states that other papers may be produced in like manner, or ''they may be typewritten upon opaque, unglazed paper 8½ by 11 inches in size.'' The quoted language is deleted but that method of preparing documents is not eliminated because (a)(5)(B) permits use of standard pica type. The only change is that the new rule now specifies margins for typewritten documents.

Subdivision (d). Local Variation.

A brief that complies with the national rule should be acceptable in every court. Local rules may move in one direction only; they may authorize noncompliance with certain of the national norms. For example, a court that wishes to do so may authorize printing of briefs on both sides of the paper, or the use of smaller type size or sans-serif proportional type. A local rule may not, however, impose requirements that are not in the national rule.

COMMITTEE NOTES ON RULES—2002 AMENDMENT

Subdivision (a)(2). On occasion, a court may permit or order the parties to file supplemental briefs addressing

an issue that was not addressed—or adequately addressed—in the principal briefs. Rule 32(a)(2) has been amended to require that tan covers be used on such supplemental briefs. The amendment is intended to promote uniformity in federal appellate practice. At present, the local rules of the circuit courts conflict. *See, e.g.*, D.C. Cir. R. 28(g) (requiring yellow covers on supplemental briefs); 11th Cir. R. 32, I.O.P. 1 (requiring white covers on supplemental briefs).

Changes Made After Publication and Comments. No changes were made to the text of the proposed amendment or to the Committee Note.

Subdivision (a)(7)(C). If the principal brief of a party exceeds 30 pages, or if the reply brief of a party exceeds 15 pages, Rule 32(a)(7)(C) provides that the party or the party's attorney must certify that the brief complies with the type-volume limitation of Rule 32(a)(7)(B). Rule 32(a)(7)(C) has been amended to refer to Form 6 (which has been added to the Appendix of Forms) and to provide that a party or attorney who uses Form 6 has complied with Rule 32(a)(7)(C). No court may provide to the contrary, in its local rules or otherwise.

Form 6 requests not only the information mandated by Rule 32(a)(7)(C), but also information that will assist courts in enforcing the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6). Parties and attorneys are not required to use Form 6, but they are encouraged to do so.

Subdivision (c)(2)(A). Under Rule 32(c)(2)(A), a cover is not required on a petition for panel rehearing, petition for hearing or rehearing en banc, answer to a petition for panel rehearing, response to a petition for hearing or rehearing en banc, or any other paper. Rule 32(d) makes it clear that no court can require that a cover be used on any of these papers. However, nothing prohibits a court from providing in its local rules that if a cover on one of these papers is ''voluntarily'' used, it must be a particular color. Several circuits have adopted such local rules. *See, e.g.*, Fed. Cir. R. 35(c) (requiring yellow covers on petitions for hearing or rehearing en banc and brown covers on responses to such petitions); Fed. Cir. R. 40(a) (requiring yellow covers on petitions for panel rehearing and brown covers on answers to such petitions); 7th Cir. R. 28 (requiring blue covers on petitions for rehearing filed by appellants or answers to such petitions, and requiring red covers on petitions for rehearing filed by appellees or answers to such petitions); 9th Cir. R. 40–1 (requiring blue covers on petitions for panel rehearing filed by appellants and red covers on answers to such petitions, and requiring red covers on petitions for panel rehearing filed by appellees and blue covers on answers to such petitions); 11th Cir. R. 35–6 (requiring white covers on petitions for hearing or rehearing en banc).

These conflicting local rules create a hardship for counsel who practice in more than one circuit. For that reason, Rule 32(c)(2)(A) has been amended to provide that if a party chooses to use a cover on a paper that is not required to have one, that cover must be white. The amendment is intended to preempt all local rulemaking on the subject of cover colors and thereby promote uniformity in federal appellate practice.

Changes Made After Publication and Comments. No changes were made to the text of the proposed amendment or to the Committee Note.

Subdivisions (d) and (e). Former subdivision (d) has been redesignated as subdivision (e), and a new subdivision (d) has been added. The new subdivision (d) requires that every brief, motion, or other paper filed with the court be signed by the attorney or unrepresented party who files it, much as Fed. R. Civ. P. 11(a) imposes a signature requirement on papers filed in district court. Only the original copy of every paper must be signed. An appendix filed with the court does not have to be signed at all.

By requiring a signature, subdivision (d) ensures that a readily identifiable attorney or party takes responsibility for every paper. The courts of appeals already have authority to sanction attorneys and parties who file papers that contain misleading or frivolous assertions, *see, e.g.*, 28 U.S.C. §1912, Fed. R. App. P. 38 & 46(b)(1)(B), and thus subdivision (d) has not been amended to incorporate provisions similar to those found in Fed. R. Civ. P. 11(b) and 11(c).

Changes Made After Publication and Comments. No changes were made to the text of the proposed amendment. A line was added to the Committee Note to clarify that only the original copy of a paper needs to be signed.

COMMITTEE NOTES ON RULES—2005 AMENDMENT

Subdivision (a)(7)(C). Rule 32(a)(7)(C) has been amended to add cross-references to new Rule 28.1, which governs briefs filed in cases involving cross-appeals. Rule 28.1(e)(2) prescribes type-volume limitations that apply to such briefs, and Rule 28.1(e)(3) requires parties to certify compliance with those type-volume limitations under Rule 32(a)(7)(C).

Rule 32.1. Citing Judicial Dispositions

(a) CITATION PERMITTED. A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been:

(i) designated as ''unpublished,'' ''not for publication,'' ''non-precedential,'' ''not precedent,'' or the like; and

(ii) issued on or after January 1, 2007.

(b) COPIES REQUIRED. If a party cites a federal judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that opinion, order, judgment, or disposition with the brief or other paper in which it is cited.

(As added Apr. 12, 2006, eff. Dec. 1, 2006.)

COMMITTEE NOTES ON RULES—2006

Rule 32.1 is a new rule addressing the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated by a federal court as ''unpublished,'' ''not for publication,'' ''non-precedential,'' ''not precedent,'' or the like. This Committee Note will refer to these dispositions collectively as''unpublished'' opinions.

Rule 32.1 is extremely limited. It does not require any court to issue an unpublished opinion or forbid any court from doing so. It does not dictate the circumstances under which a court may choose to designate an opinion as ''unpublished'' or specify the procedure that a court must follow in making that determination. It says nothing about what effect a court must give to one of its unpublished opinions or to the unpublished opinions of another court. Rule 32.1 addresses only the *citation* of federal judicial dispositions that have been *designated* as ''unpublished'' or ''non-precedential''—whether or not those dispositions have been published in some way or are precedential in some sense.

Subdivision (a). Every court of appeals has allowed unpublished opinions to be cited in some circumstances, such as to support a contention of issue preclusion or claim preclusion. But the circuits have differed dramatically with respect to the restrictions that they have placed on the citation of unpublished opinions for their persuasive value. Some circuits have freely permitted such citation, others have discouraged it but permitted it in limited circumstances, and still others have forbidden it altogether.

Rule 32.1(a) is intended to replace these inconsistent standards with one uniform rule. Under Rule 32.1(a), a court of appeals may not prohibit a party from citing an unpublished opinion of a federal court for its persuasive value or for any other reason. In addition, under Rule 32.1(a), a court may not place any restriction on the citation of such opinions. For example, a court may

not instruct parties that the citation of unpublished opinions is discouraged, nor may a court forbid parties to cite unpublished opinions when a published opinion addresses the same issue.

Rule 32.1(a) applies only to unpublished opinions issued on or after January 1, 2007. The citation of unpublished opinions issued before January 1, 2007, will continue to be governed by the local rules of the circuits.

Subdivision (b). Under Rule 32.1(b), a party who cites an opinion of a federal court must provide a copy of that opinion to the court of appeals and to the other parties, unless that opinion is available in a publicly accessible electronic database—such as a commercial database maintained by a legal research service or a database maintained by a court. A party who is required under Rule32.1(b) to provide a copy of an opinion must file and serve the copy with the brief or other paper in which the opinion is cited. Rule 32.1(b) applies to all unpublished opinions, regardless of when they were issued.

Changes Made After Publication and Comment. (At its June 15–16, 2005, meeting, the Standing Rules Committee with the advisory committee chair's concurrence agreed to delete sections of the Committee Note, which provided background information on the justification of the proposal.) The changes made by the Advisory Committee after publication are described in my May 14, 2004 report to the Standing Committee. At its April 2005 meeting, the Advisory Committee directed that two additional changes be made.

First, the Committee decided to add ''federal'' before ''judicial opinions'' in subdivision (a) and before ''judicial opinion'' in subdivision (b) to make clear that Rule 32.1 applies only to the unpublished opinions of federal courts. Conforming changes were made to the Committee Note. These changes address the concern of some state court judges—conveyed by Chief Justice Wells at the June 2004 Standing Committee meeting—that Rule 32.1 might have an impact on state law.

Second, the Committee decided to insert into the Committee Note references to the studies conducted by the Federal Judicial Center (''FJC'') and the Administrative Office (''AO''). (The studies are described below. [Omitted]) These references make clear that the arguments of Rule 32.1's opponents were taken seriously and studied carefully, but ultimately rejected because they were unsupported by or, in some instances, actually refuted by the best available empirical evidence.

Rule 33. Appeal Conferences

The court may direct the attorneys—and, when appropriate, the parties—to participate in one or more conferences to address any matter that may aid in disposing of the proceedings, including simplifying the issues and discussing settlement. A judge or other person designated by the court may preside over the conference, which may be conducted in person or by telephone. Before a settlement conference, the attorneys must consult with their clients and obtain as much authority as feasible to settle the case. The court may, as a result of the conference, enter an order controlling the course of the proceedings or implementing any settlement agreement.

(As amended Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 24, 1998, eff. Dec. 1, 1998.)

NOTES OF ADVISORY COMMITTEE ON RULES—1967

The uniform rule for review or enforcement of orders of administrative agencies, boards, commissions or officers (see the general note following Rule 15) authorizes a prehearing conference in agency review proceedings. The same considerations which make a prehearing conference desirable in such proceedings may be present in certain cases on appeal from the district courts. The proposed rule is based upon subdivision 11 of the present uniform rule for review of agency orders.

NOTES OF ADVISORY COMMITTEE ON RULES—1994 AMENDMENT

Rule 33 has been entirely rewritten. The new rule makes several changes.

The caption of the rule has been changed from ''Prehearing Conference'' to ''Appeal Conferences'' to reflect the fact that occasionally a conference is held after oral argument.

The rule permits the court to require the parties to attend the conference in appropriate cases. The Committee does not contemplate that attendance of the parties will become routine, but in certain instances the parties' presence can be useful. The language of the rule is broad enough to allow a court to determine that an executive or employee (other than the general counsel) of a corporation or government agency with authority regarding the matter at issue, constitutes ''the party.''

The rule includes the possibility of settlement among the possible conference topics.

The rule recognizes that conferences are often held by telephone.

The rule allows a judge or other person designated by the court to preside over a conference. A number of local rules permit persons other than judges to preside over conferences. 1st Cir. R. 47.5; 6th Cir. R. 18; 8th Cir. R. 33A; 9th Cir. R. 33–1; and 10th Cir. R. 33.

The rule requires an attorney to consult with his or her client before a settlement conference and obtain as much authority as feasible to settle the case. An attorney can never settle a case without his or her client's consent. Certain entities, especially government entities, have particular difficulty obtaining authority to settle a case. The rule requires counsel to obtain only as much authority ''as feasible.''

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The language of the rule is amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 34. Oral Argument

(a) IN GENERAL.

(1) *Party's Statement.* Any party may file, or a court may require by local rule, a statement explaining why oral argument should, or need not, be permitted.

(2) *Standards.* Oral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary for any of the following reasons:

(A) the appeal is frivolous;

(B) the dispositive issue or issues have been authoritatively decided; or

(C) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

(b) NOTICE OF ARGUMENT; POSTPONEMENT. The clerk must advise all parties whether oral argument will be scheduled, and, if so, the date, time, and place for it, and the time allowed for each side. A motion to postpone the argument or to allow longer argument must be filed reasonably in advance of the hearing date.

(c) ORDER AND CONTENTS OF ARGUMENT. The appellant opens and concludes the argument.

Counsel must not read at length from briefs, records, or authorities.

(d) CROSS-APPEALS AND SEPARATE APPEALS. If there is a cross-appeal, Rule 28.1(b) determines which party is the appellant and which is the appellee for purposes of oral argument. Unless the court directs otherwise, a cross-appeal or separate appeal must be argued when the initial appeal is argued. Separate parties should avoid duplicative argument.

(e) NONAPPEARANCE OF A PARTY. If the appellee fails to appear for argument, the court must hear appellant's argument. If the appellant fails to appear for argument, the court may hear the appellee's argument. If neither party appears, the case will be decided on the briefs, unless the court orders otherwise.

(f) SUBMISSION ON BRIEFS. The parties may agree to submit a case for decision on the briefs, but the court may direct that the case be argued.

(g) USE OF PHYSICAL EXHIBITS AT ARGUMENT; REMOVAL. Counsel intending to use physical exhibits other than documents at the argument must arrange to place them in the courtroom on the day of the argument before the court convenes. After the argument, counsel must remove the exhibits from the courtroom, unless the court directs otherwise. The clerk may destroy or dispose of the exhibits if counsel does not reclaim them within a reasonable time after the clerk gives notice to remove them.

(As amended Apr. 1, 1979, eff. Aug. 1, 1979; Mar. 10, 1986, eff. July 1, 1986; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 25, 2005, eff. Dec. 1, 2005.)

NOTES OF ADVISORY COMMITTEE ON RULES—1967

A majority of circuits now limit oral argument to thirty minutes for each side, with the provision that additional time may be made available upon request. The Committee is of the view that thirty minutes to each side is sufficient in most cases, but that where additional time is necessary it should be freely granted on a proper showing of cause therefor. It further feels that the matter of time should be left ultimately to each court of appeals, subject to the spirit of the rule that a reasonable time should be allowed for argument. The term ''side'' is used to indicate that the time allowed by the rule is afforded to opposing interests rather than to individual parties. Thus if multiple appellants or appellees have a common interest, they constitute only a single side. If counsel for multiple parties who constitute a single side feel that additional time is necessary, they may request it. In other particulars this rule follows the usual practice among the circuits. See 3d Cir. Rule 31; 6th Cir. Rule 20; 10th Cir. Rule 23.

NOTES OF ADVISORY COMMITTEE ON RULES—1979 AMENDMENT

The proposed amendment, patterned after the recommendations in the Report of the Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change, 1975, created by Public Law 489 of the 92nd Cong. 2nd Sess., 86 Stat. 807, sets forth general principles and minimum standards to be observed in formulating any local rule.

NOTES OF ADVISORY COMMITTEE ON RULES—1986 AMENDMENT

The amendments to Rules 34(a) and (e) are technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1991 AMENDMENT

Subdivision (d). The amendment of subdivision (d) conforms this rule with the amendment of Rule 28(h).

NOTES OF ADVISORY COMMITTEE ON RULES—1993 AMENDMENT

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

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The language of the rule is amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only. Substantive changes are made in subdivision (a).

Subdivision (a). Currently subdivision (a) says that oral argument must be permitted unless, applying a local rule, a panel of three judges unanimously agrees that oral argument is not necessary. Rule 34 then outlines the criteria to be used to determine whether oral argument is needed and requires any local rule to ''conform substantially'' to the ''minimum standard[s]'' established in the national rule. The amendments omit the local rule requirement and make the criteria applicable by force of the national rule. The local rule is an unnecessary instrument.

Paragraph (a)(2) states that one reason for deciding that oral argument is unnecessary is that the dispositive issue has been authoritatively decided. The amended language no longer states that the issue must have been ''recently'' decided. The Advisory Committee does not intend any substantive change, but thinks that the use of ''recently'' may be misleading.

Subdivision (d). A cross-reference to Rule 28(h) has been substituted for a reiteration of the provisions of Rule 28(h).

COMMITTEE NOTES ON RULES—2005 AMENDMENT

Subdivision (d). A cross-reference in subdivision (d) has been changed to reflect the fact that, as part of an effort to collect within one rule all provisions regarding briefing in cases involving cross-appeals, former Rule 28(h) has been abrogated and its contents moved to new Rule 28.1(b).

Rule 35. En Banc Determination

(a) WHEN HEARING OR REHEARING EN BANC MAY BE ORDERED. A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:

(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or

(2) the proceeding involves a question of exceptional importance.

(b) PETITION FOR HEARING OR REHEARING EN BANC. A party may petition for a hearing or rehearing en banc.

(1) The petition must begin with a statement that either:

(A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or

(B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue.

(2) Except by the court's permission, a petition for an en banc hearing or rehearing must not exceed 15 pages, excluding material not counted under Rule 32.

(3) For purposes of the page limit in Rule 35(b)(2), if a party files both a petition for panel rehearing and a petition for rehearing en banc, they are considered a single document even if they are filed separately, unless separate filing is required by local rule.

(c) TIME FOR PETITION FOR HEARING OR REHEARING EN BANC. A petition that an appeal be heard initially en banc must be filed by the date when the appellee's brief is due. A petition for a rehearing en banc must be filed within the time prescribed by Rule 40 for filing a petition for rehearing.

(d) NUMBER OF COPIES. The number of copies to be filed must be prescribed by local rule and may be altered by order in a particular case.

(e) RESPONSE. No response may be filed to a petition for an en banc consideration unless the court orders a response.

(f) CALL FOR A VOTE. A vote need not be taken to determine whether the case will be heard or reheard en banc unless a judge calls for a vote.

(As amended Apr. 1, 1979, eff. Aug. 1, 1979; Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 25, 2005, eff. Dec. 1, 2005.)

NOTES OF ADVISORY COMMITTEE ON RULES—1967

Statutory authority for in banc hearings is found in 28 U.S.C. §46(c). The proposed rule is responsive to the Supreme Court's view in *Western Pacific Ry. Corp. v. Western Pacific Ry. Co.*, 345 U.S. 247, 73 S.Ct. 656, 97 L.Ed. 986 (1953), that litigants should be free to suggest that a particular case is appropriate for consideration by all the judges of a court of appeals. The rule is addressed to the procedure whereby a party may suggest the appropriateness of convening the court in banc. It does not affect the power of a court of appeals to initiate in banc hearings *sua sponte*.

The provision that a vote will not be taken as a result of the suggestion of the party unless requested by a judge of the court in regular active service or by a judge who was a member of the panel that rendered a decision sought to be reheard is intended to make it clear that a suggestion of a party as such does not require any action by the court. See *Western Pacific Ry. Corp. v. Western Pacific Ry. Co.*, supra, 345 U.S. at 262, 73 S.Ct. 656. The rule merely authorizes a suggestion, imposes a time limit on suggestions for rehearings in banc, and provides that suggestions will be directed to the judges of the court in regular active service.

In practice, the suggestion of a party that a case be reheard in banc is frequently contained in a petition for rehearing, commonly styled ''petition for rehearing in banc.'' Such a petition is in fact merely a petition for a rehearing, with a suggestion that the case be reheard in banc. Since no response to the suggestion, as distinguished from the petition for rehearing, is required, the panel which heard the case may quite properly dispose of the petition without reference to the suggestion. In such a case the fact that no response has been made to the suggestion does not affect the finality of the judgment or the issuance of the mandate, and the final sentence of the rule expressly so provides.

NOTES OF ADVISORY COMMITTEE ON RULES—1979 AMENDMENT

Under the present rule there is no specific provision for a response to a suggestion that an appeal be heard in banc. This has led to some uncertainty as to whether such a response may be filed. The proposed amendment would resolve this uncertainty.

While the present rule provides a time limit for suggestions for rehearing in banc, it does not deal with the timing of a request that the appeal be heard in banc initially. The proposed amendment fills this gap as well, providing that the suggestion must be made by the date of which the appellee's brief is filed.

Provision is made for circulating the suggestions to members of the panel despite the fact that senior judges on the panel would not be entitled to vote on whether a suggestion will be granted.

NOTES OF ADVISORY COMMITTEE ON RULES—1994 AMENDMENT

Subdivision (d). Subdivision (d) is added; it authorizes the courts of appeals to prescribe the number of copies of suggestions for hearing or rehearing in banc that must be filed. Because the number of copies needed depends directly upon the number of judges in the circuit, local rules are the best vehicle for setting the required number of copies.

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Several substantive changes are made in this rule, however.

One of the purposes of the substantive amendments is to treat a request for a rehearing en banc like a petition for panel rehearing so that a request for a rehearing en banc will suspend the finality of the court of appeals' judgment and delay the running of the period for filing a petition for writ of certiorari. Companion amendments are made to Rule 41.

Subdivision (a). The title of this subdivision is changed from ''when hearing or rehearing in banc *will* be ordered'' to ''When Hearing or Rehearing En Banc *May* Be Ordered.'' The change emphasizes the discretion a court has with regard to granting en banc review.

Subdivision (b). The term ''petition'' for rehearing en banc is substituted for the term ''suggestion'' for rehearing en banc. The terminology change reflects the Committee's intent to treat similarly a petition for panel rehearing and a request for a rehearing en banc. The terminology change also delays the running of the time for filing a petition for a writ of certiorari because Sup. Ct. R. 13.3 says:

> if a petition for rehearing is timely filed in the lower court by any party, the time to file the petition for a writ of certiorari for all parties . . . runs from the date of the denial of the petition for rehearing or, if the petition for rehearing is granted, the subsequent entry of judgment.

The amendments also require each petition for en banc consideration to begin with a statement concisely demonstrating that the case meets the usual criteria

for en banc consideration. It is the Committee's hope that requiring such a statement will cause the drafter of a petition to focus on the narrow grounds that support en banc consideration and to realize that a petition should not be filed unless the case meets those rigid standards.

Intercircuit conflict is cited as one reason for asserting that a proceeding involves a question of ''exceptional importance.'' Intercircuit conflicts create problems. When the circuits construe the same federal law differently, parties' rights and duties depend upon where a case is litigated. Given the increase in the number of cases decided by the federal courts and the limitation on the number of cases the Supreme Court can hear, conflicts between the circuits may remain unresolved by the Supreme Court for an extended period of time. The existence of an intercircuit conflict often generates additional litigation in the other circuits as well as in the circuits that are already in conflict. Although an en banc proceeding will not necessarily prevent intercircuit conflicts, an en banc proceeding provides a safeguard against unnecessary intercircuit conflicts.

Some circuits have had rules or internal operating procedures that recognize a conflict with another circuit as a legitimate basis for granting a rehearing en banc. An intercircuit conflict may present a question of ''exceptional importance'' because of the costs that intercircuit conflicts impose on the system as a whole, in addition to the significance of the issues involved. It is not, however, the Committee's intent to make the granting of a hearing or rehearing en banc mandatory whenever there is an intercircuit conflict.

The amendment states that ''a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of every other United States Court of Appeals that has addressed the issue.'' [The Supreme Court revised the proposed amendment to Rule 35(b)(1)(B) by deleting ''every'' before ''other United States Court of Appeals''.] That language contemplates two situations in which a rehearing en banc may be appropriate. The first is when a panel decision creates a conflict. A panel decision creates a conflict when it conflicts with the decisions of all other circuits that have considered the issue. If a panel decision simply joins one side of an already existing conflict, a rehearing en banc may not be as important because it cannot avoid the conflict. The second situation that may be a strong candidate for a rehearing en banc is one in which the circuit persists in a conflict created by a pre-existing decision of the same circuit and no other circuits have joined on that side of the conflict. The amendment states that the conflict must be with an ''authoritative'' decision of another circuit. ''Authoritative'' is used rather than ''published'' because in some circuits unpublished opinions may be treated as authoritative.

Counsel are reminded that their duty is fully discharged without filing a petition for rehearing en banc unless the case meets the rigid standards of subdivision (a) of this rule and even then the granting of a petition is entirely within the court's discretion.

Paragraph (2) of this subdivision establishes a maximum length for a petition. Fifteen pages is the length currently used in several circuits. Each request for en banc consideration must be studied by every active judge of the court and is a serious call on limited judicial resources. The extraordinary nature of the issue or the threat to uniformity of the court's decision can be established in most cases in less than fifteen pages. A court may shorten the maximum length on a case by case basis but the rule does not permit a circuit to shorten the length by local rule. The Committee has retained page limits rather than using word or line counts similar to those in amended Rule 32 because there has not been a serious enough problem to justify importing the word and line-count and typeface requirements that are applicable to briefs into other contexts.

Paragraph (3), although similar to (2), is separate because it deals with those instances in which a party files both a petition for rehearing en banc under this rule and a petition for panel rehearing under Rule 40.

To improve the clarity of the rule, the material dealing with filing a response to a petition and with voting on a petition have been moved to new subdivisions (e) and (f).

Subdivision (c). Two changes are made in this subdivision. First, the sentence stating that a request for a rehearing en banc does not affect the finality of the judgment or stay the issuance of the mandate is deleted. Second, the language permitting a party to include a request for rehearing en banc in a petition for panel rehearing is deleted. The Committee believes that those circuits that want to require two separate documents should have the option to do so.

Subdivision (e). This is a new subdivision. The substance of the subdivision, however, was drawn from former subdivision (b). The only changes are stylistic; no substantive changes are intended.

Subdivision (f). This is a new subdivision. The substance of the subdivision, however, was drawn from former subdivision (b).

Because of the discretionary nature of the en banc procedure, the filing of a suggestion for rehearing en banc has not required a vote; a vote is taken only when requested by a judge. It is not the Committee's intent to change the discretionary nature of the procedure or to require a vote on a petition for rehearing en banc. The rule continues, therefore, to provide that a court is not obligated to vote on such petitions. It is necessary, however, that each court develop a procedure for disposing of such petitions because they will suspend the finality of the court's judgment and toll the time for filing a petition for certiorari.

Former subdivision (b) contained language directing the clerk to distribute a ''suggestion'' to certain judges and indicating which judges may call for a vote. New subdivision (f) does not address those issues because they deal with internal court procedures.

COMMITTEE NOTES ON RULES—2005 AMENDMENT

Subdivision (a). Two national standards—28 U.S.C. § 46(c) and Rule 35(a)—provide that a hearing or rehearing en banc may be ordered by ''a majority of the circuit judges who are in regular active service.'' Although these standards apply to all of the courts of appeals, the circuits are deeply divided over the interpretation of this language when one or more active judges are disqualified.

The Supreme Court has never addressed this issue. In *Shenker v. Baltimore & Ohio R.R. Co.*, 374 U.S. 1 (1963), the Court rejected a petitioner's claim that his rights under § 46(c) had been violated when the Third Circuit refused to rehear his case en banc. The Third Circuit had 8 active judges at the time; 4 voted in favor of rehearing the case, 2 against, and 2 abstained. No judge was disqualified. The Supreme Court ruled against the petitioner, holding, in essence, that § 46(c) did not provide a cause of action, but instead simply gave litigants ''the right to know the administrative machinery that will be followed and the right to suggest that the *en banc* procedure be set in motion in his case.'' *Id.* at 5. *Shenker* did stress that a court of appeals has broad discretion in establishing internal procedures to handle requests for rehearings—or, as *Shenker* put it, '''to devise its own administrative machinery to provide the *means* whereby a majority may order such a hearing.''' *Id.* (quoting *Western Pac. R.R. Corp. v. Western Pac. R.R. Co.*, 345 U.S. 247, 250 (1953) (emphasis added)). But *Shenker* did not address what is meant by ''a majority'' in § 46(c) (or Rule 35(a), which did not yet exist)—and *Shenker* certainly did not suggest that the phrase should have different meanings in different circuits.

In interpreting that phrase, 7 of the courts of appeals follow the ''absolute majority'' approach. *See* Marie Leary, Defining the ''Majority'' Vote Requirement in Federal Rule of Appellate Procedure 35(a) for Rehearings En Banc in the United States Courts of Appeals 8

tbl.1 (Federal Judicial Center 2002). Under this approach, disqualified judges are counted in the base in calculating whether a majority of judges have voted to hear a case en banc. Thus, in a circuit with 12 active judges, 7 must vote to hear a case en banc. If 5 of the 12 active judges are disqualified, all 7 non-disqualified judges must vote to hear the case en banc. The votes of 6 of the 7 non-disqualified judges are not enough, as 6 is not a majority of 12.

Six of the courts of appeals follow the ''case majority'' approach. *Id.* Under this approach, disqualified judges are not counted in the base in calculating whether a majority of judges have voted to hear a case en banc. Thus, in a case in which 5 of a circuit's 12 active judges are disqualified, only 4 judges (a majority of the 7 non-disqualified judges) must vote to hear a case en banc. (The First and Third Circuits explicitly qualify the case majority approach by providing that a case cannot be heard en banc unless a majority of all active judges—disqualified and non-disqualified—are eligible to participate.)

Rule 35(a) has been amended to adopt the case majority approach as a uniform national interpretation of § 46(c). The federal rules of practice and procedure exist to ''maintain consistency,'' which Congress has equated with ''promot[ing] the interest of justice.'' 28 U.S.C. § 2073(b). The courts of appeals should not follow two inconsistent approaches in deciding whether sufficient votes exist to hear a case en banc, especially when there is a governing statute and governing rule that apply to all circuits and that use identical terms, and especially when there is nothing about the local conditions of each circuit that justifies conflicting approaches.

The case majority approach represents the better interpretation of the phrase ''the circuit judges . . . in regular active service'' in the first sentence of § 46(c). The second sentence of § 46(c)—which defines which judges are eligible to participate in a case being heard or reheard en banc—uses the similar expression ''all circuit judges in regular active service.'' It is clear that ''all circuit judges in regular active service'' in the second sentence does not include disqualified judges, as disqualified judges clearly cannot participate in a case being heard or reheard en banc. Therefore, assuming that two nearly identical phrases appearing in adjacent sentences in a statute should be interpreted in the same way, the best reading of ''the circuit judges . . . in regular active service'' in the first sentence of § 46(c) is that it, too, does not include disqualified judges.

This interpretation of § 46(c) is bolstered by the fact that the case majority approach has at least two major advantages over the absolute majority approach:

First, under the absolute majority approach, a disqualified judge is, as a practical matter, counted as voting against hearing a case en banc. This defeats the purpose of recusal. To the extent possible, the disqualification of a judge should not result in the equivalent of a vote for or against hearing a case en banc.

Second, the absolute majority approach can leave the en banc court helpless to overturn a panel decision with which almost all of the circuit's active judges disagree. For example, in a case in which 5 of a circuit's 12 active judges are disqualified, the case cannot be heard en banc even if 6 of the 7 non-disqualified judges strongly disagree with the panel opinion. This permits one active judge—perhaps sitting on a panel with a visiting judge—effectively to control circuit precedent, even over the objection of all of his or her colleagues. *See Gulf Power Co. v. FCC*, 226 F.3d 1220, 1222–23 (11th Cir. 2000) (Carnes, J., concerning the denial of reh'g en banc), *rev'd sub nom. National Cable & Telecomm. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327 (2002). Even though the en banc court may, in a future case, be able to correct an erroneous legal interpretation, the en banc court will never be able to correct the injustice inflicted by the panel on the parties to the case. Morever [sic], it may take many years before sufficient non-disqualified judges can be mustered to overturn the panel's erroneous legal interpretation. In the meantime, the lower courts of the circuit must apply—and the citizens of the circuit must conform their behavior to—an interpretation of the law that almost all of the circuit's active judges believe is incorrect.

The amendment to Rule 35(a) is not meant to alter or affect the quorum requirement of 28 U.S.C. § 46(d). In particular, the amendment is not intended to foreclose the possibility that § 46(d) might be read to require that more than half of all circuit judges in regular active service be eligible to participate in order for the court to hear or rehear a case en banc.

Changes Made After Publication and Comments. No changes were made to the text of the proposed amendment. The Committee Note was modified in three respects. First, the Note was changed to put more emphasis on the fact that the case majority rule is the best interpretation of § 46(c). Second, the Note now clarifies that nothing in the proposed amendment is intended to foreclose courts from interpreting 28 U.S.C. § 46(d) to provide that a case cannot be heard or reheard en banc unless a majority of all judges in regular active service—disqualified or not—are eligible to participate. Finally, a couple of arguments made by supporters of the amendment to Rule 35(a) were incorporated into the Note.

Rule 36. Entry of Judgment; Notice

(a) ENTRY. A judgment is entered when it is noted on the docket. The clerk must prepare, sign, and enter the judgment:

(1) after receiving the court's opinion—but if settlement of the judgment's form is required, after final settlement; or

(2) if a judgment is rendered without an opinion, as the court instructs.

(b) NOTICE. On the date when judgment is entered, the clerk must serve on all parties a copy of the opinion—or the judgment, if no opinion was written—and a notice of the date when the judgment was entered.

(As amended Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002.)

NOTES OF ADVISORY COMMITTEE ON RULES—1967

This is the typical rule. See 1st Cir. Rule 29; 3rd Cir. Rule 32; 6th Cir. Rule 21. At present, uncertainty exists as to the date of entry of judgment when the opinion directs subsequent settlement of the precise terms of the judgment, a common practice in cases involving enforcement of agency orders. See Stern and Gressman, Supreme Court Practice, p. 203 (3d Ed., 1962). The principle of finality suggests that in such cases entry of judgment should be delayed until approval of the judgment in final form.

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

COMMITTEE NOTES ON RULES—2002 AMENDMENT

Subdivision (b). Subdivision (b) has been amended so that the clerk may use electronic means to serve a copy of the opinion or judgment or to serve notice of the date when judgment was entered upon parties who have consented to such service.

Changes Made After Publication and Comments. No changes were made to the text of the proposed amendment or to the Committee Note.

Rule 37. Interest on Judgment

(a) WHEN THE COURT AFFIRMS. Unless the law provides otherwise, if a money judgment in a

civil case is affirmed, whatever interest is allowed by law is payable from the date when the district court's judgment was entered.

(b) WHEN THE COURT REVERSES. If the court modifies or reverses a judgment with a direction that a money judgment be entered in the district court, the mandate must contain instructions about the allowance of interest.

(As amended Apr. 24, 1998, eff. Dec. 1, 1998.)

NOTES OF ADVISORY COMMITTEE ON RULES—1967

The first sentence makes it clear that if a money judgment is affirmed in the court of appeals, the interest which attaches to money judgments by force of law (see 28 U.S.C. §1961 and §2411) upon their initial entry is payable as if no appeal had been taken, whether or not the mandate makes mention of interest. There has been some confusion on this point. See *Blair v. Durham*, 139 F.2d 260 (6th Cir., 1943) and cases cited therein.

In reversing or modifying the judgment of the district court, the court of appeals may direct the entry of a money judgment, as, for example, when the court of appeals reverses a judgment notwithstanding the verdict and directs entry of judgment on the verdict. In such a case the question may arise as to whether interest is to run from the date of entry of the judgment directed by the court of appeals or from the date on which the judgment would have been entered in the district court except for the erroneous ruling corrected on appeal. In *Briggs v. Pennsylvania R. Co.*, 334 U.S. 304, 68 S.Ct. 1039, 92 L.Ed. 1403 (1948), the Court held that where the mandate of the court of appeals directed entry of judgment upon a verdict but made no mention of interest from the date of the verdict to the date of the entry of the judgment directed by the mandate, the district court was powerless to add such interest. The second sentence of the proposed rule is a reminder to the court, the clerk and counsel of the *Briggs* rule. Since the rule directs that the matter of interest be disposed of by the mandate, in cases where interest is simply overlooked, a party who conceives himself entitled to interest from a date other than the date of entry of judgment in accordance with the mandate should be entitled to seek recall of the mandate for determination of the question.

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 38. Frivolous Appeal—Damages and Costs

If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

(As amended Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 24, 1998, eff. Dec. 1, 1998.)

NOTES OF ADVISORY COMMITTEE ON RULES—1967

Compare 28 U.S.C. §1912. While both the statute and the usual rule on the subject by courts of appeals (Fourth Circuit Rule 20 is a typical rule) speak of "damages for delay," the courts of appeals quite properly allow damages, attorney's fees and other expenses incurred by an appellee if the appeal is frivolous without requiring a showing that the appeal resulted in delay. See *Dunscombe v. Sayle*, 340 F.2d 311 (5th Cir., 1965), *cert. den.*, 382 U.S. 814, 86 S.Ct. 32, 15 L.Ed.2d 62 (1965); *Lowe v. Willacy*, 239 F.2d 179 (9th Cir., 1956); *Griffith Wellpoint Corp. v. Munro-Langstroth, Inc.*, 269 F.2d 64 (1st Cir., 1959); *Ginsburg v. Stern*, 295 F.2d 698 (3d Cir., 1961). The subjects of interest and damages are separately regulated, contrary to the present practice of combining the two (see Fourth Circuit Rule 20) to make it clear that the awards are distinct and independent. Interest is provided for by law; damages are awarded by the court in its discretion in the case of a frivolous appeal as a matter of justice to the appellee and as a penalty against the appellant.

NOTES OF ADVISORY COMMITTEE ON RULES—1994 AMENDMENT

The amendment requires that before a court of appeals may impose sanctions, the person to be sanctioned must have notice and an opportunity to respond. The amendment reflects the basic principle enunciated in the Supreme Court's opinion in *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980), that notice and opportunity to respond must precede the imposition of sanctions. A separately filed motion requesting sanctions constitutes notice. A statement inserted in a party's brief that the party moves for sanctions is not sufficient notice. Requests in briefs for sanctions have become so commonplace that it is unrealistic to expect careful responses to such requests without any indication that the court is actually contemplating such measures. Only a motion, the purpose of which is to request sanctions, is sufficient. If there is no such motion filed, notice must come from the court. The form of notice from the court and of the opportunity for comment purposely are left to the court's discretion.

COMMITTEE NOTES ON RULES—1998 AMENDMENT

Only the caption of this rule has been amended. The changes are intended to be stylistic only.

Rule 39. Costs

(a) AGAINST WHOM ASSESSED. The following rules apply unless the law provides or the court orders otherwise:

(1) if an appeal is dismissed, costs are taxed against the appellant, unless the parties agree otherwise;

(2) if a judgment is affirmed, costs are taxed against the appellant;

(3) if a judgment is reversed, costs are taxed against the appellee;

(4) if a judgment is affirmed in part, reversed in part, modified, or vacated, costs are taxed only as the court orders.

(b) COSTS FOR AND AGAINST THE UNITED STATES. Costs for or against the United States, its agency, or officer will be assessed under Rule 39(a) only if authorized by law.

(c) COSTS OF COPIES. Each court of appeals must, by local rule, fix the maximum rate for taxing the cost of producing necessary copies of a brief or appendix, or copies of records authorized by Rule 30(f). The rate must not exceed that generally charged for such work in the area where the clerk's office is located and should encourage economical methods of copying.

(d) BILL OF COSTS: OBJECTIONS; INSERTION IN MANDATE.

(1) A party who wants costs taxed must—within 14 days after entry of judgment—file with the circuit clerk, with proof of service, an itemized and verified bill of costs.

(2) Objections must be filed within 10 days after service of the bill of costs, unless the court extends the time.

(3) The clerk must prepare and certify an itemized statement of costs for insertion in the mandate, but issuance of the mandate

must not be delayed for taxing costs. If the mandate issues before costs are finally determined, the district clerk must—upon the circuit clerk's request—add the statement of costs, or any amendment of it, to the mandate.

(e) COSTS ON APPEAL TAXABLE IN THE DISTRICT COURT. The following costs on appeal are taxable in the district court for the benefit of the party entitled to costs under this rule:

(1) the preparation and transmission of the record;

(2) the reporter's transcript, if needed to determine the appeal;

(3) premiums paid for a supersedeas bond or other bond to preserve rights pending appeal; and

(4) the fee for filing the notice of appeal.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Mar. 10, 1986, eff. July 1, 1986; Apr. 24, 1998, eff. Dec. 1, 1998.)

NOTES ON ADVISORY COMMITTEE ON RULES—1967

Subdivision (a). Statutory authorization for taxation of costs is found in 28 U.S.C. §1920. The provisions of this subdivision follow the usual practice in the circuits. A few statutes contain specific provisions in derogation of these general provisions. (See 28 U.S.C. §1928, which forbids the award of costs to a successful plaintiff in a patent infringement action under the circumstances described by the statute). These statutes are controlling in cases to which they apply.

Subdivision (b). The rules of the courts of appeals at present commonly deny costs to the United States except as allowance may be directed by statute. Those rules were promulgated at a time when the United States was generally invulnerable to an award of costs against it, and they appear to be based on the view that if the United States is not subject to costs if it loses, it ought not be entitled to recover costs if it wins.

The number of cases affected by such rules has been greatly reduced by the Act of July 18, 1966, 80 Stat. 308 (1 U.S. Code Cong. & Ad. News, p. 349 (1966), 89th Cong., 2d Sess., which amended 28 U.S.C. §2412, the former general bar to the award of costs against the United States. Section 2412 as amended generally places the United States on the same footing as private parties with respect to the award of costs in civil cases. But the United States continues to enjoy immunity from costs in certain cases. By its terms amended section 2412 authorizes an award of costs against the United States only in civil actions, and it excepts from its general authorization of an award of costs against the United States cases which are ''otherwise specifically provided (for) by statute.'' Furthermore, the Act of July 18, 1966, *supra*, provides that the amendments of section 2412 which it effects shall apply only to actions filed subsequent to the date of its enactment. The second clause continues in effect, for these and all other cases in which the United States enjoys immunity from costs, the presently prevailing rule that the United States may recover costs as the prevailing party only if it would have suffered them as the losing party.

Subdivision (c). While only five circuits (D.C. Cir. Rule 20(d); 1st Cir. Rule 31(4); 3d Cir. Rule 35(4); 4th Cir. Rule 21(4); 9th Cir. Rule 25, as amended June 2, 1967) presently tax the cost of printing briefs, the proposed rule makes the cost taxable in keeping with the principle of this rule that all cost items expended in the prosecution of a proceeding should be borne by the unsuccessful party.

Subdivision (e). The costs described in this subdivision are costs of the appeal and, as such, are within the undertaking of the appeal bond. They are made taxable in the district court for general convenience. Taxation of the cost of the reporter's transcript is specifically authorized by 28 U.S.C. §1920, but in the absence of a rule some district courts have held themselves without authority to tax the cost (*Perlman v. Feldmann*, 116 F.Supp. 102 (D.Conn., 1953); *Firtag v. Gendleman*, 152 F.Supp. 226 (D.D.C., 1957); *Todd Atlantic Shipyards Corps. v. The Southport*, 100 F.Supp. 763 (E.D.S.C., 1951). Provision for taxation of the cost of premiums paid for supersedeas bonds is common in the local rules of district courts and the practice is established in the Second, Seventh, and Ninth Circuits. *Berner v. British Commonwealth Pacific Air Lines, Ltd.*, 362 F.2d 799 (2d Cir. 1966); *Land Oberoesterreich v. Gude*, 93 F.2d 292 (2d Cir., 1937); *In re Northern Ind. Oil Co.*, 192 F.2d 139 (7th Cir., 1951); *Lunn v. F. W. Woolworth*, 210 F.2d 159 (9th Cir., 1954).

NOTES OF ADVISORY COMMITTEE ON RULES—1979 AMENDMENT

Subdivision (c). The proposed amendment would permit variations among the circuits in regulating the maximum rates taxable as costs for printing or otherwise reproducing briefs, appendices, and copies of records authorized by Rule 30(f). The present rule has had a different effect in different circuits depending upon the size of the circuit, the location of the clerk's office, and the location of other cities. As a consequence there was a growing sense that strict adherence to the rule produces some unfairness in some of the circuits and the matter should be made subject to local rule.

Subdivision (d). The present rule makes no provision for objections to a bill of costs. The proposed amendment would allow 10 days for such objections. Cf. Rule 54(d) of the F.R.C.P. It provides further that the mandate shall not be delayed for taxation of costs.

NOTES OF ADVISORY COMMITTEE ON RULES—1986 AMENDMENT

The amendment to subdivision (c) is intended to increase the degree of control exercised by the courts of appeals over rates for printing and copying recoverable as costs. It further requires the courts of appeals to encourage cost-consciousness by requiring that, in fixing the rate, the court consider the most economical methods of printing and copying.

The amendment to subdivision (d) is technical. No substantive change is intended.

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only. All references to the cost of ''printing'' have been deleted from subdivision (c) because commercial printing is so rarely used for preparation of documents filed with a court of appeals.

Rule 40. Petition for Panel Rehearing

(a) TIME TO FILE; CONTENTS; ANSWER; ACTION BY THE COURT IF GRANTED.

(1) *Time.* Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of judgment. But in a civil case, if the United States or its officer or agency is a party, the time within which any party may seek rehearing is 45 days after entry of judgment, unless an order shortens or extends the time.

(2) *Contents.* The petition must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition. Oral argument is not permitted.

(3) *Answer.* Unless the court requests, no answer to a petition for panel rehearing is per-

mitted. But ordinarily rehearing will not be granted in the absence of such a request.

(4) *Action by the Court*. If a petition for panel rehearing is granted, the court may do any of the following:

(A) make a final disposition of the case without reargument;

(B) restore the case to the calendar for reargument or resubmission; or

(C) issue any other appropriate order.

(b) FORM OF PETITION; LENGTH. The petition must comply in form with Rule 32. Copies must be served and filed as Rule 31 prescribes. Unless the court permits or a local rule provides otherwise, a petition for panel rehearing must not exceed 15 pages.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 24, 1998, eff. Dec. 1, 1998.)

NOTES OF ADVISORY COMMITTEE ON RULES—1967

This is the usual rule among the circuits, except that the express prohibition against filing a reply to the petition is found only in the rules of the Fourth, Sixth and Eighth Circuits (it is also contained in Supreme Court Rule 58(3)). It is included to save time and expense to the party victorious on appeal. In the very rare instances in which a reply is useful, the court will ask for it.

NOTES OF ADVISORY COMMITTEE ON RULES—1979 AMENDMENT

Subdivision (a). The Standing Committee added to the first sentence of Rule 40(a) the words ''or by local rule,'' to conform to current practice in the circuits. The Standing Committee believes the change noncontroversial.

Subdivision (b). The proposed amendment would eliminate the distinction drawn in the present rule between printed briefs and those duplicated from typewritten pages in fixing their maximum length. See Note to Rule 28. Since petitions for rehearing must be prepared in a short time, making typographic printing less likely, the maximum number of pages is fixed at 15, the figure used in the present rule for petitions duplicated by means other than typographic printing.

NOTES OF ADVISORY COMMITTEE ON RULES—1994 AMENDMENT

Subdivision (a). The amendment lengthens the time for filing a petition for rehearing from 14 to 45 days in civil cases involving the United States or its agencies or officers. It has no effect upon the time for filing in criminal cases. The amendment makes nation-wide the current practice in the District of Columbia and the Tenth Circuits, *see* D.C. Cir. R. 15(a), 10th Cir. R. 40.3. This amendment, analogous to the provision in Rule 4(a) extending the time for filing a notice of appeal in cases involving the United States, recognizes that the Solicitor General needs time to conduct a thorough review of the merits of a case before requesting a rehearing. In a case in which a court of appeals believes it necessary to restrict the time for filing a rehearing petition, the amendment provides that the court may do so by order. Although the first sentence of Rule 40 permits a court of appeals to shorten or lengthen the usual 14 day filing period by order or by local rule, the sentence governing appeals in civil cases involving the United States purposely limits a court's power to alter the 45 day period to orders in specific cases. If a court of appeals could adopt a local rule shortening the time for filing a petition for rehearing in all cases involving the United States, the purpose of the amendment would be defeated.

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 41. Mandate: Contents; Issuance and Effective Date; Stay

(a) CONTENTS. Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs.

(b) WHEN ISSUED. The court's mandate must issue 7 calendar days after the time to file a petition for rehearing expires, or 7 calendar days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time.

(c) EFFECTIVE DATE. The mandate is effective when issued.

(d) STAYING THE MANDATE.

(1) *On Petition for Rehearing or Motion*. The timely filing of a petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, stays the mandate until disposition of the petition or motion, unless the court orders otherwise.

(2) *Pending Petition for Certiorari*.

(A) A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and must show that the certiorari petition would present a substantial question and that there is good cause for a stay.

(B) The stay must not exceed 90 days, unless the period is extended for good cause or unless the party who obtained the stay files a petition for the writ and so notifies the circuit clerk in writing within the period of the stay. In that case, the stay continues until the Supreme Court's final disposition.

(C) The court may require a bond or other security as a condition to granting or continuing a stay of the mandate.

(D) The court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed.

(As amended Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002.)

NOTES OF ADVISORY COMMITTEE ON RULES—1967

The proposed rule follows the rule or practice in a majority of circuits by which copies of the opinion and the judgment serve in lieu of a formal mandate in the ordinary case. Compare Supreme Court Rule 59. Although 28 U.S.C. §2101(c) permits a writ of certiorari to be filed within 90 days after entry of judgment, seven of the eight circuits which now regulate the matter of stays pending application for certiorari limit the initial stay of the mandate to the 30-day period provided in the proposed rule. Compare D.C. Cir. Rule 27(e).

NOTES OF ADVISORY COMMITTEE ON RULES—1994 AMENDMENT

Subdivision (a). The amendment conforms Rule 41(a) to the amendment made to Rule 40(a). The amendment keys the time for issuance of the mandate to the expi-

ration of the time for filing a petition for rehearing, unless such a petition is filed in which case the mandate issues 7 days after the entry of the order denying the petition. Because the amendment to Rule 40(a) lengthens the time for filing a petition for rehearing in civil cases involving the United States from 14 to 45 days, the rule requiring the mandate to issue 21 days after the entry of judgment would cause the mandate to issue while the government is still considering requesting a rehearing. Therefore, the amendment generally requires the mandate to issue 7 days after the expiration of the time for filing a petition for rehearing.

Subdivision (b). The amendment requires a party who files a motion requesting a stay of mandate to file, at the same time, proof of service on all other parties. The old rule required the party to give notice to the other parties; the amendment merely requires the party to provide the court with evidence of having done so.

The amendment also states that the motion must show that a petition for certiorari would present a substantial question and that there is good cause for a stay. The amendment is intended to alert the parties to the fact that a stay of mandate is not granted automatically and to the type of showing that needs to be made. The Supreme Court has established conditions that must be met before it will stay a mandate. *See* Robert L. Stern et al., *Supreme Court Practice* §17.19 (6th ed. 1986).

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Several substantive changes are made in this rule, however.

Subdivision (b). The existing rule provides that the mandate issues 7 days after the time to file a petition for panel rehearing expires unless such a petition is timely filed. If the petition is denied, the mandate issues 7 days after entry of the order denying the petition. Those provisions are retained but the amendments further provide that if a timely petition for rehearing en banc or motion for stay of mandate is filed, the mandate does not issue until 7 days after entry of an order denying the last of all such requests. If a petition for rehearing or a petition for rehearing en banc is granted, the court enters a new judgment after the rehearing and the mandate issues within the normal time after entry of that judgment.

Subdivision (c). Subdivision (c) is new. It provides that the mandate is effective when the court issues it. A court of appeals' judgment or order is not final until issuance of the mandate; at that time the parties' obligations become fixed. This amendment is intended to make it clear that the mandate is effective upon issuance and that its effectiveness is not delayed until receipt of the mandate by the trial court or agency, or until the trial court or agency acts upon it. This amendment is consistent with the current understanding. Unless the court orders that the mandate issue earlier than provided in the rule, the parties can easily calculate the anticipated date of issuance and verify issuance with the clerk's office. In those instances in which the court orders earlier issuance of the mandate, the entry of the order on the docket alerts the parties to that fact.

Subdivision (d). Amended paragraph (1) provides that the filing of a petition for panel rehearing, a petition for rehearing en banc or a motion for a stay of mandate pending petition to the Supreme Court for a writ of certiorari stays the issuance of the mandate until the court disposes of the petition or motion. The provision that a petition for rehearing en banc stays the mandate is a companion to the amendment of Rule 35 that deletes the language stating that a request for a rehearing en banc does not affect the finality of the judgment or stay the issuance of the mandate. The Committee's objective is to treat a request for a rehearing en banc like a petition for panel rehearing so that a request for a rehearing en banc will suspend the finality of the court of appeals' judgment and delay the running of the period for filing a petition for writ of certiorari. Because the filing of a petition for rehearing en banc will stay the mandate, a court of appeals will need to take final action on the petition but the procedure for doing so is left to local practice.

Paragraph (1) also provides that the filing of a motion for a stay of mandate pending petition to the Supreme Court for a writ of certiorari stays the mandate until the court disposes of the motion. If the court denies the motion, the court must issue the mandate 7 days after entering the order denying the motion. If the court grants the motion, the mandate is stayed according to the terms of the order granting the stay. Delaying issuance of the mandate eliminates the need to recall the mandate if the motion for a stay is granted. If, however, the court believes that it would be inappropriate to delay issuance of the mandate until disposition of the motion for a stay, the court may order that the mandate issue immediately.

Paragraph (2). The amendment changes the maximum period for a stay of mandate, absent the court of appeals granting an extension for cause, to 90 days. The presumptive 30-day period was adopted when a party had to file a petition for a writ of certiorari in criminal cases within 30 days after entry of judgment. Supreme Court Rule 13.1 now provides that a party has 90 days after entry of judgment by a court of appeals to file a petition for a writ of certiorari whether the case is civil or criminal.

The amendment does not require a court of appeals to grant a stay of mandate that is coextensive with the period granted for filing a petition for a writ of certiorari. The granting of a stay and the length of the stay remain within the discretion of the court of appeals. The amendment means only that a 90-day stay may be granted without a need to show cause for a stay longer than 30 days.

Subparagraph (C) is not new; it has been moved from the end of the rule to this position.

COMMITTEE NOTES ON RULES—2002 AMENDMENT

Subdivision (b). Subdivision (b) directs that the mandate of a court must issue 7 days after the time to file a petition for rehearing expires or 7 days after the court denies a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. Intermediate Saturdays, Sundays, and legal holidays are counted in computing that 7-day deadline, which means that, except when the 7-day deadline ends on a weekend or legal holiday, the mandate issues exactly one week after the triggering event.

Fed. R. App. P. 26(a)(2) has been amended to provide that, in computing any period of time, one should "[e]xclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days, unless stated in calendar days." This change in the method of computing deadlines means that 7-day deadlines (such as that in subdivision (b)) have been lengthened as a practical matter. Under the new computation method, a mandate would never issue sooner than 9 actual days after a triggering event, and legal holidays could extend that period to as much as 13 days.

Delaying mandates for 9 or more days would introduce significant and unwarranted delay into appellate proceedings. For that reason, subdivision (b) has been amended to require that mandates issue 7 *calendar* days after a triggering event.

Changes Made After Publication and Comments. No changes were made to the text of the proposed amendment or to the Committee Note.

Rule 42. Voluntary Dismissal

(a) DISMISSAL IN THE DISTRICT COURT. Before an appeal has been docketed by the circuit

clerk, the district court may dismiss the appeal on the filing of a stipulation signed by all parties or on the appellant's motion with notice to all parties.

(b) DISMISSAL IN THE COURT OF APPEALS. The circuit clerk may dismiss a docketed appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any fees that are due. But no mandate or other process may issue without a court order. An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court.

(As amended Apr. 24, 1998, eff. Dec. 1, 1998.)

NOTES OF ADVISORY COMMITTEE ON RULES—1967

Subdivision (a). This subdivision is derived from FRCP 73(a) without change of substance.

Subdivision (b). The first sentence is a common provision in present circuit rules. The second sentence is added. Compare Supreme Court Rule 60.

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The language of the rule is amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 43. Substitution of Parties

(a) DEATH OF A PARTY.

(1) *After Notice of Appeal Is Filed*. If a party dies after a notice of appeal has been filed or while a proceeding is pending in the court of appeals, the decedent's personal representative may be substituted as a party on motion filed with the circuit clerk by the representative or by any party. A party's motion must be served on the representative in accordance with Rule 25. If the decedent has no representative, any party may suggest the death on the record, and the court of appeals may then direct appropriate proceedings.

(2) *Before Notice of Appeal Is Filed—Potential Appellant*. If a party entitled to appeal dies before filing a notice of appeal, the decedent's personal representative—or, if there is no personal representative, the decedent's attorney of record—may file a notice of appeal within the time prescribed by these rules. After the notice of appeal is filed, substitution must be in accordance with Rule 43(a)(1).

(3) *Before Notice of Appeal Is Filed—Potential Appellee*. If a party against whom an appeal may be taken dies after entry of a judgment or order in the district court, but before a notice of appeal is filed, an appellant may proceed as if the death had not occurred. After the notice of appeal is filed, substitution must be in accordance with Rule 43(a)(1).

(b) SUBSTITUTION FOR A REASON OTHER THAN DEATH. If a party needs to be substituted for any reason other than death, the procedure prescribed in Rule 43(a) applies.

(c) PUBLIC OFFICER: IDENTIFICATION; SUBSTITUTION.

(1) *Identification of Party*. A public officer who is a party to an appeal or other proceeding in an official capacity may be described as a party by the public officer's official title rather than by name. But the court may require the public officer's name to be added.

(2) *Automatic Substitution of Officeholder*. When a public officer who is a party to an appeal or other proceeding in an official capacity dies, resigns, or otherwise ceases to hold office, the action does not abate. The public officer's successor is automatically substituted as a party. Proceedings following the substitution are to be in the name of the substituted party, but any misnomer that does not affect the substantial rights of the parties may be disregarded. An order of substitution may be entered at any time, but failure to enter an order does not affect the substitution.

(As amended Mar. 10, 1986, eff. July 1, 1986; Apr. 24, 1998, eff. Dec. 1, 1998.)

NOTES OF ADVISORY COMMITTEE ON RULES—1967

Subdivision (a). The first three sentences described a procedure similar to the rule on substitution in civil actions in the district court. See FRCP 25(a). The fourth sentence expressly authorizes an appeal to be taken against one who has died after the entry of judgment. Compare FRCP 73(b), which impliedly authorizes such an appeal.

The sixth sentence authorizes an attorney of record for the deceased to take an appeal on behalf of successors in interest if the deceased has no representative. At present, if a party entitled to appeal dies before the notice of appeal is filed, the appeal can presumably be taken only by his legal representative and must be taken within the time ordinarily prescribed. 13 Cyclopedia of Federal Procedure (3d Ed.) §63.21. The states commonly make special provisions for the event of the death of a party entitled to appeal, usually by extending the time otherwise prescribed. Rules of Civil Procedure for Superior Courts of Arizona, Rule 73(t), 16 A.R.S.; New Jersey Rev. Rules 1:3–3; New York Civil Practice Law and Rules, Sec. 1022; Wisconsin Statutes Ann. 274.01(2). The provision in the proposed rule is derived from California Code of Civil Procedure, Sec. 941.

Subdivision (c). This subdivision is derived from FRCP 25(d) and Supreme Court Rule 48, with appropriate changes.

NOTES OF ADVISORY COMMITTEE ON RULES—1986 AMENDMENT

The amendments to Rules 43(a) and (c) are technical. No substantive change is intended.

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 44. Case Involving a Constitutional Question When the United States or the Relevant State is Not a Party

(a) CONSTITUTIONAL CHALLENGE TO FEDERAL STATUTE. If a party questions the constitutionality of an Act of Congress in a proceeding in which the United States or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the Attorney General.

(b) CONSTITUTIONAL CHALLENGE TO STATE STATUTE. If a party questions the constitu-

tionality of a statute of a State in a proceeding in which that State or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the attorney general of the State.

(As amended Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002.)

NOTES OF ADVISORY COMMITTEE ON RULES—1967

This rule is now found in the rules of a majority of the circuits. It is in response to the Act of August 24, 1937 (28 U.S.C. §2403), which requires all courts of the United States to advise the Attorney General of the existence of an action or proceeding of the kind described in the rule.

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The language of the rule is amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

COMMITTEE NOTES ON RULES—2002 AMENDMENT

Rule 44 requires that a party who ''questions the constitutionality of an Act of Congress'' in a proceeding in which the United States is not a party must provide written notice of that challenge to the clerk. Rule 44 is designed to implement 28 U.S.C. §2403(a), which states that: ''In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene . . . for argument on the question of constitutionality.''

The subsequent section of the statute—§2403(b)—contains virtually identical language imposing upon the courts the duty to notify the attorney general of a state of a constitutional challenge to any statute of that state. But §2403(b), unlike §2403(a), was not implemented in Rule 44.

Rule 44 has been amended to correct this omission. The text of former Rule 44 regarding constitutional challenges to federal statutes now appears as Rule 44(a), while new language regarding constitutional challenges to state statutes now appears as Rule 44(b).

Changes Made After Publication and Comments. No changes were made to the text of the proposed amendment or to the Committee Note.

Rule 45. Clerk's Duties

(a) GENERAL PROVISIONS.

(1) *Qualifications.* The circuit clerk must take the oath and post any bond required by law. Neither the clerk nor any deputy clerk may practice as an attorney or counselor in any court while in office.

(2) *When Court Is Open.* The court of appeals is always open for filing any paper, issuing and returning process, making a motion, and entering an order. The clerk's office with the clerk or a deputy in attendance must be open during business hours on all days except Saturdays, Sundays, and legal holidays. A court may provide by local rule or by order that the clerk's office be open for specified hours on Saturdays or on legal holidays other than New Year's Day, Martin Luther King, Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day.

(b) RECORDS.

(1) *The Docket.* The circuit clerk must maintain a docket and an index of all docketed cases in the manner prescribed by the Director of the Administrative Office of the United States Courts. The clerk must record all papers filed with the clerk and all process, orders, and judgments.

(2) *Calendar.* Under the court's direction, the clerk must prepare a calendar of cases awaiting argument. In placing cases on the calendar for argument, the clerk must give preference to appeals in criminal cases and to other proceedings and appeals entitled to preference by law.

(3) *Other Records.* The clerk must keep other books and records required by the Director of the Administrative Office of the United States Courts, with the approval of the Judicial Conference of the United States, or by the court.

(c) NOTICE OF AN ORDER OR JUDGMENT. Upon the entry of an order or judgment, the circuit clerk must immediately serve a notice of entry on each party, with a copy of any opinion, and must note the date of service on the docket. Service on a party represented by counsel must be made on counsel.

(d) CUSTODY OF RECORDS AND PAPERS. The circuit clerk has custody of the court's records and papers. Unless the court orders or instructs otherwise, the clerk must not permit an original record or paper to be taken from the clerk's office. Upon disposition of the case, original papers constituting the record on appeal or review must be returned to the court or agency from which they were received. The clerk must preserve a copy of any brief, appendix, or other paper that has been filed.

(As amended Mar. 1, 1971, eff. July 1, 1971; Mar. 10, 1986, eff. July 1, 1986; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 25, 2005, eff. Dec. 1, 2005.)

NOTES OF ADVISORY COMMITTEE ON RULES—1967

The duties imposed upon clerks of the courts of appeals by this rule are those imposed by rule or practice in a majority of the circuits. The second sentence of subdivision (a) authorizing the closing of the clerk's office on Saturday and non-national legal holidays follows a similar provision respecting the district court clerk's office found in FRCP 77(c) and in FRCrP 56.

NOTES OF ADVISORY COMMITTEE ON RULES—1971 AMENDMENT

The amendment adds Columbus Day to the list of legal holidays. See the Note accompanying the amendment of Rule 26(a).

NOTES OF ADVISORY COMMITTEE ON RULES—1986 AMENDMENT

The amendment to Rule 45(b) permits the courts of appeals to maintain computerized dockets. The Committee believes that the Administrative Office of the United States Courts ought to have maximum flexibility in prescribing the format of this docket in order to ensure a smooth transition from manual to automated systems and subsequent adaptation to technological improvements.

The amendments to Rules 45(a) and (d) are technical. No substantive change is intended. The Birthday of Martin Luther King, Jr. has been added to the list of national holidays.

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

COMMITTEE NOTES ON RULES—2002 AMENDMENT

Subdivision (c). Subdivision (c) has been amended so that the clerk may use electronic means to serve notice of entry of an order or judgment upon parties who have consented to such service.

Changes Made After Publication and Comments. No changes were made to the text of the proposed amendment or to the Committee Note.

COMMITTEE NOTES ON RULES—2005 AMENDMENT

Subdivision (a)(2). Rule 45(a)(2) has been amended to refer to the third Monday in February as ''Washington's Birthday.'' A federal statute officially designates the holiday as ''Washington's Birthday,'' reflecting the desire of Congress specially to honor the first president of the United States. *See* 5 U.S.C. §6103(a). During the 1998 restyling of the Federal Rules of Appellate Procedure, references to ''Washington's Birthday'' were mistakenly changed to ''Presidents' Day.'' The amendment corrects that error.

Changes Made After Publication and Comments. No changes were made to the text of the proposed amendment or to the Committee Note.

Rule 46. Attorneys

(a) ADMISSION TO THE BAR.

(1) *Eligibility.* An attorney is eligible for admission to the bar of a court of appeals if that attorney is of good moral and professional character and is admitted to practice before the Supreme Court of the United States, the highest court of a state, another United States court of appeals, or a United States district court (including the district courts for Guam, the Northern Mariana Islands, and the Virgin Islands).

(2) *Application.* An applicant must file an application for admission, on a form approved by the court that contains the applicant's personal statement showing eligibility for membership. The applicant must subscribe to the following oath or affirmation:

''I, _____, do solemnly swear [or affirm] that I will conduct myself as an attorney and counselor of this court, uprightly and according to law; and that I will support the Constitution of the United States.''

(3) *Admission Procedures.* On written or oral motion of a member of the court's bar, the court will act on the application. An applicant may be admitted by oral motion in open court. But, unless the court orders otherwise, an applicant need not appear before the court to be admitted. Upon admission, an applicant must pay the clerk the fee prescribed by local rule or court order.

(b) SUSPENSION OR DISBARMENT.

(1) *Standard.* A member of the court's bar is subject to suspension or disbarment by the court if the member:

(A) has been suspended or disbarred from practice in any other court; or

(B) is guilty of conduct unbecoming a member of the court's bar.

(2) *Procedure.* The member must be given an opportunity to show good cause, within the time prescribed by the court, why the member should not be suspended or disbarred.

(3) *Order.* The court must enter an appropriate order after the member responds and a hearing is held, if requested, or after the time prescribed for a response expires, if no response is made.

(c) DISCIPLINE. A court of appeals may discipline an attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with any court rule. First, however, the court must afford the attorney reasonable notice, an opportunity to show cause to the contrary, and, if requested, a hearing.

(As amended Mar. 10, 1986, eff. July 1, 1986; Apr. 24, 1998, eff. Dec. 1, 1998.)

NOTES OF ADVISORY COMMITTEE ON RULES—1967

Subdivision (a). The basic requirement of membership in the bar of the Supreme Court, or of the highest court of a state, or in another court of appeals or a district court is found, with minor variations, in the rules of ten circuits. The only other requirement in those circuits is that the applicant be of good moral and professional character. In the District of Columbia Circuit applicants other than members of the District of Columbia District bar or the Supreme Court bar must claim membership in the bar of the highest court of a state, territory or possession for three years prior to application for admission (D.C. Cir. Rule 7). Members of the District of Columbia District bar and the Supreme Court bar again excepted, applicants for admission to the District of Columbia Circuit bar must meet precisely defined prelaw and law school study requirements (D.C. Cir. Rule 7½).

A few circuits now require that application for admission be made by oral motion by a sponsor member in open court. The proposed rule permits both the application and the motion by the sponsor member to be in writing, and permits action on the motion without the appearance of the applicant or the sponsor, unless the court otherwise orders.

Subdivision (b). The provision respecting suspension or disbarment is uniform. Third Circuit Rule 8(3) is typical.

Subdivision (c). At present only Fourth Circuit Rule 36 contains an equivalent provision. The purpose of this provision is to make explicit the power of a court of appeals to impose sanctions less serious than suspension or disbarment for the breach of rules. It also affords some measure of control over attorneys who are not members of the bar of the court. Several circuits permit a non-member attorney to file briefs and motions, membership being required only at the time of oral argument. And several circuits permit argument pro hac vice by non-member attorneys.

NOTES OF ADVISORY COMMITTEE ON RULES—1986 AMENDMENT

The amendments to Rules 46(a) and (b) are technical. No substantive change is intended.

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 47. Local Rules by Courts of Appeals

(a) LOCAL RULES.

(1) Each court of appeals acting by a majority of its judges in regular active service may, after giving appropriate public notice and opportunity for comment, make and amend rules governing its practice. A generally applicable direction to parties or lawyers regarding practice before a court must be in a local rule rather than an internal operating procedure or standing order. A local rule must be consistent with—but not duplicative of—Acts of Congress and rules adopted under 28 U.S.C. §2072 and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. Each circuit clerk must send the Administrative Office of the United States Courts a copy of each local rule and internal operating procedure when it is promulgated or amended.

(2) A local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement.

(b) PROCEDURE WHEN THERE IS NO CONTROLLING LAW. A court of appeals may regulate practice in a particular case in any manner consistent with federal law, these rules, and local rules of the circuit. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local circuit rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

(As amended Apr. 27, 1995, eff. Dec. 1, 1995; Apr. 24, 1998, eff. Dec. 1, 1998.)

NOTES OF ADVISORY COMMITTEE ON RULES—1967

This rule continues the authority now vested in individual courts of appeals by 28 U.S.C. §2071 to make rules consistent with rules of practice and procedure promulgated by the Supreme Court.

NOTES OF ADVISORY COMMITTEE ON RULES—1995 AMENDMENT

Subdivision (a). This rule is amended to require that a generally applicable direction regarding practice before a court of appeals must be in a local rule rather than an internal operating procedure or some other general directive. It is the intent of this rule that a local rule may not bar any practice that these rules explicitly or implicitly permit. Subdivision (b) allows a court of appeals to regulate practice in an individual case by entry of an order in the case. The amendment also reflects the requirement that local rules be consistent not only with the national rules but also with Acts of Congress. The amendment also states that local rules should not repeat national rules and Acts of Congress.

The amendment also requires that the numbering of local rules conform with any uniform numbering system that may be prescribed by the Judicial Conference. Lack of uniform numbering might create unnecessary traps for counsel and litigants. A uniform numbering system would make it easier for an increasingly national bar and for litigants to locate a local rule that applies to a particular procedural issue.

Paragraph (2) is new. Its aim is to protect against loss of rights in the enforcement of local rules relating to matters of form. The proscription of paragraph (2) is narrowly drawn—covering only violations that are not willful and only those involving local rules directed to matters of form. It does not limit the court's power to impose substantive penalties upon a party if it or its attorney stubbornly or repeatedly violates a local rule, even one involving merely a matter of form. Nor does it affect the court's power to enforce local rules that involve more than mere matters of form.

Subdivision (b). This rule provides flexibility to the court in regulating practice in a particular case when there is no controlling law. Specifically, it permits the court to regulate practice in any manner consistent with Acts of Congress, with rules adopted under 28 U.S.C. §2072, and with the circuit's local rules.

The amendment to this rule disapproves imposing any sanction or other disadvantage on a person for noncompliance with such a directive, unless the alleged violator has been furnished in a particular case with actual notice of the requirement. There should be no adverse consequence to a party or attorney for violating special requirements relating to practice before a particular court unless the party or attorney has actual notice of those requirements.

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The language of the rule is amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 48. Masters

(a) APPOINTMENT; POWERS. A court of appeals may appoint a special master to hold hearings, if necessary, and to recommend factual findings and disposition in matters ancillary to proceedings in the court. Unless the order referring a matter to a master specifies or limits the master's powers, those powers include, but are not limited to, the following:

(1) regulating all aspects of a hearing;

(2) taking all appropriate action for the efficient performance of the master's duties under the order;

(3) requiring the production of evidence on all matters embraced in the reference; and

(4) administering oaths and examining witnesses and parties.

(b) COMPENSATION. If the master is not a judge or court employee, the court must determine the master's compensation and whether the cost is to be charged to any party.

(As amended Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 24, 1998, eff. Dec. 1, 1998.)

NOTES OF ADVISORY COMMITTEE ON RULES—1994 AMENDMENT

The text of the existing Rule 48 concerning the title was moved to Rule 1.

This new Rule 48 authorizes a court of appeals to appoint a special master to make recommendations concerning ancillary matters. The courts of appeals have long used masters in contempt proceedings where the issue is compliance with an enforcement order. *See Polish National Alliance v. NLRB*, 159 F.2d 38 (7th Cir. 1946), *NLRB v. Arcade-Sunshine Co.*, 132 F.2d 8 (D.C. Cir. 1942); *NLRB v. Remington Rand, Inc.*, 130 F.2d 919 (2d Cir. 1942). There are other instances when the question before a court of appeals requires a factual determination. An application for fees or eligibility for Criminal Justice Act status on appeal are examples.

Ordinarily when a factual issue is unresolved, a court of appeals remands the case to the district court or agency that originally heard the case. It is not the Committee's intent to alter that practice. However, when factual issues arise in the first instance in the

court of appeals, such as fees for representation on appeal, it would be useful to have authority to refer such determinations to a master for a recommendation.

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

APPENDIX OF FORMS

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

United States District Court for the _____ District of _____

File Number _____

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

Notice is hereby given that _____(here name all parties taking the appeal)_____, (plaintiffs) (defendants) in the above named case,* hereby appeal to the United States Court of Appeals for the _____ Circuit (from the final judgment) (from an order (describing it)) entered in this action on the _____ day of _____, 20__.

(s)_____
Attorney for _____
Address: _____

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

(As amended Apr. 22, 1993, eff. Dec. 1, 1993; Mar. 27, 2003, eff. Dec. 1, 2003.)

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

UNITED STATES TAX COURT

Washington, D.C.

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

Notice of Appeal

Notice is hereby given that _____(here name all parties taking the appeal)*_____ hereby appeal to the United States Court of Appeals for the _____ Circuit from (that part of) the decision of this court entered in the above captioned proceeding on the _____ day of _____, 20__ (relating to _____).

(s)_____
Counsel for _____
Address: _____

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

(As amended Apr. 22, 1993, eff. Dec. 1, 1993; Mar. 27, 2003, eff. Dec. 1, 2003.)

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

United States Court of Appeals
for the _____ Circuit

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

_____(here name all parties bringing the petition)*_____ hereby petition the court for review of the Order of the XYZ Commission (describe the order) entered on _____, 20__.

(s)_____,
Attorney for Petitioners
*Address:*_____

*See Rule 15.

(As amended Apr. 22, 1993, eff. Dec. 1, 1993; Mar. 27, 2003, eff. Dec. 1, 2003.)

Form 4. Affidavit to Accompany Motion for Leave to Appeal in Forma Pauperis

Form 4. Affidavit to Accompany Motion for Leave to Appeal in Forma Pauperis

United States District Court for the _____ District of _____

A.B., Plaintiff

v. Case No. _____

C.D., Defendant

Affidavit in Support of Motion	**Instructions**
I swear or affirm under penalty of perjury that, because of my poverty, I cannot prepay the docket fees of my appeal or post a bond for them. I believe I am entitled to redress. I swear or affirm under penalty of perjury under United States laws that my answers on this form are true and correct. (28 U.S.C. § 1746; 18 U.S.C § 1621.)	Complete all questions in this application and then sign it. Do not leave any blanks: if the answer to a question is "0," "none," or "not applicable (N/A)," write in that response. If you need more space to answer a question or to explain your answer, attach a separate sheet of paper identified with your name, your case's docket number, and the question number.
Signed: _____	Date: _____

My issues on appeal are:

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	**Average monthly amount during the past 12 months**		**Amount expected next month**	
	You	**Spouse**	**You**	**Spouse**
Employment	$_____	$_____	$_____	$_____
Self-employment	$_____	$_____	$_____	$_____
Income from real property (such as rental income)	$_____	$_____	$_____	$_____
Interest and dividends	$_____	$_____	$_____	$_____
Gifts	$_____	$_____	$_____	$_____
Alimony	$_____	$_____	$_____	$_____
Child support	$_____	$_____	$_____	$_____
Retirement (such as social security, pensions, annuities, insurance)	$_____	$_____	$_____	$_____
Disability (such as social security, insurance payments)	$_____	$_____	$_____	$_____
Unemployment payments	$_____	$_____	$_____	$_____
Public-assistance (such as welfare)	$_____	$_____	$_____	$_____
Other (specify):_____	$_____	$_____	$_____	$_____
Total monthly income:	$_____	$_____	$_____	$_____

2. *List your employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)*

Employer	Address	Dates of employment	Gross monthly pay

3. *List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)*

Employer	Address	Dates of employment	Gross monthly pay

4. *How much cash do you and your spouse have?* $_____
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
		$_____	$_____
		$_____	$_____
		$_____	$_____

If you are a prisoner seeking to appeal a judgment in a civil action or proceeding, you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.

5. *List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.*

Home	(Value)	**Other real estate**	(Value)	**Motor vehicle #1**	(Value)
				Make & year:	
				Model:	
				Registration #:	

Motor vehicle #2	(Value)	**Other assets**	(Value)	**Other assets**	(Value)
Make & year:					
Model:					
Registration #:					

6. *State every person, business, or organization owing you or your spouse money, and the amount owed.*

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse

7. *State the persons who rely on you or your spouse for support.*

Name	Relationship	Age
_____	_____	_____
_____	_____	_____
_____	_____	_____

8. *Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate.*

	You	Your Spouse
Rent or home-mortgage payment (include lot rented for mobile home)	$_____	$_____
Are real-estate taxes included? ☐Yes ☐No		
Is property insurance included? ☐Yes ☐No		
Utilities (electricity, heating fuel, water, sewer, and telephone)	$_____	$_____
Home maintenance (repairs and upkeep)	$_____	$_____
Food	$_____	$_____
Clothing	$_____	$_____
Laundry and dry-cleaning	$_____	$_____
Medical and dental expenses	$_____	$_____
Transportation (not including motor vehicle payments)	$_____	$_____
Recreation, entertainment, newspapers, magazines, etc.	$_____	$_____
Insurance (not deducted from wages or included in mortgage payments)	$_____	$_____
Homeowner's or renter's	$_____	$_____
Life	$_____	$_____
Health	$_____	$_____
Motor Vehicle	$_____	$_____
Other: _____	$_____	$_____
Taxes (not deducted from wages or included in mortgage payments) (specify): _____	$_____	$_____
Installment payments	$_____	$_____
Motor Vehicle	$_____	$_____
Credit card (name): _____	$_____	$_____
Department store (name): _____	$_____	$_____
Other: _____	$_____	$_____
Alimony, maintenance, and support paid to others	$_____	$_____
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$_____	$_____
Other (specify): _____	$_____	$_____
Total monthly expenses:	$_____	$_____

9. *Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?*
☐Yes ☐No If yes, describe on an attached sheet.

10. *Have you paid — or will you be paying — an attorney any money for services in connection with this case, including the completion of this form?* ☐Yes ☐No

If yes, how much? $_____.

If yes, state the attorney's name, address, and telephone number:

_____

_____

_____

11. *Have you paid — or will you be paying — anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?*
☐Yes ☐No

If yes, how much? $_____

If yes, state the person's name, address, and telephone number:

_____

_____

_____

12. *Provide any other information that will help explain why you cannot pay the docket fees for your appeal.*

13. *State the address of your legal residence.*

_____

_____

Your daytime phone number: (____) _____

Your age: _____ Your years of schooling: _____

Your social-security number: _____

(As amended Apr. 24, 1998, eff. Dec. 1, 1998.)

Form 5. Notice of Appeal to a Court of Appeals from a Judgment or Order of a District Court or a Bankruptcy Appellate Panel

United States District Court for the _____
District of _____

In re
_____,
Debtor
_____,
Plaintiff
v.
_____,
Defendant

File No. _____

Notice of Appeal to United States Court of Appeals for the _____ Circuit

_____, the plaintiff [or defendant or other party] appeals to the United States Court of Appeals for the _____ Circuit from the final judgment [or order or decree] of the district court for the district of _____ [or bankruptcy appellate panel of the _____ circuit], entered in this case on _____, 20____ [here describe the judgment, order, or decree] _____

The parties to the judgment [or order or decree] appealed from and the names and addresses of their respective attorneys are as follows:

Dated _____
Signed _____
Attorney for Appellant
Address: _____
_____

(As added Apr. 25, 1989, eff. Dec. 1, 1989; amended Mar. 27, 2003, eff. Dec. 1, 2003.)

Form 6. Certificate of Compliance With Rule 32(a)

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

☐ this brief contains [*state the number of*] words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

☐ this brief uses a monospaced typeface and contains [*state the number of*] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

☐ this brief has been prepared in a proportionally spaced typeface using [*state name and version of word processing program*] in [*state font size and name of type style*], *or*

☐ this brief has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

(s)_____

Attorney for _____

Dated: _____

(As added Apr. 29, 2002, eff. Dec. 1, 2002.)

COMMITTEE NOTES ON RULES—2002 AMENDMENT

Changes Made After Publication and Comments. No changes were made to the text of the proposed amendment or to the Committee Note.

FEDERAL RULES OF CIVIL PROCEDURE

(As amended to January 3, 2007)

HISTORICAL NOTE

The original Rules of Civil Procedure for the District Courts were adopted by order of the Supreme Court on Dec. 20, 1937, transmitted to Congress by the Attorney General on Jan. 3, 1938, and became effective on Sept. 16, 1938.

The Rules have been amended Dec. 28, 1939, eff. Apr. 3, 1941; Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Apr. 30, 1951, eff. Aug. 1, 1951; Apr. 17, 1961, eff. July 19, 1961; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Dec. 4, 1967, eff. July 1, 1968; Mar. 30, 1970, eff. July 1, 1970; Mar. 1, 1971, eff. July 1, 1971; Nov. 20, 1972, and Dec. 18, 1972, eff. July 1, 1975; Apr. 29, 1980, eff. Aug. 1, 1980; Oct. 21, 1980, Pub. L. 96–481, title II, §205(a), (b), 94 Stat. 2330; Jan. 12, 1983, Pub. L. 97–462, §§2–4, 96 Stat. 2527–2530, eff. Feb. 26, 1983; Apr. 28, 1983, eff. Aug. 1, 1983; Apr. 29, 1985, eff. Aug. 1, 1985; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 25, 1988, eff. Aug. 1, 1988; Nov. 18, 1988, Pub. L. 100–690, title VII, §§7047(b), 7049, 7050, 102 Stat. 4401; Apr. 30, 1991, eff. Dec. 1, 1991; Dec. 9, 1991, Pub. L. 102–198, §11, 105 Stat. 1626; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 27, 1995, eff. Dec. 1, 1995; Apr. 23, 1996, eff. Dec. 1, 1996; Apr. 11, 1997, eff. Dec. 1, 1997; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 26, 1999, eff. Dec. 1, 1999; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 23, 2001, eff. Dec. 1, 2001; Apr. 29, 2002, eff. Dec. 1, 2002; Mar. 27, 2003, eff. Dec. 1, 2003; Apr. 25, 2005, eff. Dec. 1, 2005; Apr. 12, 2006, eff. Dec. 1, 2006.

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5. Service and Filing of Pleadings and Other Papers.
5.1. Constitutional Challenge to a Statute—Notice, Certification, and Intervention.
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8. General Rules of Pleading.
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10. Form of Pleadings.
11. Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions.
12. Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on the Pleadings.
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19. Joinder of Persons Needed for Just Adjudication.
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51. Instructions to Jury; Objections; Preserving a Claim of Error.
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29. Complaint: Condemnation.
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33. Notice of Availability of a Magistrate Judge to Exercise Jurisdiction.
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D. Possessory, Petitory, and Partition Actions.
E. Actions in Rem and Quasi in Rem: General Provisions.
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REFERENCES TO EQUITY RULES

The Federal Rules of Civil Procedure supplant the Equity Rules since in general they cover the field now covered by the Equity Rules and the Conformity Act (former section 724 of this title).

This table shows the Equity Rules to which references are made in the notes to the Federal Rules of Civil Procedure.

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RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS[1]

I. SCOPE OF RULES—ONE FORM OF ACTION

Rule 1. Scope and Purpose of Rules

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

(As amended Dec. 29, 1948, eff. Oct. 20, 1949; Feb. 28, 1966, eff. July 1, 1966; Apr. 22, 1993, eff. Dec. 1, 1993.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

1. Rule 81 states certain limitations in the application of these rules to enumerated special proceedings.

2. The expression ''district courts of the United States'' appearing in the statute authorizing the Supreme Court of the United States to promulgate rules of civil procedure does not include the district courts held in the Territories and insular possessions. See *Mookini et al. v. United States*, 303 U.S. 201, 58 S.Ct. 543, 82 L.Ed. 748 (1938).

3. These rules are drawn under the authority of the act of June 19, 1934, U.S.C., Title 28, § 723b [see 2072] (Rules in actions at law; Supreme Court authorized to make), and § 723c [see 2072] (Union of equity and action at law rules; power of Supreme Court) and also other grants of rule making power to the Court. See Clark and Moore, *A New Federal Civil Procedure—I. The Background*, 44 Yale L.J. 387, 391 (1935). Under § 723b after the rules have taken effect all laws in conflict therewith are of no further force or effect. In accordance with § 723c the Court has united the general rules prescribed for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both. See Rule 2 (One Form of Action). For the former practice in equity and at law see U.S.C., Title 28, §§ 723 and 730 [see 2071 et seq.] (conferring power on the Supreme Court to make rules of practice in equity) and the [former] Equity Rules promulgated thereunder; U.S.C., Title 28, [former] § 724 (Conformity act): [former] Equity Rule 22 (Action at Law Erroneously Begun as Suit in Equity—Transfer); [former] Equity Rule 23 (Matters Ordinarily Determinable at Law When Arising in Suit in Equity to be Disposed of Therein); U.S.C., Title 28, [former] §§ 397 (Amendments to pleadings when case brought to wrong side of court), and 398 (Equitable defenses and equitable relief in actions at law).

4. With the second sentence compare U.S.C., Title 28, [former] §§ 777 (Defects of form; amendments), 767 (Amendment of process); [former] Equity Rule 19 (Amendments Generally).

NOTES OF ADVISORY COMMITTEE ON RULES—1948 AMENDMENT

The change in nomenclature conforms to the official designation of district courts in Title 28, U.S.C., § 132(a).

NOTES OF ADVISORY COMMITTEE ON RULES—1966 AMENDMENT

This is the fundamental change necessary to effect unification of the civil and admiralty procedure. Just as the 1938 rules abolished the distinction between actions at law and suits in equity, this change would abolish the distinction between civil actions and suits in admiralty. See also Rule 81.

NOTES OF ADVISORY COMMITTEE ON RULES—1993 AMENDMENT

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

Rule 2. One Form of Action

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

NOTES OF ADVISORY COMMITTEE ON RULES—1937

1. This rule modifies U.S.C., Title 28, [former] § 384 (Suits in equity, when not sustainable). U.S.C., Title 28, §§ 723 and 730 [see 2071 et seq.] (conferring power on the Supreme Court to make rules of practice in equity), are unaffected insofar as they relate to the rule making power in admiralty. These sections, together with § 723b [see 2072] (Rules in actions at law; Supreme Court authorized to make) are continued insofar as they are not inconsistent with § 723c [see 2072] (Union of equity and action at law rules; power of Supreme Court). See Note 3 to Rule 1. U.S.C., Title 28, [former] §§ 724 (Conformity act), 397 (Amendments to pleadings when case brought to wrong side of court) and 398 (Equitable defenses and equitable relief in actions at law) are superseded.

2. Reference to actions at law or suits in equity in all statutes should now be treated as referring to the civil action prescribed in these rules.

3. This rule follows in substance the usual introductory statements to code practices which provide for a single action and mode of procedure, with abolition of

[1] Title amended December 29, 1948, effective October 20, 1949.

forms of action and procedural distinctions. Representative statutes are N.Y. Code 1848 (Laws 1848, ch. 379) §62; N.Y.C.P.A. (1937) §8; Calif.Code Civ.Proc. (Deering, 1937) §307; 2 Minn.Stat. (Mason, 1927) §9164; 2 Wash.Rev.Stat.Ann. (Remington, 1932) §§153, 255.

II. COMMENCEMENT OF ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS

Rule 3. Commencement of Action

A civil action is commenced by filing a complaint with the court.

NOTES OF ADVISORY COMMITTEE ON RULES—1937

1. Rule 5(e) defines what constitutes filing with the court.

2. This rule governs the commencement of all actions, including those brought by or against the United States or an officer or agency thereof, regardless of whether service is to be made personally pursuant to Rule 4(d), or otherwise pursuant to Rule 4(e).

3. With this rule compare [former] Equity Rule 12 (Issue of Subpoena—Time for Answer) and the following statutes (and other similar statutes) which provide a similar method for commencing an action:

U.S.C., Title 28:

§45 [former] (District courts; practice and procedure in certain cases under interstate commerce laws).

§762 [see 1402] (Petition in suit against United States).

§766 [see 2409] (Partition suits where United States is tenant in common or joint tenant).

4. This rule provides that the first step in an action is the filing of the complaint. Under Rule 4(a) this is to be followed forthwith by issuance of a summons and its delivery to an officer for service. Other rules providing for dismissal for failure to prosecute suggest a method available to attack unreasonable delay in prosecuting an action after it has been commenced. When a Federal or State statute of limitations is pleaded as a defense, a question may arise under this rule whether the mere filing of the complaint stops the running of the statute, or whether any further step is required, such as, service of the summons and complaint or their delivery to the marshal for service. The answer to this question may depend on whether it is competent for the Supreme Court, exercising the power to make rules of procedure without affecting substantive rights, to vary the operation of statutes of limitations. The requirement of Rule 4(a) that the clerk shall forthwith issue the summons and deliver it to the marshal for service will reduce the chances of such a question arising.

Rule 4. Summons

(a) FORM. The summons shall be signed by the clerk, bear the seal of the court, identify the court and the parties, be directed to the defendant, and state the name and address of the plaintiff's attorney or, if unrepresented, of the plaintiff. It shall also state the time within which the defendant must appear and defend, and notify the defendant that failure to do so will result in a judgment by default against the defendant for the relief demanded in the complaint. The court may allow a summons to be amended.

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

(c) SERVICE WITH COMPLAINT; BY WHOM MADE.

(1) A summons shall be served together with a copy of the complaint. The plaintiff is responsible for service of a summons and complaint within the time allowed under subdivision (m) and shall furnish the person effecting service with the necessary copies of the summons and complaint.

(2) Service may be effected by any person who is not a party and who is at least 18 years of age. At the request of the plaintiff, however, the court may direct that service be effected by a United States marshal, deputy United States marshal, or other person or officer specially appointed by the court for that purpose. Such an appointment must be made when the plaintiff is authorized to proceed in forma pauperis pursuant to 28 U.S.C. §1915 or is authorized to proceed as a seaman under 28 U.S.C. §1916.

(d) WAIVER OF SERVICE; DUTY TO SAVE COSTS OF SERVICE; REQUEST TO WAIVE.

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

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

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

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

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

(D) shall inform the defendant, by means of a text prescribed in an official form promulgated pursuant to Rule 84, of the consequences of compliance and of a failure to comply with the request;

(E) shall set forth the date on which the request is sent;

(F) shall allow the defendant a reasonable time to return the waiver, which shall be at least 30 days from the date on which the request is sent, or 60 days from that date if the defendant is addressed outside any judicial district of the United States; and

(G) shall provide the defendant with an extra copy of the notice and request, as well as a prepaid means of compliance in writing.

If a defendant located within the United States fails to comply with a request for waiver made by a plaintiff located within the United States, the court shall impose the costs subsequently incurred in effecting service on the defendant unless good cause for the failure be shown.

(3) A defendant that, before being served with process, timely returns a waiver so requested is not required to serve an answer to the complaint until 60 days after the date on which the request for waiver of service was sent, or 90 days after that date if the defendant was addressed outside any judicial district of the United States.

(4) When the plaintiff files a waiver of service with the court, the action shall proceed, except as provided in paragraph (3), as if a summons and complaint had been served at the time of filing the waiver, and no proof of service shall be required.

(5) The costs to be imposed on a defendant under paragraph (2) for failure to comply with a request to waive service of a summons shall include the costs subsequently incurred in effecting service under subdivision (e), (f), or (h), together with the costs, including a reasonable attorney's fee, of any motion required to collect the costs of service.

(e) SERVICE UPON INDIVIDUALS WITHIN A JUDICIAL DISTRICT OF THE UNITED STATES. Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in any judicial district of the United States:

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

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

(f) SERVICE UPON INDIVIDUALS IN A FOREIGN COUNTRY. Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in a place not within any judicial district of the United States:

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

(2) if there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice:

(A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or

(B) as directed by the foreign authority in response to a letter rogatory or letter of request; or

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

(i) delivery to the individual personally of a copy of the summons and the complaint; or

(ii) any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or

(3) by other means not prohibited by international agreement as may be directed by the court.

(g) SERVICE UPON INFANTS AND INCOMPETENT PERSONS. Service upon an infant or an incompetent person in a judicial district of the United States shall be effected in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state. Service upon an infant or an incompetent person in a place not within any judicial district of the United States shall be effected in the manner prescribed by paragraph (2)(A) or (2)(B) of subdivision (f) or by such means as the court may direct.

(h) SERVICE UPON CORPORATIONS AND ASSOCIATIONS. Unless otherwise provided by federal law, service upon a domestic or foreign corporation or upon a partnership or other unincorporated association that is subject to suit under a common name, and from which a waiver of service has not been obtained and filed, shall be effected:

(1) in a judicial district of the United States in the manner prescribed for individuals by subdivision (e)(1), or by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant, or

(2) in a place not within any judicial district of the United States in any manner prescribed for individuals by subdivision (f) except personal delivery as provided in paragraph (2)(C)(i) thereof.

(i) SERVING THE UNITED STATES, ITS AGENCIES, CORPORATIONS, OFFICERS, OR EMPLOYEES.

(1) Service upon the United States shall be effected

(A) by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court or by sending a copy of the summons and of the complaint by registered or certified mail addressed to the civil process clerk at the office of the United States attorney and

(B) by also sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia, and

(C) in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered or certified mail to the officer or agency.

(2)(A) Service on an agency or corporation of the United States, or an officer or employee of the United States sued only in an official capacity, is effected by serving the United States in the manner prescribed by Rule 4(i)(1) and by also sending a copy of the summons and complaint by registered or certified mail to the officer, employee, agency, or corporation.

(B) Service on an officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States—whether or not the officer or employee is sued also in an official capacity—is effected by serving the United States in the manner prescribed by Rule 4(i)(1) and by serving the officer or employee in the manner prescribed by Rule 4(e), (f), or (g).

(3) The court shall allow a reasonable time to serve process under Rule 4(i) for the purpose of curing the failure to serve:

(A) all persons required to be served in an action governed by Rule 4(i)(2)(A), if the plaintiff has served either the United States attorney or the Attorney General of the United States, or

(B) the United States in an action governed by Rule 4(i)(2)(B), if the plaintiff has served an officer or employee of the United States sued in an individual capacity.

(j) SERVICE UPON FOREIGN, STATE, OR LOCAL GOVERNMENTS.

(1) Service upon a foreign state or a political subdivision, agency, or instrumentality thereof shall be effected pursuant to 28 U.S.C. §1608.

(2) Service upon a state, municipal corporation, or other governmental organization subject to suit shall be effected by delivering a copy of the summons and of the complaint to its chief executive officer or by serving the summons and complaint in the manner prescribed by the law of that state for the service of summons or other like process upon any such defendant.

(k) TERRITORIAL LIMITS OF EFFECTIVE SERVICE.

(1) Service of a summons or filing a waiver of service is effective to establish jurisdiction over the person of a defendant

(A) who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located, or

(B) who is a party joined under Rule 14 or Rule 19 and is served at a place within a judicial district of the United States and not more than 100 miles from the place from which the summons issues, or

(C) who is subject to the federal interpleader jurisdiction under 28 U.S.C. §1335, or

(D) when authorized by a statute of the United States.

(2) If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.

(*l*) PROOF OF SERVICE. If service is not waived, the person effecting service shall make proof thereof to the court. If service is made by a person other than a United States marshal or deputy United States marshal, the person shall make affidavit thereof. Proof of service in a place not within any judicial district of the United States shall, if effected under paragraph (1) of subdivision (f), be made pursuant to the applicable treaty or convention, and shall, if effected under paragraph (2) or (3) thereof, include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court. Failure to make proof of service does not affect the validity of the service. The court may allow proof of service to be amended.

(m) TIME LIMIT FOR SERVICE. If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period. This subdivision does not apply to service in a foreign country pursuant to subdivision (f) or (j)(1).

(n) SEIZURE OF PROPERTY; SERVICE OF SUMMONS NOT FEASIBLE.

(1) If a statute of the United States so provides, the court may assert jurisdiction over property. Notice to claimants of the property shall then be sent in the manner provided by the statute or by service of a summons under this rule.

(2) Upon a showing that personal jurisdiction over a defendant cannot, in the district where the action is brought, be obtained with reasonable efforts by service of summons in any manner authorized by this rule, the court may assert jurisdiction over any of the defendant's assets found within the district by seizing the assets under the circumstances and in the manner provided by the law of the state in which the district court is located.

(As amended Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Apr. 29, 1980, eff. Aug. 1, 1980; Pub. L. 97–462, §2, Jan. 12, 1983, 96 Stat. 2527; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 17, 2000, eff. Dec. 1, 2000.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

Note to Subdivision (a). With the provision permitting additional summons upon request of the plaintiff compare [former] Equity Rule 14 (Alias Subpoena) and the last sentence of [former] Equity Rule 12 (Issue of Subpoena—Time for Answer).

Note to Subdivision (b). This rule prescribes a form of summons which follows substantially the requirements stated in [former] Equity Rules 12 (Issue of Subpoena—Time for Answer) and 7 (Process, Mesne and Final).

U.S.C., Title 28, §721 [now 1691] (Sealing and testing of writs) is substantially continued insofar as it applies to a summons, but its requirements as to teste of process are superseded. U.S.C., Title 28, [former] §722 (Teste of process, day of), is superseded.

See Rule 12(a) for a statement of the time within which the defendant is required to appear and defend.

Note to Subdivision (c). This rule does not affect U.S.C., Title 28, §503 [see 566], as amended June 15, 1935 (Marshals; duties) and such statutes as the following

insofar as they provide for service of process by a marshal, but modifies them insofar as they may imply service by a marshal only:

U.S.C., Title 15:

§ 5 (Bringing in additional parties) (Sherman Act)
§ 10 (Bringing in additional parties)
§ 25 (Restraining violations; procedure)

U.S.C., Title 28:

§ 45 [former] (Practice and procedure in certain cases under the interstate commerce laws)

Compare [former] Equity Rule 15 (Process, by Whom Served).

Note to Subdivision (d). Under this rule the complaint must always be served with the summons.

Paragraph (1). For an example of a statute providing for service upon an agent of an individual see U.S.C., Title 28, § 109 [now 1400, 1694] (Patent cases).

Paragraph (3). This enumerates the officers and agents of a corporation or of a partnership or other unincorporated association upon whom service of process may be made, and permits service of process only upon the officers, managing or general agents, or agents authorized by appointment or by law, of the corporation, partnership or unincorporated association against which the action is brought. See *Christian v. International Ass'n of Machinists*, 7 F.(2d) 481 (D.C.Ky., 1925) and *Singleton v. Order of Railway Conductors of America*, 9 F.Supp. 417 (D.C.Ill., 1935). Compare *Operative Plasterers' and Cement Finishers' International Ass'n of the United States and Canada v. Case*, 93 F.(2d) 56 (App.D.C., 1937).

For a statute authorizing service upon a specified agent and requiring mailing to the defendant, see U.S.C., Title 6, § 7 [now Title 31, § 9306] (Surety companies as sureties; appointment of agents; service of process).

Paragraphs (4) and (5) provide a uniform and comprehensive method of service for all actions against the United States or an officer or agency thereof. For statutes providing for such service, see U.S.C., Title 7, §§ 217 (Proceedings for suspension of orders), 499k (Injunctions; application of injunction laws governing orders of Interstate Commerce Commission), 608c(15)(B) (Court review of ruling of Secretary of Agriculture), and 855 (making § 608c(15)(B) applicable to orders of the Secretary of Agriculture as to handlers of anti-hog-cholera serum and hog-cholera virus); U.S.C., Title 26, [former] § 1569 (Bill in chancery to clear title to realty on which the United States has a lien for taxes); U.S.C., Title 28, [former] §§ 45 (District Courts; practice and procedure in certain cases under the interstate commerce laws), [former] 763 (Petition in suit against the United States; service; appearance by district attorney), 766 [now 2409] (Partition suits where United States is tenant in common or joint tenant), 902 [now 2410] (Foreclosure of mortgages or other liens on property in which the United States has an interest). These and similar statutes are modified insofar as they prescribe a different method of service or dispense with the service of a summons.

For the [former] Equity Rule on service, see [former] Equity Rule 13 (Manner of Serving Subpoena).

Note to Subdivision (e). The provisions for the service of a summons or of notice or of an order in lieu of summons contained in U.S.C., Title 8, § 405 [see 1451] (Cancellation of certificates of citizenship fraudulently or illegally procured) (service by publication in accordance with State law); U.S.C., Title 28, § 118 [now 1655] (Absent defendants in suits to enforce liens); U.S.C., Title 35, § 72a [now 146, 291] (Jurisdiction of District Court of United States for the District of Columbia in certain equity suits where adverse parties reside elsewhere) (service by publication against parties residing in foreign countries); U.S.C., Title 38, § 445 [now 1984] (Action against the United States on a veteran's contract of insurance) (parties not inhabitants of or not found within the District may be served with an order of the court, personally or by publication) and similar statutes are continued by this rule. Title 24, § 378 [now Title 13, § 336] of the Code of the District of Columbia (Publication against nonresident; those absent for six months; unknown heirs or devisees; for divorce or in rem; actual service beyond District) is continued by this rule.

Note to Subdivision (f). This rule enlarges to some extent the present rule as to where service may be made. It does not, however, enlarge the jurisdiction of the district courts.

U.S.C., Title 28, §§ 113 [now 1392] (Suits in States containing more than one district) (where there are two or more defendants residing in different districts), [former] 115 (Suits of a local nature), 116 [now 1392] (Property in different districts in same State), [former] 838 (Executions run in all districts of State); U.S.C., Title 47, § 13 (Action for damages against a railroad or telegraph company whose officer or agent in control of a telegraph line refuses or fails to operate such line in a certain manner—"upon any agent of the company found in such state"); U.S.C., Title 49, § 321(c) [see 13304(a)] (Requiring designation of a process agent by interstate motor carriers and in case of failure so to do, service may be made upon any agent in the State) and similar statutes, allowing the running of process throughout a State, are substantially continued.

U.S.C., Title 15, §§ 5 (Bringing in additional parties) (Sherman Act), 25 (Restraining violations; procedure); U.S.C., Title 28, §§ 44 [now 2321] (Procedure in certain cases under interstate commerce laws; service of processes of court), 117 [now 754, 1692] (Property in different States in same circuit; jurisdiction of receiver), 839 [now 2413] (Executions; run in every State and Territory) and similar statutes, providing for the running of process beyond the territorial limits of a State, are expressly continued.

Note to Subdivision (g). With the second sentence compare [former] Equity Rule 15 (Process, by Whom Served).

Note to Subdivision (h). This rule substantially continues U.S.C., Title 28, [former] § 767 (Amendment of process).

NOTES OF ADVISORY COMMITTEE ON RULES—1963 AMENDMENT

Subdivision (b). Under amended subdivision (e) of this rule, an action may be commenced against a nonresident of the State in which the district court is held by complying with State procedures. Frequently the form of the summons or notice required in these cases by State law differs from the Federal form of summons described in present subdivision (b) and exemplified in Form 1. To avoid confusion, the amendment of subdivision (b) states that a form of summons or notice, corresponding "as nearly as may be" to the State form, shall be employed. See also a corresponding amendment of Rule 12(a) with regard to the time to answer.

Subdivision (d)(4). This paragraph, governing service upon the United States, is amended to allow the use of certified mail as an alternative to registered mail for sending copies of the papers to the Attorney General or to a United States officer or agency. Cf. N.J. Rule 4:5–2. See also the amendment of Rule 30(f)(1).

Subdivision (d)(7). Formerly a question was raised whether this paragraph, in the context of the rule as a whole, authorized service in original Federal actions pursuant to State statutes permitting service on a State official as a means of bringing a nonresident motorist defendant into court. It was argued in *McCoy v. Siler*, 205 F.2d 498, 501–2 (3d Cir.) (concurring opinion), *cert. denied*, 346 U.S. 872, 74 S.Ct. 120, 98 L.Ed. 380 (1953), that the effective service in those cases occurred not when the State official was served but when notice was given to the defendant outside the State, and that subdivision (f) (Territorial limits of effective service), as then worded, did not authorize out-of-State service. This contention found little support. A considerable number of cases held the service to be good, either by fixing upon the service on the official within the State as the effective service, thus satisfying the wording of

subdivision (f) as it then stood, see *Holbrook v. Cafiero*, 18 F.R.D. 218 (D.Md. 1955); *Pasternack v. Dalo*, 17 F.R.D. 420; (W.D.Pa. 1955); cf. *Super Prods. Corp. v. Parkin*, 20 F.R.D. 377 (S.D.N.Y. 1957), or by reading paragraph (7) as not limited by subdivision (f). See *Griffin v. Ensign*, 234 F.2d 307 (3d Cir. 1956); 2 *Moore's Federal Practice*, ¶4.19 (2d ed. 1948); 1 Barron & Holtzoff, *Federal Practice & Procedure* §182.1 (Wright ed. 1960); Comment, 27 U. of Chi.L.Rev. 751 (1960). See also *Olberding v. Illinois Central R.R.*, 201 F.2d 582 (6th Cir.), *rev'd on other grounds*, 346 U.S. 338, 74 S.Ct. 83, 98 L.Ed. 39 (1953); *Feinsinger v. Bard*, 195 F.2d 45 (7th Cir. 1952).

An important and growing class of State statutes base personal jurisdiction over nonresidents on the doing of acts or on other contacts within the State, and permit notice to be given the defendant outside the State without any requirement of service on a local State official. See, e.g., Ill.Ann.Stat. ch. 110, §§16, 17 (Smith-Hurd 1956); Wis.Stat. §262.06 (1959). This service, employed in original Federal actions pursuant to paragraph (7), has also been held proper. See *Farr & Co. v. Cia. Intercontinental de Nav. de Cuba*, 243 F.2d 342 (2d Cir. 1957); *Kappus v. Western Hills Oil, Inc.*, 24 F.R.D. 123 (E.D.Wis. 1959); *Star v. Rogalny*, 162 F.Supp. 181 (E.D.Ill. 1957). It has also been held that the clause of paragraph (7) which permits service "in the manner prescribed by the law of the state," etc., is not limited by subdivision (c) requiring that service of all process be made by certain designated persons. See *Farr & Co. v. Cia. Intercontinental de Nav. de Cuba, supra. But cf. Sappia v. Lauro Lines*, 130 F.Supp. 810 (S.D.N.Y. 1955).

The salutary results of these cases are intended to be preserved. See paragraph (7), with a clarified reference to State law, and amended subdivisions (e) and (f).

Subdivision (e). For the general relation between subdivisions (d) and (e), see 2 Moore, *supra*, ¶4.32.

The amendment of the first sentence inserting the word "thereunder" supports the original intention that the "order of court" must be authorized by a specific United States statute. See 1 Barron & Holtzoff, supra, at 731. The clause added at the end of the first sentence expressly adopts the view taken by commentators that, if no manner of service is prescribed in the statute or order, the service may be made in a manner stated in Rule 4. See 2 Moore, *supra*, ¶4.32, at 1004; Smit, *International Aspects of Federal Civil Procedure*, 61 Colum.L.Rev. 1031, 1036–39 (1961). *But see* Commentary, 5 Fed. Rules Serv. 791 (1942).

Examples of the statutes to which the first sentence relates are 28 U.S.C. §2361 (Interpleader; process and procedure); 28 U.S.C. §1655 (Lien enforcement; absent defendants).

The second sentence, added by amendment, expressly allows resort in original Federal actions to the procedures provided by State law for effecting service on nonresident parties (as well as on domiciliaries not found within the State). See, as illustrative, the discussion under amended subdivision (d)(7) of service pursuant to State nonresident motorist statutes and other comparable State statutes. Of particular interest is the change brought about by the reference in this sentence to State procedures for commencing actions against nonresidents by attachment and the like, accompanied by notice. Although an action commenced in a State court by attachment may be removed to the Federal court if ordinary conditions for removal are satisfied, see 28 U.S.C. §1450; *Rorick v. Devon Syndicate, Ltd.*, 307 U.S. 299, 59 S.Ct. 877, 83 L.Ed. 1303 (1939); *Clark v. Wells*, 203 U.S. 164, 27 S.Ct. 43, 51 L.Ed. 138 (1906), there has heretofore been no provision recognized by the courts for commencing an original Federal civil action by attachment. See Currie, *Attachment and Garnishment in the Federal Courts*, 59 Mich.L.Rev. 337 (1961), arguing that this result came about through historical anomaly. Rule 64, which refers to attachment, garnishment, and similar procedures under State law, furnishes only provisional remedies in actions otherwise validly commenced. See *Big Vein Coal Co. v. Read*, 229 U.S. 31, 33 S.Ct. 694, 57 L.Ed. 1953 (1913); *Davis v. Ensign-Bickford Co.*, 139 F.2d 624 (8th Cir. 1944); 7 *Moore's Federal Practice* ¶64.05 (2d ed. 1954); 3 Barron & Holtzoff, *Federal Practice & Procedure* §1423 (Wright ed. 1958); but cf. Note, 13 So.Calif.L.Rev. 361 (1940). The amendment will now permit the institution of original Federal actions against nonresidents through the use of familiar State procedures by which property of these defendants is brought within the custody of the court and some appropriate service is made up them.

The necessity of satisfying subject-matter jurisdictional requirements and requirements of venue will limit the practical utilization of these methods of effecting service. Within those limits, however, there appears to be no reason for denying plaintiffs means of commencing actions in Federal courts which are generally available in the State courts. See 1 Barron & Holtzoff, *supra*, at 374–80; Nordbye, *Comments on Proposed Amendments to Rules of Civil Procedure for the United States District Courts*, 18 F.R.D. 105, 106 (1956); Note, 34 Corn.L.Q. 103 (1948); Note, 13 So.Calif.L.Rev. 361 (1940).

If the circumstances of a particular case satisfy the applicable Federal law (first sentence of Rule 4(e), as amended) and the applicable State law (second sentence), the party seeking to make the service may proceed under the Federal or the State law, at his option.

See also amended Rule 13(a), and the Advisory Committee's Note thereto.

Subdivision (f). The first sentence is amended to assure the effectiveness of service outside the territorial limits of the State in all the cases in which any of the rules authorize service beyond those boundaries. Besides the preceding provisions of Rule 4, see Rule 71A(d)(3). In addition, the new second sentence of the subdivision permits effective service within a limited area outside the State in certain special situations, namely, to bring in additional parties to a counterclaim or cross-claim (Rule 13(h)), impleaded parties (Rule 14), and indispensable or conditionally necessary parties to a pending action (Rule 19); and to secure compliance with an order of commitment for civil contempt. In those situations effective service can be made at points not more than 100 miles distant from the courthouse in which the action is commenced, or to which it is assigned or transferred for trial.

The bringing in of parties under the 100-mile provision in the limited situations enumerated is designed to promote the objective of enabling the court to determine entire controversies. In the light of present-day facilities for communication and travel, the territorial range of the service allowed, analogous to that which applies to the service of a subpoena under Rule 45(e)(1), can hardly work hardship on the parties summoned. The provision will be especially useful in metropolitan areas spanning more than one State. Any requirements of subject-matter jurisdiction and venue will still have to be satisfied as to the parties brought in, although these requirements will be eased in some instances when the parties can be regarded as "ancillary." See *Pennsylvania R.R. v. Erie Avenue Warehouse Co.*, 5 F.R.Serv.2d 14a.62, Case 2 (3d Cir. 1962); *Dery v. Wyer*, 265 F.2d 804 (2d Cir. 1959); *United Artists Corp. v. Masterpiece Productions, Inc.*, 221 F.2d 213 (2d Cir. 1955); *Lesnik v. Public Industrials Corp.*, 144 F.2d 968 (2d Cir. 1944); *Vaughn v. Terminal Transp. Co.*, 162 F.Supp. 647 (E.D.Tenn. 1957); and compare the fifth paragraph of the Advisory Committee's Note to Rule 4(e), as amended. The amendment is but a moderate extension of the territorial reach of Federal process and has ample practical justification. See 2 Moore, *supra*. §4.01[13] (Supp. 1960); 1 Barron & Holtzoff, supra, §184; Note, 51 Nw.U.L.Rev. 354 (1956). *But cf.* Nordbye, *Comments on Proposed Amendments to Rules of Civil Procedure for the United States District Courts*, 18 F.R.D. 105, 106 (1956).

As to the need for enlarging the territorial area in which orders of commitment for civil contempt may be served, see *Graber v. Graber*, 93 F.Supp. 281 (D.D.C. 1950); *Teele Soap Mfg. Co. v. Pine Tree Products Co., Inc.*, 8 F.Supp. 546 (D.N.H. 1934); *Mitchell v. Dexter*, 244 Fed. 926 (1st Cir. 1917); *in re Graves*, 29 Fed. 60 (N.D. Iowa 1886).

As to the Court's power to amend subdivisions (e) and (f) as here set forth, see *Mississippi Pub. Corp. v. Murphree*, 326 U.S. 438, 66 S.Ct. 242, 90 L.Ed. 185 (1946).

Subdivision (i). The continual increase of civil litigation having international elements makes it advisable to consolidate, amplify, and clarify the provisions governing service upon parties in foreign countries. See generally Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 Yale L.J. 515 (1953); Longley, *Serving Process, Subpoenas and Other Documents in Foreign Territory*, Proc. A.B.A., Sec. Int'l & Comp. L. 34 (1959); Smit, *International Aspects of Federal Civil Procedure*, 61 Colum.L.Rev. 1031 (1961).

As indicated in the opening lines of new subdivision (i), referring to the provisions of subdivision (e), the authority for effecting foreign service must be found in a statute of the United States or a statute or rule of court of the State in which the district court is held providing in terms or upon proper interpretation for service abroad upon persons not inhabitants of or found within the State. See the Advisory Committee's Note to amended Rule 4(d)(7) and Rule 4(e). For examples of Federal and State statutes expressly authorizing such service, see 8 U.S.C. §1451(b); 35 U.S.C. §§146, 293; Me.Rev.Stat., ch. 22, §70 (Supp. 1961); Minn.Stat.Ann. §303.13 (1947); N.Y.Veh. & Tfc.Law §253. Several decisions have construed statutes to permit service in foreign countries, although the matter is not expressly mentioned in the statutes. See, e.g., *Chapman v. Superior Court*, 162 Cal.App.2d 421, 328 P.2d 23 (Dist.Ct.App. 1958); *Sperry v. Fliegers*, 194 Misc. 438, 86 N.Y.S.2d 830 (Sup.Ct. 1949); *Ewing v. Thompson*, 233 N.C. 564, 65 S.E.2d 17 (1951); *Rushing v. Bush*, 260 S.W.2d 900 (Tex.Ct.Civ.App. 1953). Federal and State statutes authorizing service on nonresidents in such terms as to warrant the interpretation that service abroad is permissible include 15 U.S.C. §§77v(a), 78aa, 79y; 28 U.S.C. §1655; 38 U.S.C. §784(a); Ill.Ann.Stat. ch. 110, §§16, 17 (Smith-Hurd 1956); Wis.Stat. §262.06 (1959).

Under subdivisions (e) and (i), when authority to make foreign service is found in a Federal statute or statute or rule of court of a State, it is always sufficient to carry out the service in the manner indicated therein. Subdivision (i) introduces considerable further flexibility by permitting the foreign service and return thereof to be carried out in any of a number of other alternative ways that are also declared to be sufficient. Other aspects of foreign service continue to be governed by the other provisions of Rule 4. Thus, for example, subdivision (i) effects no change in the form of the summons, or the issuance of separate or additional summons, or the amendment of service.

Service of process beyond the territorial limits of the United States may involve difficulties not encountered in the case of domestic service. Service abroad may be considered by a foreign country to require the performance of judicial, and therefore ''sovereign,'' acts within its territory, which that country may conceive to be offensive to its policy or contrary to its law. See Jones, *supra*, at 537. For example, a person not qualified to serve process according to the law of the foreign country may find himself subject to sanctions if he attempts service therein. See Inter-American Judicial Committee, *Report on Uniformity of Legislation on International Cooperation in Judicial Procedures* 20 (1952). The enforcement of a judgment in the foreign country in which the service was made may be embarrassed or prevented if the service did not comport with the law of that country. See *ibid*.

One of the purposes of subdivision (i) is to allow accommodation to the policies and procedures of the foreign country. It is emphasized, however, that the attitudes of foreign countries vary considerably and that the question of recognition of United States judgments abroad is complex. Accordingly, if enforcement is to be sought in the country of service, the foreign law should be examined before a choice is made among the methods of service allowed by subdivision (i).

Subdivision (i)(1). Subparagraph (a) of paragraph (1), permitting service by the method prescribed by the law of the foreign country for service on a person in that country in a civil action in any of its courts of general jurisdiction, provides an alternative that is likely to create least objection in the place of service and also is likely to enhance the possibilities of securing ultimate enforcement of the judgment abroad. See *Report on Uniformity of Legislation on International Cooperation in Judicial Procedures, supra*.

In certain foreign countries service in aid of litigation pending in other countries can lawfully be accomplished only upon request to the foreign court, which in turn directs the service to be made. In many countries this has long been a customary way of accomplishing the service. See *In re Letters Rogatory out of First Civil Court of City of Mexico*, 261 Fed. 652 (S.D.N.Y. 1919); *Jones, supra*, at 543; Comment, 44 Colum.L.Rev. 72 (1944); Note, 58 Yale L.J. 1193 (1949). Subparagraph (B) of paragraph (1), referring to a letter rogatory, validates this method. A proviso, applicable to this subparagraph and the preceding one, requires, as a safeguard, that the service made shall be reasonably calculated to give actual notice of the proceedings to the party. See *Milliken v. Meyer*, 311 U.S. 457, 61 S.Ct. 339, 85 L.Ed. 278 (1940).

Subparagraph (C) of paragraph (1), permitting foreign service by personal delivery on individuals and corporations, partnerships, and associations, provides for a manner of service that is not only traditionally preferred, but also is most likely to lead to actual notice. Explicit provision for this manner of service was thought desirable because a number of Federal and State statutes permitting foreign service do not specifically provide for service by personal delivery abroad, see e.g., 35 U.S.C. §§146, 293; 46 [App.] U.S.C. §1292; Calif.Ins.Code §1612; N.Y.Veh. & Tfc.Law §253, and it also may be unavailable under the law of the country in which the service is made.

Subparagraph (D) of paragraph (1), permitting service by certain types of mail, affords a manner of service that is inexpensive and expeditious, and requires a minimum of activity within the foreign country. Several statutes specifically provide for service in a foreign country by mail, e.g., Hawaii Rev.Laws §§230–31, 230–32 (1955); Minn.Stat.Ann. §303.13 (1947); N.Y.Civ.Prac.Act, §229–b; N.Y.Veh. & Tfc.Law §253, and it has been sanctioned by the courts even in the absence of statutory provision specifying that form of service. *Zurini v. United States*, 189 F.2d 722 (8th Cir. 1951); *United States v. Cardillo*, 135 F.Supp. 798 (W.D.Pa. 1955); *Autogiro Co. v. Kay Gyroplanes, Ltd.*, 55 F.Supp. 919 (D.D.C. 1944). Since the reliability of postal service may vary from country to country, service by mail is proper only when it is addressed to the party to be served and a form of mail requiring a signed receipt is used. An additional safeguard is provided by the requirement that the mailing be attended to be the clerk of the court. See also the provisions of paragraph (2) of this subdivision (i) regarding proof of service by mail.

Under the applicable law it may be necessary, when the defendant is an infant or incompetent person, to deliver the summons and complaint to a guardian, committee, or similar fiduciary. In such a case it would be advisable to make service under subparagraph (A), (B), or (E).

Subparagraph (E) of paragraph (1) adds flexibility by permitting the court by order to tailor the manner of service to fit the necessities of a particular case or the peculiar requirements of the law of the country in which the service is to be made. A similar provision appears in a number of statutes, e.g., 35 U.S.C. §§146, 293; 38 U.S.C. §784(a); 46 [App.] U.S.C. §1292.

The next-to-last sentence of paragraph (1) permits service under (C) and (E) to be made by any person who is not a party and is not less than 18 years of age or who is designated by court order or by the foreign court. Cf. Rule 45(c); N.Y.Civ.Prac.Act §§233, 235. This alternative increases the possibility that the plaintiff will be able to find a process server who can proceed unimpeded in the foreign country; it also may improve the chances of enforcing the judgment in the country of service. Especially is the alternative valuable when au-

thority for the foreign service is found in a statute or rule of court that limits the group of eligible process servers to designated officials or special appointees who, because directly connected with another ''sovereign,'' may be particularly offensive to the foreign country. See generally Smit, *supra*, at 1040–41. When recourse is had to subparagraph (A) or (B) the identity of the process server always will be determined by the law of the foreign country in which the service is made.

The last sentence of paragraph (1) sets forth an alternative manner for the issuance and transmission of the summons for service. After obtaining the summons from the clerk, the plaintiff must ascertain the best manner of delivering the summons and complaint to the person, court, or officer who will make the service. Thus the clerk is not burdened with the task of determining who is permitted to serve process under the law of a particular country or the appropriate governmental or nongovernmental channel for forwarding a letter rogatory. Under (D), however, the papers must always be posted by the clerk.

Subdivision (i)(2). When service is made in a foreign country, paragraph (2) permits methods for proof of service in addition to those prescribed by subdivision (g). Proof of service in accordance with the law of the foreign country is permitted because foreign process servers, unaccustomed to the form or the requirement of return of service prevalent in the United States, have on occasion been unwilling to execute the affidavit required by Rule 4(g). See Jones, *supra*, at 537; Longley, *supra*, at 35. As a corollary of the alternate manner of service in subdivision (i)(1)(E), proof of service as directed by order of the court is permitted. The special provision for proof of service by mail is intended as an additional safeguard when that method is used. On the type of evidence of delivery that may be satisfactory to a court in lieu of a signed receipt, see *Aero Associates, Inc. v. La Metropolitana*, 183 F.Supp. 357 (S.D.N.Y. 1960).

NOTES OF ADVISORY COMMITTEE ON RULES—1966 AMENDMENT

The wording of Rule 4(f) is changed to accord with the amendment of Rule 13(h) referring to Rule 19 as amended.

NOTES OF ADVISORY COMMITTEE ON RULES—1980 AMENDMENT

Subdivision (a). This is a technical amendment to conform this subdivision with the amendment of subdivision (c).

Subdivision (c). The purpose of this amendment is to authorize service of process to be made by any person who is authorized to make service in actions in the courts of general jurisdiction of the state in which the district court is held or in which service is made.

There is a troublesome ambiguity in Rule 4. Rule 4(c) directs that all process is to be served by the marshal, by his deputy, or by a person specially appointed by the court. But Rule 4(d)(7) authorizes service in certain cases ''in the manner prescribed by the law of the state in which the district court is held. . . .'' And Rule 4(e), which authorizes service beyond the state and service in *quasi in rem* cases when state law permits such service, directs that ''service may be made . . . under the circumstances and in the manner prescribed in the [state] statute or rule.'' State statutes and rules of the kind referred to in Rule 4(d)(7) and Rule 4(e) commonly designate the persons who are to make the service provided for, *e.g.*, a sheriff or a plaintiff. When that is so, may the persons so designated by state law make service, or is service in all cases to be made by a marshal or by one specially appointed under present Rule 4(c)? The commentators have noted the ambiguity and have suggested the desirability of an amendment. See 2 *Moore's Federal Practice* ¶4.08 (1974); Wright & Miller, *Federal Practice and Procedure: Civil* §1092 (1969). And the ambiguity has given rise to unfortunate results. See *United States for the use of Tanos v. St. Paul Mercury Ins. Co.*, 361 F. 2d 838 (5th Cir. 1966); *Veeck v. Commodity Enterprises, Inc.*, 487 F. 2d 423 (9th Cir. 1973).

The ambiguity can be resolved by specific amendments to Rules 4(d)(7) and 4(e), but the Committee is of the view that there is no reason why Rule 4(c) should not generally authorize service of process in all cases by anyone authorized to make service in the courts of general jurisdiction of the state in which the district court is held or in which service is made. The marshal continues to be the obvious, always effective officer for service of process.

LEGISLATIVE STATEMENT—1983 AMENDMENT

128 Congressional Record H9848, Dec. 15, 1982

Mr. EDWARDS of California. Mr. Speaker, in July Mr. MCCLORY and I brought before the House a bill to delay the effective date of proposed changes in rule 4 of the Federal Rules of Civil Procedure, dealing with service of process. The Congress enacted that legislation and delayed the effective date so that we could cure certain problems in the proposed amendments to rule 4.

Since that time, Mr. MCCLORY and I introduced a bill, H.R. 7154, that cures those problems. It was drafted in consultation with representatives of the Department of Justice, the Judicial Conference of the United States, and others.

The Department of Justice and the Judicial Conference have endorsed the bill and have urged its prompt enactment. Indeed, the Department of Justice has indicated that the changes occasioned by the bill will facilitate its collection of debts owned to the Government.

I have a letter from the Office of Legislative Affairs of the Department of Justice supporting the bill that I will submit for the RECORD. Also, I am submitting for the RECORD a section-by-section analysis of the bill.

H.R. 7154 makes much needed changes in rule 4 of the Federal Rules of Civil Procedure and is supported by all interested parties. I urge my colleagues to support it.

U.S. DEPARTMENT OF JUSTICE.
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, D.C., December 10, 1982.

Hon. PETER W. RODINO, Jr.,
Chairman, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is to proffer the views of the Department of Justice on H.R. 7154, the proposed Federal Rules of Civil Procedure Amendments Act of 1982. While the agenda is extremely tight and we appreciate that fact, we do reiterate that this Department strongly endorses the enactment of H.R. 7154. We would greatly appreciate your watching for any possible way to enact this legislation expeditiously.

H.R. 7154 would amend Rule 4 of the Federal Rules of Civil Procedure to relieve effectively the United States Marshals Service of the duty of routinely serving summonses and complaints for private parties in civil actions and would thus achieve a goal this Department has long sought. Experience has shown that the Marshals Service's increasing workload and limited budget require such major relief from the burdens imposed by its role as process-server in all civil actions.

The bill would also amend Rule 4 to permit certain classes of defendants to be served by first class mail with a notice and acknowledgment of receipt form enclosed. We have previously expressed a preference for the service-by-mail provisions of the proposed amendments to Rule 4 which the Supreme Court transmitted to Congress on April 28, 1982.

The amendments proposed by the Supreme Court would permit service by registered or certified mail, return receipt requested. We had regarded the Supreme Court proposal as the more efficient because it would not require and affirmative act of signing and mailing on the part of a defendant. Moreover, the Supreme Court proposal would permit the entry of a default judgment if the record contained a returned receipt showing acceptance by the defendant or a returned en-

velope showing refusal of the process by the defendant and subsequent service and notice by first class mail. However, critics of that system of mail service have argued that certified mail is not an effective method of providing actual notice to defendants of claims against them because signatures may be illegible or may not match the name of the defendant, or because it may be difficult to determine whether mail has been ''unclaimed'' or ''refused,'' the latter providing the sole basis for a default judgment.

As you know, in light of these criticisms the Congress enacted Public Law 97–227 (H.R. 6663) postponing the effective date of the proposed amendments to Rule 4 until October 1, 1983, so as to facilitate further review of the problem. This Department opposed the delay in the effective date, primarily because the Supreme Court's proposed amendments also contained urgently needed provisions designed to relieve the United States Marshals of the burden of serving summonses and complaints in private civil actions. In our view, these necessary relief provisions are readily separable from the issues of service by certified mail and the propriety of default judgment after service by certified mail which the Congress felt warranted additional review.

During the floor consideration of H.R. 6663 Congressman Edwards and other proponents of the delayed effective date pledged to expedite the review of the proposed amendments to Rule 4, given the need to provide prompt relief for the Marshals Service in the service of process area. In this spirit Judiciary Committee staff consulted with representatives of this Department, the Judicial Conference, and others who had voiced concern about the proposed amendments.

H.R. 7154 is the product of those consultations and accommodated the concerns of the Department in a very workable and acceptable manner.

Accordingly, we are satisfied that the provisions of H.R. 7154 merit the support of all three branches of the Federal Government and everyone else who has a stake in the fair and efficient service of process in civil actions. We urge prompt consideration of H.R. 7154 by the Committee.[1]

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

ROBERT A. MCCONNELL,
Assistant Attorney General.

[1] In addition to amending Rule 4, we have previously recommended: (a) amendments to 28 U.S.C. §569(b) redefining the Marshals traditional role by eliminating the statutory requirement that they serve subpoenas, as well as summonses and complaints, and; (b) amendments to 28 U.S.C. §1921 changing the manner and level in which marshal fees are charged for serving private civil process. These legislative changes are embodied in Section 10 of S. 2567 and the Department's proposed fiscal year 1983 Appropriations Authorization bill. If, in the Committee's judgment, efforts to incorporate these suggested amendments in H.R. 7154 would in any way impede consideration of the bill during the few remaining legislative days in the 97th Congress, we would urge that they be separately considered early in the 98th Congress.

H.R. 7154—FEDERAL RULES OF CIVIL PROCEDURE AMENDMENTS ACT OF 1982

BACKGROUND

The Federal Rules of Civil Procedure set forth the procedures to be followed in civil actions and proceedings in United States district courts. These rules are usually amended by a process established by 28 U.S.C. 2072, often referred to as the ''Rules Enabling Act''. The Rules Enabling Act provides that the Supreme Court can propose new rules of ''practice and procedure'' and amendments to existing rules by transmitting them to Congress after the start of a regular session but not later than May 1. The rules and amendments so proposed take effect 90 days after transmittal unless legislation to the contrary is enacted.[1]

On April 28, 1982, the Supreme Court transmitted to Congress several proposed amendments to the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure (which govern criminal cases and proceedings in Federal courts), and the Rules and Forms Governing Proceedings in the United States District Courts under sections 2254 and 2255 of Title 28, United States Code (which govern habeas corpus proceedings). These amendments were to have taken effect on August 1, 1982.

The amendments to Rule 4 of the Federal Rules of Civil Procedure were intended primarily to relieve United States marshals of the burden of serving summonses and complaints in private civil actions. Appendix II, at 7 (Report of the Committee on Rules of Practice and Procedure), 16 (Advisory Committee Note). The Committee received numerous complaints that the changes not only failed to achieve that goal, but that in the process the changes saddled litigators with flawed mail service, deprived litigants of the use of effective local procedures for service, and created a time limit for service replete with ambiguities that could only be resolved by costly litigation. See House Report No. 97–662, at 2–4 (1982).

In order to consider these criticisms, Congress enacted Public Law 97–227, postponing the effective date of the proposed amendments to Rule 4 until October 1, 1983.[2] Accordingly, in order to help shape the policy behind, and the form of, the proposed amendments, Congress must enact legislation before October 1, 1983.[3]

With that deadline and purpose in mind, consultations were held with representatives of the Judicial Conference, the Department of Justice, and others who had voiced concern about the proposed amendments. H.R. 7154 is the product of those consultations. The bill seeks to effectuate the policy of relieving the Marshals Service of the duty of routinely serving summonses and complaints. It provides a system of service by mail modeled upon a system found to be effective in California, and finally, it makes appropriate stylistic, grammatical, and other changes in Rule 4.

NEED FOR THE LEGISLATION

1. Current Rule 4

Rule 4 of the Federal Rules of Civil Procedure relates to the issuance and service of process. Subsection (c) authorizes service of process by personnel of the Marshals Service, by a person specially appointed by the Court, or ''by a person authorized to serve process in an action brought in the courts of general jurisdiction of the state in which the district court is held or in which service is made.'' Subsection (d) describes how a summons and complaint must be served and designates those persons who must be served in cases involving specified categories of defendants. Mail service is not directly authorized. Subsection (d)(7), however, authorizes service under the law of the state in which the district court sits upon defendants described in subsections (d)(1) (certain individuals) and (d)(3) (organizations). Thus, if state law authorizes service by mail of a summons and complaint upon an individual or organization described in subsections (d)(1) or (3), then subsection (d)(7) authorizes service by mail for United States district courts in that state.[4]

2. Reducing the role of marshals

The Supreme Court's proposed modifications of Rule 4 were designed to alleviate the burden on the Marshals Service of serving summonses and complaints in private civil actions. Appendix II, at 7 (Report of the Committee on Rules of Practice and Procedure), 16 (Advisory Committee Note). While the Committee received no complaints about the goal of reducing the role of the Marshals Service, the Court's proposals simply failed to achieve that goal. See House Report No. 97–662, at 2–3 (1982).

The Court's proposed Rule 4(c)(2)(B) required the Marshals Service to serve summonses and complaints ''pursuant to any statutory provision expressly provid-

ing for service by a United States Marshal or his deputy.''[5] One such statutory provision is 28 U.S.C. 569(b), which compels marshals to ''execute *all* lawful writs, process and orders issued under authority of the United States, *including those of the courts* * * *.'' (emphasis added). Thus, any party could have invoked 28 U.S.C. 569(b) to utilize a marshal for service of a summons and complaint, thereby thwarting the intent of the new subsection to limit the use of marshals. The Justice Department acknowledges that the proposed subsection did not accomplish its objectives.[6]

Had 28 U.S.C. 569(b) been inconsistent with proposed Rule 4(c)(2)(B), the latter would have nullified the former under 28 U.S.C. 2072, which provides that ''All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.'' Since proposed Rule 4(c)(2)(B) specifically referred to statutes such as 28 U.S.C. 569(b), however, the new subsection did not conflict with 28 U.S.C. 569(b) and did not, therefore, supersede it.

H.R. 7154 cures this problem and achieves the desired reduction in the role of the Marshals Service by authorizing marshals to serve summonses and complaints ''on behalf of the United States''. By so doing, H.R. 7154 eliminates the loophole in the Court's proposed language and still provides for service by marshals on behalf of the Government.[7]

3. Mail service

The Supreme Court's proposed subsection (d)(7) and (8) authorized, as an alternative to personal service, mail service of summonses and complaints on individuals and organizations described in subsection (d)(1) and (3), but only through registered or certified mail, restricted delivery. Critics of that system of mail service argued that registered and certified mail were not necessarily effective methods of providing actual notice to defendants of claims against them. This was so, they argued, because signatures may be illegible or may not match the name of the defendant, or because it may be difficult to determine whether mail has been ''unclaimed'' or ''refused'', the latter apparently providing the sole basis for a default judgment.[8]

H.R. 7154 provides for a system of service by mail similar to the system now used in California. See Cal. Civ. Pro. §415.30 (West 1973). Service would be by ordinary mail with a notice and acknowledgment of receipt form enclosed. If the defendant returns the acknowledgment form to the sender within 20 days of mailing, the sender files the return and service is complete. If the acknowledgment is not returned within 20 days of mailing, then service must be effected through some other means provided for in the Rules.

This system of mail service avoids the notice problems created by the registered and certified mail procedures proposed by the Supreme Court. If the proper person receives the notice and returns the acknowledgment, service is complete. If the proper person does not receive the mailed form, or if the proper person receives the notice but fails to return the acknowledgment form, another method of service authorized by law is required.[9] In either instance, however, the defendant will receive actual notice of the claim. In order to encourage defendants to return the acknowledgment form, the court can order a defendant who does not return it to pay the costs of service unless the defendant can show good cause for the failure to return it.

4. The local option

The Court's proposed amendments to Rule 4 deleted the provision in current subsection (d)(7) that authorizes service of a summons and complaint upon individuals and organizations ''in the manner prescribed by the law of the state in which the district court is held for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state.'' The Committee received a variety of complaints about the deletion of this provision. Those in favor of preserving the local option saw no reason to forego systems of service that had been successful in achieving effective notice.[10]

H.R. 7154 carries forward the policy of the current rule and permits a party to serve a summons and complaint upon individuals and organizations described in Rule 4(d)(1) and (3) in accordance with the law of the state in which the district court sits. Thus, the bill authorizes four methods of serving a summons and complaint on such defendants: (1) service by a nonparty adult (Rule 4(c)(2)(A)); (2) service by personnel of the Marshals Service, if the party qualifies, such as because the party is proceeding in forma pauperis (Rule 4(c)(2)(B)); (3) service in any manner authorized by the law of the state in which the district court is held (Rule 4(c)(2)(C)(i)); or (4) service by regular mail with a notice and acknowledgment of receipt form enclosed (Rule 4(c)(2)(C)(ii)).[11]

5. Time limits

Rule 4 does not currently provide a time limit within which service must be completed. Primarily because United States marshals currently effect service of process, no time restriction has been deemed necessary. Appendix II, at 18 (Advisory Committee Note). Along with the proposed changes to subdivisions (c) and (d) to reduce the role of the Marshals Service, however, came new subdivision (j), requiring that service of a summons and complaint be made within 120 days of the filing of the complaint. If service were not accomplished within that time, proposed subdivision (j) required that the action ''be dismissed as to that defendant without prejudice upon motion or upon the court's own initiative''. Service by mail was deemed made for purposes of subdivision (j) ''as of the date on which the process was accepted, refused, or returned as unclaimed''.[12]

H.R. 7154 adopts a policy of limiting the time to effect service. It provides that if a summons and complaint have not been served within 120 days of the filing of the complaint and the plaintiff fails to show ''good cause'' for not completing service within that time, then the court must dismiss the action as to the unserved defendant. H.R. 7154 ensures that a plaintiff will be notified of an attempt to dismiss the action. If dismissal for failure to serve is raised by the court upon its own motion, the legislation requires that the court provide notice to the plaintiff. If dismissal is sought by someone else, Rule 5(a) of the Federal Rules of Civil Procedure requires that the motion be served upon the plaintiff.

Like proposed subsection (j), H.R. 7154 provides that a dismissal for failure to serve within 120 days shall be ''without prejudice''. Proposed subsection (j) was criticized by some for ambiguity because, it was argued, neither the text of subsection (j) nor the Advisory Committee Note indicated whether a dismissal without prejudice would toll a statute of limitation. *See* House Report 97–662, at 3–4 (1982). The problem would arise when a plaintiff files the complaint within the applicable statute of limitation period but does not effect service within 120 days. If the statute of limitation period expires during that period, and if the plaintiff's action is dismissed ''without prejudice'', can the plaintiff refile the complaint and maintain the action? The answer depends upon how the statute of limitation is tolled.[13]

If the law provides that the statute of limitation is tolled by filing and service of the complaint, then a dismissal under H.R. 7154 for failure to serve within the 120 days would, by the terms of the law controlling the tolling, bar the plaintiff from later maintaining the cause of action.[14] If the law provides that the statute of limitation is tolled by filing alone, then the status of the plaintiff's cause of action turns upon the plaintiff's diligence. If the plaintiff has not been diligent, the court will dismiss the complaint for failure to serve within 120 days, and the plaintiff will be barred from later maintaining the cause of action because the statute of limitation has run. A dismissal without prejudice does not confer upon the plaintiff any rights that the plaintiff does not otherwise possess and leaves a

plaintiff whose action has been dismissed in the same position as if the action had never been filed.[15] If, on the other hand, the plaintiff has made reasonable efforts to effect service, then the plaintiff can move under Rule 6(b) to enlarge the time within which to serve or can oppose dismissal for failure to serve. A court would undoubtedly permit such a plaintiff additional time within which to effect service. Thus, a diligent plaintiff can preserve the cause of action. This result is consistent with the policy behind the time limit for service and with statutes of limitation, both of which are designed to encourage prompt movement of civil actions in the federal courts.

6. Conforming and clarifying subsections (d)(4) and (5)

Current subsections (d)(4) and (5) prescribe which persons must be served in cases where an action is brought against the United States or an officer or agency of the United States. Under subsection (d)(4), where the United States is the named defendant, service must be made as follows: (1) personal service upon the United States attorney, an assistant United States attorney, or a designated clerical employee of the United States attorney in the district in which the action is brought; (2) registered or certified mail service to the Attorney General of the United States in Washington, D.C.; and (3) registered or certified mail service to the appropriate officer or agency if the action attacks an order of that officer or agency but does not name the officer or agency as a defendant. Under subsection (d)(5), where an officer or agency of the United States is named as a defendant, service must be made as in subsection (d)(4), except that personal service upon the officer or agency involved is required.[16]

The time limit for effecting service in H.R. 7154 would present significant difficulty to a plaintiff who has to arrange for personal service upon an officer or agency that may be thousands of miles away. There is little reason to require different types of service when the officer or agency is named as a party, and H.R. 7154 therefore conforms the manner of service under subsection (d)(5) to the manner of service under subsection (d)(4).

SECTION-BY-SECTION ANALYSIS

SECTION 1

Section 1 provides that the short title of the bill is the ''Federal Rules of Civil Procedure Amendments Act of 1982''.

SECTION 2

Section 2 of the bill consists of 7 numbered paragraphs, each amending a different part of Rule 4 of the Federal Rules of Civil Procedure.

Paragraph (1) deletes the requirement in present Rule 4(a) that a summons be delivered for service to the marshal or other person authorized to serve it. As amended by the legislation, Rule 4(a) provides that the summons be delivered to ''the plaintiff or the plaintiff's attorney, who shall be responsible for prompt service of the summons and complaint''. This change effectuates the policy proposed by the Supreme Court. See Appendix II, at — (Advisory Committee Note).

Paragraph (2) amends current Rule 4(c), which deals with the service of process. New Rule 4(c)(1) requires that all process, other than a subpoena or a summons and complaint, be served by the Marshals Service or by a person especially appointed for that purpose. Thus, the Marshals Service or persons specially appointed will continue to serve all process other than subpoenas and summonses and complaints, a policy identical to that proposed by the Supreme Court. See Appendix II, at 8 (Report of the Judicial Conference Committee on Rules of Practice and Procedure). The service of subpoenas is governed by Rule 45,[17] and the service of summonses and complaints is governed by new Rule 4(c)(2).

New Rule 4(c)(2)(A) sets forth the general rule that summonses and complaints shall be served by someone who is at least 18 years old and not a party to the action or proceeding. This is consistent with the Court's proposal. Appendix II, at 16 (Advisory Committee Note). Subparagraphs (B) and (C) of new Rule 4(c)(2) set forth exceptions to this general rule.

Subparagraph (B) sets forth 3 exceptions to the general rule. First, subparagraph (B)(i) requires the Marshals Service (or someone specially appointed by the court) to serve summonses and complaints on behalf of a party proceeding in forma pauperis or a seaman authorized to proceed under 28 U.S.C. 1916. This is identical to the Supreme Court's proposal. *See* Appendix II, at 3 (text of proposed rule), 16 (Advisory Committee Note). Second, subparagraph (B)(ii) requires the Marshals Service (or someone specially appointed by the court) to serve a summons and complaint when the court orders the marshals to do so in order properly to effect service in that particular action.[18] This, except for nonsubstantive changes in phrasing, is identical to the Supreme Court's proposal. See Appendix II, at 3 (text of proposed rule), 16 (Advisory Committee Note).

Subparagraph (C) of new Rule 4(c)(2) provides 2 exceptions to the general rule of service by a nonparty adult. These exceptions apply only when the summons and complaint is to be served upon persons described in Rule 4(d)(1) (certain individuals) or Rule 4(d)(3) (organizations).[19] First, subparagraph (C)(i) permits service of a summons and complaint in a manner authorized by the law of the state in which the court sits. This restates the option to follow local law currently found in Rule 4(d)(7) and would authorize service by mail if the state law so allowed. The method of mail service in that instance would, of course, be the method permitted by state law.

Second, subparagraph (C)(ii) permits service of a summons and complaint by regular mail. The sender must send to the defendant, by first-class mail, postage prepaid, a copy of the summons and complaint, together with 2 copies of a notice and acknowledgment of receipt of summons and complaint form and a postage prepaid return envelope addressed to the sender. If a copy of the notice and acknowledgment form is not received by the sender within 20 days after the date of mailing, then service must be made under Rule 4(c)(2)(A) or (B) (i.e., by a nonparty adult or, if the person qualifies,[20] by personnel of the Marshals Service or a person specially appointed by the court) in the manner prescribed by Rule 4(d)(1) or (3) (i.e., personal or substituted service).

New Rule 4(c)(2)(D) permits a court to penalize a person who avoids service by mail. It authorizes the court to order a person who does not return the notice and acknowledgment form within 20 days after mailing to pay the costs of service, unless that person can show good cause for failing to return the form. The purpose of this provision is to encourage the prompt return of the form so that the action can move forward without unnecessary delay. Fairness requires that a person who causes another additional and unnecessary expense in effecting service ought to reimburse the party who was forced to bear the additional expense.

Subparagraph (E) of rule 4(c)(2) requires that the notice and acknowledgment form described in new Rule 4(c)(2)(C)(ii) be executed under oath or affirmation. This provision tracks the language of 28 U.S.C. 1746, which permits the use of unsworn declarations under penalty of perjury whenever an oath or affirmation is required. Statements made under penalty of perjury are subject to 18 U.S,C. 1621(2), which provides felony penalties for someone who ''willfully subscribes as true any material matter which he does not believe to be true''. The requirement that the form be executed under oath or affirmation is intended to encourage truthful submissions to the court, as the information contained in the form is important to the parties.[21]

New Rule 4(c)(3) authorizes the court freely to make special appointments to serve summonses and complaints under Rule 4(c)(2)(B) and all other process under Rule 4(c)(1). This carries forward the policy of present Rule 4(c).

Paragraph (3) of section 2 of the bill makes a non-substantive change in the caption of Rule 4(d) in order to

reflect more accurately the provisions of Rule 4(d). Paragraph (3) also deletes a provision on service of a summons and complaint pursuant to state law. This provision is redundant in view of new Rule 4(c)(2)(C)(i).

Paragraph (4) of section 2 of the bill conforms Rule 4(d)(5) to present Rule 4(d)(4). Rule 4(d)(5) is amended to provide that service upon a named defendant agency or officer of the United States shall be made by ''sending'' a copy of the summons and complaint ''by registered or certified mail'' to the defendant.[22] Rule 4(d)(5) currently provides for service by ''delivering'' the copies to the defendant, but 28 U.S.C. 1391(e) authorizes delivery upon a defendant agency or officer outside of the district in which the action is brought by means of certified mail. Hence, the change is not a marked departure from current practice.

Paragraph (5) of section 2 of the bill amends the caption of Rule 4(e) in order to describe subdivision (e) more accurately.

Paragraph (6) of section 2 of the bill amends Rule 4(g), which deals with return of service. Present rule 4(g) is not changed except to provide that, if service is made pursuant to the new system of mail service (Rule 4(c)(2)(C)(ii)), the plaintiff or the plaintiff's attorney must file with the court the signed acknowledgment form returned by the person served.

Paragraph (7) of section 2 of the bill adds new subsection (j) to provide a time limitation for the service of a summons and complaint. New Rule 4(j) retains the Supreme Court's requirement that a summons and complaint be served within 120 days of the filing of the complaint. See Appendix II, at 18 (Advisory Committee Note).[23] The plaintiff must be notified of an effort or intention to dismiss the action. This notification is mandated by subsection (j) if the dismissal is being raised on the court's own initiative and will be provided pursuant to Rule 5 (which requires service of motions upon the adverse party) if the dismissal is sought by someone else.[24] The plaintiff may move under Rule 6(b) to enlarge the time period. See Appendix II, at 1d. (Advisory Committee Note). If service is not made within the time period or enlarged time period, however, and if the plaintiff fails to show ''good cause'' for not completing service, then the court must dismiss the action as to the unserved defendant. The dismissal is ''without prejudice''. The term ''without prejudice'' means that the dismissal does not constitute an adjudication of the merits of the complaint. A dismissal ''without prejudice'' leaves a plaintiff whose action has been dismissed in the position in which that person would have been if the action had never been filed.

SECTION 3

Section 3 of the bill amends the Appendix of Forms at the end of the Federal Rules of Civil Procedure by adding a new form 18A, ''Notice and Acknowledgment for Service by Mail''. This new form is required by new Rule 4(c)(2)(C)(ii), which requires that the notice and acknowledgment form used with service by regular mail conform substantially to Form 18A.

Form 18A as set forth in section 3 of the bill is modeled upon a form used in California.[25] It contains 2 parts. The first part is a notice to the person being served that tells that person that the enclosed summons and complaint is being served pursuant to Rule 4(c)(2)(C)(ii); advises that person to sign and date the acknowledgment form and indicate the authority to receive service if the person served is not the party to the action (e.g., the person served is an officer of the organization being served); and warns that failure to return the form to the sender within 20 days may result in the court ordering the party being served to pay the expenses involved in effecting service. The notice also warns that if the complaint is not responded to within 20 days, a default judgment can be entered against the party being served. The notice is dated under penalty of perjury by the plaintiff or the plaintiff's attorney.[26]

The second part of the form contains the acknowledgment of receipt of the summons and complaint. The person served must declare on this part of the form, under penalty of perjury, the date and place of service and the person's authority to receive service.

SECTION 4

Section 4 of the bill provides that the changes in Rule 4 made by H.R. 7154 will take effect 45 days after enactment, thereby giving the bench and bar, as well as other interested persons and organizations (such as the Marshals Service), an opportunity to prepare to implement the changes made by the legislation. The delayed effective date means that service of process issued before the effective date will be made in accordance with current Rule 4. Accordingly, all process in the hands of the Marshals Service prior to the effective date will be served by the Marshals Service under the present rule.

SECTION 5

Section 5 of the bill provides that the amendments to Rule 4 proposed by the Supreme Court (whose effective date was postponed by Public Law 97–227) shall not take effect. This is necessary because under Public Law 97–227 the proposed amendments will take effect on October 1, 1983.

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[1] The drafting of the rules and amendments is actually done by a committee of the Judicial Conference of the United States. In the case of the Federal Rules of Civil Procedure, the initial draft is prepared by the Advisory Committee on Civil Rules. The Advisory Committee's draft is then reviewed by the Committee on Rules of Practice and Procedure, which must give its approval to the draft. Any draft approved by that committee is forwarded to the Judicial Conference. If the Judicial Conference approves the draft, it forwards the draft to the Supreme Court. The Judicial Conference's role in the rule-making process is defined by 28 U.S.C. 331.

For background information about how the Judicial Conference committees operate, see Wright, ''Procedural Reform: Its Limitation and Its Future,'' 1 Ga.L.Rev. 563, 565–66 (1967) (civil rules); statement of United States District Judge Roszel C. Thomsen, Hearings on Proposed Amendments to the Federal Rules of Criminal Procedure Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 93d Cong., 2d Sess. at 25 (1974) (criminal rules); statement of United States Circuit Judge J. Edward Lumbard, id. at 203 (criminal rules); J. Weinstein, Reform of Federal Court Rulemaking Procedure (1977); Weinstein, ''Reform of Federal Rulemaking Procedures,'' 76 Colum.L.Rev. 905 (1976).

[2] All of the other amendments, including all of the proposed amendments to the Federal Rules of Criminal Procedure and the Rules and Forms Governing Proceedings in the United States District Courts under sections 2254 and 2255 of Title 28, United States Code, took effect on August 1, 1982, as scheduled.

[3] The President has urged Congress to act promptly. See President's Statement on Signing H.R. 6663 into Law, 18 Weekly Comp. of Pres. Doc. 982 (August 2, 1982).

[4] Where service of a summons is to be made upon a party who is neither an inhabitant of, nor found within, the state where the district court sits, subsection (e) authorizes service under a state statute or rule of court that provides for service upon such a party. This would authorize mail service if the state statute or rule of court provided for service by mail.

[5] The Court's proposal authorized service by the Marshals Service in other situations. This authority, however, was not seen as thwarting the underlying policy of limiting the use of marshals. *See* Appendix II, at 16, 17 (Advisory Committee Note).

[6] Appendix I, at 2 (letter of Assistant Attorney General Robert A. McConnell).

[7] The provisions of H.R. 7154 conflict with 28 U.S.C. 569(b) because the latter is a broader command to marshals to serve all federal court process. As a later statutory enactment, however, H.R. 7154 supersedes 28 U.S.C. 569(b), thereby achieving the goal of reducing the role of marshals.

[8] Proposed Rule 4(d)(8) provided that ''Service . . . shall not be the basis for the entry of a default or a judgment by default unless the record contains a return receipt showing acceptance by the defendant or a returned envelope showing refusal of the process by the defendant.'' This provision reflects a desire to preclude default judgments on unclaimed mail. See Appendix II, at 7 (Report of the Committee on Rules of Practice and Procedure).

The interpretation of Rule 4(d)(8) to require a refusal of delivery in order to have a basis for a default judgment, while undoubtedly the interpretation intended and the interpretation that reaches the fairest result, may not be the only possible interpretation. Since a default judgment can be entered for defendant's failure to respond to the complaint once defendant has been served and the time to answer the complaint has run, it can

be argued that a default judgment can be obtained where the mail was unclaimed because proposed subsection (j), which authorized dismissal of a complaint not served within 120 days, provided that mail service would be deemed made ''on the date on which the process was accepted, refused, or *returned as unclaimed*'' (emphasis added).

[9] See p. 15 infra.

[10] Proponents of the California system of mail service, in particular, saw no reason to supplant California's proven method of mail service with a certified mail service that they believed likely to result in default judgments without actual notice to defendants. See House Report No. 97–662, at 3 (1982).

[11] The parties may, of course, stipulate to service, as is frequently done now.

[12] While return of the letter as unclaimed was deemed service for the purpose of determining whether the plaintiff's action could be dismissed, return of the letter as unclaimed was not service for the purpose of entry of a default judgment against the defendant. See note 8 supra.

[13] The law governing the tolling of a statute of limitation depends upon the type of civil action involved. In adversity action, state law governs tolling. *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980). In *Walker*, plaintiff had filed his complaint and thereby commenced the action under Rule 3 of the Federal Rules of Civil Procedure within the statutory period. He did not, however, serve the summons and complaint until after the statutory period had run. The Court held that state law (which required both filing and service within the statutory period) governed, barring plaintiff's action.

In the federal question action, the courts of appeals have generally held that Rule 3 governs, so that the filing of the complaint tolls a statute of limitation. *United States v. Wahl*, 538 F.2d 285 (6th Cir. 1978); *Windbrooke Dev. Co. v. Environmental Enterprises Inc. of Fla.*, 524 F.2d 461 (5th Cir. 1975); *Metropolitan Paving Co. v. International Union of Operating Engineers*, 439 F.2d 300 (10th Cir. 1971); *Moore Co. v. Sid Richardson Carbon & Gasoline Co.*, 347 F.2d 921 (8th Cir.), cert. denied, 383 U.S. 925, reh. denied, 384 U.S. 914 (1965); *Hoffman v. Halden*, 268 F.2d 280 (9th Cir. 1959). The continued validity of this line of cases, however, must be questioned in light of the *Walker* case, even though the Court in that case expressly reserved judgment about federal question actions, *see Walker v. Armco Steel Corp.*, 446 U.S. 741, 751 n.11 (1980).

[14] The same result obtains even if service occurs within the 120 day period, if the service occurs after the statute of limitation has run.

[15] See p. 19 infra.

[16] See p. 17 infra.

[17] Rule 45(c) provides that ''A subpoena may be served by the marshal, by his deputy, or by any other person who is not a party and is not less than 18 years of age.''

[18] Some litigators have voiced concern that there may be situations in which personal service by someone other than a member of the Marshals Service may present a risk of injury to the person attempting to make the service. For example, a hostile defendant may have a history of injuring persons attempting to serve process. Federal judges undoubtedly will consider the risk of harm to private persons who would be making personal service when deciding whether to order the Marshals Service to make service under Rule 4(c)(2)(B)(iii).

[19] The methods of service authorized by Rule 4(c)(2)(C) may be invoked by any person seeking to effect service. Thus, a nonparty adult who receives the summons and complaint for service under Rule 4(c)(1) may serve them personally or by mail in the manner authorized by Rule 4(c)(2)(C)(ii). Similarly, the Marshals Service may utilize the mail service authorized by Rule 4(c)(2)(C)(ii) when serving a summons and complaint under Rule 4(c)(2)(B)(i)(iii). When serving a summons and complaint under Rule 4(c)(2)(B)(ii), however, the Marshals Service must serve in the manner set forth in the court's order. If no particular manner of service is specified, then the Marshals Service may utilize Rule 4(c)(2)(C)(ii). It would not seem to be appropriate, however, for the Marshals Service to utilize Rule 4(c)(2)(C)(ii) in a situation where a previous attempt to serve by mail failed. Thus, it would not seem to be appropriate for the Marshals Service to attempt service by regular mail when serving a summons and complaint on behalf of a plaintiff who is proceeding in forma pauperis if that plaintiff previously attempted unsuccessfully to serve the defendant by mail.

[20] To obtain service by personnel of the Marshals Service or someone specially appointed by the court, a plaintiff who has unsuccessfully attempted mail service under Rule 4(c)(2)(C)(ii) must meet the conditions of Rule 4(c)(2)(B)—for example, the plaintiff must be proceeding *in forma pauperis*.

[21] For example, the sender must state the date of mailing on the form. If the form is not returned to the sender within 20 days of that date, then the plaintiff must serve the defendant in another manner and the defendant may be liable for the costs of such service. Thus, a defendant would suffer the consequences of a misstatement about the date of mailing.

[22] See p. 12 supra.

[23] The 120 day period begins to run upon the filing of each complaint. Thus, where a defendant files a cross-claim against the plaintiff, the 120 day period begins to run upon the filing of the cross-complaint, not upon the filing of the plaintiff's complaint initiating the action.

[24] The person who may move to dismiss can be the putative defendant (i.e., the person named as defendant in the complaint filed with the court) or, in multi-party actions, another party to the action. (If the putative defendant moves to dismiss and the failure to effect service is due to that person's evasion of service, a court should not dismiss because the plaintiff has ''good cause'' for not completing service.)

[25] See Cal. Civ. Pro. §415.30 (West 1973).

[26] See p. 16 supra.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1993 AMENDMENT

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

First, the revised rule authorizes the use of any means of service provided by the law not only of the forum state, but also of the state in which a defendant is served, unless the defendant is a minor or incompetent.

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

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

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

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

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

The Caption of the Rule. Prior to this revision, Rule 4 was entitled ''Process'' and applied to the service of not

only the summons but also other process as well, although these are not covered by the revised rule. Service of process in eminent domain proceedings is governed by Rule 71A. Service of a subpoena is governed by Rule 45, and service of papers such as orders, motions, notices, pleadings, and other documents is governed by Rule 5.

The revised rule is entitled ''Summons'' and applies only to that form of legal process. Unless service of the summons is waived, a summons must be served whenever a person is joined as a party against whom a claim is made. Those few provisions of the former rule which relate specifically to service of process other than a summons are relocated in Rule 4.1 in order to simplify the text of this rule.

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

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

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

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

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

Subdivision (d). This text is new, but is substantially derived from the former subdivisions (c)(2)(C) and (D), added to the rule by Congress in 1983. The aims of the provision are to eliminate the costs of service of a summons on many parties and to foster cooperation among adversaries and counsel. The rule operates to impose upon the defendant those costs that could have been avoided if the defendant had cooperated reasonably in the manner prescribed. This device is useful in dealing with defendants who are furtive, who reside in places not easily reached by process servers, or who are outside the United States and can be served only at substantial and unnecessary expense. Illustratively, there is no useful purpose achieved by requiring a plaintiff to comply with all the formalities of service in a foreign country, including costs of translation, when suing a defendant manufacturer, fluent in English, whose products are widely distributed in the United States. *See Bankston v. Toyota Motor Corp.*, 889 F.2d 172 (8th Cir. 1989).

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

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

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

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

It is hoped that, since transmission of the notice and waiver forms is a private nonjudicial act, does not purport to effect service, and is not accompanied by any summons or directive from a court, use of the procedure will not offend foreign sovereignties, even those that have withheld their assent to formal service by mail or have objected to the ''service-by-mail'' provisions of the former rule. Unless the addressee consents, receipt of the request under the revised rule does not give rise to any obligation to answer the lawsuit, does not provide a basis for default judgment, and does not suspend the statute of limitations in those states where the period continues to run until service. Nor are there any adverse consequences to a foreign defendant, since the provisions for shifting the expense of service to a defendant that declines to waive service apply only if the plaintiff and defendant are both located in the United States.

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

where, as a condition to formal service under a convention, documents must be translated into another language or where formal service will be otherwise costly or time-consuming.

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

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

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

Paragraph (2)(B) permits the use of alternatives to the United States mails in sending the Notice and Request. While private messenger services or electronic communications may be more expensive than the mail, they may be equally reliable and on occasion more convenient to the parties. Especially with respect to transmissions to foreign countries, alternative means may be desirable, for in some countries facsimile transmission is the most efficient and economical means of communication. If electronic means such as facsimile transmission are employed, the sender should maintain a record of the transmission to assure proof of transmission if receipt is denied, but a party receiving such a transmission has a duty to cooperate and cannot avoid liability for the resulting cost of formal service if the transmission is prevented at the point of receipt.

A defendant failing to comply with a request for waiver shall be given an opportunity to show good cause for the failure, but sufficient cause should be rare. It is not a good cause for failure to waive service that the claim is unjust or that the court lacks jurisdiction. Sufficient cause not to shift the cost of service would exist, however, if the defendant did not receive the request or was insufficiently literate in English to understand it. It should be noted that the provisions for shifting the cost of service apply only if the plaintiff and the defendant are both located in the United States, and accordingly a foreign defendant need not show ''good cause'' for its failure to waive service.

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

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

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

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

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

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

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

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

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

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

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

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

Subdivision (f). This subdivision provides for service on individuals who are in a foreign country, replacing the former subdivision (i) that was added to Rule 4 in 1963. Reflecting the pattern of Rule 4 in incorporating state law limitations on the exercise of jurisdiction over persons, the former subdivision (i) limited service outside the United States to cases in which extraterritorial service was authorized by state or federal law. The new rule eliminates the requirement of explicit authorization. On occasion, service in a foreign country was held to be improper for lack of statutory authority. *E.g., Martens v. Winder*, 341 F.2d 197 (9th Cir.), *cert. denied*, 382 U.S. 937 (1965). This authority, however, was found to exist by implication. *E.g., SEC v. VTR, Inc.*, 39 F.R.D. 19 (S.D.N.Y. 1966). Given the substantial increase in the number of international transactions and events that are the subject of litigation in federal courts, it is appropriate to infer a general legislative authority to effect service on defendants in a foreign country.

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

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

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

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

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

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

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

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

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

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

Subdivision (i). This subdivision retains much of the text of former subdivisions (d)(4) and (d)(5). Paragraph (1) provides for service of a summons on the United States; it amends former subdivision (d)(4) to permit the United States attorney to be served by registered or certified mail. The rule does not authorize the use of the Notice and Request procedure of revised subdivision (d) when the United States is the defendant. To assure proper handling of mail in the United States attorney's office, the authorized mail service must be specifically addressed to the civil process clerk of the office of the United States attorney.

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

Subdivision (j). This subdivision retains the text of former subdivision (d)(6) without material change. The

waiver-of-service provision is also inapplicable to actions against governments subject to service pursuant to this subdivision.

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

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

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

This paragraph corrects a gap in the enforcement of federal law. Under the former rule, a problem was presented when the defendant was a non-resident of the United States having contacts with the United States sufficient to justify the application of United States law and to satisfy federal standards of forum selection, but having insufficient contact with any single state to support jurisdiction under state long-arm legislation or meet the requirements of the Fourteenth Amendment limitation on state court territorial jurisdiction. In such cases, the defendant was shielded from the enforcement of federal law by the fortuity of a favorable limitation on the power of state courts, which was incorporated into the federal practice by the former rule. In this respect, the revision responds to the suggestion of the Supreme Court made in *Omni Capital Int'l v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 111 (1987).

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

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

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

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

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

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

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

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

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

Paragraph (2) provides for other uses of quasi-in-rem jurisdiction but limits its use to exigent circumstances. Provisional remedies may be employed as a means to secure jurisdiction over the property of a defendant whose person is not within reach of the court, but occasions for the use of this provision should be rare, as where the defendant is a fugitive or assets are in imminent danger of disappearing. Until 1963, it was not possible under Rule 4 to assert jurisdiction in a fed-

eral court over the property of a defendant not personally served. The 1963 amendment to subdivision (e) authorized the use of state law procedures authorizing seizures of assets as a basis for jurisdiction. Given the liberal availability of long-arm jurisdiction, the exercise of power quasi-in-rem has become almost an anachronism. Circumstances too spare to affiliate the defendant to the forum state sufficiently to support long-arm jurisdiction over the defendant's person are also inadequate to support seizure of the defendant's assets fortuitously found within the state. *Shaffer v. Heitner*, 433 U.S. 186 (1977).

COMMITTEE NOTES ON RULES—2000 AMENDMENT

Paragraph (2)(B) is added to Rule 4(i) to require service on the United States when a United States officer or employee is sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States. Decided cases provide uncertain guidance on the question whether the United States must be served in such actions. *See Vaccaro v. Dobre*, 81 F.3d 854, 856–857 (9th Cir. 1996); *Armstrong v. Sears*, 33 F.3d 182, 185–187 (2d Cir. 1994); *Ecclesiastical Order of the Ism of Am v. Chasin*, 845 F.2d 113, 116 (6th Cir. 1988); *Light v. Wolf*, 816 F.2d 746 (D.C. Cir. 1987); *see also Simpkins v. District of Columbia*, 108 F.3d 366, 368–369 (D.C. Cir. 1997). Service on the United States will help to protect the interest of the individual defendant in securing representation by the United States, and will expedite the process of determining whether the United States will provide representation. It has been understood that the individual defendant must be served as an individual defendant, a requirement that is made explicit. Invocation of the individual service provisions of subdivisions (e), (f), and (g) invokes also the waiver-of-service provisions of subdivision (d).

Paragraph 2(B) reaches service when an officer or employee of the United States is sued in an individual capacity "for acts or omissions occurring in connection with the performance of duties on behalf of the United States." This phrase has been chosen as a functional phrase that can be applied without the occasionally distracting associations of such phrases as "scope of employment," "color of office," or "arising out of the employment." Many actions are brought against individual federal officers or employees of the United States for acts or omissions that have no connection whatever to their governmental roles. There is no reason to require service on the United States in these actions. The connection to federal employment that requires service on the United States must be determined as a practical matter, considering whether the individual defendant has reasonable grounds to look to the United States for assistance and whether the United States has reasonable grounds for demanding formal notice of the action.

An action against a former officer or employee of the United States is covered by paragraph (2)(B) in the same way as an action against a present officer or employee. Termination of the relationship between the individual defendant and the United States does not reduce the need to serve the United States.

Paragraph (3) is amended to ensure that failure to serve the United States in an action governed by paragraph 2(B) does not defeat an action. This protection is adopted because there will be cases in which the plaintiff reasonably fails to appreciate the need to serve the United States. There is no requirement, however, that the plaintiff show that the failure to serve the United States was reasonable. A reasonable time to effect service on the United States must be allowed after the failure is pointed out. An additional change ensures that if the United States or United States attorney is served in an action governed by paragraph 2(A), additional time is to be allowed even though no officer, employee, agency, or corporation of the United States was served.

GAP Report. The most important changes were made to ensure that no one would read the seemingly independent provisions of paragraphs 2(A) and 2(B) to mean that service must be made twice both on the United States and on the United States employee when the employee is sued in both official and individual capacities. The word "only" was added in subparagraph (A) and the new phrase "whether or not the officer or employee is sued also in an individual capacity" was inserted in subparagraph (B).

Minor changes were made to include "Employees" in the catchline for subdivision (i), and to add "or employee" in paragraph 2(A). Although it may seem awkward to think of suit against an employee in an official capacity, there is no clear definition that separates "officers" from "employees" for this purpose. The published proposal to amend Rule 12(a)(3) referred to actions against an employee sued in an official capacity, and it seemed better to make the rules parallel by adding "employee" to Rule 4(i)(2)(A) than by deleting it from Rule 12(a)(3)(A).

AMENDMENT BY PUBLIC LAW

1983—Subd. (a). Pub. L. 97–462, §2(1), substituted "deliver the summons to the plaintiff or the plaintiff's attorney, who shall be responsible for prompt service of the summons and a copy of the complaint" for "deliver it for service to the marshal or to any other person authorized by Rule 4(c) to serve it".

Subd. (c). Pub. L. 97–462, §2(2), substituted provision with subd. heading "Service" for provision with subd. heading "By Whom Served" which read: "Service of process shall be made by a United States marshal, by his deputy, or by some person specially appointed by the court for that purpose, except that a subpoena may be served as provided in Rule 45. Special appointments to serve process shall be made freely. Service of process may also be made by a person authorized to serve process in an action brought in the courts of general jurisdiction of the state in which the district court is held or in which service is made."

Subd. (d). Pub. L. 97–462, §2(3), (4), substituted "Summons and Complaint: Person to be Served" for "Summons: Personal Service" in subd. heading.

Subd. (d)(5). Pub. L. 97–462, §2(4), substituted "sending a copy of the summons and of the complaint by registered or certified mail" for "delivering a copy of the summons and of the complaint".

Subd. (d)(7). Pub. L. 97–462, §2(3)(B), struck out par. (7) which read: "Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if the summons and complaint are served in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state in which the district court is held for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state.". See subd. (c)(2)(C) of this rule.

Subd. (e). Pub. L. 97–462, §2(5), substituted "Summons" for "Same" as subd. heading.

Subd. (g). Pub. L. 97–462, §2(6), substituted in second sentence "deputy United States marshal" and "such person" for "his deputy" and "he" and inserted third sentence "If service is made under subdivision (c)(2)(C)(ii) of this rule, return shall be made by the sender's filing with the court the acknowledgment received pursuant to such subdivision.".

Subd. (j). Pub. L. 97–462, §2(7), added subd. (j).

EFFECTIVE DATE OF 1983 AMENDMENT

Amendment by Pub. L. 97–462 effective 45 days after Jan. 12, 1983, see section 4 of Pub. L. 97–462, set out as a note under section 2071 of this title.

Rule 4.1. Service of Other Process

(a) GENERALLY. Process other than a summons as provided in Rule 4 or subpoena as provided in Rule 45 shall be served by a United States marshal, a deputy United States marshal, or a per-

son specially appointed for that purpose, who shall make proof of service as provided in Rule 4(*l*). The process may be served anywhere within the territorial limits of the state in which the district court is located, and, when authorized by a statute of the United States, beyond the territorial limits of that state.

(b) ENFORCEMENT OF ORDERS: COMMITMENT FOR CIVIL CONTEMPT. An order of civil commitment of a person held to be in contempt of a decree or injunction issued to enforce the laws of the United States may be served and enforced in any district. Other orders in civil contempt proceedings shall be served in the state in which the court issuing the order to be enforced is located or elsewhere within the United States if not more than 100 miles from the place at which the order to be enforced was issued.

(As added Apr. 22, 1993, eff. Dec. 1, 1993.)

NOTES OF ADVISORY COMMITTEE ON RULES—1993

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

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

Service of process is not required to notify a party of a decree or injunction, or of an order that the party show cause why that party should not be held in contempt of such an order. With respect to a party who has once been served with a summons, the service of the decree or injunction itself or of an order to show cause can be made pursuant to Rule 5. Thus, for example, an injunction may be served on a party through that person's attorney. *Chagas v. United States*, 369 F.2d 643 (5th Cir. 1966). The same is true for service of an order to show cause. *Waffenschmidt v. Mackay*, 763 F.2d 711 (5th Cir. 1985).

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

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

Rule 5. Service and Filing of Pleadings and Other Papers

(a) SERVICE: WHEN REQUIRED. Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, 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. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

In an action begun by seizure of property, in which no person need be or is named as defendant, any service required to be made prior to the filing of an answer, claim, or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.

(b) MAKING SERVICE.

(1) Service under Rules 5(a) and 77(d) on a party represented by an attorney is made on the attorney unless the court orders service on the party.

(2) Service under Rule 5(a) is made by:

(A) Delivering a copy to the person served by:

(i) handing it to the person;

(ii) leaving it at the person's office with a clerk or other person in charge, or if no one is in charge leaving it in a conspicuous place in the office; or

(iii) if the person has no office or the office is closed, leaving it at the person's dwelling house or usual place of abode with someone of suitable age and discretion residing there.

(B) Mailing a copy to the last known address of the person served. Service by mail is complete on mailing.

(C) If the person served has no known address, leaving a copy with the clerk of the court.

(D) Delivering a copy by any other means, including electronic means, consented to in writing by the person served. Service by electronic means is complete on transmission; service by other consented means is complete when the person making service delivers the copy to the agency designated to make delivery. If authorized by local rule, a party may make service under this subparagraph (D) through the court's transmission facilities.

(3) Service by electronic means under Rule 5(b)(2)(D) is not effective if the party making service learns that the attempted service did not reach the person to be served.

(c) SAME: NUMEROUS DEFENDANTS. In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied

or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(d) FILING; CERTIFICATE OF SERVICE. All papers after the complaint required to be served upon a party, together with a certificate of service, must be filed with the court within a reasonable time after service, but disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: (i) depositions, (ii) interrogatories, (iii) requests for documents or to permit entry upon land, and (iv) requests for admission.

(e) FILING WITH THE COURT DEFINED. The filing of papers with the court as required by these rules shall be made by filing them with the clerk of court, except that the judge may permit the papers to be filed with the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. A court may by local rule permit or require papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A local rule may require filing by electronic means only if reasonable exceptions are allowed. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules. The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices.

(As amended Jan. 21, 1963, eff. July 1, 1963; Mar. 30, 1970, eff. July 1, 1970; Apr. 29, 1980, eff. Aug. 1, 1980; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 23, 1996, eff. Dec. 1, 1996; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 23, 2001, eff. Dec. 1, 2001; Apr. 12, 2006, eff. Dec. 1, 2006.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

Note to Subdivisions (a) and (b). Compare 2 Minn.Stat. (Mason, 1927) §§9240, 9241, 9242; N.Y.C.P.A. (1937) §§163, 164, and N.Y.R.C.P. (1937) Rules 20, 21; 2 Wash.Rev.Stat.Ann. (Remington, 1932) §§244–249.

Note to Subdivision (d). Compare the present practice under [former] Equity Rule 12 (Issue of Subpoena—Time for Answer).

NOTES OF ADVISORY COMMITTEE ON RULES—1963 AMENDMENT

The words ''affected thereby,'' stricken out by the amendment, introduced a problem of interpretation. See 1 Barron & Holtzoff, *Federal Practice & Procedure* 760–61 (Wright ed. 1960). The amendment eliminates this difficulty and promotes full exchange of information among the parties by requiring service of papers on all the parties to the action, except as otherwise provided in the rules. See also subdivision (c) of Rule 5. So, for example, a third-party defendant is required to serve his answer to the third-party complaint not only upon the defendant but also upon the plaintiff. See amended Form 22–A and the Advisory Committee's Note thereto.

As to the method of serving papers upon a party whose address is unknown, see Rule 5(b).

NOTES OF ADVISORY COMMITTEE ON RULES—1970 AMENDMENT

The amendment makes clear that all papers relating to discovery which are required to be served on any party must be served on all parties, unless the court orders otherwise. The present language expressly includes notices and demands, but it is not explicit as to answers or responses as provided in Rules 33, 34, and 36. Discovery papers may be voluminous or the parties numerous, and the court is empowered to vary the requirement if in a given case it proves needlessly onerous.

In actions begun by seizure of property, service will at times have to be made before the absent owner of the property has filed an appearance. For example, a prompt deposition may be needed in a maritime action in rem. See Rules 30(a) and 30(b)(2) and the related notes. A provision is added authorizing service on the person having custody or possession of the property at the time of its seizure.

NOTES OF ADVISORY COMMITTEE ON RULES—1980 AMENDMENT

Subdivision (d). By the terms of this rule and Rule 30(f)(1) discovery materials must be promptly filed, although it often happens that no use is made of the materials after they are filed. Because the copies required for filing are an added expense and the large volume of discovery filings presents serious problems of storage in some districts, the Committee in 1978 first proposed that discovery materials not be filed unless on order of the court or for use in the proceedings. But such materials are sometimes of interest to those who may have no access to them except by a requirement of filing, such as members of a class, litigants similarly situated, or the public generally. Accordingly, this amendment and a change in Rule 30(f)(1) continue the requirement of filing but make it subject to an order of the court that discovery materials not be filed unless filing is requested by the court or is effected by parties who wish to use the materials in the proceeding.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1991 AMENDMENT

Subdivision (d). This subdivision is amended to require that the person making service under the rule certify that service has been effected. Such a requirement has generally been imposed by local rule.

Having such information on file may be useful for many purposes, including proof of service if an issue arises concerning the effectiveness of the service. The certificate will generally specify the date as well as the manner of service, but parties employing private delivery services may sometimes be unable to specify the date of delivery. In the latter circumstance, a specification of the date of transmission of the paper to the delivery service may be sufficient for the purposes of this rule.

Subdivision (e). The words *''pleading and other''* are stricken as unnecessary. Pleadings are papers within the meaning of the rule. The revision also accommodates the development of the use of facsimile transmission for filing.

Several local district rules have directed the office of the clerk to refuse to accept for filing papers not conforming to certain requirements of form imposed by local rules or practice. This is not a suitable role for the office of the clerk, and the practice exposes litigants to the hazards of time bars; for these reasons, such rules are proscribed by this revision. The enforcement of these rules and of the local rules is a role for a judicial officer. A clerk may of course advise a party or counsel that a particular instrument is not in proper form, and may be directed to so inform the court.

NOTES OF ADVISORY COMMITTEE ON RULES—1993 AMENDMENT

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

NOTES OF ADVISORY COMMITTEE ON RULES—1996 AMENDMENT

The present Rule 5(e) has authorized filing by facsimile or other electronic means on two conditions. The filing must be authorized by local rule. Use of this means of filing must be authorized by the Judicial Conference of the United States and must be consistent with standards established by the Judicial Conference. Attempts to develop Judicial Conference standards have demonstrated the value of several adjustments in the rule.

The most significant change discards the requirement that the Judicial Conference authorize local electronic filing rules. As before, each district may decide for itself whether it has the equipment and personnel required to establish electronic filing, but a district that wishes to establish electronic filing need no longer await Judicial Conference action.

The role of the Judicial Conference standards is clarified by specifying that the standards are to govern technical matters. Technical standards can provide nationwide uniformity, enabling ready use of electronic filing without pausing to adjust for the otherwise inevitable variations among local rules. Judicial Conference adoption of technical standards should prove superior to specification in these rules. Electronic technology has advanced with great speed. The process of adopting Judicial Conference standards should prove speedier and more flexible in determining the time for the first uniform standards, in adjusting standards at appropriate intervals, and in sparing the Supreme Court and Congress the need to consider technological details. Until Judicial Conference standards are adopted, however, uniformity will occur only to the extent that local rules deliberately seek to copy other local rules.

It is anticipated that Judicial Conference standards will govern such technical specifications as data formatting, speed of transmission, means to transmit copies of supporting documents, and security of communication. Perhaps more important, standards must be established to assure proper maintenance and integrity of the record and to provide appropriate access and retrieval mechanisms. Local rules must address these issues until Judicial Conference standards are adopted.

The amended rule also makes clear the equality of filing by electronic means with written filings. An electronic filing that complies with the local rule satisfies all requirements for filing on paper, signature, or verification. An electronic filing that otherwise satisfies the requirements of 28 U.S.C. §1746 need not be separately made in writing. Public access to electronic filings is governed by the same rules as govern written filings.

The separate reference to filing by facsimile transmission is deleted. Facsimile transmission continues to be included as an electronic means.

COMMITTEE NOTES ON RULES—2000 AMENDMENT

Subdivision (d). Rule 5(d) is amended to provide that disclosures under Rule 26(a)(1) and (2), and discovery requests and responses under Rules 30, 31, 33, 34, and 36 must not be filed until they are used in the action. ''Discovery requests'' includes deposition notices and ''discovery responses'' includes objections. The rule supersedes and invalidates local rules that forbid, permit, or require filing of these materials before they are used in the action. The former Rule 26(a)(4) requirement that disclosures under Rule 26(a)(1) and (2) be filed has been removed. Disclosures under Rule 26(a)(3), however, must be promptly filed as provided in Rule 26(a)(3). Filings in connection with Rule 35 examinations, which involve a motion proceeding when the parties do not agree, are unaffected by these amendments.

Recognizing the costs imposed on parties and courts by required filing of discovery materials that are never used in an action, Rule 5(d) was amended in 1980 to authorize court orders that excuse filing. Since then, many districts have adopted local rules that excuse or forbid filing. In 1989 the Judicial Conference Local Rules Project concluded that these local rules were inconsistent with Rule 5(d), but urged the Advisory Committee to consider amending the rule. *Local Rules Project* at 92 (1989). The Judicial Conference of the Ninth Circuit gave the Committee similar advice in 1997. The reality of nonfiling reflected in these local rules has even been assumed in drafting the national rules. In 1993, Rule 30(f)(1) was amended to direct that the officer presiding at a deposition file it with the court or send it to the attorney who arranged for the transcript or recording. The Committee Note explained that this alternative to filing was designed for ''courts which direct that depositions not be automatically filed.'' Rule 30(f)(1) has been amended to conform to this change in Rule 5(d).

Although this amendment is based on widespread experience with local rules, and confirms the results directed by these local rules, it is designed to supersede and invalidate local rules. There is no apparent reason to have different filing rules in different districts. Even if districts vary in present capacities to store filed materials that are not used in an action, there is little reason to continue expending court resources for this purpose. These costs and burdens would likely change as parties make increased use of audio- and videotaped depositions. Equipment to facilitate review and reproduction of such discovery materials may prove costly to acquire, maintain, and operate.

The amended rule provides that discovery materials and disclosures under Rule 26(a)(1) and (a)(2) must not be filed until they are ''used in the proceeding.'' This phrase is meant to refer to proceedings in court. This filing requirement is not triggered by ''use'' of discovery materials in other discovery activities, such as depositions. In connection with proceedings in court, however, the rule is to be interpreted broadly; any use of discovery materials in court in connection with a motion, a pretrial conference under Rule 16, or otherwise, should be interpreted as use in the proceeding.

Once discovery or disclosure materials are used in the proceeding, the filing requirements of Rule 5(d) should apply to them. But because the filing requirement applies only with regard to materials that are used, only those parts of voluminous materials that are actually used need be filed. Any party would be free to file other pertinent portions of materials that are so used. *See* Fed. R. Evid. 106; *cf*. Rule 32(a)(4). If the parties are unduly sparing in their submissions, the court may order further filings. By local rule, a court could provide appropriate direction regarding the filing of discovery materials, such as depositions, that are used in proceedings.

''Shall'' is replaced by ''must'' under the program to conform amended rules to current style conventions when there is no ambiguity.

GAP Report. The Advisory Committee recommends no changes to either the amendments to Rule 5(d) or the Committee Note as published.

COMMITTEE NOTES ON RULES—2001 AMENDMENT

Rule 5(b) is restyled.

Rule 5(b)(1) makes it clear that the provision for service on a party's attorney applies only to service made under Rules 5(a) and 77(d). Service under Rules 4, 4.1, 45(b), and 71A(d)(3)—as well as rules that invoke those rules—must be made as provided in those rules.

Subparagraphs (A), (B), and (C) of Rule 5(b)(2) carry forward the method-of-service provisions of former Rule 5(b).

Subparagraph (D) of Rule 5(b)(2) is new. It authorizes service by electronic means or any other means, but only if consent is obtained from the person served. The consent must be express, and cannot be implied from conduct. Early experience with electronic filing as authorized by Rule 5(d) is positive, supporting service by electronic means as well. Consent is required, however, because it is not yet possible to assume universal entry into the world of electronic communication. Subparagraph (D) also authorizes service by nonelectronic means. The Rule 5(b)(2)(B) provision making mail service complete on mailing is extended in subparagraph (D) to make service by electronic means complete on transmission; transmission is effected when the sender does the last act that must be performed by the sender. Service by other agencies is complete on delivery to the designated agency.

Finally, subparagraph (D) authorizes adoption of local rules providing for service through the court. Electronic case filing systems will come to include the capacity to make service by using the court's facilities to transmit all documents filed in the case. It may prove most efficient to establish an environment in which a party can file with the court, making use of the court's transmission facilities to serve the filed paper on all other parties. Transmission might be by such means as direct transmission of the paper, or by transmission of a notice of filing that includes an electronic link for direct access to the paper. Because service is under subparagraph (D), consent must be obtained from the persons served.

Consent to service under Rule 5(b)(2)(D) must be in writing, which can be provided by electronic means. Parties are encouraged to specify the scope and duration of the consent. The specification should include at least the persons to whom service should be made, the appropriate address or location for such service—such as the e-mail address or facsimile machine number, and the format to be used for attachments. A district court may establish a registry or other facility that allows advance consent to service by specified means for future actions.

Rule 6(e) is amended to allow additional time to respond when service is made under Rule 5(b)(2)(D). The additional time does not relieve a party who consents to service under Rule 5(b)(2)(D) of the responsibilities to monitor the facility designated for receiving service and to provide prompt notice of any address change.

Paragraph (3) addresses a question that may arise from a literal reading of the provision that service by electronic means is complete on transmission. Electronic communication is rapidly improving, but lawyers report continuing failures of transmission, particularly with respect to attachments. Ordinarily the risk of non-receipt falls on the person being served, who has consented to this form of service. But the risk should not extend to situations in which the person attempting service learns that the attempted service in fact did not reach the person to be served. Given actual knowledge that the attempt failed, service is not effected. The person attempting service must either try again or show circumstances that justify dispensing with service.

Paragraph (3) does not address the similar questions that may arise when a person attempting service learns that service by means other than electronic means in fact did not reach the person to be served. Case law provides few illustrations of circumstances in which a person attempting service actually knows that the attempt failed but seeks to act as if service had been made. This negative history suggests there is no need to address these problems in Rule 5(b)(3). This silence does not imply any view on these issues, nor on the circumstances that justify various forms of judicial action even though service has not been made.

Changes Made After Publication and Comments Rule 5(b)(2)(D) was changed to require that consent be ''in writing.''

Rule 5(b)(3) is new. The published proposal did not address the question of failed service in the text of the rule. Instead, the Committee Note included this statement: ''As with other modes of service, however, actual notice that the transmission was not received defeats the presumption of receipt that arises from the provision that service is complete on transmission. The sender must take additional steps to effect service. Service by other agencies is complete on delivery to the designated agency.'' The addition of paragraph (3) was prompted by consideration of the draft Appellate Rule 25(c) that was prepared for the meeting of the Appellate Rules Advisory Committee. This draft provided: ''Service by electronic means is complete on transmission, unless the party making service is notified that the paper was not received.'' Although Appellate Rule 25(c) is being prepared for publication and comment, while Civil Rule 5(b) has been published and otherwise is ready to recommend for adoption, it seemed desirable to achieve some parallel between the two rules.

The draft Rule 5(b)(3) submitted for consideration by the Advisory Committee covered all means of service except for leaving a copy with the clerk of the court when the person to be served has no known address. It was not limited to electronic service for fear that a provision limited to electronic service might generate unintended negative implications as to service by other means, particularly mail. This concern was strengthened by a small number of opinions that say that service by mail is effective, because complete on mailing, even when the person making service has prompt actual notice that the mail was not delivered. The Advisory Committee voted to limit Rule 5(b)(3) to service by electronic means because this means of service is relatively new, and seems likely to miscarry more frequently than service by post. It was suggested during the Advisory Committee meeting that the question of negative implication could be addressed in the Committee Note. There was little discussion of this possibility. The Committee Note submitted above includes a ''no negative implications'' paragraph prepared by the Reporter for consideration by the Standing Committee.

The Advisory Committee did not consider at all a question that was framed during the later meeting of the Appellate Rules Advisory Committee. As approved by the Advisory Committee, Rule 5(b)(3) defeats service by electronic means ''if the party making service learns that the attempted service did not reach the person to be served.'' It says nothing about the time relevant to learning of the failure. The omission may seem glaring. Curing the omission, however, requires selection of a time. As revised, proposed Appellate Rule 25(c) requires that the party making service learn of the failure within three calendar days. The Appellate Rules Advisory Committee will have the luxury of public comment and another year to consider the desirability of this short period. If Civil Rule 5(b) is to be recommended for adoption now, no such luxury is available. This issue deserves careful consideration by the Standing Committee.

Several changes are made in the Committee Note. (1) It requires that consent ''be express, and cannot be implied from conduct.'' This addition reflects a more general concern stimulated by a reported ruling that an e-mail address on a firm's letterhead implied consent to email service. (2) The paragraph discussing service through the court's facilities is expanded by describing alternative methods, including an ''electronic link.'' (3) There is a new paragraph that states that the requirement of written consent can be satisfied by electronic means, and that suggests matters that should be addressed by the consent. (4) A paragraph is added to note the additional response time provided by amended Rule 6(e). (5) The final two paragraphs address newly added Rule 5(b)(3). The first explains the rule that electronic service is not effective if the person making service learns that it did not reach the person to be served. The second paragraph seeks to defeat any negative implications that might arise from limiting Rule 5(b)(3) to electronic service, not mail, not other means consented to such as commercial express service, and not service on another person on behalf of the person to be served.

Rule 6(e)

The Advisory Committee recommended that no change be made in Civil Rule 6(e) to reflect the provisions of Civil Rule 5(b)(2)(D) that, with the consent of the person to be served, would allow service by electronic or other means. Absent change, service by these means would not affect the time for acting in response to the paper served. Comment was requested, however, on the alternative that would allow an additional 3 days to respond. The alternative Rule 6(e) amendments are cast in a form that permits ready incorporation in the Bankruptcy Rules. Several of the comments suggest that the added three days should be provided. Electronic transmission is not always instantaneous, and may fail for any of a number of reasons. It may take three days to arrange for transmission in readable form. Providing added time to respond will not discourage people from asking for consent to electronic transmission, and may encourage people to give consent. The more who consent, the quicker will come the improvements that will make electronic service ever more attractive. Consistency with the Bankruptcy Rules will be a good thing, and the Bankruptcy Rules Advisory Committee believes the additional three days should be allowed.

COMMITTEE NOTES ON RULES—2006 AMENDMENT

Amended Rule 5(e) acknowledges that many courts have required electronic filing by means of a standing order, procedures manual, or local rule. These local practices reflect the advantages that courts and most litigants realize from electronic filing. Courts that mandate electronic filing recognize the need to make exceptions when requiring electronic filing imposes a hardship on a party. Under amended Rule 5(e), a local rule that requires electronic filing must include reasonable exceptions, but Rule 5(e) does not define the scope of those exceptions. Experience with the local rules that have been adopted and that will emerge will aid in drafting new local rules and will facilitate gradual convergence on uniform exceptions, whether in local rules or in an amended Rule 5(e).

Changes Made after Publication and Comment. This recommendation is of a modified version of the proposal as published. The changes from the published version limit local rule authority to implement a caution stated in the published Committee Note. A local rule that requires electronic filing must include reasonable exceptions. This change was accomplished by a separate sentence stating that a ''local rule may require filing by electronic means only if reasonable exceptions are allowed.'' Corresponding changes were made in the Committee Note, in collaboration with the Appellate Rules Committee. The changes from the published proposal are shown below. [Omitted]

Rule 5.1. Constitutional Challenge to a Statute—Notice, Certification, and Intervention

(a) NOTICE BY A PARTY. A party that files a pleading, written motion, or other paper drawing into question the constitutionality of a federal or state statute must promptly:

(1) file a notice of constitutional question stating the question and identifying the paper that raises it, if:

(A) a federal statute is questioned and neither the United States nor any of its agencies, officers, or employees is a party in an official capacity, or

(B) a state statute is questioned and neither the state nor any of its agencies, officers, or employees is a party in an official capacity; and

(2) serve the notice and paper on the Attorney General of the United States if a federal statute is challenged—or on the state attorney general if a state statute is challenged—either by certified or registered mail or by sending it to an electronic address designated by the attorney general for this purpose.

(b) CERTIFICATION BY THE COURT. The court must, under 28 U.S.C. §2403, certify to the Attorney General of the United States that there is a constitutional challenge to a federal statute, or certify to the state attorney general that there is a constitutional challenge to a state statute.

(c) INTERVENTION; FINAL DECISION ON THE MERITS. Unless the court sets a later time, the attorney general may intervene within 60 days after the notice of constitutional question is filed or after the court certifies the challenge, whichever is earlier. Before the time to intervene expires, the court may reject the constitutional challenge, but may not enter a final judgment holding the statute unconstitutional.

(d) NO FORFEITURE. A party's failure to file and serve the notice, or the court's failure to certify, does not forfeit a constitutional claim or defense that is otherwise timely asserted.

(As added Apr. 12, 2006, eff. Dec. 1, 2006.)

COMMITTEE NOTES ON RULES—2006

Rule 5.1 implements 28 U.S.C. §2403, replacing the final three sentences of Rule 24(c). New Rule 5.1 requires a party that files a pleading, written motion, or other paper drawing in question the constitutionality of a federal or state statute to file a notice of constitutional question and serve it on the United States Attorney General or state attorney general. The party must promptly file and serve the notice of constitutional question. This notice requirement supplements the court's duty to certify a constitutional challenge to the United States Attorney General or state attorney general. The notice of constitutional question will ensure that the attorney general is notified of constitutional challenges and has an opportunity to exercise the statutory right to intervene at the earliest possible point in the litigation. The court's certification obligation remains, and is the only notice when the constitutionality of a federal or state statute is drawn in question by means other than a party's pleading, written motion, or other paper.

Moving the notice and certification provisions from Rule 24(c) to a new rule is designed to attract the parties' attention to these provisions by locating them in the vicinity of the rules that require notice by service and pleading.

Rule 5.1 goes beyond the requirements of §2403 and the former Rule 24(c) provisions by requiring notice and certification of a constitutional challenge to any federal or state statute, not only those ''affecting the public interest.'' It is better to assure, through notice, that the attorney general is able to determine whether to seek intervention on the ground that the act or statute affects a public interest. Rule 5.1 refers to a ''federal statute,'' rather than the §2403 reference to an ''Act of Congress,'' to maintain consistency in the Civil Rules vocabulary. In Rule 5.1 ''statute'' means any congressional enactment that would qualify as an ''Act of Congress.''

Unless the court sets a later time, the 60-day period for intervention runs from the time a party files a notice of constitutional question or from the time the court certifies a constitutional challenge, whichever is earlier. Rule 5.1(a) directs that a party promptly serve the notice of constitutional question. The court may extend the 60-[day] period on its own or on motion. One occasion for extension may arise if the court certifies a challenge under §2403 after a party files a notice of constitutional question. Pretrial activities may continue without interruption during the intervention period, and the court retains authority to grant inter-

locutory relief. The court may reject a constitutional challenge to a statute at any time. But the court may not enter a final judgment holding a statute unconstitutional before the attorney general has responded or the intervention period has expired without response. This rule does not displace any of the statutory or rule procedures that permit dismissal of all or part of an action—including a constitutional challenge—at any time, even before service of process.

Changes Made After Publication and Comment. Rule 5.1 as proposed for adoption incorporates several changes from the published draft. The changes were made in response to public comments and Advisory Committee discussion.

The Advisory Committee debated at length the question whether the party who files a notice of constitutional question should be required to serve the notice on the appropriate attorney general. The service requirement was retained, but the time for intervention was set to run from the earlier of the notice filing or the court's certification. The definition of the time to intervene was changed in tandem with this change. The published rule directed the court to set an intervention time not less than 60 days from the court's certification. This was changed to set a 60-day period in the rule "[u]nless the court sets a later time." The Committee Note points out that the court may extend the 60-day period on its own or on motion, and recognizes that an occasion for extension may arise if the 60-day period begins with the filing of the notice of constitutional question.

The method of serving the notice of constitutional question set by the published rule called for serving the United States Attorney General under Civil Rule 4, and for serving a state attorney general by certified or registered mail. This proposal has been changed to provide service in all cases either by certified or registered mail or by sending the Notice to an electronic address designated by the attorney general for this purpose.

The rule proposed for adoption brings into subdivision (c) matters that were stated in the published Committee Note but not in the rule text. The court may reject a constitutional challenge at any time, but may not enter a final judgment holding a statute unconstitutional before the time set to intervene expires.

The published rule would have required notice and certification when an officer of the United States or a state brings suit in an official capacity. There is no need for notice in such circumstances. The words "is sued" were deleted to correct this oversight.

Several style changes were made at the Style Subcommittee's suggestion. One change that straddles the line between substance and style appears in Rule 5.1(d). The published version adopted the language of present Rule 24(c): failure to comply with the Notice or certification requirements does not forfeit a constitutional "right." This expression is changed to "claim or defense" from concern that reference to a "right" may invite confusion of the no-forfeiture provision with the merits of the claim or defense that is not forfeited.

Rule 6. Time

(a) COMPUTATION. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, 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 office of the clerk of the district court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. 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(c), "legal holiday" includes New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the district court is held.

(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) with or without motion or notice order the period enlarged if request therefor is made 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 50(b) and (c)(2), 52(b), 59(b), (d) and (e), and 60(b), except to the extent and under the conditions stated in them.

[(c) UNAFFECTED BY EXPIRATION OF TERM.] (Rescinded Feb. 28, 1966, eff. July 1, 1966)

(d) FOR MOTIONS—AFFIDAVITS. A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time.

(e) ADDITIONAL TIME AFTER CERTAIN KINDS OF SERVICE. Whenever a party must or may act within a prescribed period after service and service is made under Rule 5(b)(2)(B), (C), or (D), 3 days are added after the prescribed period would otherwise expire under subdivision (a).

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Dec. 4, 1967, eff. July 1, 1968; Mar. 1, 1971, eff. July 1, 1971; Apr. 28, 1983, eff. Aug. 1, 1983; Apr. 29, 1985, eff. Aug. 1, 1985; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 26, 1999, eff. Dec. 1, 1999; Apr. 23, 2001, eff. Dec. 1, 2001; Apr. 25, 2005, eff. Dec. 1, 2005.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

Note to Subdivisions (a) and (b). These are amplifications along lines common in state practices, of [former] Equity Rule 80 (Computation of Time—Sundays and Holidays) and of the provisions for enlargement of time found in [former] Equity Rules 8 (Enforcement of Final Decrees) and 16 (Defendant to Answer—Default—Decree Pro Confesso). See also Rule XIII, Rules and Forms in Criminal Cases, 292 U.S. 661, 666 (1934). Compare Ala.Code Ann. (Michie, 1928) §13 and former Law Rule 8 of the Rules of the Supreme Court of the District of Columbia (1924), superseded in 1929 by Law Rule 8, Rules of the District Court of the United States for the District of Columbia (1937).

Note to Subdivision (c). This eliminates the difficulties caused by the expiration of terms of court. Such statutes as U.S.C. Title 28, [former] §12 (Trials not discontinued by new term) are not affected. Compare *Rules of the United States District Court of Minnesota*, Rule 25 (Minn.Stat. (Mason, Supp. 1936), p. 1089).

Note to Subdivision (d). Compare 2 Minn.Stat. (Mason, 1927) §9246; N.Y.R.C.P. (1937) Rules 60 and 64.

NOTES OF ADVISORY COMMITTEE ON RULES—1946 AMENDMENT

Subdivision (b). The purpose of the amendment is to clarify the finality of judgments. Prior to the advent of the Federal Rules of Civil Procedure, the general rule that a court loses jurisdiction to disturb its judgments, upon the expiration of the term at which they were entered, had long been the classic device which (together with the statutory limits on the time for appeal) gave finality to judgments. See Note to Rule 73(a). Rule 6(c) abrogates that limit on judicial power. That limit was open to many objections, one of them being inequality of operation because, under it, the time for vacating a judgment rendered early in a term was much longer than for a judgment rendered near the end of the term.

The question to be met under Rule 6(b) is: how far should the desire to allow correction of judgments be allowed to postpone their finality? The rules contain a number of provisions permitting the vacation or modification of judgments on various grounds. Each of these rules contains express time limits on the motions for granting of relief. Rule 6(b) is a rule of general application giving wide discretion to the court to enlarge these time limits or revive them after they have expired, the only exceptions stated in the original rule being a prohibition against enlarging the time specified in Rule 59(b) and (d) for making motions for or granting new trials, and a prohibition against enlarging the time fixed by law for taking an appeal. It should also be noted that Rule 6(b) itself contains no limitation of time within which the court may exercise its discretion, and since the expiration of the term does not end its power, there is now no time limit on the exercise of its discretion under Rule 6(b).

Decisions of lower federal courts suggest that some of the rules containing time limits which may be set aside under Rule 6(b) are Rules 25, 50(b), 52(b), 60(b), and 73(g).

In a number of cases the effect of Rule 6(b) on the time limitations of these rules has been considered. Certainly the rule is susceptible of the interpretation that the court is given the power in its discretion to relieve a party from failure to act within the times specified in any of these other rules, with only the exceptions stated in Rule 6(b), and in some cases the rule has been so construed.

With regard to Rule 25(a) for substitution, it was held in *Anderson v. Brady* (E.D.Ky. 1941) 4 Fed.Rules Service 25a.1, Case 1, and in *Anderson v. Yungkau* (C.C.A. 6th, 1946) 153 F.(2d) 685, cert. granted (1946) 66 S.Ct. 1025, that under Rule 6(b) the court had no authority to allow substitution of parties after the expiration of the limit fixed in Rule 25(a).

As to Rules 50(b) for judgments notwithstanding the verdict and 52(b) for amendment of findings and vacation of judgment, it was recognized in *Leishman v. Associated Wholesale Electric Co*. (1943) 318 U.S. 203, that Rule 6(b) allowed the district court to enlarge the time to make a motion for amended findings and judgment beyond the limit expressly fixed in Rule 52(b). See *Coca-Cola v. Busch* (E.D.Pa. 1943) 7 Fed.Rules Service 59b.2, Case 4. Obviously, if the time limit in Rule 52(b) could be set aside under Rule 6(b), the time limit in Rule 50(b) for granting judgment notwithstanding the verdict (and thus vacating the judgment entered ''forthwith'' on the verdict) likewise could be set aside.

As to Rule 59 on motions for a new trial, it has been settled that the time limits in Rule 59(b) and (d) for making motions for or granting new trial could not be set aside under Rule 6(b), because Rule 6(b) expressly refers to Rule 59, and forbids it. See *Safeway Stores, Inc. v. Coe* (App.D.C. 1943) 136 F.(2d) 771; *Jusino v. Morales & Tio* (C.C.A. 1st, 1944) 139 F.(2d) 946; *Coca-Cola Co. v. Busch* (E.D.Pa. 1943) 7 Fed.Rules Service 59b.2, Case 4; *Peterson v. Chicago Great Western Ry. Co*. (D.Neb. 1943) 7 Fed.Rules Service 59b.2, Case 1; *Leishman v. Associated Wholesale Electric Co*. (1943) 318 U.S. 203.

As to Rule 60(b) for relief from a judgment, it was held in *Schram v. O'Connor* (E.D.Mich. 1941) 5 Fed.Rules Serv. 6b.31, Case 1, 2 F.R.D. 192, s. c. 5 Fed.Rules Serv. 6b.31, Case 2, F.R.D. 192, that the six-months time limit in original Rule 60(b) for making a motion for relief from a judgment for surprise, mistake, or excusable neglect could be set aside under Rule 6(b). The contrary result was reached in *Wallace v. United States* (C.C.A.2d, 1944) 142 F.(2d) 240, cert. den. (1944) 323 U.S. 712; *Reed v. South Atlantic Steamship Co. of Del*. (D.Del. 1942) 6 Fed.Rules Serv. 60b.31, Case 1.

As to Rule 73(g), fixing the time for docketing an appeal, it was held in *Ainsworth v. Gill Glass & Fixture Co*. (C.C.A.3d, 1939) 104 F.(2d) 83, that under Rule 6(b) the district court, upon motion made after the expiration of the forty-day period, stated in Rule 73(g), but before the expiration of the ninety-day period therein specified, could permit the docketing of the appeal on a showing of excusable neglect. The contrary was held in *Mutual Benefit Health & Accident Ass'n v. Snyder* (C.C.A. 6th, 1940) 109 F.(2d) 469 and in *Burke v. Canfield* (App.D.C. 1940) 111 F.(2d) 526.

The amendment of Rule 6(b) now proposed is based on the view that there should be a definite point where it can be said a judgment is final; that the right method of dealing with the problem is to list in Rule 6(b) the various other rules whose time limits may not be set aside, and then, if the time limit in any of those other rules is too short, to amend that other rule to give a longer time. The further argument is that Rule 6(c) abolished the long standing device to produce finality in judgments through expiration of the term, and since that limitation on the jurisdiction of courts to set aside their own judgments has been removed by Rule 6(c), some other limitation must be substituted or judgments never can be said to be final.

In this connection reference is made to the established rule that if a motion for new trial is seasonably made, the mere making or pendency of the motion destroys the finality of the judgment, and even though the motion is ultimately denied, the full time for appeal starts anew from the date of denial. Also, a motion to amend the findings under Rule 52(b) has the same effect on the time for appeal. *Leishman v. Associated Wholesale Electric Co*. (1943) 318 U.S. 203. By the same reasoning a motion for judgment under Rule 50(b), involving as it does the vacation of a judgment entered ''forthwith'' on the verdict (Rule 58), operates to postpone, until an order is made, the running of the time for appeal. The Committee believes that the abolition by Rule 6(c) of the old rule that a court's power over its judgments ends with the term, requires a substitute limitation, and that unless Rule 6(b) is amended to prevent enlargement of the times specified in Rules 50(b), 52(b) and 60(b), and the limitation as to Rule 59(b) and (d) is retained, no one can say when a judgment is final. This is also true with regard to proposed Rule 59(e), which authorizes a motion to alter or amend a judgment, hence that rule is also included in the enumeration in amended Rule 6(b). In consideration of the amendment, however, it should be noted that Rule 60(b) is also to be amended so as to lengthen the six-months period originally prescribed in that rule to one year.

As to Rule 25 on substitution, while finality is not involved, the limit there fixed should be controlling. That rule, as amended, gives the court power, upon showing of a reasonable excuse, to permit substitution after the expiration of the two-year period.

As to Rule 73(g), it is believed that the conflict in decisions should be resolved and not left to further litigation, and that the rule should be listed as one whose limitation may not be set aside under Rule 6(b).

As to Rule 59(c), fixing the time for serving affidavits on motion for new trial, it is believed that the court should have authority under Rule 6(b) to enlarge the

time, because, once the motion for new trial is made, the judgment no longer has finality, and the extension of time for affidavits thus does not of itself disturb finality.

Other changes proposed in Rule 6(b) are merely clarifying and conforming. Thus ''request'' is substituted for ''application'' in clause (1) because an application is defined as a motion under Rule 7(b). The phrase ''extend the time'' is substituted for ''enlarge the period'' because the former is a more suitable expression and relates more clearly to both clauses (1) and (2). The final phrase in Rule 6(b), ''or the period for taking an appeal as provided by law'', is deleted and a reference to Rule 73(a) inserted, since it is proposed to state in that rule the time for appeal to a circuit court of appeals, which is the only appeal governed by the Federal Rules, and allows an extension of time. See Rule 72.

Subdivision (c). The purpose of this amendment is to prevent reliance upon the continued existence of a term as a source of power to disturb the finality of a judgment upon grounds other than those stated in these rules. See *Hill v. Hawes* (1944) 320 U.S. 520; *Boaz v. Mutual Life Ins. Co. of New York* (C.C.A. 8th, 1944) 146 F.(2d) 321; *Bucy v. Nevada Construction Co*. (C.C.A. 9th, 1942) 125 F.(2d) 213.

NOTES OF ADVISORY COMMITTEE ON RULES—1963 AMENDMENT

Subdivision (a). This amendment is related to the amendment of Rule 77(c) changing the regulation of the days on which the clerk's office shall be open.

The wording of the first sentence of Rule 6(a) is clarified and the subdivision is made expressly applicable to computing periods of time set forth in local rules.

Saturday is to be treated in the same way as Sunday or a ''legal holiday'' in that it is not to be included when it falls on the last day of a computed period, nor counted as an intermediate day when the period is less than 7 days. ''Legal holiday'' is defined for purposes of this subdivision and amended Rule 77(c). Compare the definition of ''holiday'' in 11 U.S.C. §1(18); also 5 U.S.C. §86a; Executive Order No. 10358, ''Observance of Holidays,'' June 9, 1952, 17 Fed.Reg. 5269. In the light of these changes the last sentence of the present subdivision, dealing with half holidays, is eliminated.

With Saturdays and State holidays made ''dies non'' in certain cases by the amended subdivision, computation of the usual 5–day notice of motion or the 2–day notice to dissolve or modify a temporary restraining order may work out so as to cause embarrassing delay in urgent cases. The delay can be obviated by applying to the court to shorten the time, see Rules 6(d) and 65(b).

Subdivision (b). The prohibition against extending the time for taking action under Rule 25 (Substitution of parties) is eliminated. The only limitation of time provided for in amended Rule 25 is the 90–day period following a suggestion upon the record of the death of a party within which to make a motion to substitute the proper parties for the deceased party. See Rule 25(a)(1), as amended, and the Advisory Committee's Note thereto. It is intended that the court shall have discretion to enlarge that period.

NOTES OF ADVISORY COMMITTEE ON RULES—1968 AMENDMENT

The amendment eliminates the references to Rule 73, which is to be abrogated.

P. L. 88–139, §1, 77 Stat. 248, approved on October 16, 1963, amended 28 U.S.C. §138 to read as follows: ''The district court shall not hold formal terms.'' Thus Rule 6(c) is rendered unnecessary, and it is rescinded.

NOTES OF ADVISORY COMMITTEE ON RULES—1971 AMENDMENT

The amendment adds Columbus Day to the list of legal holidays to conform the subdivision to the Act of June 28, 1968, 82 Stat. 250, which constituted Columbus Day a legal holiday effective after January 1, 1971.

The Act, which amended Title 5, U.S.C., §6103(a), changes the day on which certain holidays are to be observed. Washington's Birthday, Memorial Day and Veterans Day are to be observed on the third Monday in February, the last Monday in May and the fourth Monday in October, respectively, rather than, as heretofore, on February 22, May 30, and November 11, respectively. Columbus Day is to be observed on the second Monday in October. New Year's Day, Independence Day, Thanksgiving Day and Christmas continue to be observed on the traditional days.

NOTES OF ADVISORY COMMITTEE ON RULES—1983 AMENDMENT

Subdivision (b). The amendment confers finality upon the judgments of magistrates by foreclosing enlargement of the time for appeal except as provided in new Rule 74(a) (20 day period for demonstration of excusable neglect).

NOTES OF ADVISORY COMMITTEE ON RULES—1985 AMENDMENT

Rule 6(a) is amended to acknowledge that weather conditions or other events may render the clerk's office inaccessible one or more days. Parties who are obliged to file something with the court during that period should not be penalized if they cannot do so. The amendment conforms to changes made in Federal Rule of Criminal Procedure 45(a), effective August 1, 1982.

The Rule also is amended to extend the exclusion of intermediate Saturdays, Sundays, and legal holidays to the computation of time periods less than 11 days. Under the current version of the Rule, parties bringing motions under rules with 10-day periods could have as few as 5 working days to prepare their motions. This hardship would be especially acute in the case of Rules 50(b) and (c)(2), 52(b), and 59(b), (d), and (e), which may not be enlarged at the discretion of the court. See Rule 6(b). If the exclusion of Saturdays, Sundays, and legal holidays will operate to cause excessive delay in urgent cases, the delay can be obviated by applying to the court to shorten the time, See Rule 6(b).

The Birthday of Martin Luther King, Jr., which becomes a legal holiday effective in 1986, has been added to the list of legal holidays enumerated in the Rule.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

COMMITTEE NOTES ON RULES—1999 AMENDMENT

The reference to Rule 74(a) is stricken from the catalogue of time periods that cannot be extended by the district court. The change reflects the 1997 abrogation of Rule 74(a).

COMMITTEE NOTES ON RULES—2001 AMENDMENT

The additional three days provided by Rule 6(e) is extended to the means of service authorized by the new paragraph (D) added to Rule 5(b), including—with the consent of the person served—service by electronic or other means. The three-day addition is provided as well for service on a person with no known address by leaving a copy with the clerk of the court.

Changes Made After Publication and Comments. Proposed Rule 6(e) is the same as the ''alternative proposal'' that was published in August 1999.

COMMITTEE NOTES ON RULES—2005 AMENDMENT

Rule 6(e) is amended to remove any doubt as to the method for extending the time to respond after service by mail, leaving with the clerk of court, electronic means, or other means consented to by the party served. Three days are added after the prescribed period otherwise expires under Rule 6(a). Intermediate Saturdays, Sundays, and legal holidays are included in counting these added three days. If the third day is a

Saturday, Sunday, or legal holiday, the last day to act is the next day that is not a Saturday, Sunday, or legal holiday. The effect of invoking the day when the prescribed period would otherwise expire under Rule 6(a) can be illustrated by assuming that the thirtieth day of a thirty-day period is a Saturday. Under Rule 6(a) the period expires on the next day that is not a Sunday or legal holiday. If the following Monday is a legal holiday, under Rule 6(a) the period expires on Tuesday. Three days are then added—Wednesday, Thursday, and Friday as the third and final day to act. If the period prescribed expires on a Friday, the three added days are Saturday, Sunday, and Monday, which is the third and final day to act unless it is a legal holiday. If Monday is a legal holiday, the next day that is not a legal holiday is the third and final day to act.

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

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

III. PLEADINGS AND MOTIONS

Rule 7. Pleadings Allowed; Form of Motions

(a) PLEADINGS. There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party 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. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(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.

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

(c) DEMURRERS, PLEAS, ETC., ABOLISHED. Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Apr. 28, 1983, eff. Aug. 1, 1983.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

1. A provision designating pleadings and defining a motion is common in the State practice acts. See Ill.Rev.Stat. (1937), ch. 110, §156 (Designation and order of pleadings); 2 Minn.Stat. (Mason, 1927) §9246 (Definition of motion); and N.Y.C.P.A. (1937) §113 (Definition of motion). Former Equity Rules 18 (Pleadings—Technical Forms Abrogated), 29 (Defenses—How Presented), and 33 (Testing Sufficiency of Defense) abolished technical forms of pleading, demurrers, and pleas, and exceptions for insufficiency of an answer.

2. *Note to Subdivision (a).* This preserves the substance of [former] Equity Rule 31 (Reply—When Required—When Cause at Issue). Compare the English practice, English Rules Under the Judicature Act (The Annual Practice, 1937) O. 23, r.r. 1, 2 (Reply to counterclaim; amended, 1933, to be subject to the rules applicable to defenses, O. 21). See O. 21, r.r. 1–14; O. 27, r. 13 (When pleadings deemed denied and put in issue). Under the codes the pleadings are generally limited. A reply is sometimes required to an affirmative defense in the answer. 1 Colo.Stat.Ann. (1935) §66; Ore.Code Ann. (1930) §§1–614, 1–616. In other jurisdictions no reply is necessary to an affirmative defense in the answer, but a reply may be ordered by the court. N.C.Code Ann. (1935) §525; 1 S.D.Comp.Laws (1929) §2357. A reply to a counterclaim is usually required. Ark.Civ.Code (Crawford, 1934) §§123–125; Wis.Stat. (1935) §§263.20, 263.21. U.S.C., Title 28, [former] §45 (District courts; practice and procedure in certain cases) is modified insofar as it may dispense with a reply to a counterclaim.

For amendment of pleadings, see Rule 15 dealing with amended and supplemental pleadings.

3. All statutes which use the words ''petition'', ''bill of complaint'', ''plea'', ''demurrer'', and other such terminology are modified in form by this rule.

NOTES OF ADVISORY COMMITTEE ON RULES—1946 AMENDMENT

This amendment [to subdivision (a)] eliminates any question as to whether the compulsory reply, where a counterclaim is pleaded, is a reply only to the counterclaim or is a general reply to the answer containing the counterclaim. See Commentary, *Scope of Reply Where Defendant Has Pleaded Counterclaim* (1939) 1 Fed.Rules Serv. 672; *Fort Chartres and Ivy Landing Drainage and Levee District No. Five v. Thompson* (E.D.Ill. 1945) 8 Fed.Rules Serv. 13.32, Case 1.

NOTES OF ADVISORY COMMITTEE ON RULES—1963 AMENDMENT

Certain redundant words are eliminated and the subdivision is modified to reflect the amendment of Rule 14(a) which in certain cases eliminates the requirement of obtaining leave to bring in a third-party defendant.

NOTES OF ADVISORY COMMITTEE ON RULES—1983 AMENDMENT

One of the reasons sanctions against improper motion practice have been employed infrequently is the lack of clarity of Rule 7. That rule has stated only generally that the pleading requirements relating to captions, signing, and other matters of form also apply to motions and other papers. The addition of Rule 7(b)(3) makes explicit the applicability of the signing requirement and the sanctions of Rule 11, which have been amplified.

Rule 7.1. Disclosure Statement

(a) WHO MUST FILE: NONGOVERNMENTAL CORPORATE PARTY. A nongovernmental corporate party to an action or proceeding in a district court must file two copies of a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation.

(b) TIME FOR FILING; SUPPLEMENTAL FILING. A party must:

(1) file the Rule 7.1(a) statement with its first appearance, pleading, petition, motion, response, or other request addressed to the court, and

(2) promptly file a supplemental statement upon any change in the information that the statement requires.

(As added Apr. 29, 2002, eff. Dec. 1, 2002.)

COMMITTEE NOTES ON RULES—2002 AMENDMENT

Rule 7.1 is drawn from Rule 26.1 of the Federal Rules of Appellate Procedure, with changes to adapt to the circumstances of district courts that dictate different provisions for the time of filing, number of copies, and the like. The information required by Rule 7.1(a) reflects the ''financial interest'' standard of Canon 3C(1)(c) of the Code of Conduct for United States Judges. This information will support properly informed disqualification decisions in situations that call for automatic disqualification under Canon 3C(1)(c). It does not cover all of the circumstances that may call for disqualification under the financial interest standard, and does not deal at all with other circumstances that may call for disqualification.

Although the disclosures required by Rule 7.1(a) may seem limited, they are calculated to reach a majority of the circumstances that are likely to call for disqualification on the basis of financial information that a judge may not know or recollect. Framing a rule that calls for more detailed disclosure will be difficult. Unnecessary disclosure requirements place a burden on the parties and on courts. Unnecessary disclosure of volumes of information may create a risk that a judge will overlook the one bit of information that might require disqualification, and also may create a risk that unnecessary disqualifications will be made rather than attempt to unravel a potentially difficult question. It has not been feasible to dictate more detailed disclosure requirements in Rule 7.1(a).

Rule 7.1 does not prohibit local rules that require disclosures in addition to those required by Rule 7.1. Developing experience with local disclosure practices and advances in electronic technology may provide a foundation for adopting more detailed disclosure requirements by future amendments of Rule 7.1.

Changes Made After Publication and Comments. The provisions that would require disclosure of additional information that may be required by the Judicial Conference have been deleted.

Rule 8. General Rules of Pleading

(a) CLAIMS FOR RELIEF. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, 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 the pleader seeks. 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 a 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 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, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, 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 on terms, 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, equitable, or maritime 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.

(As amended Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

Note to Subdivision (a). See [former] Equity Rules 25 (Bill of Complaint—Contents), and 30 (Answer—Contents—Counterclaim). Compare 2 Ind.Stat.Ann. (Burns, 1933) §§2–1004, 2–1015; 2 Ohio Gen.Code Ann. (Page, 1926) §§11305, 11314; Utah Rev.Stat.Ann. (1933), §§104–7–2, 104–9–1.

See Rule 19(c) for the requirement of a statement in a claim for relief of the names of persons who ought to be parties and the reason for their omission.

See Rule 23(b) for particular requirements as to the complaint in a secondary action by shareholders.

Note to Subdivision (b). 1. This rule supersedes the methods of pleading prescribed in U.S.C., Title 19, §508 (Persons making seizures pleading general issue and

providing special matter); U.S.C., Title 35, [former] §§40d (Providing under general issue, upon notice, that a statement in application for an extended patent is not true), 69 [now 282] (Pleading and proof in actions for infringement) and similar statutes.

2. This rule is, in part, [former] Equity Rule 30 (Answer—Contents—Counterclaim), with the matter on denials largely from the Connecticut practice. See Conn.Practice Book (1934) §§107, 108, and 122; Conn.Gen.Stat. (1930) §§5508–5514. Compare the English practice, *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 19, r.r. 17–20.

Note to Subdivision (c). This follows substantially English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r. 15 and N.Y.C.P.A. (1937) §242, with ''surprise'' omitted in this rule.

Note to Subdivision (d). The first sentence is similar to [former] Equity Rule 30 (Answer—Contents—Counterclaim). For the second sentence see [former] Equity Rule 31 (Reply—When Required—When Cause at Issue). This is similar to English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r.r. 13, 18; and to the practice in the States.

Note to Subdivision (e). This rule is an elaboration upon [former] Equity Rule 30 (Answer—Contents—Counterclaim), plus a statement of the actual practice under some codes. Compare also [former] Equity Rule 18 (Pleadings—Technical Forms Abrogated). See Clark, Code Pleading (1928), pp. 171–4, 432–5; Hankin, *Alternative and Hypothetical Pleading* (1924), 33 Yale L.J. 365.

Note to Subdivision (f). A provision of like import is of frequent occurrence in the codes. Ill.Rev.Stat. (1937) ch. 110, §157(3); 2 Minn.Stat. (Mason, 1927) §9266; N.Y.C.P.A. (1937) §275; 2 N.D.Comp.Laws Ann. (1913) §7458.

NOTES OF ADVISORY COMMITTEE ON RULES—1966 AMENDMENT

The change here is consistent with the broad purposes of unification.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

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, the party desiring to raise the issue 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) ADMIRALTY AND MARITIME CLAIMS. A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), and 82, and the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions. If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not. The amendment of a pleading to add or withdraw an identifying statement is governed by the principles of Rule 15. A case that includes an admiralty or maritime claim within this subdivision is an admiralty case within 28 U.S.C. §1292(a)(3).

(As amended Feb. 28, 1966, eff. July 1, 1966; Dec. 4, 1967, eff. July 1, 1968; Mar. 30, 1970, eff. July 1, 1970; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 11, 1997, eff. Dec. 1, 1997; Apr. 12, 2006, eff. Dec. 1, 2006.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

Note to Subdivision (a). Compare [former] Equity Rule 25 (Bill of Complaint—Contents) requiring disability to be stated; Utah Rev.Stat.Ann. (1933) §104–13–15, enumerating a number of situations where a general averment of capacity is sufficient. For provisions governing averment of incorporation, see 2 Minn.Stat. (Mason, 1927) §9271; N.Y.R.C.P. (1937) Rule 93; 2 N.D.Comp.Laws Ann. (1913) §7981 et seq.

Note to Subdivision (b). See *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 19, r. 22.

Note to Subdivision (c). The codes generally have this or a similar provision. See English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r. 14; 2 Minn.Stat. (Mason, 1927) §9273; N.Y.R.C.P. (1937) Rule 92; 2 N.D.Comp.Laws Ann. (1913) §7461; 2 Wash.Rev.Stat.Ann. (Remington, 1932) §288.

Note to Subdivision (e). The rule expands the usual code provisions on pleading a judgment by including judgments or decisions of administrative tribunals and foreign courts. Compare Ark.Civ.Code (Crawford, 1934) §141; 2 Minn.Stat. (Mason, 1927) §9269; N.Y.R.C.P. (1937) Rule 95; 2 Wash.Rev.Stat.Ann. (Remington, 1932) §287.

NOTES OF ADVISORY COMMITTEE ON RULES—1966 AMENDMENT

Certain distinctive features of the admiralty practice must be preserved for what are now suits in admiralty. This raises the question: After unification, when a single form of action is established, how will the counterpart of the present suit in admiralty be identifiable? In part the question is easily answered. Some claims for relief can only be suits in admiralty, either because the admiralty jurisdiction is exclusive or because no nonmaritime ground of federal jurisdiction exists. Many claims, however, are cognizable by the district courts

whether asserted in admiralty or in a civil action, assuming the existence of a nonmaritime ground of jurisdiction. Thus at present the pleader has power to determine procedural consequences by the way in which he exercises the classic privilege given by the saving-to-suitors clause (28 U.S.C. §1333) or by equivalent statutory provisions. For example, a longshoreman's claim for personal injuries suffered by reason of the unseaworthiness of a vessel may be asserted in a suit in admiralty or, if diversity of citizenship exists, in a civil action. One of the important procedural consequences is that in the civil action either party may demand a jury trial, while in the suit in admiralty there is no right to jury trial except as provided by statute.

It is no part of the purpose of unification to inject a right to jury trial into those admiralty cases in which that right is not provided by statute. Similarly as will be more specifically noted below, there is no disposition to change the present law as to interlocutory appeals in admiralty, or as to the venue of suits in admiralty; and, of course, there is no disposition to inject into the civil practice as it now is the distinctively maritime remedies (maritime attachment and garnishment, actions in rem, possessory, petitory and partition actions and limitation of liability). The unified rules must therefore provide some device for preserving the present power of the pleader to determine whether these historically maritime procedures shall be applicable to his claim or not; the pleader must be afforded some means of designating his claim as the counterpart of the present suit in admiralty, where its character as such is not clear.

The problem is different from the similar one concerning the identification of claims that were formerly suits in equity. While that problem is not free from complexities, it is broadly true that the modern counterpart of the suit in equity is distinguishable from the former action at law by the character of the relief sought. This mode of identification is possible in only a limited category of admiralty cases. In large numbers of cases the relief sought in admiralty is simple money damages, indistinguishable from the remedy afforded by the common law. This is true, for example, in the case of the longshoreman's action for personal injuries stated above. After unification has abolished the distinction between civil actions and suits in admiralty, the complaint in such an action would be almost completely ambiguous as to the pleader's intentions regarding the procedure invoked. The allegation of diversity of citizenship might be regarded as a clue indicating an intention to proceed as at present under the saving-to-suitors clause; but this, too, would be ambiguous if there were also reference to the admiralty jurisdiction, and the pleader ought not be required to forego mention of all available jurisdictional grounds.

Other methods of solving the problem were carefully explored, but the Advisory Committee concluded that the preferable solution is to allow the pleader who now has power to determine procedural consequences by filing a suit in admiralty to exercise that power under unification, for the limited instances in which procedural differences will remain, by a simple statement in his pleading to the effect that the claim is an admiralty or maritime claim.

The choice made by the pleader in identifying or in failing to identify his claim as an admiralty or maritime claim is not an irrevocable election. The rule provides that the amendment of a pleading to add or withdraw an identifying statement is subject to the principles of Rule 15.

NOTES OF ADVISORY COMMITTEE ON RULES—1968 AMENDMENT

The amendment eliminates the reference to Rule 73 which is to be abrogated and transfers to Rule 9(h) the substance of Subsection (h) of Rule 73 which preserved the right to an interlocutory appeal in admiralty cases which is provided by 28 U.S.C. §1292(a)(3).

NOTES OF ADVISORY COMMITTEE ON RULES—1970 AMENDMENT

The reference to Rule 26(a) is deleted, in light of the transfer of that subdivision to Rule 30(a) and the elimination of the de bene esse procedure therefrom. See the Advisory Committee's note to Rule 30(a).

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendment is technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1997 AMENDMENT

Section 1292(a)(3) of the Judicial Code provides for appeal from "[i]nterlocutory decrees of * * * district courts * * * determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed."

Rule 9(h) was added in 1966 with the unification of civil and admiralty procedure. Civil Rule 73(h) was amended at the same time to provide that the §1292(a)(3) reference "to admiralty cases shall be construed to mean admiralty and maritime claims within the meaning of Rule 9(h)." This provision was transferred to Rule 9(h) when the Appellate Rules were adopted.

A single case can include both admiralty or maritime claims and nonadmiralty claims or parties. This combination reveals an ambiguity in the statement in present Rule 9(h) that an admiralty "claim" is an admiralty "case." An order "determining the rights and liabilities of the parties" within the meaning of §1292(a)(3) may resolve only a nonadmiralty claim, or may simultaneously resolve interdependent admiralty and nonadmiralty claims. Can appeal be taken as to the nonadmiralty matter, because it is part of a case that includes an admiralty claim, or is appeal limited to the admiralty claim?

The courts of appeals have not achieved full uniformity in applying the §1292(a)(3) requirement that an order "determin[e] the rights and liabilities of the parties." It is common to assert that the statute should be construed narrowly, under the general policy that exceptions to the final judgment rule should be construed narrowly. This policy would suggest that the ambiguity should be resolved by limiting the interlocutory appeal right to orders that determine the rights and liabilities of the parties to an admiralty claim.

A broader view is chosen by this amendment for two reasons. The statute applies to admiralty "cases," and may itself provide for appeal from an order that disposes of a nonadmiralty claim that is joined in a single case with an admiralty claim. Although a rule of court may help to clarify and implement a statutory grant of jurisdiction, the line is not always clear between permissible implementation and impermissible withdrawal of jurisdiction. In addition, so long as an order truly disposes of the rights and liabilities of the parties within the meaning of §1292(a)(3), it may prove important to permit appeal as to the nonadmiralty claim. Disposition of the nonadmiralty claim, for example, may make it unnecessary to consider the admiralty claim and have the same effect on the case and parties as disposition of the admiralty claim. Or the admiralty and nonadmiralty claims may be interdependent. An illustration is provided by *Roco Carriers, Ltd. v. M/V Nurnberg Express*, 899 F.2d 1292 (2d Cir. 1990). Claims for losses of ocean shipments were made against two defendants, one subject to admiralty jurisdiction and the other not. Summary judgment was granted in favor of the admiralty defendant and against the nonadmiralty defendant. The nonadmiralty defendant's appeal was accepted, with the explanation that the determination of its liability was "integrally linked with the determination of non-liability" of the admiralty defendant, and that "section 1292(a)(3) is not limited to admiralty *claims*; instead, it refers to admiralty *cases*." 899 F.2d at 1297. The advantages of permitting appeal by the non-

admiralty defendant would be particularly clear if the plaintiff had appealed the summary judgment in favor of the admiralty defendant.

It must be emphasized that this amendment does not rest on any particular assumptions as to the meaning of the §1292(a)(3) provision that limits interlocutory appeal to orders that determine the rights and liabilities of the parties. It simply reflects the conclusion that so long as the case involves an admiralty claim and an order otherwise meets statutory requirements, the opportunity to appeal should not turn on the circumstance that the order does—or does not—dispose of an admiralty claim. No attempt is made to invoke the authority conferred by 28 U.S.C. §1292(e) to provide by rule for appeal of an interlocutory decision that is not otherwise provided for by other subsections of §1292.

GAP Report on Rule 9(h). No changes have been made in the published proposal.

COMMITTEE NOTES ON RULES—2006 AMENDMENT

Rule 9(h) is amended to conform to the changed title of the Supplemental Rules.

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, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

(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.

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The first sentence is derived in part from the opening statement of [former] Equity Rule 25 (Bill of Complaint—Contents). The remainder of the rule is an expansion in conformity with usual state provisions. For numbered paragraphs and separate statements, see Conn.Gen.Stat. (1930) §5513; Ill.Rev.Stat. (1937) ch. 110, §157 (2); N.Y.R.C.P. (1937) Rule 90. For incorporation by reference, see N.Y.R.C.P. (1937) Rule 90. For written instruments as exhibits, see Ill.Rev.Stat. (1937) ch. 110, §160.

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

(a) SIGNATURE. Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) REPRESENTATIONS TO COURT. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) SANCTIONS. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) *How Initiated*.

(A) *By Motion*. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) *On Court's Initiative*. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) *Nature of Sanction; Limitations*. A sanction imposed for violation of this rule shall be lim-

ited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) *Order*. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) INAPPLICABILITY TO DISCOVERY. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.

(As amended Apr. 28, 1983, eff. Aug. 1, 1983; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993.)

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This is substantially the content of [former] Equity Rules 24 (Signature of Counsel) and 21 (Scandal and Impertinence) consolidated and unified. Compare [former] Equity Rule 36 (Officers Before Whom Pleadings Verified). Compare to similar purposes, *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 19, r. 4, and *Great Australian Gold Mining Co. v. Martin, L. R.*, 5 Ch.Div. 1, 10 (1877). Subscription of pleadings is required in many codes. 2 Minn.Stat. (Mason, 1927) §9265; N.Y.R.C.P. (1937) Rule 91; 2 N.D.Comp.Laws Ann. (1913) §7455.

This rule expressly continues any statute which requires a pleading to be verified or accompanied by an affidavit, such as:

U.S.C., Title 28:

§381 [former] (Preliminary injunctions and temporary restraining orders)

§762 [now 1402] (Suit against the United States).

U.S.C., Title 28, §829 [now 1927] (Costs; attorney liable for, when) is unaffected by this rule.

For complaints which must be verified under these rules, see Rules 23(b) (Secondary Action by Shareholders) and 65 (Injunctions).

For abolition of 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, see Pa.Stat.Ann. (Purdon, 1931) see 12 P.S.Pa., §1222; for the rule in equity itself, see *Greenfield v. Blumenthal*, 69 F.2d 294 (C.C.A. 3d, 1934).

NOTES OF ADVISORY COMMITTEE ON RULES—1983 AMENDMENT

Since its original promulgation, Rule 11 has provided for the striking of pleadings and the imposition of disciplinary sanctions to check abuses in the signing of pleadings. Its provisions have always applied to motions and other papers by virtue of incorporation by reference in Rule 7(b)(2). The amendment and the addition of Rule 7(b)(3) expressly confirms this applicability.

Experience shows that in practice Rule 11 has not been effective in deterring abuses. See 6 Wright & Miller, *Federal Practice and Procedure: Civil* §1334 (1971). There has been considerable confusion as to (1) the circumstances that should trigger striking a pleading or motion or taking disciplinary action, (2) the standard of conduct expected of attorneys who sign pleadings and motions, and (3) the range of available and appropriate sanctions. See Rodes, Ripple & Mooney, *Sanctions Imposable for Violations of the Federal Rules of Civil Procedure* 64–65, Federal Judicial Center (1981). The new language is intended to reduce the reluctance of courts to impose sanctions, see Moore, *Federal Practice* ¶7.05, at 1547, by emphasizing the responsibilities of the attorney and reenforcing those obligations by the imposition of sanctions.

The amended rule attempts to deal with the problem by building upon and expanding the equitable doctrine permitting the court to award expenses, including attorney's fees, to a litigant whose opponent acts in bad faith in instituting or conducting litigation. See, *e.g.*, *Roadway Express, Inc. v. Piper*, 447 U.S. 752, (1980); *Hall v. Cole*, 412 U.S. 1, 5 (1973). Greater attention by the district courts to pleading and motion abuses and the imposition of sanctions when appropriate, should discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses.

The expanded nature of the lawyer's certification in the fifth sentence of amended Rule 11 recognizes that the litigation process may be abused for purposes other than delay. See, *e.g.*, *Browning Debenture Holders' Committee v. DASA Corp.*, 560 F.2d 1078 (2d Cir. 1977).

The words ''good ground to support'' the pleading in the original rule were interpreted to have both factual and legal elements. See, *e.g.*, *Heart Disease Research Foundation v. General Motors Corp.*, 15 Fed.R.Serv. 2d 1517, 1519 (S.D.N.Y. 1972). They have been replaced by a standard of conduct that is more focused.

The new language stresses the need for some prefiling inquiry into both the facts and the law to satisfy the affirmative duty imposed by the rule. The standard is one of reasonableness under the circumstances. See *Kinee v. Abraham Lincoln Fed. Sav. & Loan Ass'n*, 365 F.Supp. 975 (E.D.Pa. 1973). This standard is more stringent than the original good-faith formula and thus it is expected that a greater range of circumstances will trigger its violation. See *Nemeroff v. Abelson*, 620 F.2d 339 (2d Cir. 1980).

The rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories. The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted. Thus, what constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer; whether he had to rely on a client for information as to the facts underlying the pleading, motion, or other paper; whether the pleading, motion, or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel or another member of the bar.

The rule does not require a party or an attorney to disclose privileged communications or work product in order to show that the signing of the pleading, motion, or other paper is substantially justified. The provisions of Rule 26(c), including appropriate orders after *in camera* inspection by the court, remain available to protect a party claiming privilege or work product protection.

Amended Rule 11 continues to apply to anyone who signs a pleading, motion, or other paper. Although the standard is the same for unrepresented parties, who are obliged themselves to sign the pleadings, the court has sufficient discretion to take account of the special circumstances that often arise in *pro se* situations. See *Haines v. Kerner* 404 U.S. 519 (1972).

The provision in the original rule for striking pleadings and motions as sham and false has been deleted. The passage has rarely been utilized, and decisions thereunder have tended to confuse the issue of attorney honesty with the merits of the action. See generally Risinger, *Honesty in Pleading and its Enforcement: Some ''Striking'' Problems with Fed. R. Civ. P. 11*, 61 Minn.L.Rev. 1 (1976). Motions under this provision generally present issues better dealt with under Rules 8, 12, or 56. See *Murchison v. Kirby*, 27 F.R.D. 14 (S.D.N.Y. 1961); 5 Wright & Miller, *Federal Practice and Procedure: Civil* §1334 (1969).

The former reference to the inclusion of scandalous or indecent matter, which is itself strong indication that an improper purpose underlies the pleading, motion, or other paper, also has been deleted as unnecessary. Such matter may be stricken under Rule 12(f) as well as dealt with under the more general language of amended Rule 11.

The text of the amended rule seeks to dispel apprehensions that efforts to obtain enforcement will be fruitless by insuring that the rule will be applied when properly invoked. The word ''sanctions'' in the caption, for example, stresses a deterrent orientation in dealing with improper pleadings, motions or other papers. This corresponds to the approach in imposing sanctions for discovery abuses. See *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639 (1976) (per curiam). And the words ''shall impose'' in the last sentence focus the court's attention on the need to impose sanctions for pleading and motion abuses. The court, however, retains the necessary flexibility to deal appropriately with violations of the rule. It has discretion to tailor sanctions to the particular facts of the case, with which it should be well acquainted.

The reference in the former text to wilfullness as a prerequisite to disciplinary action has been deleted. However, in considering the nature and severity of the sanctions to be imposed, the court should take account of the state of the attorney's or party's actual or presumed knowledge when the pleading or other paper was signed. Thus, for example, when a party is not represented by counsel, the absence of legal advice is an appropriate factor to be considered.

Courts currently appear to believe they may impose sanctions on their own motion. See *North American Trading Corp. v. Zale Corp.*, 73 F.R.D. 293 (S.D.N.Y. 1979). Authority to do so has been made explicit in order to overcome the traditional reluctance of courts to intervene unless requested by one of the parties. The detection and punishment of a violation of the signing requirement, encouraged by the amended rule, is part of the court's responsibility for securing the system's effective operation.

If the duty imposed by the rule is violated, the court should have the discretion to impose sanctions on either the attorney, the party the signing attorney represents, or both, or on an unrepresented party who signed the pleading, and the new rule so provides. Although Rule 11 has been silent on the point, courts have claimed the power to impose sanctions on an attorney personally, either by imposing costs or employing the contempt technique. See 5 Wright & Miller, *Federal Practice and Procedure: Civil* §1334 (1969); 2A Moore, *Federal Practice* ¶11.02, at 2104 n.8. This power has been used infrequently. The amended rule should eliminate any doubt as to the propriety of assessing sanctions against the attorney.

Even though it is the attorney whose signature violates the rule, it may be appropriate under the circumstances of the case to impose a sanction on the client. See *Browning Debenture Holders' Committee v. DASA Corp., supra*. This modification brings Rule 11 in line with practice under Rule 37, which allows sanctions for abuses during discovery to be imposed upon the party, the attorney, or both.

A party seeking sanctions should give notice to the court and the offending party promptly upon discovering a basis for doing so. The time when sanctions are to be imposed rests in the discretion of the trial judge. However, it is anticipated that in the case of pleadings the sanctions issue under Rule 11 normally will be determined at the end of the litigation, and in the case of motions at the time when the motion is decided or shortly thereafter. The procedure obviously must comport with due process requirements. The particular format to be followed should depend on the circumstances of the situation and the severity of the sanction under consideration. In many situations the judge's participation in the proceedings provides him with full knowledge of the relevant facts and little further inquiry will be necessary.

To assure that the efficiencies achieved through more effective operation of the pleading regimen will not be offset by the cost of satellite litigation over the imposition of sanctions, the court must to the extent possible limit the scope of sanction proceedings to the record. Thus, discovery should be conducted only by leave of the court, and then only in extraordinary circumstances.

Although the encompassing reference to ''other papers'' in new Rule 11 literally includes discovery papers, the certification requirement in that context is governed by proposed new Rule 26(g). Discovery motions, however, fall within the ambit of Rule 11.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1993 AMENDMENT

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

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

Subdivision (a). Retained in this subdivision are the provisions requiring signatures on pleadings, written motions, and other papers. Unsigned papers are to be received by the Clerk, but then are to be stricken if the omission of the signature is not corrected promptly after being called to the attention of the attorney or pro se litigant. Correction can be made by signing the paper on file or by submitting a duplicate that contains the signature. A court may require by local rule that papers contain additional identifying information regarding the parties or attorneys, such as telephone numbers to facilitate facsimile transmissions, though, as for omission of a signature, the paper should not be rejected for failure to provide such information.

The sentence in the former rule relating to the effect of answers under oath is no longer needed and has been eliminated. The provision in the former rule that signing a paper constitutes a certificate that it has been read by the signer also has been eliminated as unnecessary. The obligations imposed under subdivision (b) ob-

viously require that a pleading, written motion, or other paper be read before it is filed or submitted to the court.

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

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

The certification with respect to allegations and other factual contentions is revised in recognition that sometimes a litigant may have good reason to believe that a fact is true or false but may need discovery, formal or informal, from opposing parties or third persons to gather and confirm the evidentiary basis for the allegation. Tolerance of factual contentions in initial pleadings by plaintiffs or defendants when specifically identified as made on information and belief does not relieve litigants from the obligation to conduct an appropriate investigation into the facts that is reasonable under the circumstances; it is not a license to join parties, make claims, or present defenses without any factual basis or justification. Moreover, if evidentiary support is not obtained after a reasonable opportunity for further investigation or discovery, the party has a duty under the rule not to persist with that contention. Subdivision (b) does not require a formal amendment to pleadings for which evidentiary support is not obtained, but rather calls upon a litigant not thereafter to advocate such claims or defenses.

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

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

The changes in subdivisions (b)(3) and (b)(4) will serve to equalize the burden of the rule upon plaintiffs and defendants, who under Rule 8(b) are in effect allowed to deny allegations by stating that from their initial investigation they lack sufficient information to form a belief as to the truth of the allegation. If, after further investigation or discovery, a denial is no longer warranted, the defendant should not continue to insist on that denial. While sometimes helpful, formal amendment of the pleadings to withdraw an allegation or denial is not required by subdivision (b).

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

The court has available a variety of possible sanctions to impose for violations, such as striking the offending paper; issuing an admonition, reprimand, or censure; requiring participation in seminars or other educational programs; ordering a fine payable to the court; referring the matter to disciplinary authorities (or, in the case of government attorneys, to the Attorney General, Inspector General, or agency head), etc. *See Manual for Complex Litigation, Second*, § 42.3. The rule does not attempt to enumerate the factors a court should consider in deciding whether to impose a sanction or what sanctions would be appropriate in the circumstances; but, for emphasis, it does specifically note that a sanction may be nonmonetary as well as monetary. Whether the improper conduct was willful, or negligent; whether it was part of a pattern of activity, or an isolated event; whether it infected the entire pleading, or only one particular count or defense; whether the person has engaged in similar conduct in other litigation; whether it was intended to injure; what effect it had on the litigation process in time or expense; whether the responsible person is trained in the law; what amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case; what amount is needed to deter similar activity by other litigants: all of these may in a particular case be proper considerations. The court has significant discretion in determining what sanctions, if any, should be imposed for a violation, subject to the principle that the sanctions should not be more severe than reasonably necessary to deter repetition of the conduct by the offending person or comparable conduct by similarly situated persons.

Since the purpose of Rule 11 sanctions is to deter rather than to compensate, the rule provides that, if a monetary sanction is imposed, it should ordinarily be paid into court as a penalty. However, under unusual circumstances, particularly for [subdivision] (b)(1) violations, deterrence may be ineffective unless the sanction not only requires the person violating the rule to make a monetary payment, but also directs that some or all of this payment be made to those injured by the violation. Accordingly, the rule authorizes the court, if requested in a motion and if so warranted, to award attorney's fees to another party. Any such award to another party, however, should not exceed the expenses and attorneys' fees for the services directly and unavoidably caused by the violation of the certification requirement. If, for example, a wholly unsupportable

count were included in a multi-count complaint or counterclaim for the purpose of needlessly increasing the cost of litigation to an impecunious adversary, any award of expenses should be limited to those directly caused by inclusion of the improper count, and not those resulting from the filing of the complaint or answer itself. The award should not provide compensation for services that could have been avoided by an earlier disclosure of evidence or an earlier challenge to the groundless claims or defenses. Moreover, partial reimbursement of fees may constitute a sufficient deterrent with respect to violations by persons having modest financial resources. In cases brought under statutes providing for fees to be awarded to prevailing parties, the court should not employ cost-shifting under this rule in a manner that would be inconsistent with the standards that govern the statutory award of fees, such as stated in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978).

The sanction should be imposed on the persons—whether attorneys, law firms, or parties—who have violated the rule or who may be determined to be responsible for the violation. The person signing, filing, submitting, or advocating a document has a nondelegable responsibility to the court, and in most situations is the person to be sanctioned for a violation. Absent exceptional circumstances, a law firm is to be held also responsible when, as a result of a motion under subdivision (c)(1)(A), one of its partners, associates, or employees is determined to have violated the rule. Since such a motion may be filed only if the offending paper is not withdrawn or corrected within 21 days after service of the motion, it is appropriate that the law firm ordinarily be viewed as jointly responsible under established principles of agency. This provision is designed to remove the restrictions of the former rule. *Cf. Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120 (1989) (1983 version of Rule 11 does not permit sanctions against law firm of attorney signing groundless complaint).

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

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

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

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

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

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

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

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

The power of the court to act on its own initiative is retained, but with the condition that this be done through a show cause order. This procedure provides the person with notice and an opportunity to respond. The revision provides that a monetary sanction imposed after a court-initiated show cause order be limited to a penalty payable to the court and that it be imposed only if the show cause order is issued before any voluntary dismissal or an agreement of the parties to settle the claims made by or against the litigant. Parties settling a case should not be subsequently faced with an unexpected order from the court leading to monetary sanctions that might have affected their willingness to settle or voluntarily dismiss a case. Since show cause orders will ordinarily be issued only in situations that are akin to a contempt of court, the rule does not provide a ''safe harbor'' to a litigant for withdrawing a claim, defense, etc., after a show cause order has been issued on the court's own initiative. Such corrective action, however, should be taken into account in deciding what—if any—sanction to impose if, after consideration of the litigant's response, the court concludes that a violation has occurred.

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

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

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

(a) WHEN PRESENTED.

(1) Unless a different time is prescribed in a statute of the United States, a defendant shall serve an answer

(A) within 20 days after being served with the summons and complaint, or

(B) if service of the summons has been timely waived on request under Rule 4(d), within 60 days after the date when the request for waiver was sent, or within 90 days after that date if the defendant was addressed outside any judicial district of the United States.

(2) A party served with a pleading stating a cross-claim against that party shall serve an answer thereto within 20 days after being served. The plaintiff shall serve a reply to a counterclaim in the answer within 20 days after service of the answer, or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs.

(3)(A) The United States, an agency of the United States, or an officer or employee of the United States sued in an official capacity, shall serve an answer to the complaint or cross-claim—or a reply to a counterclaim—within 60 days after the United States attorney is served with the pleading asserting the claim.

(B) An officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States shall serve an answer to the complaint or cross-claim—or a reply to a counterclaim—within 60 days after service on the officer or employee, or service on the United States attorney, whichever is later.

(4) Unless a different time is fixed by court order, the service of a motion permitted under this rule alters these periods of time as follows:

(A) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; or

(B) if the court grants a motion for a more definite statement, the responsive pleading shall be served within 10 days after the service of the more definite statement.

(b) HOW PRESENTED. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, 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) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. 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 (6) 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)–(7) 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 a responsive pleading. 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 the 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) hereof on any of the grounds there stated.

(h) WAIVER OR PRESERVATION OF CERTAIN DEFENSES.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), 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, a defense of failure to join a party indispensable under Rule 19, 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.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 17, 2000, eff. Dec. 1, 2000.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

Note to Subdivision (a). 1. Compare [former] Equity Rules 12 (Issue of Subpoena—Time for Answer) and 31 (Reply—When Required—When Cause at Issue); 4 Mont.Rev.Codes Ann. (1935) §§9107, 9158; N.Y.C.P.A. (1937) §263; N.Y.R.C.P. (1937) Rules 109–111.

2. U.S.C., Title 28, §763 [now 547] (Petition in action against United States; service; appearance by district attorney) provides that the United States as a defendant shall have 60 days within which to answer or otherwise defend. This and other statutes which provide 60 days for the United States or an officer or agency thereof to answer or otherwise defend are continued by this rule. Insofar as any statutes not excepted in Rule 81 provide a different time for a defendant to defend, such statutes are modified. See U.S.C., Title 28, [former] §45 (District courts; practice and procedure in certain cases under the interstate commerce laws) (30 days).

3. Compare the last sentence of [former] Equity Rule 29 (Defenses—How Presented) and N.Y.C.P.A. (1937) §283. See Rule 15(a) for time within which to plead to an amended pleading.

Note to Subdivisions (b) and (d). 1. See generally [former] Equity Rules 29 (Defenses—How Presented), 33 (Testing Sufficiency of Defense), 43 (Defect of Parties—Resisting Objection), and 44 (Defect of Parties—Tardy Objection); N.Y.C.P.A. (1937) §§277–280; N.Y.R.C.P. (1937) Rules 106–112; *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 25, r.r. 1–4; Clark, *Code Pleading* (1928) pp. 371–381.

2. For provisions authorizing defenses to be made in the answer or reply see *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 25, r.r. 1–4; 1 Miss.Code Ann. (1930) §§378, 379. Compare [former] Equity Rule 29 (Defenses—How Presented); U.S.C., Title 28, [former] §45 (District Courts; practice and procedure in certain cases under the interstate commerce laws). U.S.C., Title 28, [former] §45, substantially continued by this rule, provides: "No replication need be filed to the answer, and objections to the sufficiency of the petition or answer as not setting forth a cause of action or defense must be taken at the final hearing or by motion to dismiss the petition based on said grounds, which motion may be made at any time before answer is filed." Compare Calif.Code Civ.Proc. (Deering, 1937) §433; 4 Nev.Comp.Laws (Hillyer, 1929) §8600. For provisions that the defendant may demur and answer at the same time, see Calif.Code Civ.Proc. (Deering, 1937) §431; 4 Nev.Comp.Laws (Hillyer, 1929) §8598.

3. [Former] Equity Rule 29 (Defenses—How Presented) abolished demurrers and provided that defenses in point of law arising on the face of the bill should be made by motion to dismiss or in the answer, with further provision that every such point of law going to the whole or material part of the cause or causes stated might be called up and disposed of before final hearing "at the discretion of the court." Likewise many state practices have abolished the demurrer, or retain it only to attack substantial and not formal defects. See 6 Tenn.Code Ann. (Williams, 1934) §8784; Ala.Code Ann. (Michie, 1928) §9479; 2 Mass.Gen.Laws (Ter.Ed., 1932) ch. 231, §§15–18; Kansas Gen.Stat.Ann. (1935) §§60–705, 60–706.

Note to Subdivision (c). Compare [former] Equity Rule 33 (Testing Sufficiency of Defense); N.Y.R.C.P. (1937) Rules 111 and 112.

Note to Subdivisions (e) and (f). Compare [former] Equity Rules 20 (Further and Particular Statement in Pleading May Be Required) and 21 (Scandal and Impertinence); *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 19, r.r. 7, 7a, 7b, 8; 4 Mont.Rev.Codes Ann. (1935) §§9166, 9167; N.Y.C.P.A. (1937) §247; N.Y.R.C.P. (1937) Rules 103, 115, 116, 117; Wyo.Rev.Stat.Ann. (Courtright, 1931) §§89–1033, 89–1034.

Note to Subdivision (g). Compare Rules of the District Court of the United States for the District of Columbia

(1937), Equity Rule 11; N.M. Rules of Pleading, Practice and Procedure, 38 N.M.Rep. vii [105–408] (1934); Wash.Gen.Rules of the Superior Courts, 1 Wash.Rev.Stat.Ann. (Remington, 1932) p. 160, Rule VI (e) and (f).

Note to Subdivision (h). Compare Calif.Code Civ.Proc. (Deering, 1937) § 434; 2 Minn.Stat. (Mason, 1927) § 9252; N.Y.C.P.A. (1937) §§ 278 and 279; Wash.Gen.Rules of the Superior Courts, 1 Wash.Rev.Stat.Ann. (Remington, 1932) p. 160, Rule VI (e). This rule continues U.S.C., Title 28, § 80 [now 1359, 1447, 1919] (Dismissal or remand) (of action over which district court lacks jurisdiction), while U.S.C., Title 28, § 399 [now 1653] (Amendments to show diverse citizenship) is continued by Rule 15.

NOTES OF ADVISORY COMMITTEE ON RULES—1946 AMENDMENT

Subdivision (a). Various minor alterations in language have been made to improve the statement of the rule. All references to bills of particulars have been stricken in accordance with changes made in subdivision (e).

Subdivision (b). The addition of defense (7), ''failure to join an indispensable party'', cures an omission in the rules, which are silent as to the mode of raising such failure. See Commentary, *Manner of Raising Objection of Non-Joinder of Indispensable Party* (1940) 2 Fed.Rules Serv. 658 and (1942) 5 Fed.Rules Serv. 820. In one case, *United States v. Metropolitan Life Ins. Co.* (E.D.Pa. 1941) 36 F.Supp. 399, the failure to join an indispensable party was raised under Rule 12(c).

Rule 12(b)(6), permitting a motion to dismiss for failure of the complaint to state a claim on which relief can be granted, is substantially the same as the old demurrer for failure of a pleading to state a cause of action. Some courts have held that as the rule by its terms refers to statements in the complaint, extraneous matter on affidavits, depositions or otherwise, may not be introduced in support of the motion, or to resist it. On the other hand, in many cases the district courts have permitted the introduction of such material. When these cases have reached circuit courts of appeals in situations where the extraneous material so received shows that there is no genuine issue as to any material question of fact and that on the undisputed facts as disclosed by the affidavits or depositions, one party or the other is entitled to judgment as a matter of law, the circuit courts, properly enough, have been reluctant to dispose of the case merely on the face of the pleading, and in the interest of prompt disposition of the action have made a final disposition of it. In dealing with such situations the Second Circuit has made the sound suggestion that whatever its label or original basis, the motion may be treated as a motion for summary judgment and disposed of as such. *Samara v. United States* (C.C.A.2d, 1942) 129 F.(2d) 594, cert. den. (1942) 317 U.S. 686; *Boro Hall Corp. v. General Motors Corp.* (C.C.A.2d, 1942) 124 F.(2d) 822, cert. den. (1943) 317 U.S. 695. See also *Kithcart v. Metropolitan Life Ins. Co.* (C.C.A.8th, 1945) 150 F.(2d) 997, aff'g 62 F.Supp. 93.

It has also been suggested that this practice could be justified on the ground that the federal rules permit ''speaking'' motions. The Committee entertains the view that on motion under Rule 12(b)(6) to dismiss for failure of the complaint to state a good claim, the trial court should have authority to permit the introduction of extraneous matter, such as may be offered on a motion for summary judgment, and if it does not exclude such matter the motion should then be treated as a motion for summary judgment and disposed of in the manner and on the conditions stated in Rule 56 relating to summary judgments, and, of course, in such a situation, when the case reaches the circuit court of appeals, that court should treat the motion in the same way. The Committee believes that such practice, however, should be tied to the summary judgment rule. The term ''speaking motion'' is not mentioned in the rules, and if there is such a thing its limitations are undefined. Where extraneous matter is received, by tying further proceedings to the summary judgment rule the courts have a definite basis in the rules for disposing of the motion.

The Committee emphasizes particularly the fact that the summary judgment rule does not permit a case to be disposed of by judgment on the merits on affidavits, which disclose a conflict on a material issue of fact, and unless this practice is tied to the summary judgment rule, the extent to which a court, on the introduction of such extraneous matter, may resolve questions of fact on conflicting proof would be left uncertain.

The decisions dealing with this general situation may be generally grouped as follows: (1) cases dealing with the use of affidavits and other extraneous material on motions; (2) cases reversing judgments to prevent final determination on mere pleading allegations alone.

Under group (1) are: *Boro Hall Corp. v. General Motors Corp.* (C.C.A.2d, 1942) 124 F.(2d) 822, cert. den. (1943) 317 U.S. 695; *Gallup v. Caldwell* (C.C.A.3d, 1941) 120 F.(2d) 90; *Central Mexico Light & Power Co. v. Munch* (C.C.A.2d, 1940) 116 F.(2d) 85; *National Labor Relations Board v. Montgomery Ward & Co.* (App.D.C. 1944) 144 F.(2d) 528, cert. den. (1944) 65 S.Ct. 134; *Urquhart v. American-La France Foamite Corp.* (App.D.C. 1944) 144 F.(2d) 542; *Samara v. United States* (C.C.A.2d, 1942) 129 F.(2d) 594; *Cohen v. American Window Glass Co.* (C.C.A.2d, 1942) 126 F.(2d) 111; *Sperry Products Inc. v. Association of American Railroads* (C.C.A.2d, 1942) 132 F.(2d) 408; *Joint Council Dining Car Employees Local 370 v. Delaware, Lackawanna and Western R. Co.* (C.C.A.2d, 1946) 157 F.(2d) 417; *Weeks v. Bareco Oil Co.* (C.C.A.7th, 1941) 125 F.(2d) 84; *Carroll v. Morrison Hotel Corp.* (C.C.A.7th, 1945) 149 F.(2d) 404; *Victory v. Manning* (C.C.A.3rd, 1942) 128 F.(2d) 415; *Locals No. 1470, No. 1469, and 1512 of International Longshoremen's Association v. Southern Pacific Co.* (C.C.A.5th, 1942) 131 F.(2d) 605; *Lucking v. Delano* (C.C.A.6th, 1942) 129 F.(2d) 283; *San Francisco Lodge No. 68 of International Association of Machinists v. Forrestal* (N.D.Cal. 1944) 58 F.Supp. 466; *Benson v. Export Equipment Corp.* (N. Mex. 1945) 164 P.2d 380 (construing New Mexico rule identical with Rule 12(b)(6); *F. E. Myers & Bros. Co. v. Gould Pumps, Inc.* (W.D.N.Y. 1946) 9 Fed.Rules Serv. 12b.33, Case 2, 5 F.R.D. 132. Cf. *Kohler v. Jacobs* (C.C.A.5th, 1943) 138 F.(2d) 440; *Cohen v. United States* (C.C.A.8th, 1942) 129 F.(2d) 733.

Under group (2) are: *Sparks v. England* (C.C.A.8th, 1940) 113 F.(2d) 579; *Continental Collieries, Inc. v. Shober* (C.C.A.3d, 1942) 130 F.(2d) 631; *Downey v. Palmer* (C.C.A.2d 1940) 114 F.(2d) 116; *DeLoach v. Crowley's Inc.* (C.C.A.5th, 1942) 128 F.(2d) 378; *Leimer v. State Mutual Life Assurance Co. of Worcester, Mass.* (C.C.A.8th, 1940) 108 F.(2d) 302; *Rossiter v. Vogel* (C.C.A.2d, 1943) 134 F.(2d) 908, compare s. c. (C.C.A.2d, 1945) 148 F.(2d) 292; *Karl Kiefer Machine Co. v. United States Bottlers Machinery Co.* (C.C.A.7th, 1940) 113 F.(2d) 356; *Chicago Metallic Mfg. Co. v. Edward Katzinger Co.* (C.C.A.7th, 1941) 123 F.(2d) 518; *Louisiana Farmers' Protective Union, Inc. v. Great Atlantic & Pacific Tea Co. of America, Inc.* (C.C.A.8th, 1942) 131 F.(2d) 419; *Publicity Bldg. Realty Corp. v. Hannegan* (C.C.A.8th, 1943) 139 F.(2d) 583; *Dioguardi v. Durning* (C.C.A.2d, 1944) 139 F.(2d) 774; *Package Closure Corp. v. Sealright Co., Inc.* (C.C.A.2d, 1944) 141 F.(2d) 972; *Tahir Erk v. Glenn L. Martin Co.* (C.C.A.4th, 1941) 116 F.(2d) 865; *Bell v. Preferred Life Assurance Society of Montgomery, Ala.* (1943) 320 U.S. 238.

The addition at the end of subdivision (b) makes it clear that on a motion under Rule 12(b)(6) extraneous material may not be considered if the court excludes it, but that if the court does not exclude such material the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56. It will also be observed that if a motion under Rule 12(b)(6) is thus converted into a summary judgment motion, the amendment insures that both parties shall be given a reasonable opportunity to submit affidavits and extraneous proofs to avoid taking a party by surprise through the conversion of the motion into a motion for summary judgment. In this manner and to this extent the amendment regularizes the practice above described. As the courts are already dealing with cases in this way, the effect of this amendment is really only to define the practice carefully and apply the require-

ments of the summary judgment rule in the disposition of the motion.

Subdivision (c). The sentence appended to subdivision (c) performs the same function and is grounded on the same reasons as the corresponding sentence added in subdivision (b).

Subdivision (d). The change here was made necessary because of the addition of defense (7) in subdivision (b).

Subdivision (e). References in this subdivision to a bill of particulars have been deleted, and the motion provided for is confined to one for a more definite statement, to be obtained only in cases where the movant cannot reasonably be required to frame an answer or other responsive pleading to the pleading in question. With respect to preparations for trial, the party is properly relegated to the various methods of examination and discovery provided in the rules for that purpose. *Slusher v. Jones* (E.D.Ky. 1943) 7 Fed.Rules Serv. 12e.231, Case 5, 3 F.R.D. 168; *Best Foods, Inc. v. General Mills, Inc.* (D.Del. 1943) 7 Fed.Rules Serv. 12e.231, Case 7, 3 F.R.D. 275; *Braden v. Callaway* (E.D.Tenn. 1943) 8 Fed.Rules Serv. 12e.231, Case 1 (''. . . most courts . . . conclude that the definiteness required is only such as will be sufficient for the party to prepare responsive pleadings''). Accordingly, the reference to the 20 day time limit has also been eliminated, since the purpose of this present provision is to state a time period where the motion for a bill is made for the purpose of preparing for trial.

Rule 12(e) as originally drawn has been the subject of more judicial rulings than any other part of the rules, and has been much criticized by commentators, judges and members of the bar. See general discussion and cases cited in 1 *Moore's Federal Practice* (1938), Cum.Supplement §12.07, under ''Page 657''; also, Holtzoff, *New Federal Procedure and the Courts* (1940) 35–41. And compare vote of Second Circuit Conference of Circuit and District Judges (June 1940) recommending the abolition of the bill of particulars; *Sun Valley Mfg. Co. v. Mylish* (E.D.Pa. 1944) 8 Fed.Rules Serv. 12e.231, Case 6 (''Our experience . . . has demonstrated not only that 'the office of the bill of particulars is fast becoming obsolete' . . . but that in view of the adequate discovery procedure available under the Rules, motions for bills of particulars should be abolished altogether.''); *Walling v. American Steamship Co.* (W.D.N.Y. 1945) 4 F.R.D. 355, 8 Fed.Rules Serv. 12e.244, Case 8 (''. . . the adoption of the rule was ill advised. It has led to confusion, duplication and delay.'') The tendency of some courts freely to grant extended bills of particulars has served to neutralize any helpful benefits derived from Rule 8, and has overlooked the intended use of the rules on depositions and discovery. The words ''or to prepare for trial''—eliminated by the proposed amendment—have sometimes been seized upon as grounds for compulsory statement in the opposing pleading of all the details which the movant would have to meet at the trial. On the other hand, many courts have in effect read these words out of the rule. See *Walling v. Alabama Pipe Co.* (W.D.Mo. 1942) 6 Fed.Rules Serv. 12e.244, Case 7; *Fleming v. Mason & Dixon Lines, Inc.* (E.D.Tenn. 1941) 42 F.Supp. 230; *Kellogg Co. v. National Biscuit Co.* (D.N.J. 1941) 38 F.Supp. 643; *Brown v. H. L. Green Co.* (S.D.N.Y. 1943) 7 Fed.Rules Serv. 12e.231, Case 6; *Pedersen v. Standard Accident Ins. Co.* (W.D.Mo. 1945) 8 Fed.Rules Serv. 12e.231, Case 8; *Bowles v. Ohse* (D.Neb. 1945) 4 F.R.D. 403, 9 Fed.Rules Serv. 12e.231, Case 1; *Klages v. Cohen* (E.D.N.Y. 1945) 9 Fed.Rules Serv. 8a.25, Case 4; *Bowles v. Lawrence* (D.Mass. 1945) 8 Fed.Rules Serv. 12e.231, Case 19; *McKinney Tool & Mfg. Co. v. Hoyt* (N.D.Ohio 1945) 9 Fed.Rules Serv. 12e.235, Case 1; *Bowles v. Jack* (D.Minn. 1945) 5 F.R.D. 1, 9 Fed.Rules Serv. 12e.244, Case 9. And it has been urged from the bench that the phrase be stricken. *Poole v. White* (N.D.W.Va. 1941). 5 Fed.Rules Serv. 12e.231, Case 4, 2 F.R.D. 40. See also *Bowles v. Gabel* (W.D.Mo. 1946) 9 Fed.Rules Serv. 12e.244, Case 10 (''The courts have never favored that portion of the rules which undertook to justify a motion of this kind for the purpose of aiding counsel in preparing his case for trial.'').

Subdivision (f). This amendment affords a specific method of raising the insufficiency of a defense, a matter which has troubled some courts, although attack has been permitted in one way or another. See *Dysart v. Remington-Rand, Inc.* (D.Conn. 1939) 31 F.Supp. 296; *Eastman Kodak Co. v. McAuley* (S.D.N.Y. 1941) 4 Fed.Rules Serv. 12f.21, Case 8, 2 F.R.D. 21; *Schenley Distillers Corp. v. Renken* (E.D.S.C. 1940) 34 F.Supp. 678; *Yale Transport Corp. v. Yellow Truck & Coach Mfg. Co.* (S.D.N.Y. 1944) 3 F.R.D. 440; *United States v. Turner Milk Co.* (N.D.Ill. 1941) 4 Fed.Rules Serv. 12b.51, Case 3, 1 F.R.D. 643; *Teiger v. Stephan Oderwald, Inc.* (S.D.N.Y. 1940) 31 F.Supp. 626; *Teplitsky v. Pennsylvania R. Co.* (N.D.Ill. 1941) 38 F.Supp. 535; *Gallagher v. Carroll* (E.D.N.Y. 1939) 27 F.Supp. 568; *United States v. Palmer* (S.D.N.Y. 1939) 28 F.Supp. 936. And see *Indemnity Ins. Co. of North America v. Pan American Airways, Inc.* (S.D.N.Y. 1944) 58 F.Supp. 338; Commentary, *Modes of Attacking Insufficient Defenses in the Answer* (1939) 1 Fed.Rules Serv. 669 (1940) 2 Fed.Rules Serv. 640.

Subdivision (g). The change in title conforms with the companion provision in subdivision (h).

The alteration of the ''except'' clause requires that other than provided in subdivision (h) a party who resorts to a motion to raise defenses specified in the rule, must include in one motion all that are then available to him. Under the original rule defenses which could be raised by motion were divided into two groups which could be the subjects of two successive motions.

Subdivision (h). The addition of the phrase relating to indispensable parties is one of necessity.

NOTES OF ADVISORY COMMITTEE ON RULES—1963 AMENDMENT

This amendment conforms to the amendment of Rule 4(e). See also the Advisory Committee's Note to amended Rule 4(b).

NOTES OF ADVISORY COMMITTEE ON RULES—1966 AMENDMENT

Subdivision (b)(7). The terminology of this subdivision is changed to accord with the amendment of Rule 19. See the Advisory Committee's Note to Rule 19, as amended, especially the third paragraph therein before the caption ''Subdivision (c).''

Subdivision (g). Subdivision (g) has forbidden a defendant who makes a preanswer motion under this rule from making a further motion presenting any defense or objection which was available to him at the time he made the first motion and which he could have included, but did not in fact include therein. Thus if the defendant moves before answer to dismiss the complaint for failure to state a claim, he is barred from making a further motion presenting the defense of improper venue, if that defense was available to him when he made his original motion. Amended subdivision (g) is to the same effect. This required consolidation of defenses and objections in a Rule 12 motion is salutary in that it works against piecemeal consideration of a case. For exceptions to the requirement of consolidation, see the last clause of subdivision (g), referring to new subdivision (h)(2).

Subdivision (h). The question has arisen whether an omitted defense which cannot be made the basis of a second motion may nevertheless be pleaded in the answer. Subdivision (h) called for waiver of ''* * * defenses and objections which he [defendant] does not present * * * by motion * * * or, if he has made no motion, in his answer * * *.'' If the clause ''if he has made no motion,'' was read literally, it seemed that the omitted defense was waived and could not be pleaded in the answer. On the other hand, the clause might be read as adding nothing of substance to the preceding words; in that event it appeared that a defense was not waived by reason of being omitted from the motion and might be set up in the answer. The decisions were divided. Favoring waiver, see *Keefe v. Derounian*, 6 F.R.D. 11 (N.D.Ill. 1946); *Elbinger v. Precision Metal Workers Corp.*, 18 F.R.D. 467 (E.D.Wis. 1956); see also *Rensing v.*

Turner Aviation Corp., 166 F.Supp. 790 (N.D.Ill. 1958); *P. Beiersdorf & Co. v. Duke Laboratories, Inc.*, 10 F.R.D. 282 (S.D.N.Y. 1950); *Neset v. Christensen*, 92 F.Supp. 78 (E.D.N.Y. 1950). Opposing waiver, see *Phillips v. Baker*, 121 F.2d 752 (9th Cir. 1941); *Crum v. Graham*, 32 F.R.D. 173 (D.Mont. 1963) (regretfully following the Phillips case); see also *Birnbaum v. Birrell*, 9 F.R.D. 72 (S.D.N.Y. 1948); *Johnson v. Joseph Schlitz Brewing Co.*, 33 F.Supp. 176 (E.D.Tenn. 1940); cf. *Carter v. American Bus Lines, Inc.*, 22 F.R.D. 323 (D.Neb. 1958).

Amended subdivision (h)(1)(A) eliminates the ambiguity and states that certain specified defenses which were available to a party when he made a preanswer motion, but which he omitted from the motion, are waived. The specified defenses are lack of jurisdiction over the person, improper venue, insufficiency of process, and insufficiency of service of process (see Rule 12(b)(2)–(5)). A party who by motion invites the court to pass upon a threshold defense should bring forward all the specified defenses he then has and thus allow the court to do a reasonably complete job. The waiver reinforces the policy of subdivision (g) forbidding successive motions.

By amended subdivision (h)(1)(B), the specified defenses, even if not waived by the operation of (A), are waived by the failure to raise them by a motion under Rule 12 or in the responsive pleading or any amendment thereof to which the party is entitled as a matter of course. The specified defenses are of such a character that they should not be delayed and brought up for the first time by means of an application to the court to amend the responsive pleading.

Since the language of the subdivisions is made clear, the party is put on fair notice of the effect of his actions and omissions and can guard himself against unintended waiver. It is to be noted that while the defenses specified in subdivision (h)(1) are subject to waiver as there provided, the more substantial defenses of failure to state a claim upon which relief can be granted, failure to join a party indispensable under Rule 19, and failure to state a legal defense to a claim (see Rule 12(b)(6), (7), (f)), as well as the defense of lack of jurisdiction over the subject matter (see Rule 12(b)(1)), are expressly preserved against waiver by amended subdivision (h)(2) and (3).

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1993 AMENDMENT

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

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

COMMITTEE NOTES ON RULES—2000 AMENDMENT

Rule 12(a)(3)(B) is added to complement the addition of Rule 4(i)(2)(B). The purposes that underlie the requirement that service be made on the United States in an action that asserts individual liability of a United States officer or employee for acts occurring in connection with the performance of duties on behalf of the United States also require that the time to answer be extended to 60 days. Time is needed for the United States to determine whether to provide representation to the defendant officer or employee. If the United States provides representation, the need for an extended answer period is the same as in actions against the United States, a United States agency, or a United States officer sued in an official capacity.

An action against a former officer or employee of the United States is covered by subparagraph (3)(B) in the same way as an action against a present officer or employee. Termination of the relationship between the individual defendant and the United States does not reduce the need for additional time to answer.

GAP Report. No changes are recommended for Rule 12 as published.

Rule 13. Counterclaim and Cross-Claim

(a) COMPULSORY COUNTERCLAIMS. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, 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 pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon the claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

(b) PERMISSIVE COUNTERCLAIMS. A pleading 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. These rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the United States or an officer or agency thereof.

(e) COUNTERCLAIM MATURING OR ACQUIRED AFTER PLEADING. A claim which either matured or was acquired by the pleader after serving a pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.

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

(g) CROSS-CLAIM AGAINST CO-PARTY. A pleading may state as a cross-claim any claim by one party against a co-party arising out of the

transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

(h) JOINDER OF ADDITIONAL PARTIES. Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rules 19 and 20.

(i) SEPARATE TRIALS; SEPARATE JUDGMENTS. If the court orders separate trials as provided in Rule 42(b), judgment on a counterclaim or cross-claim 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.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

1. This is substantially [former] Equity Rule 30 (Answer—Contents—Counterclaim), broadened to include legal as well as equitable counterclaims.

2. Compare the English practice, *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 19, r.r. 2 and 3, and O. 21, r.r. 10—17; *Beddall v. Maitland*, L.R. 17 Ch.Div. 174, 181, 182 (1881).

3. Certain States have also adopted almost unrestricted provisions concerning both the subject matter of and the parties to a counterclaim. This seems to be the modern tendency. Ark.Civ.Code (Crawford, 1934) §§117 (as amended) and 118; N.J.Comp.Stat. (2 Cum.Supp. 1911–1924), N.Y.C.P.A. (1937) §§262, 266, 267 (all as amended, Laws of 1936, ch. 324), 268, 269, and 271; Wis.Stat. (1935) §263.14 (1)(c).

4. Most codes do not expressly provide for a counterclaim in the reply. Clark, *Code Pleading* (1928), p. 486. Ky.Codes (Carroll, 1932) Civ.Pract. §98 does provide, however, for such counterclaim.

5. The provisions of this rule respecting counterclaims are subject to Rule 82 (Jurisdiction and Venue Unaffected). For a discussion of Federal jurisdiction and venue in regard to counterclaims and cross-claims, see Shulman and Jaegerman, *Some Jurisdictional Limitations in Federal Procedure* (1936), 45 Yale L.J. 393, 410 et seq.

6. This rule does not affect such statutes of the United States as U.S.C., Title 28, §41(1) [now 1332, 1345, 1359] (United States as plaintiff; civil suits at common law and in equity), relating to assigned claims in actions based on diversity of citizenship.

7. If the action proceeds to judgment without the interposition of a counterclaim as required by subdivision (a) of this rule, the counterclaim is barred. See *American Mills Co. v. American Surety Co.*, 260 U.S. 360 (1922); *Marconi Wireless Telegraph Co. v. National Electric Signalling Co.*, 206 Fed. 295 (E.D.N.Y., 1913); Hopkins, *Federal Equity Rules* (8th ed., 1933), p. 213; Simkins, *Federal Practice* (1934), p. 663

8. For allowance of credits against the United States see U.S.C., Title 26, §§1672–1673 [see 7442] (Suits for refunds of internal revenue taxes—limitations); U.S.C., Title 28, §§774 [now 2406] (Suits by United States against individuals; credits), [former] 775 (Suits under postal laws; credits); U.S.C., Title 31, §227 [now 3728] (Offsets against judgments and claims against United States).

NOTES OF ADVISORY COMMITTEE ON RULES—1946 AMENDMENT

Subdivision (a). The use of the word ''filing'' was inadvertent. The word ''serving'' conforms with subdivision (*e*) and with usage generally throughout the rules.

The removal of the phrase ''not the subject of a pending action'' and the addition of the new clause at the end of the subdivision is designed to eliminate the ambiguity noted in *Prudential Insurance Co. of America v. Saxe* (App.D.C. 1943) 134 F.(2d) 16, 33–34, cert. den. (1943) 319 U.S. 745. The rewording of the subdivision in this respect insures against an undesirable possibility presented under the original rule whereby a party having a claim which would be the subject of a compulsory counterclaim could avoid stating it as such by bringing an independent action in another court after the commencement of the federal action but before serving his pleading in the federal action.

Subdivision (g). The amendment is to care for a situation such as where a second mortgagee is made defendant in a foreclosure proceeding and wishes to file a cross-complaint against the mortgagor in order to secure a personal judgment for the indebtedness and foreclose his lien. A claim of this sort by the second mortgagee may not necessarily arise out of the transaction or occurrence that is the subject matter of the original action under the terms of Rule 13(g).

Subdivision (h). The change clarifies the interdependence of Rules 13(i) and 54(b).

NOTES OF ADVISORY COMMITTEE ON RULES—1963 AMENDMENT

When a defendant, if he desires to defend his interest in property, is obliged to come in and litigate in a court to whose jurisdiction he could not ordinarily be subjected, fairness suggests that he should not be required to assert counterclaims, but should rather be permitted to do so at his election. If, however, he does elect to assert a counterclaim, it seems fair to require him to assert any other which is compulsory within the meaning of Rule 13(a). Clause (2), added by amendment to Rule 13(a), carries out this idea. It will apply to various cases described in Rule 4(e), as amended, where service is effected through attachment or other process by which the court does not acquire jurisdiction to render a personal judgment against the defendant. Clause (2) will also apply to actions commenced in State courts jurisdictionally grounded on attachment or the like, and removed to the Federal courts.

NOTES OF ADVISORY COMMITTEE ON RULES—1966 AMENDMENT

Rule 13(h), dealing with the joinder of additional parties to a counterclaim or cross-claim, has partaken of some of the textual difficulties of Rule 19 on necessary joinder of parties. See Advisory Committee's Note to Rule 19, as amended; cf. 3 *Moore's Federal Practice*, Par. 13.39 (2d ed. 1963), and Supp. thereto; 1A Barron & Holtzoff, *Federal Practice and Procedure* §399 (Wright ed. 1960). Rule 13(h) has also been inadequate in failing to call attention to the fact that a party pleading a counterclaim or cross-claim may join additional persons when the conditions for permissive joinder of parties under Rule 20 are satisfied.

The amendment of Rule 13(h) supplies the latter omission by expressly referring to Rule 20, as amended, and also incorporates by direct reference the revised criteria and procedures of Rule 19, as amended. Hereafter, for the purpose of determining who must or may be joined as additional parties to a counterclaim or cross-claim, the party pleading the claim is to be regarded as a plaintiff and the additional parties as plaintiffs or defendants as the case may be, and amended Rules 19 and 20 are to be applied in the usual fashion. See also Rules 13(a) (compulsory counterclaims) and 22 (interpleader).

The amendment of Rule 13(h), like the amendment of Rule 19, does not attempt to regulate Federal jurisdiction or venue. See Rule 82. It should be noted, however,

that in some situations the decisional law has recognized ''ancillary'' Federal jurisdiction over counterclaims and cross-claims and ''ancillary'' venue as to parties to these claims.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

Rule 14. Third-Party Practice

(a) WHEN DEFENDANT MAY BRING IN THIRD PARTY. At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff. The third-party plaintiff need not obtain leave to make the service if the third-party plaintiff files the third-party complaint not later than 10 days after serving the original answer. Otherwise the third-party plaintiff must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make any defenses to the third-party plaintiff's claim as provided in Rule 12 and any counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert any defenses as provided in Rule 12 and any counterclaims and cross-claims as provided in Rule 13. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to the third-party defendant for all or part of the claim made in the action against the third-party defendant. The third-party complaint, if within the admiralty and maritime jurisdiction, may be in rem against a vessel, cargo, or other property subject to admiralty or maritime process in rem, in which case references in this rule to the summons include the warrant of arrest, and references to the third-party plaintiff or defendant include, where appropriate, a person who asserts a right under Supplemental Rule C(6)(a)(1) in the property arrested.

(b) WHEN PLAINTIFF MAY BRING IN THIRD PARTY. When a counterclaim is asserted against a plaintiff, the plaintiff may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

(c) ADMIRALTY AND MARITIME CLAIMS. When a plaintiff asserts an admiralty or maritime claim within the meaning of Rule 9(h), the defendant or person who asserts a right under Supplemental Rule C(6)(a)(1), as a third-party plaintiff, may bring in a third-party defendant who may be wholly or partly liable, either to the plaintiff or to the third-party plaintiff, by way of remedy over, contribution, or otherwise on account of the same transaction, occurrence, or series of transactions or occurrences. In such a case the third-party plaintiff may also demand judgment against the third-party defendant in favor of the plaintiff, in which event the third-party defendant shall make any defenses to the claim of the plaintiff as well as to that of the third-party plaintiff in the manner provided in Rule 12 and the action shall proceed as if the plaintiff had commenced it against the third-party defendant as well as the third-party plaintiff.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 12, 2006, eff. Dec. 1, 2006.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

Third-party impleader is in some aspects a modern innovation in law and equity although well known in admiralty. Because of its many advantages a liberal procedure with respect to it has developed in England, in the Federal admiralty courts, and in some American State jurisdictions. See *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 16A, r.r. 1–13; United States Supreme Court Admiralty Rules (1920), Rule 56 (Right to Bring in Party Jointly Liable); Pa.Stat.Ann. (Purdon, 1936) Title 12, §141; Wis.Stat. (1935) §§260.19, 260.20; N.Y.C.P.A. (1937) §§193 (2), 211(a). Compare La.Code Pract. (Dart, 1932) §§378–388. For the practice in Texas as developed by judicial decision, see *Lottman v. Cuilla*, 288 S.W. 123, 126 (Tex., 1926). For a treatment of this subject see Gregory, *Legislative Loss Distribution in Negligence Actions* (1936); Shulman and Jaegerman, *Some Jurisdictional Limitations on Federal Procedure* (1936), 45 Yale L.J. 393, 417, et seq.

Third-party impleader under the conformity act has been applied in actions at law in the Federal courts. *Lowry and Co., Inc., v. National City Bank of New York*, 28 F.(2d) 895 (S.D.N.Y., 1928); *Yellow Cab Co. of Philadelphia v. Rodgers*, 61 F.(2d) 729 (C.C.A.3d, 1932).

NOTES OF ADVISORY COMMITTEE ON RULES—1946 AMENDMENT

The provisions in Rule 14(a) which relate to the impleading of a third party who is or may be liable to the plaintiff have been deleted by the proposed amendment. It has been held that under Rule 14(a) the plaintiff need not amend his complaint to state a claim against such third party if he does not wish to do so. *Satink v. Holland Township* (D.N.J. 1940) 31 F.Supp. 229, noted (1940) 88 U.Pa.L.Rev. 751; *Connelly v. Bender* (E.D.Mich. 1941) 36 F.Supp. 368; *Whitmire v. Partin v. Milton* (E.D.Tenn. 1941) 5 Fed.Rules Serv. 14a.513, Case 2; *Crim v. Lumbermen's Mutual Casualty Co.* (D.D.C. 1939) 26 F.Supp. 715; *Carbola Chemical Co., Inc. v. Trundle* (S.D.N.Y. 1943) 7 Fed.Rules Serv. 14a.224, Case 1; *Roadway Express, Inc. v. Automobile Ins. Co. of Hartford, Conn. v. Providence Washington Ins. Co.* (N.D.Ohio 1945) 8 Fed.Rules Serv. 14a.513, Case 3. In *Delano v. Ives* (E.D.Pa. 1941) 40 F.Supp. 672, the court said: ''. . . the weight of authority is to the effect that a defendant cannot compel the plaintiff, who has sued him, to sue also a third party whom he does not wish to sue, by tendering in a third party complaint the third party as an additional defendant directly liable to the plaintiff.'' Thus impleader here amounts to no more than a mere offer of a party to the plaintiff, and if he rejects it, the attempt is a time-consuming futility. See *Satink v. Holland Township, supra; Malkin v. Arundel Corp.* (D.Md. 1941) 36

F.Supp. 948; also Koenigsberger, *Suggestions for Changes in the Federal Rules of Civil Procedure*, (1941) 4 Fed.Rules Serv. 1010. But *cf. Atlantic Coast Line R. Co. v. United States Fidelity & Guaranty Co.* (M.D.Ga. 1943) 52 F.Supp. 177. Moreover, in any case where the plaintiff could not have joined the third party originally because of jurisdictional limitations such as lack of diversity of citizenship, the majority view is that any attempt by the plaintiff to amend his complaint and assert a claim against the impleaded third party would be unavailing. *Hoskie v. Prudential Ins. Co. of America v. Lorrac Real Estate Corp.* (E.D.N.Y. 1941) 39 F.Supp. 305; *Johnson v. G. J. Sherrard Co. v. New England Telephone & Telegraph Co.* (D.Mass. 1941) 5 Fed.Rules Serv. 14a.511, Case 1, 2 F.R.D. 164; *Thompson v. Cranston* (W.D.N.Y. 1942) 6 Fed.Rules Serv. 14a.511, Case 1, 2 F.R.D. 270, aff'd (C.C.A.2d, 1942) 132 F.(2d) 631, cert. den. (1943) 319 U.S. 741; *Friend v. Middle Atlantic Transportation Co.* (C.C.A.2d, 1946) 153 F.(2d) 778, cert. den. (1946) 66 S.Ct. 1370; *Herrington v. Jones* (E.D.La. 1941) 5 Fed.Rules Serv. 14a.511, Case 2, 2 F.R.D. 108; *Banks v. Employers' Liability Assurance Corp. v. Central Surety & Ins. Corp.* (W.D.Mo. 1943) 7 Fed.Rules Serv. 14a.11, Case 2; *Saunders v. Baltimore & Ohio R. Co.* (S.D.W.Va. 1945) 9 Fed.Rules Serv. 14a.62, Case 2; *Hull v. United States Rubber Co. v. Johnson Larsen & Co.* (E.D.Mich. 1945) 9 Fed.Rules Serv. 14a.62, Case 3. See also concurring opinion of Circuit Judge Minton in *People of State of Illinois for use of Trust Co. of Chicago v. Maryland Casualty Co.* (C.C.A.7th, 1942) 132 F.(2d) 850, 853. *Contra: Sklar v. Hayes v. Singer* (E.D.Pa. 1941) 4 Fed.Rules Serv. 14a.511, Case 2, 1 F.R.D. 594. Discussion of the problem will be found in Commentary, *Amendment of Plaintiff's Pleading to Assert Claim Against Third-Party Defendant* (1942) 5 Fed.Rules Serv. 811; Commentary, *Federal Jurisdiction in Third-Party Practice* (1943) 6 Fed.Rules Serv. 766; Holtzoff, *Some Problems Under Federal Third-Party Practice* (1941) 3 La.L.Rev. 408, 419–420; 1. *Moore's Federal Practice* (1938) Cum.Supplement §14.08. For these reasons therefore, the words "or to the plaintiff" in the first sentence of subdivision (a) have been removed by the amendment; and in conformance therewith the words "the plaintiff" in the second sentence of the subdivision, and the words "or to the third-party plaintiff" in the concluding sentence thereof have likewise been eliminated.

The third sentence of Rule 14(a) has been expanded to clarify the right of the third-party defendant to assert any defenses which the third-party plaintiff may have to the plaintiff's claim. This protects the impleaded third-party defendant where the third-party plaintiff fails or neglects to assert a proper defense to the plaintiff's action. A new sentence has also been inserted giving the third-party defendant the right to assert directly against the original plaintiff any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. This permits all claims arising out of the same transaction or occurrence to be heard and determined in the same action. See *Atlantic Coast Line R. Co. v. United States Fidelity & Guaranty Co.* (M.D.Ga. 1943) 52 F.Supp. 177. Accordingly, the next to the last sentence of subdivision (a) has also been revised to make clear that the plaintiff may, if he desires, assert directly against the third-party defendant either by amendment or by a new pleading any claim he may have against him arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. In such a case, the third-party defendant then is entitled to assert the defenses, counterclaims and cross-claims provided in Rules 12 and 13.

The sentence reading "The third-party defendant is bound by the adjudication of the third-party plaintiff's liability to the plaintiff, as well as of his own to the plaintiff, or to the third-party plaintiff" has been stricken from Rule 14(a), not to change the law, but because the sentence states a rule of substantive law which is not within the scope of a procedural rule. It is not the purpose of the rules to state the effect of a judgment.

The elimination of the words "the third-party plaintiff, or any other party" from the second sentence of Rule 14(a), together with the insertion of the new phrases therein, are not changes of substance but are merely for the purpose of clarification.

NOTES OF ADVISORY COMMITTEE ON RULES—1963 AMENDMENT

Under the amendment of the initial sentences of the subdivision, a defendant as a third-party plaintiff may freely and without leave of court bring in a third-party defendant if he files the third-party complaint not later than 10 days after he serves his original answer. When the impleader comes so early in the case, there is little value in requiring a preliminary ruling by the court on the propriety of the impleader.

After the third-party defendant is brought in, the court has discretion to strike the third-party claim if it is obviously unmeritorious and can only delay or prejudice the disposition of the plaintiff's claim, or to sever the third-party claim or accord it separate trial if confusion or prejudice would otherwise result. This discretion, applicable not merely to the cases covered by the amendment where the third-party defendant is brought in without leave, but to all impleaders under the rule, is emphasized in the next-to-last sentence of the subdivision, added by amendment.

In dispensing with leave of court for an impleader filed not later than 10 days after serving the answer, but retaining the leave requirement for impleaders sought to be effected thereafter, the amended subdivision takes a moderate position on the lines urged by some commentators, see Note, 43 Minn.L.Rev. 115 (1958); cf. Pa.R.Civ.P. 2252–53 (60 days after service on the defendant); Minn.R.Civ.P. 14.01 (45 days). Other commentators would dispense with the requirement of leave regardless of the time when impleader is effected, and would rely on subsequent action by the court to dismiss the impleader if it would unduly delay or complicate the litigation or would be otherwise objectionable. See 1A Barron & Holtzoff, Federal Practice & Procedure 649–50 (Wright ed. 1960); Comment, 58 Colum.L.Rev. 532, 546 (1958); cf. N.Y.Civ.Prac. Act §193–a; Me.R.Civ.P. 14. The amended subdivision preserves the value of a preliminary screening, through the leave procedure, of impleaders attempted after the 10-day period.

The amendment applies also when an impleader is initiated by a third-party defendant against a person who may be liable to him, as provided in the last sentence of the subdivision.

NOTES OF ADVISORY COMMITTEE ON RULES—1966 AMENDMENT

Rule 14 was modeled on Admiralty Rule 56. An important feature of Admiralty Rule 56 was that it allowed impleader not only of a person who might be liable to the defendant by way of remedy over, but also of any person who might be liable to the plaintiff. The importance of this provision was that the defendant was entitled to insist that the plaintiff proceed to judgment against the third-party defendant. In certain cases this was a valuable implementation of a substantive right. For example, in a case of ship collision where a finding of mutual fault is possible, one ship- owner, if sued alone, faces the prospect of an absolute judgment for the full amount of the damage suffered by an innocent third party; but if he can implead the owner of the other vessel, and if mutual fault is found, the judgment against the original defendant will be in the first instance only for a moiety of the damages; liability for the remainder will be conditioned on the plaintiff's inability to collect from the third-party defendant.

This feature was originally incorporated in Rule 14, but was eliminated by the amendment of 1946, so that under the amended rule a third party could not be impleaded on the basis that he might be liable to the plaintiff. One of the reasons for the amendment was that the Civil Rule, unlike the Admiralty Rule, did not require the plaintiff to go to judgment against the third-party defendant. Another reason was that where

jurisdiction depended on diversity of citizenship the impleader of an adversary having the same citizenship as the plaintiff was not considered possible.

Retention of the admiralty practice in those cases that will be counterparts of a suit in admiralty is clearly desirable.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

COMMITTEE NOTES ON RULES—2000 AMENDMENT

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

GAP Report. Rule B(1)(a) was modified by moving ''in an in personam action'' out of paragraph (a) and into the first line of subdivision (1). This change makes it clear that all paragraphs of subdivision (1) apply when attachment is sought in an in personam action. Rule B(1)(d) was modified by changing the requirement that the clerk deliver the summons and process to the person or organization authorized to serve it. The new form requires only that the summons and process be delivered, not that the clerk effect the delivery. This change conforms to present practice in some districts and will facilitate rapid service. It matches the spirit of Civil Rule 4(b), which directs the clerk to issue the summons ''to the plaintiff for service on the defendant.'' A parallel change is made in Rule C(3)(b).

COMMITTEE NOTES ON RULES—2006 AMENDMENT

Rule 14 is amended to conform to changes in designating the paragraphs of Supplemental Rule C(6).

Rule 15. Amended and Supplemental Pleadings

(a) AMENDMENTS. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's 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 the party in maintaining the party's 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. An amendment of a pleading relates back to the date of the original pleading when

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

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

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

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

(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 serve 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 statement 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.

(As amended Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991; Pub. L. 102–198, §11(a), Dec. 9, 1991, 105 Stat. 1626; Apr. 22, 1993, eff. Dec. 1, 1993.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

See generally for the present federal practice, [former] Equity Rules 19 (Amendments Generally), 28 (Amendment of Bill as of Course), 32 (Answer to Amended Bill), 34 (Supplemental Pleading), and 35 (Bills of Revivor and Supplemental Bills—Form); U.S.C., Title 28, §§399 [now 1653] (Amendments to show diverse citizenship) and [former] 777 (Defects of Form; amendments). See *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 28, r.r. 1–13; O. 20, r. 4; O. 24, r.r. 1–3.

Note to Subdivision (a). The right to serve an amended pleading once as of course is common. 4 Mont.Rev.Codes Ann. (1935) §9186; 1 Ore.Code Ann. (1930) §1–904; 1 S.C.Code (Michie, 1932) §493; *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 28, r. 2. Provision for amendment of pleading before trial, by leave of court, is in almost every code. If there is no statute the power of the court to grant leave is

said to be inherent. Clark, *Code Pleading*, (1928) pp. 498, 509.

Note to Subdivision (b). Compare [former] Equity Rule 19 (Amendments Generally) and code provisions which allow an amendment ''at any time in furtherance of justice,'' (e. g., Ark.Civ.Code (Crawford, 1934) §155) and which allow an amendment of pleadings to conform to the evidence, where the adverse party has not been misled and prejudiced (e.g., N.M.Stat.Ann. (Courtright, 1929) §§105–601, 105–602).

Note to Subdivision (c). ''Relation back'' is a well recognized doctrine of recent and now more frequent application. Compare Ala.Code Ann. (Michie, 1928) §9513; Ill.Rev.Stat. (1937) ch. 110, §170(2); 2 Wash.Rev.Stat.Ann. (Remington, 1932) §308–3(4). See U.S.C., Title 28, §399 [now 1653] (Amendments to show diverse citizenship) for a provision for ''relation back.''

Note to Subdivision (d). This is an adaptation of Equity Rule 34 (Supplemental Pleading).

NOTES OF ADVISORY COMMITTEE ON RULES—1963 AMENDMENT

Rule 15(d) is intended to give the court broad discretion in allowing a supplemental pleading. However, some cases, opposed by other cases and criticized by the commentators, have taken the rigid and formalistic view that where the original complaint fails to state a claim upon which relief can be granted, leave to serve a supplemental complaint must be denied. See *Bonner v. Elizabeth Arden, Inc.*, 177 F.2d 703 (2d Cir. 1949); *Bowles v. Senderowitz*, 65 F.Supp. 548 (E.D.Pa.), rev'd on other grounds, 158 F.2d 435 (3d Cir. 1946), cert. denied, *Senderowitz v. Fleming*, 330 U.S. 848, 67 S.Ct. 1091, 91 L.Ed. 1292 (1947); cf. *LaSalle Nat. Bank v. 222 East Chestnut St. Corp.*, 267 F.2d 247 (7th Cir.), cert. denied, 361 U.S. 836, 80 S.Ct. 88, 4 L.Ed.2d 77 (1959). But see *Camilla Cotton Oil Co. v. Spencer Kellogg & Sons*, 257 F.2d 162 (5th Cir. 1958); *Genuth v. National Biscuit Co.*, 81 F.Supp. 213 (S.D.N.Y. 1948), app. dism., 177 F.2d 962 (2d Cir. 1949); 3 *Moore's Federal Practice* ¶15.01 [5] (Supp. 1960); 1A Barron & Holtzoff, *Federal Practice & Procedure* 820–21 (Wright ed. 1960). Thus plaintiffs have sometimes been needlessly remitted to the difficulties of commencing a new action even though events occurring after the commencement of the original action have made clear the right to relief.

Under the amendment the court has discretion to permit a supplemental pleading despite the fact that the original pleading is defective. As in other situations where a supplemental pleading is offered, the court is to determine in the light of the particular circumstances whether filing should be permitted, and if so, upon what terms. The amendment does not attempt to deal with such questions as the relation of the statute of limitations to supplemental pleadings, the operation of the doctrine of laches, or the availability of other defenses. All these questions are for decision in accordance with the principles applicable to supplemental pleadings generally. Cf. *Blau v. Lamb*, 191 F.Supp. 906 (S.D.N.Y. 1961); *Lendonsol Amusement Corp. v. B. & Q. Assoc., Inc.*, 23 F.R.Serv. 15d. 3, Case 1 (D.Mass. 1957).

NOTES OF ADVISORY COMMITTEE ON RULES—1966 AMENDMENT

Rule 15(c) is amplified to state more clearly when an amendment of a pleading changing the party against whom a claim is asserted (including an amendment to correct a misnomer or misdescription of a defendant) shall ''relate back'' to the date of the original pleading.

The problem has arisen most acutely in certain actions by private parties against officers or agencies of the United States. Thus an individual denied social security benefits by the Secretary of Health, Education, and Welfare may secure review of the decision by bringing a civil action against that officer within sixty days. 42 U.S.C. §405(g) (Supp. III, 1962). In several recent cases the claimants instituted timely action but mistakenly named as defendant the United States, the Department of HEW, the ''Federal Security Administration'' (a nonexistent agency), and a Secretary who had retired from the office nineteen days before. Discovering their mistakes, the claimants moved to amend their complaints to name the proper defendant; by this time the statutory sixty-day period had expired. The motions were denied on the ground that the amendment ''would amount to the commencement of a new proceeding and would not relate back in time so as to avoid the statutory provision * * * that suit be brought within sixty days * * *'' *Cohn v. Federal Security Adm.*, 199 F.Supp. 884, 885 (W.D.N.Y. 1961); see also *Cunningham v. United States*, 199 F.Supp. 541 (W.D.Mo. 1958); *Hall v. Department of HEW*, 199 F.Supp. 833 (S.D.Tex. 1960); *Sandridge v. Folsom, Secretary of HEW*, 200 F.Supp. 25 (M.D.Tenn. 1959). [The Secretary of Health, Education, and Welfare has approved certain ameliorative regulations under 42 U.S.C. §405(g). See 29 Fed.Reg. 8209 (June 30, 1964); Jacoby, The Effect of Recent Changes in the Law of ''Nonstatutory'' Judicial Review, 53 Geo.L.J. 19, 42–43 (1964); see also *Simmons v. United States Dept. HEW*, 328 F.2d 86 (3d Cir. 1964).]

Analysis in terms of ''new proceeding'' is traceable to *Davis v. L. L. Cohen & Co.*, 268 U.S. 638 (1925), and *Mellon v. Arkansas Land & Lumber Co.*, 275 U.S. 460 (1928), but those cases antedate the adoption of the Rules which import different criteria for determining when an amendment is to ''relate back''. As lower courts have continued to rely on the *Davis* and *Mellon* cases despite the contrary intent of the Rules, clarification of Rule 15(c) is considered advisable.

Relation back is intimately connected with the policy of the statute of limitations. The policy of the statute limiting the time for suit against the Secretary of HEW would not have been offended by allowing relation back in the situations described above. For the government was put on notice of the claim within the stated period—in the particular instances, by means of the initial delivery of process to a responsible government official (see Rule 4(d)(4) and (5). In these circumstances, characterization of the amendment as a new proceeding is not responsive to the realty, but is merely question-begging; and to deny relation back is to defeat unjustly the claimant's opportunity to prove his case. See the full discussion by Byse, *Suing the ''Wrong'' Defendant in Judicial Review of Federal Administrative Action: Proposals for Reform*, 77 Harv.L.Rev. 40 (1963); see also Ill.Civ.P.Act §46(4).

Much the same question arises in other types of actions against the government (see *Byse*, supra, at 45 n. 15). In actions between private parties, the problem of relation back of amendments changing defendants has generally been better handled by the courts, but incorrect criteria have sometimes been applied, leading sporadically to doubtful results. See 1A Barron & Holtzoff, *Federal Practice & Procedure* §451 (Wright ed. 1960); 1 id. §186 (1960); 2 id. §543 (1961); 3 *Moore's Federal Practice*, par. 15.15 (Cum.Supp. 1962); Annot., *Change in Party After Statute of Limitations Has Run*, 8 A.L.R.2d 6 (1949). Rule 15(c) has been amplified to provide a general solution. An amendment changing the party against whom a claim is asserted relates back if the amendment satisfies the usual condition of Rule 15(c) of ''arising out of the conduct * * * set forth * * * in the original pleading,'' and if, within the applicable limitations period, the party brought in by amendment, first, received such notice of the institution of the action—the notice need not be formal—that he would not be prejudiced in defending the action, and, second, knew or should have known that the action would have been brought against him initially had there not been a mistake concerning the identity of the proper party. Revised Rule 15(c) goes on to provide specifically in the government cases that the first and second requirements are satisfied when the government has been notified in the manner there described (see Rule 4(d)(4) and (5). As applied to the government cases, revised Rule 15(c) further advances the objectives of the 1961 amendment of Rule 25(d) (substitution of public officers).

The relation back of amendments changing plaintiffs is not expressly treated in revised Rule 15(c) since the

problem is generally easier. Again the chief consideration of policy is that of the statute of limitations, and the attitude taken in revised Rule 15(c) toward change of defendants extends by analogy to amendments changing plaintiffs. Also relevant is the amendment of Rule 17(a) (real party in interest). To avoid forfeitures of just claims, revised Rule 17(a) would provide that 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 for correction of the defect in the manner there stated.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1991 AMENDMENT

The rule has been revised to prevent parties against whom claims are made from taking unjust advantage of otherwise inconsequential pleading errors to sustain a limitations defense.

Paragraph (c)(1). This provision is new. It is intended to make it clear that the rule does not apply to preclude any relation back that may be permitted under the applicable limitations law. Generally, the applicable limitations law will be state law. If federal jurisdiction is based on the citizenship of the parties, the primary reference is the law of the state in which the district court sits. *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980). If federal jurisdiction is based on a federal question, the reference may be to the law of the state governing relations between the parties. *E.g., Board of Regents v. Tomanio*, 446 U.S. 478 (1980). In some circumstances, the controlling limitations law may be federal law. *E.g., West v. Conrail, Inc.*, 107 S.Ct. 1538 (1987). Cf. *Burlington Northern R. Co. v. Woods*, 480 U.S. 1 (1987); *Stewart Organization v. Ricoh*, 108 S.Ct. 2239 (1988). Whatever may be the controlling body of limitations law, if that law affords a more forgiving principle of relation back than the one provided in this rule, it should be available to save the claim. Accord, *Marshall v. Mulrenin*, 508 F.2d 39 (1st cir. 1974). If *Schiavone v. Fortune*, 106 S.Ct. 2379 (1986) implies the contrary, this paragraph is intended to make a material change in the rule.

Paragraph (c)(3). This paragraph has been revised to change the result in *Schiavone v. Fortune, supra*, with respect to the problem of a misnamed defendant. An intended defendant who is notified of an action within the period allowed by Rule 4(m) for service of a summons and complaint may not under the revised rule defeat the action on account of a defect in the pleading with respect to the defendant's name, provided that the requirements of clauses (A) and (B) have been met. If the notice requirement is met within the Rule 4(m) period, a complaint may be amended at any time to correct a formal defect such as a misnomer or misidentification. On the basis of the text of the former rule, the Court reached a result in *Schiavone v. Fortune* that was inconsistent with the liberal pleading practices secured by Rule 8. See Bauer, Schiavone: *An Un-Fortune-ate Illustration of the Supreme Court's Role as Interpreter of the Federal Rules of Civil Procedure*, 63 NOTRE DAME L. REV. 720 (1988); Brussack, *Outrageous Fortune: The Case for Amending Rule 15(c) Again*, 61 S. CAL. L. REV. 671 (1988); Lewis, *The Excessive History of Federal Rule 15(c) and Its Lessons for Civil Rules Revision*, 86 MICH. L. REV. 1507 (1987).

In allowing a name-correcting amendment within the time allowed by Rule 4(m), this rule allows not only the 120 days specified in that rule, but also any additional time resulting from any extension ordered by the court pursuant to that rule, as may be granted, for example, if the defendant is a fugitive from service of the summons.

This revision, together with the revision of Rule 4(i) with respect to the failure of a plaintiff in an action against the United States to effect timely service on all the appropriate officials, is intended to produce results contrary to those reached in *Gardner v. Gartman*, 880 F.2d 797 (4th cir. 1989), *Rys v. U.S. Postal Service*, 886 F.2d 443 (1st cir. 1989), *Martin's Food & Liquor, Inc. v. U.S. Dept. of Agriculture*, 14 F.R.S.3d 86 (N.D. Ill. 1988). *But cf. Montgomery v. United States Postal Service*, 867 F.2d 900 (5th cir. 1989), *Warren v. Department of the Army*, 867 F.2d 1156 (8th cir. 1989); *Miles v. Department of the Army*, 881 F.2d 777 (9th cir. 1989), *Barsten v. Department of the Interior*, 896 F.2d 422 (9th cir. 1990); *Brown v. Georgia Dept. of Revenue*, 881 F.2d 1018 (11th cir. 1989).

CONGRESSIONAL MODIFICATION OF PROPOSED 1991 AMENDMENT

Section 11(a) of Pub. L. 102–198 [set out as a note under section 2074 of this title] provided that Rule 15(c)(3) of the Federal Rules of Civil Procedure as transmitted to Congress by the Supreme Court to become effective on Dec. 1, 1991, is amended. See 1991 Amendment note below.

NOTES OF ADVISORY COMMITTEE ON RULES—1993 AMENDMENT

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

AMENDMENT BY PUBLIC LAW

1991—Subd. (c)(3). Pub. L. 102–198 substituted ''Rule 4(j)'' for ''Rule 4(m)''.

Rule 16. Pretrial Conferences; Scheduling; Management

(a) PRETRIAL CONFERENCES; OBJECTIVES. 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 for such purposes as

(1) expediting the disposition of the action;

(2) establishing early and continuing control so that the case will not be protracted because of lack of management;

(3) discouraging wasteful pretrial activities;

(4) improving the quality of the trial through more thorough preparation, and;

(5) facilitating the settlement of the case.

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

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

(2) to file motions; and

(3) to complete discovery.

The scheduling order also may include

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

(5) provisions for disclosure or discovery of electronically stored information;

(6) any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after production;

(7) the date or dates for conferences before trial, a final pretrial conference, and trial; and

(8) any other matters appropriate in the circumstances of the case.

The order shall issue as soon as practicable but in any event within 90 days after the appearance of a defendant and within 120 days after the complaint has been served on a defendant. A schedule shall not be modified except upon a showing of good cause and by leave of the district judge or, when authorized by local rule, by a magistrate judge.

(c) SUBJECTS FOR CONSIDERATION AT PRETRIAL CONFERENCES. At any conference under this rule consideration may be given, and the court may take appropriate action, with respect to

(1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses;

(2) the necessity or desirability of amendments to the pleadings;

(3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence;

(4) the avoidance of unnecessary proof and of cumulative evidence, and limitations or restrictions on the use of testimony under Rule 702 of the Federal Rules of Evidence;

(5) the appropriateness and timing of summary adjudication under Rule 56;

(6) the control and scheduling of discovery, including orders affecting disclosures and discovery pursuant to Rule 26 and Rules 29 through 37;

(7) the identification of witnesses and documents, the need and schedule for filing and exchanging pretrial briefs, and the date or dates for further conferences and for trial;

(8) the advisability of referring matters to a magistrate judge or master;

(9) settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule;

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

(11) the disposition of pending motions;

(12) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;

(13) an order for a separate trial pursuant to Rule 42(b) with respect to a claim, counterclaim, cross-claim, or third-party claim, or with respect to any particular issue in the case;

(14) an order directing a party or parties to present evidence early in the trial with respect to a manageable issue that could, on the evidence, be the basis for a judgment as a matter of law under Rule 50(a) or a judgment on partial findings under Rule 52(c);

(15) an order establishing a reasonable limit on the time allowed for presenting evidence; and

(16) such other matters as may facilitate the just, speedy, and inexpensive disposition of the action.

At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed. If appropriate, the court may require that a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute.

(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 a 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. This 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 judge, upon motion or the judge's 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 judge shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

(As amended Apr. 28, 1983, eff. Aug. 1, 1983; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 12, 2006, eff. Dec. 1, 2006.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

1. Similar rules of pre-trial procedure are now in force in Boston, Cleveland, Detroit, and Los Angeles, and a rule substantially like this one has been proposed for the urban centers of New York state. For a discussion of the successful operation of pre-trial procedure in relieving the congested condition of trial calendars of the courts in such cities and for the proposed New York plan, see *A Proposal for Minimizing Calendar Delay in Jury Cases* (Dec. 1936—published by The New York Law Society); *Pre-Trial Procedure and Administration*, Third Annual Report of the Judicial Council of the State of New York (1937), pp. 207–243; *Report of the Commission on the Administration of Justice in New York State* (1934), pp. (288)–(290). See also *Pre-Trial Procedure in the Wayne Circuit Court*, Detroit, Michigan, Sixth Annual Report of the Judicial Council of Michigan (1936), pp. 63–75; and Sunderland, *The Theory and Practice of Pre-Trial Procedure* (Dec. 1937) 36 Mich.L.Rev. 215–226, 21 J.Am.Jud.Soc. 125. Compare the English procedure known as the ''summons for directions,'' *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 38a; and a similar procedure in New Jersey, N.J.Comp.Stat. (2 Cum.Supp. 1911–1924); N.J. Supreme Court Rules, 2 N.J.Misc.Rep. (1924) 1230, Rules 94, 92, 93, 95 (the last three as amended 1933, 11 N.J.Misc.Rep. (1933) 955).

2. Compare the similar procedure under Rule 56(d) (Summary Judgment—Case Not Fully Adjudicated on Motion). Rule 12(g) (Consolidation of Motions), by requiring to some extent the consolidation of motions dealing with matters preliminary to trial, is a step in the same direction. In connection with clause (5) of this rule, see Rules 53(b) (Masters; Reference) and 53(e)(3) (Master's Report; In Jury Actions).

NOTES OF ADVISORY COMMITTEE ON RULES—1983 AMENDMENT

Introduction

Rule 16 has not been amended since the Federal Rules were promulgated in 1938. In many respects, the rule has been a success. For example, there is evidence that pretrial conferences may improve the quality of justice rendered in the federal courts by sharpening the preparation and presentation of cases, tending to eliminate trial surprise, and improving, as well as facilitating, the settlement process. See 6 Wright & Miller, *Federal Practice and Procedure: Civil* § 1522 (1971). However, in other respects particularly with regard to case management, the rule has not always been as helpful as it might have been. Thus there has been a widespread feeling that amendment is necessary to encourage pretrial management that meets the needs of modern litigation. See *Report of the National Commission for the Review of Antitrust Laws and Procedures* (1979).

Major criticism of Rule 16 has centered on the fact that its application can result in over-regulation of some cases and under-regulation of others. In simple, run-of-the-mill cases, attorneys have found pretrial requirements burdensome. It is claimed that over-administration leads to a series of mini-trials that result in a waste of an attorney's time and needless expense to a client. Pollack, *Pretrial Procedures More Effectively Handled*, 65 F.R.D. 475 (1974). This is especially likely to be true when pretrial proceedings occur long before trial. At the other end of the spectrum, the discretionary character of Rule 16 and its orientation toward a single conference late in the pretrial process has led to under-administration of complex or protracted cases. Without judicial guidance beginning shortly after institution, these cases often become mired in discovery.

Four sources of criticism of pretrial have been identified. First, conferences often are seen as a mere exchange of legalistic contentions without any real analysis of the particular case. Second, the result frequently is nothing but a formal agreement on minutiae. Third, the conferences are seen as unnecessary and time-consuming in cases that will be settled before trial. Fourth, the meetings can be ceremonial and ritualistic, having little effect on the trial and being of minimal value, particularly when the attorneys attending the sessions are not the ones who will try the case or lack authority to enter into binding stipulations. See generally *McCargo v. Hedrick*, 545 F.2d 393 (4th Cir. 1976); Pollack, *Pretrial Procedures More Effectively Handled*, 65 F.R.D. 475 (1974); Rosenberg, *The Pretrial Conference and Effective Justice* 45 (1964).

There also have been difficulties with the pretrial orders that issue following Rule 16 conferences. When an order is entered far in advance of trial, some issues may not be properly formulated. Counsel naturally are cautious and often try to preserve as many options as possible. If the judge who tries the case did not conduct the conference, he could find it difficult to determine exactly what was agreed to at the conference. But any insistence on a detailed order may be too burdensome, depending on the nature or posture of the case.

Given the significant changes in federal civil litigation since 1938 that are not reflected in Rule 16, it has been extensively rewritten and expanded to meet the challenges of modern litigation. Empirical studies reveal that when a trial judge intervenes personally at an early stage to assume judicial control over a case and to schedule dates for completion by the parties of the principal pretrial steps, the case is disposed of by settlement or trial more efficiently and with less cost and delay than when the parties are left to their own devices. Flanders, *Case Management and Court Management in United States District Courts* 17, Federal Judicial Center (1977). Thus, the rule mandates a pretrial scheduling order. However, although scheduling and pretrial conferences are encouraged in appropriate cases, they are not mandated.

Discussion

Subdivision (a); Pretrial Conferences; Objectives. The amended rule makes scheduling and case management an express goal of pretrial procedure. This is done in Rule 16(a) by shifting the emphasis away from a conference focused solely on the trial and toward a process of judicial management that embraces the entire pretrial phase, especially motions and discovery. In addition, the amendment explicitly recognizes some of the objectives of pretrial conferences and the powers that many courts already have assumed. Rule 16 thus will be a more accurate reflection of actual practice.

Subdivision (b); Scheduling and Planning. The most significant change in Rule 16 is the mandatory scheduling order described in Rule 16(b), which is based in part on Wisconsin Civil Procedure Rule 802.10. The idea of scheduling orders is not new. It has been used by many federal courts. See, *e.g.*, Southern District of Indiana, Local Rule 19.

Although a mandatory scheduling order encourages the court to become involved in case management early in the litigation, it represents a degree of judicial involvement that is not warranted in many cases. Thus, subdivision (b) permits each district court to promulgate a local rule under Rule 83 exempting certain categories of cases in which the burdens of scheduling orders exceed the administrative efficiencies that would be gained. See Eastern District of Virginia, Local Rule 12(1). Logical candidates for this treatment include social security disability matters, habeas corpus petitions, forfeitures, and reviews of certain administrative actions.

A scheduling conference may be requested either by the judge, a magistrate when authorized by district court rule, or a party within 120 days after the summons and complaint are filed. If a scheduling conference is not arranged within that time and the case is not exempted by local rule, a scheduling order must be issued under Rule 16(b), after some communication with the parties, which may be by telephone or mail rather than in person. The use of the term ''judge'' in subdivision (b) reflects the Advisory Committee's judgment that is it preferable that this task should be handled by a district judge rather than a magistrate, except when the magistrate is acting under 28 U.S.C. § 636(c). While personal supervision by the trial judge is preferred, the rule, in recognition of the impracticality or difficulty of complying with such a requirement in some districts, authorizes a district by local rule to delegate the duties to a magistrate. In order to formulate a practicable scheduling order, the judge, or a magistrate when authorized by district court rule, and attorneys are required to develop a timetable for the matters listed in Rule 16(b)(1)–(3). As indicated in Rule 16(b)(4)–(5), the order may also deal with a wide range of other matters. The rule is phrased permissively as to clauses (4) and (5), however, because scheduling these items at an early point may not be feasible or appropriate. Even though subdivision (b) relates only to scheduling, there is no reason why some of the procedural matters listed in Rule 16(c) cannot be addressed at the same time, at least when a scheduling conference is held.

Item (1) assures that at some point both the parties and the pleadings will be fixed, by setting a time within which joinder of parties shall be completed and the pleadings amended.

Item (2) requires setting time limits for interposing various motions that otherwise might be used as stalling techniques.

Item (3) deals with the problem of procrastination and delay by attorneys in a context in which schedul-

ing is especially important—discovery. Scheduling the completion of discovery can serve some of the same functions as the conference described in Rule 26(f).

Item (4) refers to setting dates for conferences and for trial. Scheduling multiple pretrial conferences may well be desirable if the case is complex and the court believes that a more elaborate pretrial structure, such as that described in the *Manual for Complex Litigation*, should be employed. On the other hand, only one pretrial conference may be necessary in an uncomplicated case.

As long as the case is not exempted by local rule, the court must issue a written scheduling order even if no scheduling conference is called. The order, like pretrial orders under the former rule and those under new Rule 16(c), normally will ''control the subsequent course of the action.'' See Rule 16(e). After consultation with the attorneys for the parties and any unrepresented parties—a formal motion is not necessary—the court may modify the schedule on a showing of good cause if it cannot reasonably be met despite the diligence of the party seeking the extension. Since the scheduling order is entered early in the litigation, this standard seems more appropriate than a ''manifest injustice'' or ''substantial hardship'' test. Otherwise, a fear that extensions will not be granted may encourage counsel to request the longest possible periods for completing pleading, joinder, and discovery. Moreover, changes in the court's calendar sometimes will oblige the judge or magistrate when authorized by district court rule to modify the scheduling order.

The district courts undoubtedly will develop several prototype scheduling orders for different types of cases. In addition, when no formal conference is held, the court may obtain scheduling information by telephone, mail, or otherwise. In many instances this will result in a scheduling order better suited to the individual case than a standard order, without taking the time that would be required by a formal conference.

Rule 16(b) assures that the judge will take some early control over the litigation, even when its character does not warrant holding a scheduling conference. Despite the fact that the process of preparing a scheduling order does not always bring the attorneys and judge together, the fixing of time limits serves

> to stimulate litigants to narrow the areas of inquiry and advocacy to those they believe are truly relevant and material. Time limits not only compress the amount of time for litigation, they should also reduce the amount of resources invested in litigation. Litigants are forced to establish discovery priorities and thus to do the most important work first.

Report of the National Commission for the Review of Antitrust Laws and Procedures 28 (1979).

Thus, except in exempted cases, the judge or a magistrate when authorized by district court rule will have taken some action in every case within 120 days after the complaint is filed that notifies the attorneys that the case *will* be moving toward trial. Subdivision (b) is reenforced by subdivision (f), which makes it clear that the sanctions for violating a scheduling order are the same as those for violating a pretrial order.

Subdivision (c); Subjects to be Discussed at Pretrial Conferences. This subdivision expands upon the list of things that may be discussed at a pretrial conference that appeared in original Rule 16. The intention is to encourage better planning and management of litigation. Increased judicial control during the pretrial process accelerates the processing and termination of cases. Flanders, *Case Management and Court Management in United States District Courts*, Federal Judicial Center (1977). See also *Report of the National Commission for the Review of Antitrust Laws and Procedures* (1979).

The reference in Rule 16(c)(1) to ''formulation'' is intended to clarify and confirm the court's power to identify the litigable issues. It has been added in the hope of promoting efficiency and conserving judicial resources by identifying the real issues prior to trial, thereby saving time and expense for everyone. See generally *Meadow Gold Prods. Co. v. Wright*, 278 F.2d 867 (D.C. Cir. 1960). The notion is emphasized by expressly authorizing the elimination of frivolous claims or defenses at a pretrial conference. There is no reason to require that this await a formal motion for summary judgment. Nor is there any reason for the court to wait for the parties to initiate the process called for in Rule 16(c)(1).

The timing of any attempt at issue formulation is a matter of judicial discretion. In relatively simple cases it may not be necessary or may take the form of a stipulation between counsel or a request by the court that counsel work together to draft a proposed order.

Counsel bear a substantial responsibility for assisting the court in identifying the factual issues worthy of trial. If counsel fail to identify an issue for the court, the right to have the issue tried is waived. Although an order specifying the issues is intended to be binding, it may be amended at trial to avoid manifest injustice. See Rule 16(e). However, the rule's effectiveness depends on the court employing its discretion sparingly.

Clause (6) acknowledges the widespread availability and use of magistrates. The corresponding provision in the original rule referred only to masters and limited the function of the reference to the making of ''findings to be used as evidence'' in a case to be tried to a jury. The new text is not limited and broadens the potential use of a magistrate to that permitted by the Magistrate's Act.

Clause (7) explicitly recognizes that it has become commonplace to discuss settlement at pretrial conferences. Since it obviously eases crowded court dockets and results in savings to the litigants and the judicial system, settlement should be facilitated at as early a stage of the litigation as possible. Although it is not the purpose of Rule 16(b)(7) to impose settlement negotiations on unwilling litigants, it is believed that providing a neutral forum for discussing the subject might foster it. See Moore's *Federal Practice* ¶16.17; 6 Wright & Miller, *Federal Practice and Procedure: Civil* §1522 (1971). For instance, a judge to whom a case has been assigned may arrange, on his own motion or a at a party's request, to have settlement conferences handled by another member of the court or by a magistrate. The rule does not make settlement conferences mandatory because they would be a waste of time in many cases. See Flanders, *Case Management and Court Management in the United States District Courts*, 39, Federal Judicial Center (1977). Requests for a conference from a party indicating a willingness to talk settlement normally should be honored, unless thought to be frivolous or dilatory.

A settlement conference is appropriate at any time. It may be held in conjunction with a pretrial or discovery conference, although various objectives of pretrial management, such as moving the case toward trial, may not always be compatible with settlement negotiations, and thus a separate settlement conference may be desirable. See 6 Wright & Miller, *Federal Practice and Procedure: Civil* §1522, at p. 751 (1971).

In addition to settlement, Rule 16(c)(7) refers to exploring the use of procedures other than litigation to resolve the dispute. This includes urging the litigants to employ adjudicatory techniques outside the courthouse. See, for example, the experiment described in Green, Marks & Olson, *Settling Large Case Litigation: An Alternative Approach*, 11 Loyola of L.A. L.Rev. 493 (1978).

Rule 16(c)(10) authorizes the use of special pretrial procedures to expedite the adjudication of potentially difficult or protracted cases. Some district courts obviously have done so for many years. See Rubin, *The Managed Calendar: Some Pragmatic Suggestions About Achieving the Just, Speedy and Inexpensive Determination of Civil Cases in Federal Courts*, 4 Just. Sys. J. 135 (1976). Clause 10 provides an explicit authorization for such procedures and encourages their use. No particular techniques have been described; the Committee felt that flexibility and experience are the keys to efficient management of complex cases. Extensive guidance is offered in such documents as the *Manual for Complex Litigation*.

The rule simply identifies characteristics that make a case a strong candidate for special treatment. The four mentioned are illustrative, not exhaustive, and overlap to some degree. But experience has shown that one or more of them will be present in every protracted or difficult case and it seems desirable to set them out. See Kendig, *Procedures for Management of Non-Routine Cases*, 3 Hofstra L.Rev. 701 (1975).

The last sentence of subdivision (c) is new. See Wisconsin Civil Procedure Rule 802.11(2). It has been added to meet one of the criticisms of the present practice described earlier and insure proper preconference preparation so that the meeting is more than a ceremonial or ritualistic event. The reference to ''authority'' is not intended to insist upon the ability to settle the litigation. Nor should the rule be read to encourage the judge conducting the conference to compel attorneys to enter into stipulations or to make admissions that they consider to be unreasonable, that touch on matters that could not normally have been anticipated to arise at the conference, or on subjects of a dimension that normally require prior consultation with and approval from the client.

Subdivision (d); Final Pretrial Conference. This provision has been added to make it clear that the time between any final pretrial conference (which in a simple case may be the *only* pretrial conference) and trail should be as short as possible to be certain that the litigants make substantial progress with the case and avoid the inefficiency of having that preparation repeated when there is a delay between the last pretrial conference and trial. An optimum time of 10 days to two weeks has been suggested by one federal judge. Rubin, *The Managed Calendar: Some Pragmatic Suggestions About Achieving the Just, Speedy and Inexpensive Determination of Civil Cases in Federal Courts*, 4 Just. Sys. J. 135, 141 (1976). The Committee, however, concluded that it would be inappropriate to fix a precise time in the rule, given the numerous variables that could bear on the matter. Thus the timing has been left to the court's discretion.

At least one of the attorneys who will conduct the trial for each party must be present at the final pretrial conference. At this late date there should be no doubt as to which attorney or attorneys this will be. Since the agreements and stipulations made at this final conference will control the trial, the presence of lawyers who will be involved in it is especially useful to assist the judge in structuring the case, and to lead to a more effective trial.

Subdivision (e); Pretrial Orders. Rule 16(e) does not substantially change the portion of the original rule dealing with pretrial orders. The purpose of an order is to guide the course of the litigation and the language of the original rule making that clear has been retained. No compelling reason has been found for major revision, especially since this portion of the rule has been interpreted and clarified by over forty years of judicial decisions with comparatively little difficulty. See 6 Wright & Miller, *Federal Practice and Procedure: Civil* §§1521–30 (1971). Changes in language therefore have been kept to a minimum to avoid confusion.

Since the amended rule encourages more extensive pretrial management than did the original, two or more conferences may be held in many cases. The language of Rule 16(e) recognizes this possibility and the corresponding need to issue more than one pretrial order in a single case.

Once formulated, pretrial orders should not be changed lightly; but total inflexibility is undesirable. See, *e.g.*, *Clark v. Pennsylvania R.R. Co.*, 328 F.2d 591 (2d Cir. 1964). The exact words used to describe the standard for amending the pretrial order probably are less important than the meaning given them in practice. By not imposing any limitation on the ability to modify a pretrial order, the rule reflects the reality that in any process of continuous management what is done at one conference may have to be altered at the next. In the case of the final pretrial order, however, a more stringent standard is called for and the words ''to prevent manifest injustice,'' which appeared in the original rule, have been retained. They have the virtue of familiarity and adequately describe the restraint the trial judge should exercise.

Many local rules make the plaintiff's attorney responsible for drafting a proposed pretrial order, either before or after the conference. Others allow the court to appoint any of the attorneys to perform the task, and others leave it to the court. See Note, *Pretrial Conference: A Critical Examination of Local Rules Adopted by Federal District Courts*, 64 Va.L.Rev. 467 (1978). Rule 16 has never addressed this matter. Since there is no consensus about which method of drafting the order works best and there is no reason to believe that nationwide uniformity is needed, the rule has been left silent on the point. See *Handbook for Effective Pretrial Procedure*, 37 F.R.D. 225 (1964).

Subdivision (f); Sanctions. Original Rule 16 did not mention the sanctions that might be imposed for failing to comply with the rule. However, courts have not hesitated to enforce it by appropriate measures. See, *e.g.*, *Link v. Wabash R. Co.*, 370 U.S. 628 (1962) (district court's dismissal under Rule 41(b) after plaintiff's attorney failed to appear at a pretrial conference upheld); *Admiral Theatre Corp. v. Douglas Theatre*, 585 F.2d 877 (8th Cir. 1978) (district court has discretion to exclude exhibits or refuse to permit the testimony of a witness not listed prior to trial in contravention of its pretrial order).

To reflect that existing practice, and to obviate dependence upon Rule 41(b) or the court's inherent power to regulate litigation, *cf. Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958), Rule 16(f) expressly provides for imposing sanctions on disobedient or recalcitrant parties, their attorneys, or both in four types of situations. Rodes, Ripple & Mooney, *Sanctions Imposable for Violations of the Federal Rules of Civil Procedure* 65–67, 80–84, Federal Judicial Center (1981). Furthermore, explicit reference to sanctions reenforces the rule's intention to encourage forceful judicial management.

Rule 16(f) incorporates portions of Rule 37(b)(2), which prescribes sanctions for failing to make discovery. This should facilitate application of Rule 16(f), since courts and lawyers already are familiar with the Rule 37 standards. Among the sanctions authorized by the new subdivision are: preclusion order, striking a pleading, staying the proceeding, default judgment, contempt, and charging a party, his attorney, or both with the expenses, including attorney's fees, caused by noncompliance. The contempt sanction, however, is only available for a violation of a court order. The references in Rule 16(f) are not exhaustive.

As is true under Rule 37(b)(2), the imposition of sanctions may be sought by either the court or a party. In addition, the court has discretion to impose whichever sanction it feels is appropriate under the circumstances. Its action is reviewable under the abuse-of-discretion standard. See *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976).

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1993 AMENDMENT

Subdivision (b). One purpose of this amendment is to provide a more appropriate deadline for the initial scheduling order required by the rule. The former rule directed that the order be entered within 120 days from the filing of the complaint. This requirement has created problems because Rule 4(m) allows 120 days for service and ordinarily at least one defendant should be available to participate in the process of formulating the scheduling order. The revision provides that the order is to be entered within 90 days after the date a defendant first appears (whether by answer or by a mo-

tion under Rule 12) or, if earlier (as may occur in some actions against the United States or if service is waived under Rule 4), within 120 days after service of the complaint on a defendant. The longer time provided by the revision is not intended to encourage unnecessary delays in entering the scheduling order. Indeed, in most cases the order can and should be entered at a much earlier date. Rather, the additional time is intended to alleviate problems in multi-defendant cases and should ordinarily be adequate to enable participation by all defendants initially named in the action.

In many cases the scheduling order can and should be entered before this deadline. However, when setting a scheduling conference, the court should take into account the effect this setting will have in establishing deadlines for the parties to meet under revised Rule 26(f) and to exchange information under revised Rule 26(a)(1). While the parties are expected to stipulate to additional time for making their disclosures when warranted by the circumstances, a scheduling conference held before defendants have had time to learn much about the case may result in diminishing the value of the Rule 26(f) meeting, the parties' proposed discovery plan, and indeed the conference itself.

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

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

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

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

Paragraph (4) is revised to clarify that in advance of trial the court may address the need for, and possible limitations on, the use of expert testimony under Rule 702 of the Federal Rules of Evidence. Even when proposed expert testimony might be admissible under the standards of Rules 403 and 702 of the evidence rules, the court may preclude or limit such testimony if the cost to the litigants—which may include the cost to adversaries of securing testimony on the same subjects by other experts—would be unduly expensive given the needs of the case and the other evidence available at trial.

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

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

Paragraph (9) is revised to describe more accurately the various procedures that, in addition to traditional settlement conferences, may be helpful in settling litigation. Even if a case cannot immediately be settled, the judge and attorneys can explore possible use of alternative procedures such as mini-trials, summary jury trials, mediation, neutral evaluation, and nonbinding arbitration that can lead to consensual resolution of the dispute without a full trial on the merits. The rule acknowledges the presence of statutes and local rules or plans that may authorize use of some of these procedures even when not agreed to by the parties. See 28 U.S.C. §§473(a)(6), 473(b)(4), 651–58; Section 104(b)(2), Pub. L. 101–650. The rule does not attempt to resolve questions as to the extent a court would be authorized to require such proceedings as an exercise of its inherent powers.

The amendment of paragraph (9) should be read in conjunction with the sentence added to the end of subdivision (c), authorizing the court to direct that, in appropriate cases, a responsible representative of the parties be present or available by telephone during a conference in order to discuss possible settlement of the case. The sentence refers to participation by a party or its representative. Whether this would be the individual party, an officer of a corporate party, a representative from an insurance carrier, or someone else would depend on the circumstances. Particularly in litigation in which governmental agencies or large amounts of money are involved, there may be no one with on-the-spot settlement authority, and the most that should be expected is access to a person who would have a major role in submitting a recommendation to the body or board with ultimate decision-making responsibility. The selection of the appropriate representative should ordinarily be left to the party and its counsel. Finally, it should be noted that the unwillingness of a party to be available, even by telephone, for a settlement conference may be a clear signal that the time and expense involved in pursuing settlement is likely to be unproductive and that personal participation by the parties should not be required.

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

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

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

COMMITTEE NOTES ON RULES—2006 AMENDMENT

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

Rule 16(b) is also amended to include among the topics that may be addressed in the scheduling order any agreements that the parties reach to facilitate discovery by minimizing the risk of waiver of privilege or work-product protection. Rule 26(f) is amended to add to the discovery plan the parties' proposal for the court to enter a case-management or other order adopting such an agreement. The parties may agree to various arrangements. For example, they may agree to initial provision of requested materials without waiver of privilege or protection to enable the party seeking production to designate the materials desired or protection for actual production, with the privilege review of only those materials to follow. Alternatively, they may agree that if privileged or protected information is inadvertently produced, the producing party may by timely notice assert the privilege or protection and obtain return of the materials without waiver. Other arrangements are possible. In most circumstances, a party who receives information under such an arrangement cannot assert that production of the information waived a claim of privilege or of protection as trial-preparation material.

An order that includes the parties' agreement may be helpful in avoiding delay and excessive cost in discovery. *See Manual for Complex Litigation* (4th) § 11.446. Rule 16(b)(6) recognizes the propriety of including such agreements in the court's order. The rule does not provide the court with authority to enter such a case-management or other order without party agreement, or limit the court's authority to act on motion.

Changes Made After Publication and Comment. This recommendation is of a modified version of the proposal as published. Subdivision (b)(6) was modified to eliminate the references to ''adopting'' agreements for ''protection against waiving'' privilege. It was feared that these words might seem to promise greater protection than can be assured. In keeping with changes to Rule 26(b)(5)(B), subdivision (b)(6) was expanded to include agreements for asserting claims of protection as trial-preparation materials. The Committee Note was revised to reflect the changes in the rule text.

The proposed changes from the published rule are set out below. [Omitted]

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; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States. 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 effect 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. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such 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, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Title 28, U.S.C., Sections 754 and 959(a).

(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. An infant or incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 25, 1988, eff. Aug. 1, 1988; Pub. L. 100–690, title VII, § 7049, Nov. 18, 1988, 102 Stat. 4401.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

Note to Subdivision (a). The real party in interest provision, except for the last clause which is new, is taken verbatim from [former] Equity Rule 37 (Parties Generally—Intervention), except that the word ''expressly'' has been omitted. For similar provisions see N.Y.C.P.A. (1937) § 210; Wyo.Rev.Stat.Ann. (1931) §§ 89–501, 89–502, 89–503; *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 16, r. 8. See also Equity Rule 41 (Suit to Execute Trusts of Will—Heir as Party). For examples of statutes of the United States providing particularly for an action for the use or benefit of another in the name of the United States, see U.S.C., [former] Title 40, § 270b (Suit by persons furnishing labor and

material for work on public building contracts * * * may sue on a payment bond, ''in the name of the United States for the use of the person suing'') [now 40 U.S.C. §3133(b), (c)]; and U.S.C., Title 25, §201 (Penalties under laws relating to Indians—how recovered). Compare U.S.C., Title 26, [former] §1645(c) (Suits for penalties, fines, and forfeitures, under this title, where not otherwise provided for, to be in name of United States).

Note to Subdivision (b). For capacity see generally Clark and Moore, *A New Federal Civil Procedure—II. Pleadings and Parties*, 44 Yale L.J. 1291, 1312–1317 (1935) and specifically *Coppedge v. Clinton*, 72 F.(2d) 531 (C.C.A.10th, 1934) (natural person); *David Lupton's Sons Co. v. Automobile Club of America*, 225 U.S. 489 (1912) (corporation); *Puerto Rico v. Russell & Co.*, 288 U.S. 476 (1933) (unincorporated ass'n.); *United Mine Workers of America v. Coronado Coal Co.*, 259 U.S. 344 (1922) (federal substantive right enforced against unincorporated association by suit against the association in its common name without naming all its members as parties). This rule follows the existing law as to such associations, as declared in the case last cited above. Compare *Moffat Tunnel League v. United States*, 289 U.S. 113 (1933). See note to Rule 23, clause (1).

Note to Subdivision (c). The provision for infants and incompetent persons is substantially [former] Equity Rule 70 (Suits by or Against Incompetents) with slight additions. Compare the more detailed English provisions, *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 16, r.r. 16–21.

NOTES OF ADVISORY COMMITTEE ON RULES—1946 AMENDMENT

The new matter [in subdivision (b)] makes clear the controlling character of Rule 66 regarding suits by or against a federal receiver in a federal court.

NOTES OF ADVISORY COMMITTEE ON RULES—1948 AMENDMENT

Since the statute states the capacity of a federal receiver to sue or be sued, a repetitive statement in the rule is confusing and undesirable.

NOTES OF ADVISORY COMMITTEE ON RULES—1966 AMENDMENT

The minor change in the text of the rule is designed to make it clear that the specific instances enumerated are not exceptions to, but illustrations of, the rule. These illustrations, of course, carry no negative implication to the effect that there are not other instances of recognition as the real party in interest of one whose standing as such may be in doubt. The enumeration is simply of cases in which there might be substantial doubt as to the issue but for the specific enumeration. There are other potentially arguable cases that are not excluded by the enumeration. For example, the enumeration states that the promisee in a contract for the benefit of a third party may sue as real party in interest; it does not say, because it is obvious, that the third-party beneficiary may sue (when the applicable law gives him that right.)

The rule adds to the illustrative list of real parties in interest a bailee—meaning, of course, a bailee suing on behalf of the bailor with respect to the property bailed. (When the possessor of property other than the owner sues for an invasion of the possessory interest he is the real party in interest.) The word ''bailee'' is added primarily to preserve the admiralty practice whereby the owner of a vessel as bailee of the cargo, or the master of the vessel as bailee of both vessel and cargo, sues for damage to either property interest or both. But there is no reason to limit such a provision to maritime situations. The owner of a warehouse in which household furniture is stored is equally entitled to sue on behalf of the numerous owners of the furniture stored. Cf. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

The provision that 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 the objection has been raised, for ratification, substitution, etc., is added simply in the interests of justice. In its origin the rule concerning the real party in interest was permissive in purpose: it was designed to allow an assignee to sue in his own name. That having been accomplished, the modern function of the rule in its negative aspect is simply to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata.

This provision keeps pace with the law as it is actually developing. Modern decisions are inclined to be lenient when an honest mistake has been made in choosing the party in whose name the action is to be filed—in both maritime and nonmaritime cases. See *Levinson v. Deupree*, 345 U.S. 648 (1953); *Link Aviation, Inc. v. Downs*, 325 F.2d 613 (D.C.Cir. 1963). The provision should not be misunderstood or distorted. It is intended to prevent forfeiture when determination of the proper party to sue is difficult or when an understandable mistake has been made. It does not mean, for example, that, following an airplane crash in which all aboard were killed, an action may be filed in the name of John Doe (a fictitious person), as personal representative of Richard Roe (another fictitious person), in the hope that at a later time the attorney filing the action may substitute the real name of the real personal representative of a real victim, and have the benefit of suspension of the limitation period. It does not even mean, when an action is filed by the personal representative of John Smith, of Buffalo, in the good faith belief that he was aboard the flight, that upon discovery that Smith is alive and well, having missed the fatal flight, the representative of James Brown, of San Francisco, an actual victim, can be substituted to take advantage of the suspension of the limitation period. It is, in cases of this sort, intended to insure against forfeiture and injustice—in short, to codify in broad terms the salutary principle of *Levinson v. Deupree*, 345 U.S. 648 (1953), and *Link Aviation, Inc. v. Downs*, 325 F.2d 613 (D.C.Cir. 1963).

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1988 AMENDMENT

The amendment is technical. No substantive change is intended.

AMENDMENT BY PUBLIC LAW

1988—Subd. (a). Pub. L. 100–690, which directed amendment of subd. (a) by striking ''with him'', could not be executed because of the intervening amendment by the Court by order dated Apr. 25, 1988, eff. Aug. 1, 1988.

Rule 18. Joinder of Claims and Remedies

(a) JOINDER OF CLAIMS. A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as the party has against an opposing party.

(b) JOINDER OF REMEDIES; FRAUDULENT CONVEYANCES. 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. In particular, a plaintiff may state a claim for money and a claim to have set aside a con-

veyance fraudulent as to that plaintiff, without first having obtained a judgment establishing the claim for money.

(As amended Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

Note to Subdivision (a). 1. Recent development, both in code and common law states, has been toward unlimited joinder of actions. See Ill.Rev.Stat. (1937) ch. 110, §168; N.J.S.A. 2:27–37, as modified by N.J.Sup.Ct.Rules, Rule 21, 2 N.J.Misc. 1208 (1924); N.Y.C.P.A. (1937) §258 as amended by Laws of 1935, ch. 339.

2. This provision for joinder of actions has been patterned upon [former] Equity Rule 26 (Joinder of Causes of Action) and broadened to include multiple parties. Compare the English practice, *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 18, r.r. 1–9 (noting rules 1 and 6). The earlier American codes set forth classes of joinder, following the now abandoned New York rule. See N.Y.C.P.A. §258 before amended in 1935; Compare Kan.Gen.Stat.Ann. (1935) §60–601; Wis.Stat. (1935) §263.04 for the more liberal practice.

3. The provisions of this rule for the joinder of claims are subject to Rule 82 (Jurisdiction and Venue Unaffected). For the jurisdictional aspects of joinder of claims, see Shulman and Jaegerman, *Some Jurisdictional Limitations on Federal Procedure* (1936), 45 Yale L.J. 393, 397–410. For separate trials of joined claims, see Rule 42(b).

Note to Subdivision (b). This rule is inserted to make it clear that in a single action a party should be accorded all the relief to which he is entitled regardless of whether it is legal or equitable or both. This necessarily includes a deficiency judgment in foreclosure actions formerly provided for in [former] Equity Rule 10 (Decree for Deficiency in Foreclosures, Etc.). In respect to fraudulent conveyances the rule changes the former rule requiring a prior judgment against the owner (*Braun v. American Laundry Mach. Co.*, 56 F.(2d) 197 (S.D.N.Y. 1932)) to conform to the provisions of the Uniform Fraudulent Conveyance Act, §§9 and 10. See McLaughlin, *Application of the Uniform Fraudulent Conveyance Act*, 46 Harv.L.Rev. 404, 444 (1933).

NOTES OF ADVISORY COMMITTEE ON RULES—1966 AMENDMENT

The Rules ''proceed upon the theory that no inconvenience can result from the joinder of any two or more matters in the pleadings, but only from trying two or more matters together which have little or nothing in common.'' Sunderland, *The New Federal Rules*, 45 W.Va.L.Q. 5, 13 (1938); see Clark, *Code Pleading* 58 (2d ed. 1947). Accordingly, Rule 18(a) has permitted a party to plead multiple claims of all types against an opposing party, subject to the court's power to direct an appropriate procedure for trying the claims. See Rules 42(b), 20(b), 21.

The liberal policy regarding joinder of claims in the pleadings extends to cases with multiple parties. However, the language used in the second sentence of Rule 18(a)—''if the requirements of Rules 19 [necessary joinder of parties], 20 [permissive joinder of parties], and 22 [interpleader] are satisfied''—has led some courts to infer that the rules regulating joinder of parties are intended to carry back to Rule 18(a) and to impose some special limits on joinder of claims in multiparty cases. In particular, Rule 20(a) has been read as restricting the operation of Rule 18(a) in certain situations in which a number of parties have been permissively joined in an action. In *Federal Housing Admr. v. Christianson*, 26 F.Supp. 419 (D.Conn. 1939), the indorsee of two notes sued the three comakers of one note, and sought to join in the action a count on a second note which had been made by two of the three defendants. There was no doubt about the propriety of the joinder of the three parties defendant, for a right to relief was being asserted against all three defendants which arose out of a single ''transaction'' (the first note) and a question of fact or law ''common'' to all three defendants would arise in the action. See the text of Rule 20(a). The court, however, refused to allow the joinder of the count on the second note, on the ground that this right to relief, assumed to arise from a distinct transaction, did not involve a question common to all the defendants but only two of them. For analysis of the Christianson case and other authorities, see 2 Barron & Holtzoff, *Federal Practice & Procedure*, §533.1 (Wright ed. 1961); 3 *Moore's Federal Practice*, par. 18.04[3] (2d ed. 1963).

If the court's view is followed, it becomes necessary to enter at the pleading stage into speculations about the exact relation between the claim sought to be joined against fewer than all the defendants properly joined in the action, and the claims asserted against all the defendants. Cf. Wright, *Joinder of Claims and Parties Under Modern Pleading Rules*, 36 Minn.L.Rev. 580, 605–06 (1952). Thus if it could be found in the Christianson situation that the claim on the second note arose out of the same transaction as the claim on the first or out of a transaction forming part of a ''series,'' and that any question of fact or law with respect to the second note also arose with regard to the first, it would be held that the claim on the second note could be joined in the complaint. See 2 Barron & Holtzoff, supra, at 199; see also id. at 198 n. 60.4; cf. 3 *Moore's Federal Practice*, supra, at 1811. Such pleading niceties provide a basis for delaying and wasteful maneuver. It is more compatible with the design of the Rules to allow the claim to be joined in the pleading, leaving the question of possible separate trial of that claim to be later decided. See 2 Barron & Holtzoff, supra, §533.1; Wright, supra, 36 Minn.L.Rev. at 604–11; *Developments in the Law—Multiparty Litigation in the Federal Courts*, 71 Harv. 874, 970–71 (1958); Commentary, *Relation Between Joinder of Parties and Joinder of Claims*, 5 F.R.Serv. 822 (1942). It is instructive to note that the court in the Christianson case, while holding that the claim on the second note could not be joined as a matter of pleading, held open the possibility that both claims would later be consolidated for trial under Rule 42(a). See 26 F.Supp. 419.

Rule 18(a) is now amended not only to overcome the Christianson decision and similar authority, but also to state clearly as a comprehensive proposition, that a party asserting a claim (an original claim, counterclaim, cross-claim, or third-party claim) may join as many claims as he has against an opposing party. See *Noland Co., Inc. v. Graver Tank & Mfg. Co.*, 301 F.2d 43, 49–51 (4th Cir. 1962); but cf. *C. W. Humphrey Co. v. Security Alum. Co.*, 31 F.R.D. 41 (E.D.Mich. 1962) This permitted joinder of claims is not affected by the fact that there are multiple parties in the action. The joinder of parties is governed by other rules operating independently.

It is emphasized that amended Rule 18(a) deals only with pleading. As already indicated, a claim properly joined as a matter of pleading need not be proceeded with together with the other claim if fairness or convenience justifies separate treatment.

Amended Rule 18(a), like the rule prior to amendment, does not purport to deal with questions of jurisdiction or venue which may arise with respect to claims properly joined as a matter of pleading. See Rule 82.

See also the amendment of Rule 20(a) and the Advisory Committee's Note thereto.

Free joinder of claims and remedies is one of the basic purposes of unification of the admiralty and civil procedure. The amendment accordingly provides for the inclusion in the rule of maritime claims as well as those which are legal and equitable in character.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

Rule 19. Joinder of Persons Needed for Just Adjudication

(a) PERSONS TO BE JOINED IF FEASIBLE. 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 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 a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

(b) DETERMINATION BY COURT WHENEVER JOINDER NOT FEASIBLE. If a person as described in subdivision (a)(1)–(2) hereof 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: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, 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) hereof who are not joined, and the reasons why they are not joined.

(d) EXCEPTION OF CLASS ACTIONS. This rule is subject to the provisions of Rule 23.

(As amended Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

Note to Subdivision (a). The first sentence with verbal differences (e.g., "united" interest for "joint" interest) is to be found in [former] Equity Rule 37 (Parties Generally—Intervention). Such compulsory joinder provisions are common. Compare Alaska Comp. Laws (1933) § 3392 (containing in same sentence a "class suit" provision); Wyo.Rev.Stat.Ann. (Courtright, 1931) § 89–515 (immediately followed by "class suit" provisions, § 89–516). See also [former] Equity Rule 42 (Joint and Several Demands). For example of a proper case for involuntary plaintiff, see *Independent Wireless Telegraph Co. v. Radio Corp. of America*, 269 U.S. 459 (1926).

The joinder provisions of this rule are subject to Rule 82 (Jurisdiction and Venue Unaffected).

Note to Subdivision (b). For the substance of this rule see [former] Equity Rule 39 (Absence of Persons Who Would be Proper Parties) and U.S.C., Title 28, § 111 [now 1391] (When part of several defendants cannot be served); *Camp v. Gress*, 250 U.S. 308 (1919). See also the second and third sentences of [former] Equity Rule 37 (Parties Generally—Intervention).

Note to Subdivision (c). For the substance of this rule see the fourth subdivision of [former] Equity Rule 25 (Bill of Complaint—Contents).

NOTES OF ADVISORY COMMITTEE ON RULES—1966 AMENDMENT

General Considerations

Whenever feasible, the persons materially interested in the subject of an action—see the more detailed description of these persons in the discussion of new subdivision (a) below—should be joined as parties so that they may be heard and a complete disposition made. When this comprehensive joinder cannot be accomplished—a situation which may be encountered in Federal courts because of limitations on service of process, subject matter jurisdiction, and venue—the case should be examined pragmatically and a choice made between the alternatives of proceeding with the action in the absence of particular interested persons, and dismissing the action.

Even if the court is mistaken in its decision to proceed in the absence of an interested person, it does not by that token deprive itself of the power to adjudicate as between the parties already before it through proper service of process. But the court can make a legally binding adjudication only between the parties actually joined in the action. It is true that an adjudication between the parties before the court may on occasion adversely affect the absent person as a practical matter, or leave a party exposed to a later inconsistent recovery by the absent person. These are factors which should be considered in deciding whether the action should proceed, or should rather be dismissed; but they do not themselves negate the court's power to adjudicate as between the parties who have been joined.

Defects in the Original Rule

The foregoing propositions were well understood in the older equity practice, see Hazard, *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 Colum.L.Rev. 1254 (1961), and Rule 19 could be and often was applied in consonance with them. But experience showed that the rule was defective in its phrasing and did not point clearly to the proper basis of decision.

Textual defects.—(1) The expression "persons * * * who ought to be parties if complete relief is to be accorded between those already parties," appearing in original subdivision (b), was apparently intended as a description of the persons whom it would be desirable to join in the action, all questions of feasibility of joinder being put to one side; but it was not adequately descriptive of those persons.

(2) The word "Indispensable," appearing in original subdivision (b), was apparently intended as an inclusive reference to the interested persons in whose absence it would be advisable, all factors having been considered, to dismiss the action. Yet the sentence implied that there might be interested persons, not "indispensable." in whose absence the action ought also to be dismissed. Further, it seemed at least superficially plausible to equate the word "indispensable" with the expression "having a joint interest," appearing in subdivision (a). See *United States v. Washington Inst. of Tech., Inc.*, 138 F.2d 25, 26 (3d Cir. 1943); cf. *Chidester v. City of Newark*, 162 F.2d 598 (3d Cir. 1947). But persons holding an interest technically "joint" are not always so related to an action that it would be unwise to proceed without joining all of them, whereas persons holding an interest not technically "joint" may have this relation to an action. See Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 Mich.L.Rev. 327, 356 ff., 483 (1957).

(3) The use of "indispensable" and "joint interest" in the context of original Rule 19 directed attention to the technical or abstract character of the rights or obliga-

tions of the persons whose joinder was in question, and correspondingly distracted attention from the pragmatic considerations which should be controlling.

(4) The original rule, in dealing with the feasibility of joining a person as a party to the action, besides referring to whether the person was ''subject to the jurisdiction of the court as to both service of process and venue,'' spoke of whether the person could be made a party ''without depriving the court of jurisdiction of the parties before it.'' The second quoted expression used ''jurisdiction'' in the sense of the competence of the court over the subject matter of the action, and in this sense the expression was apt. However, by a familiar confusion, the expression seems to have suggested to some that the absence from the lawsuit of a person who was ''indispensable'' or ''who ought to be [a] part[y]'' itself deprived the court of the power to adjudicate as between the parties already joined. See *Samuel Goldwyn, Inc. v. United Artists Corp.*, 113 F.2d 703, 707 (3d Cir. 1940); *McArthur v. Rosenbaum Co. of Pittsburgh*, 180 F.2d 617, 621 (3d Cir. 1949); cf. *Calcote v. Texas Pac. Coal & Oil Co.*, 157 F.2d 216 (5th Cir. 1946), cert. denied, 329 U.S. 782 (1946), noted in 56 Yale L.J. 1088 (1947); Reed, supra, 55 Mich.L.Rev. at 332–34.

Failure to point to correct basis of decision. The original rule did not state affirmatively what factors were relevant in deciding whether the action should proceed or be dismissed when joinder of interested persons was infeasible. In some instances courts did not undertake the relevant inquiry or were misled by the ''jurisdiction'' fallacy. In other instances there was undue preoccupation with abstract classifications of rights or obligations, as against consideration of the particular consequences of proceeding with the action and the ways by which these consequences might be ameliorated by the shaping of final relief or other precautions.

Although these difficulties cannot be said to have been general analysis of the cases showed that there was good reason for attempting to strengthen the rule. The literature also indicated how the rule should be reformed. See Reed, supra (discussion of the important case of *Shields v. Barrow*, 17 How. (58 U.S.) 130 (1854), appears at 55 Mich.L.Rev., p. 340 ff.); Hazard, supra; N.Y. Temporary Comm. on Courts, First Preliminary Report, Legis.Doc. 1957, No. 6(b), pp. 28, 233; N.Y. Judicial Council, Twelfth Ann.Rep., Legis.Doc. 1946, No. 17, p. 163; Joint Comm. on Michigan Procedural Revision, Final Report, Pt. III, p. 69 (1960); Note, *Indispensable Parties in the Federal Courts*, 65 Harv.L.Rev. 1050 (1952); *Developments in the Law—Multiparty Litigation in the Federal Courts*, 71 Harv.L.Rev. 874, 879 (1958); Mich.Gen.Court Rules, R. 205 (effective Jan. 1, 1963); N.Y.Civ.Prac.Law & Rules, §1001 (effective Sept. 1, 1963).

The Amended Rule

New subdivision (a) defines the persons whose joinder in the action is desirable. Clause (1) stresses the desirability of joining those persons in whose absence the court would be obliged to grant partial or ''hollow'' rather than complete relief to the parties before the court. The interests that are being furthered here are not only those of the parties, but also that of the public in avoiding repeated lawsuits on the same essential subject matter. Clause (2)(i) recognizes the importance of protecting the person whose joinder is in question against the practical prejudice to him which may arise through a disposition of the action in his absence. Clause (2)(ii) recognizes the need for considering whether a party may be left, after the adjudication, in a position where a person not joined can subject him to a double or otherwise inconsistent liability. See Reed, supra, 55 Mich.L.Rev. at 330, 338; Note, supra, 65 Harv.L.Rev. at 1052–57; Developments in the Law, supra, 71 Harv.L.Rev. at 881–85.

The subdivision (a) definition of persons to be joined is not couched in terms of the abstract nature of their interests—''joint,'' ''united,'' ''separable,'' or the like. See N.Y. Temporary Comm. on Courts, First Preliminary Report, supra; Developments in the Law, supra, at 880. It should be noted particularly, however, that the description is not at variance with the settled authorities holding that a tortfeasor with the usual ''joint-and-several'' liability is merely a permissive party to an action against another with like liability. See 3 *Moore's Federal Practice* 2153 (2d ed. 1963); 2 Barron & Holtzoff, *Federal Practice & Procedure* §513.8 (Wright ed. 1961). Joinder of these tortfeasors continues to be regulated by Rule 20; compare Rule 14 on third-party practice.

If a person as described in subdivision (a)(1)(2) is amenable to service of process and his joinder would not deprive the court of jurisdiction in the sense of competence over the action, he should be joined as a party; and if he has not been joined, the court should order him to be brought into the action. If a party joined has a valid objection to the venue and chooses to assert it, he will be dismissed from the action.

Subdivision (b).—When a person as described in subdivision (a)(1)–(2) cannot be made a party, the court is to determine whether in equity and good conscience the action should proceed among the parties already before it, or should be dismissed. That this decision is to be made in the light of pragmatic considerations has often been acknowledged by the courts. See *Roos v. Texas Co.*, 23 F.2d 171 (2d Cir. 1927), cert. denied, 277 U.S. 587 (1928); *Niles-Bement-Pond Co. v. Iron Moulders, Union*, 254 U.S. 77, 80 (1920). The subdivision sets out four relevant considerations drawn from the experience revealed in the decided cases. The factors are to a certain extent overlapping, and they are not intended to exclude other considerations which may be applicable in particular situations.

The first factor brings in a consideration of what a judgment in the action would mean to the absentee. Would the absentee be adversely affected in a practical sense, and if so, would the prejudice be immediate and serious, or remote and minor? The possible collateral consequences of the judgment upon the parties already joined are also to be appraised. Would any party be exposed to a fresh action by the absentee, and if so, how serious is the threat? See the elaborate discussion in Reed, supra; cf. *A. L. Smith Iron Co. v. Dickson*, 141 F.2d 3 (2d Cir. 1944); *Caldwell Mfg. Co. v. Unique Balance Co.*, 18 F.R.D. 258 (S.D.N.Y. 1955).

The second factor calls attention to the measures by which prejudice may be averted or lessened. The ''shaping of relief'' is a familiar expedient to this end. See, e.g., the award of money damages in lieu of specific relief where the latter might affect an absentee adversely. *Ward v. Deavers*, 203 F.2d 72 (D.C.Cir. 1953); *Miller & Lux, Inc. v. Nickel*, 141 F.Supp. 41 (N.D.Calif. 1956). On the use of ''protective provisions,'' see *Roos v. Texas Co.*, supra; *Atwood v. Rhode Island Hosp. Trust Co.*, 275 Fed. 513, 519 (1st Cir. 1921), cert. denied, 257 U.S. 661 (1922); cf. *Stumpf v. Fidelity Gas Co.*, 294 F.2d 886 (9th Cir. 1961); and the general statement in *National Licorice Co. v. Labor Board*, 309 U.S. 350, 363 (1940).

Sometimes the party is himself able to take measures to avoid prejudice. Thus a defendant faced with a prospect of a second suit by an absentee may be in a position to bring the latter into the action by defensive interpleader. See *Hudson v. Newell*, 172 F.2d 848, 852 mod., 176 F.2d 546 (5th Cir. 1949); *Gauss v. Kirk*, 198 F.2d 83, 86 (D.C.Cir. 1952); *Abel v. Brayton Flying Service, Inc.*, 248 F.2d 713, 716 (5th Cir. 1957) (suggestion of possibility of counterclaim under Rule 13(h)); cf. *Parker Rust-Proof Co. v. Western Union Tel. Co.*, 105 F.2d 976 (2d Cir. 1939) cert. denied, 308 U.S. 597 (1939). See also the absentee may sometimes be able to avert prejudice to himself by voluntarily appearing in the action or intervening on an ancillary basis. See *Developments in the Law*, supra, 71 Harv.L.Rev. at 882; Annot., *Intervention or Subsequent Joinder of Parties as Affecting Jurisdiction of Federal Court Based on Diversity of Citizenship*, 134 A.L.R. 335 (1941); *Johnson v. Middleton*, 175 F.2d 535 (7th Cir. 1949); *Kentucky Nat. Gas Corp. v. Duggins*, 165 F.2d 1011 (6th Cir. 1948); *McComb v. McCormack*, 159 F.2d 219 (5th Cir. 1947). The court should consider whether this, in turn,

would impose undue hardship on the absentee. (For the possibility of the court's informing an absentee of the pendency of the action, see comment under subdivision (c) below.)

The third factor—whether an "adequate" judgment can be rendered in the absence of a given person—calls attention to the extent of the relief that can be accorded among the parties joined. It meshes with the other factors, especially the "shaping of relief" mentioned under the second factor. Cf. *Kroese v. General Steel Castings Corp.*, 179 F.2d 760 (3d Cir. 1949), cert. denied, 339 U.S. 983 (1950).

The fourth factor, looking to the practical effects of a dismissal, indicates that the court should consider whether there is any assurance that the plaintiff, if dismissed, could sue effectively in another forum where better joinder would be possible. See *Fitzgerald v. Haynes*, 241 F.2d 417, 420 (3d Cir. 1957); *Fouke v. Schenewerk*, 197 F.2d 234, 236 (5th Cir. 1952); cf. *Warfield v. Marks*, 190 F.2d 178 (5th Cir. 1951).

The subdivision uses the word "indispensable" only in a conclusory sense, that is, a person is "regarded as indispensable" when he cannot be made a party and, upon consideration of the factors above mention, it is determined that in his absence it would be preferable to dismiss the action, rather than to retain it.

A person may be added as a party at any stage of the action on motion or on the court's initiative (see Rule 21); and a motion to dismiss, on the ground that a person has not been joined and justice requires that the action should not proceed in his absence, may be made as late as the trial on the merits (see Rule 12(h)(2), as amended; cf. Rule 12(b)(7), as amended). However, when the moving party is seeking dismissal in order to protect himself against a later suit by the absent person (subdivision (a)(2)(ii)), and is not seeking vicariously to protect the absent person against a prejudicial judgment (subdivision (a)(2)(i)), his undue delay in making the motion can properly be counted against him as a reason for denying the motion. A joinder question should be decided with reasonable promptness, but decision may properly be deferred if adequate information is not available at the time. Thus the relationship of an absent person to the action, and the practical effects of an adjudication upon him and others, may not be sufficiently revealed at the pleading stage; in such a case it would be appropriate to defer decision until the action was further advanced. Cf. Rule 12(d).

The amended rule makes no special provision for the problem arising in suits against subordinate Federal officials where it has often been set up as a defense that some superior officer must be joined. Frequently this defense has been accompanied by or intermingled with defenses of sovereign community or lack of consent of the United States to suit. So far as the issue of joinder can be isolated from the rest, the new subdivision seems better adapted to handle it than the predecessor provision. See the discussion in *Johnson v. Kirkland*, 290 F.2d 440, 446–47 (5th Cir. 1961) (stressing the practical orientation of the decisions); *Shaughnessy v. Pedreiro*, 349 U.S. 48, 54 (1955). Recent legislation, P.L. 87–748, 76 Stat. 744, approved October 5, 1962, adding §§ 1361, 1391(e) to Title 28, U.S.C., vests original jurisdiction in the District Courts over actions in the nature of mandamus to compel officials of the United States to perform their legal duties, and extends the range of service of process and liberalizes venue in these actions. If, then, it is found that a particular official should be joined in the action, the legislation will make it easy to bring him in.

Subdivision (c) parallels the predecessor subdivision (c) of Rule 19. In some situations it may be desirable to advise a person who has not been joined of the fact that the action is pending, and in particular cases the court in its discretion may itself convey this information by directing a letter or other informal notice to the absentee.

Subdivision (d) repeats the exception contained in the first clause of the predecessor subdivision (a).

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

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. All persons (and any vessel, cargo or other property subject to admiralty process in rem) may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief 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 defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

(b) SEPARATE TRIALS. The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom the party asserts no claim and who asserts no claim against the party, and may order separate trials or make other orders to prevent delay or prejudice.

(As amended Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

The provisions for joinder here stated are in substance the provisions found in England, California, Illinois, New Jersey, and New York. They represent only a moderate expansion of the present federal equity practice to cover both law and equity actions.

With this rule compare also [former] Equity Rules 26 (Joinder of Causes of Action), 37 (Parties Generally—Intervention), 40 (Nominal Parties), and 42 (Joint and Several Demands).

The provisions of this rule for the joinder of parties are subject to Rule 82 (Jurisdiction and Venue Unaffected).

Note to Subdivision (a). The first sentence is derived from *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 16, r. 1. Compare Calif.Code Civ.Proc. (Deering, 1937) §§ 378, 379a; Ill.Rev.Stat. (1937) ch. 110, §§ 147–148; N.J.Comp.Stat. (2 Cum.Supp., 1911–1924), N.Y.C.P.A. (1937) §§ 209, 211. The second sentence is derived from *English Rules Under the Judicature Act* (he Annual Practice, 1937) O. 16, r. 4. The third sentence is derived from O. 16, r. 5, and the fourth from O. 16, r.r. 1 and 4.

Note to Subdivision (b). This is derived from *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 16, r.r. 1 and 5.

NOTES OF ADVISORY COMMITTEE ON RULES—1966 AMENDMENT

See the amendment of Rule 18(a) and the Advisory Committee's Note thereto. It has been thought that a lack of clarity in the antecedent of the word "them," as it appeared in two places in Rule 20(a), contributed to the view, taken by some courts, that this rule limited the joinder of claims in certain situations of per-

missive party joinder. Although the amendment of Rule 18(a) should make clear that this view is untenable, it has been considered advisable to amend Rule 20(a) to eliminate any ambiguity. See 2 Barron & Holtzoff, *Federal Practice & Procedure* 202 (Wright Ed. 1961).

A basic purpose of unification of admiralty and civil procedure is to reduce barriers to joinder; hence the reference to ''any vessel,'' etc.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

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.

NOTES OF ADVISORY COMMITTEE ON RULES—1937

See *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 16, r. 11. See also [former] Equity Rules 43 (Defect of Parties—Resisting Objection) and 44 (Defect of Parties—Tardy Objection).

For separate trials see Rules 13(i) (Counterclaims and Cross-Claims: Separate Trials; Separate Judgments), 20(b) (Permissive Joinder of Parties: Separate Trials), and 42(b) (Separate Trials, generally) and the note to the latter rule.

Rule 22. Interpleader

(1) Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that the plaintiff is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20.

(2) The remedy herein provided is in addition to and in no way supersedes or limits the remedy provided by Title 28, U.S.C., §§1335, 1397, and 2361. Actions under those provisions shall be conducted in accordance with these rules.

(As amended Dec. 29, 1948, eff. Oct. 20, 1949; Mar. 2, 1987, eff. Aug. 1, 1987.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

The first paragraph provides for interpleader relief along the newer and more liberal lines of joinder in the alternative. It avoids the confusion and restrictions that developed around actions of strict interpleader and actions in the nature of interpleader. Compare *John Hancock Mutual Life Insurance Co. v. Kegan et al.*, (D.C.Md., 1938) [22 F.Supp. 326]. It does not change the rules on service of process, jurisdiction, and venue, as established by judicial decision.

The second paragraph allows an action to be brought under the recent interpleader statute when applicable. By this paragraph all remedies under the statute are continued, but the manner of obtaining them is in accordance with these rules. For temporary restraining orders and preliminary injunctions under this statute, see Rule 65(e).

This rule substantially continues such statutory provisions as U.S.C., Title 38, §445 [now 1984] (Actions on claims; jurisdiction; parties; procedure; limitation; witnesses; definitions) (actions upon veterans' contracts of insurance with the United States), providing for interpleader by the United States where it acknowledges indebtedness under a contract of insurance with the United States; U.S.C., Title 49, §97 [now 80110(e)] (Interpleader of conflicting claimants) (by carrier which has issued bill of lading). See Chafee, *The Federal Interpleader Act of 1936: I and II* (1936), 45 Yale L.J. 963, 1161.

NOTES OF ADVISORY COMMITTEE ON RULES—1948 AMENDMENT

The amendment substitutes the present statutory reference.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendment is technical. No substantive change is intended.

Rule 23. Class Actions

(a) PREREQUISITES TO A CLASS ACTION. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) CLASS ACTIONS MAINTAINABLE. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning

the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) DETERMINING BY ORDER WHETHER TO CERTIFY A CLASS ACTION; APPOINTING CLASS COUNSEL; NOTICE AND MEMBERSHIP IN CLASS; JUDGMENT; MULTIPLE CLASSES AND SUBCLASSES.

(1)(A) When a person sues or is sued as a representative of a class, the court must—at an early practicable time—determine by order whether to certify the action as a class action.

(B) An order certifying a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) An order under Rule 23(c)(1) may be altered or amended before final judgment.

(2)(A) For any class certified under Rule 23(b)(1) or (2), the court may direct appropriate notice to the class.

(B) For any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language:

- the nature of the action,
- the definition of the class certified,
- the class claims, issues, or defenses,
- that a class member may enter an appearance through counsel if the member so desires,
- that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and
- the binding effect of a class judgment on class members under Rule 23(c)(3).

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) ORDERS IN CONDUCT OF ACTIONS. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) SETTLEMENT, VOLUNTARY DISMISSAL, OR COMPROMISE.

(1)(A) The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class.

(B) The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.

(C) The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

(2) The parties seeking approval of a settlement, voluntary dismissal, or compromise under Rule 23(e)(1) must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.

(3) In an action previously certified as a class action under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(4)(A) Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval under Rule 23(e)(1)(A).

(B) An objection made under Rule 23(e)(4)(A) may be withdrawn only with the court's approval.

(f) APPEALS. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) CLASS COUNSEL.

(1) *Appointing Class Counsel.*

(A) Unless a statute provides otherwise, a court that certifies a class must appoint class counsel.

(B) An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class.

(C) In appointing class counsel, the court

(i) must consider:

• the work counsel has done in identifying or investigating potential claims in the action,

• counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action,

• counsel's knowledge of the applicable law, and

• the resources counsel will commit to representing the class;

(ii) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(iii) may direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs; and

(iv) may make further orders in connection with the appointment.

(2) *Appointment Procedure.*

(A) The court may designate interim counsel to act on behalf of the putative class before determining whether to certify the action as a class action.

(B) When there is one applicant for appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1)(B) and (C). If more than one adequate applicant seeks appointment as class counsel, the court must appoint the applicant best able to represent the interests of the class.

(C) The order appointing class counsel may include provisions about the award of attorney fees or nontaxable costs under Rule 23(h).

(h) ATTORNEY FEES AWARD. In an action certified as a class action, the court may award reasonable attorney fees and nontaxable costs authorized by law or by agreement of the parties as follows:

(1) *Motion for Award of Attorney Fees.* A claim for an award of attorney fees and nontaxable costs must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision, at a time set by the court. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) *Objections to Motion.* A class member, or a party from whom payment is sought, may object to the motion.

(3) *Hearing and Findings.* The court may hold a hearing and must find the facts and state its conclusions of law on the motion under Rule 52(a).

(4) *Reference to Special Master or Magistrate Judge.* The court may refer issues related to the amount of the award to a special master or to a magistrate judge as provided in Rule 54(d)(2)(D).

(As amended Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 24, 1998, eff. Dec. 1, 1998; Mar. 27, 2003, eff. Dec. 1, 2003.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

Note to Subdivision (a). This is a substantial restatement of [former] Equity Rule 38 (Representatives of Class) as that rule has been construed. It applies to all actions, whether formerly denominated legal or equitable. For a general analysis of class actions, effect of judgment, and requisites of jurisdiction see Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 Georgetown L.J. 551, 570 *et seq.* (1937); Moore and Cohn, *Federal Class Actions*, 32 Ill.L.Rev. 307 (1937); Moore and Cohn, *Federal Class Actions—Jurisdiction and Effect of Judgment*, 32 Ill.L.Rev. 555—567 (1938); Lesar, *Class Suits and the Federal Rules*, 22 Minn.L.Rev. 34 (1937); *cf.* Arnold and James, *Cases on Trials, Judgments and Appeals* (1936) 175; and see Blume, *Jurisdictional Amount in Representative Suits*, 15 Minn.L.Rev. 501 (1931).

The general test of [former] Equity Rule 38 (Representatives of Class) that the question should be "one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court," is a common test. For states which require the two elements of a common or general interest and numerous persons, as provided for in [former] Equity Rule 38, see Del.Ch.Rule 113; Fla.Comp.Gen.Laws Ann. (Supp., 1936) §4918 (7); Georgia Code (1933) §37–1002, and see *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 16, r. 9. For statutory provisions providing for class actions when the question is one of common or general interest or when the parties are numerous, see Ala.Code Ann. (Michie, 1928) §5701; 2 Ind.Stat.Ann. (Burns, 1933) §2–220; N.Y.C.P.A. (1937) §195; Wis.Stat. (1935) §260.12. These statutes have, however, been uniformly construed as though phrased in the conjunctive. See *Garfein v. Stiglitz*, 260 Ky. 430, 86 S.W.(2d) 155 (1935). The rule adopts the test of [former] Equity Rule 38, but defines what constitutes a "common or general interest". Compare with code provisions which make the action dependent upon the propriety of joinder of the parties. See Blume, *The "Common Questions" Principle in the Code Provision for Representative Suits*, 30 Mich.L.Rev. 878 (1932). For discussion of what constitutes "numerous persons" see Wheaton, *Representative Suits Involving Numerous Litigants*, 19 Corn.L.Q. 399 (1934); Note, 36 Harv.L.Rev. 89 (1922).

Clause (1), Joint, Common, or Secondary Right. This clause is illustrated in actions brought by or against representatives of an unincorporated association. See *Oster v. Brotherhood of Locomotive Firemen and Enginemen*, 271 Pa. 419, 114 Atl. 377 (1921); *Pickett v. Walsh*, 192 Mass. 572, 78 N.E. 753, 6 L.R.A. (N.S.) 1067 (1906); *Colt v. Hicks*, 97 Ind.App. 177, 179 N.E. 335 (1932). Compare Rule 17(b) as to when an unincorporated association has capacity to sue or be sued in its common name; *United Mine Workers of America v. Coronado Coal Co.*, 259 U.S. 344 (1922) (an unincorporated association was sued as an entity for the purpose of enforcing against it a federal substantive right); Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 Georgetown L.J. 551, 566 (for discussion of jurisdictional requisites when an unincorporated association sues or is sued in its common name and jurisdiction is founded upon diversity of citizenship). For an action brought by representatives of one group against representatives of another group for distribution of a fund held by an unincorporated association, see *Smith v. Swormstedt*, 16 How. 288 (U.S. 1853). Compare *Christopher, et al. v. Brusselback*, 58 S.Ct. 350 [302 U.S. 500] (1938).

For an action to enforce rights held in common by policyholders against the corporate issuer of the policies, see *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356 (1921). See also *Terry v. Little*, 101 U.S. 216 (1880); *John A. Roebling's Sons Co. v. Kinnicutt*, 248 Fed. 596 (D.C.N.Y., 1917) dealing with the right held in common by creditors to enforce the statutory liability of stockholders.

Typical of a secondary action is a suit by stockholders to enforce a corporate right. For discussion of the general nature of these actions see *Ashwander v. Ten-*

nessee Valley Authority, 297 U.S. 288 (1936); Glenn, *The Stockholder's Suit—Corporate and Individual Grievances*, 33 Yale L.J. 580 (1924); McLaughlin, *Capacity of Plaintiff-Stockholder to Terminate a Stockholder's Suit*, 46 Yale L.J. 421 (1937). See also *Subdivision (b)* of this rule which deals with Shareholder's Action; Note, 15 Minn.L.Rev. 453 (1931).

Clause (2). A creditor's action for liquidation or reorganization of a corporation is illustrative of this clause. An action by a stockholder against certain named defendants as representatives of numerous claimants presents a situation converse to the creditor's action.

Clause (3). See *Everglades Drainage League v. Napoleon Broward Drainage Dist.*, 253 Fed. 246 (D.C.Fla., 1918); *Gramling v. Maxwell*, 52 F.(2d) 256 (D.C.N.C., 1931), approved in 30 Mich.L.Rev. 624 (1932); *Skinner v. Mitchell*, 108 Kan. 861, 197 Pac. 569 (1921); *Duke of Bedford v. Ellis* (1901) A.C. 1, for class actions when there were numerous persons and there was only a question of law or fact common to them; and see Blume, *The "Common Questions" Principle in the Code Provision for Representative Suits*, 30 Mich.L.Rev. 878 (1932).

Note to Subdivision (b). This is [former] Equity Rule 27 (Stockholder's Bill) with verbal changes. See also *Hawes v. Oakland*, 104 U.S. 450, 26 L.Ed. 827 (1882) and former Equity Rule 94, promulgated January 23, 1882, 104 U.S. IX.

Note to Subdivision (c). See McLaughlin, *Capacity of Plaintiff-Stockholder to Terminate a Stockholder's Suit*, 46 Yale L.J. 421 (1937).

NOTES OF ADVISORY COMMITTEE ON RULES—1946 AMENDMENT

Subdivision (b), relating to secondary actions by shareholders, provides among other things, that in, such an action the complainant "shall aver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law . . ."

As a result of the decision in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (decided April 25, 1938, after this rule was promulgated by the Supreme Court, though before it took effect) a question has arisen as to whether the provision above quoted deals with a matter of substantive right or is a matter of procedure. If it is a matter of substantive law or right, then under *Erie R. Co. v. Tompkins* clause (1) may not be validly applied in cases pending in states whose local law permits a shareholder to maintain such actions, although not a shareholder at the time of the transactions complained of. The Advisory Committee, believing the question should be settled in the courts, proposes no change in Rule 23 but thinks rather that the situation should be explained in an appropriate note.

The rule has a long history. In *Hawes v. Oakland* (1882) 104 U.S. 450, the Court held that a shareholder could not maintain such an action unless he owned shares at the time of the transactions complained of, or unless they devolved on him by operation of law. At that time the decision in *Swift v. Tyson* (1842) 16 Peters 1, was the law, and the federal courts considered themselves free to establish their own principles of equity jurisprudence, so the Court was not in 1882 and has not been, until *Erie R. Co. v. Tompkins* in 1938, concerned with the question whether *Hawes v. Oakland* dealt with substantive right or procedure.

Following the decision in *Hawes v. Oakland*, and at the same term, the Court, to implement its decision, adopted [former] Equity Rule 94, which contained the same provision above quoted from Rule 23 F.R.C.P. The provision in [former] Equity Rule 94 was later embodied in [former] Equity Rule 27, of which the present Rule 23 is substantially a copy.

In *City of Quincy v. Steel* (1887) 120 U.S. 241, 245, the Court referring to *Hawes v. Oakland* said: "In order to give effect to the principles there laid down, this Court at that term adopted Rule 94 of the rules of practice for courts of equity of the United States."

Some other cases dealing with [former] Equity Rules 94 or 27 prior to the decision in *Erie R. Co. v. Tompkins* are *Dimpfel v. Ohio & Miss. R. R.* (1884) 110 U.S. 209; *Illinois Central R. Co. v. Adams* (1901) 180 U.S. 28, 34; *Venner v. Great Northern Ry.* (1908) 209 U.S. 24, 30; *Jacobson v. General Motors Corp.* (S.D.N.Y. 1938) 22 F.Supp. 255, 257. These cases generally treat *Hawes v. Oakland* as establishing a "principle" of equity, or as dealing not with jurisdiction but with the "right" to maintain an action, or have said that the defense under the equity rule is analogous to the defense that the plaintiff has no "title" and results in a dismissal "for want of equity."

Those state decisions which held that a shareholder acquiring stock after the event may maintain a derivative action are founded on the view that it is a right belonging to the shareholder at the time of the transaction and which passes as a right to the subsequent purchaser. See *Pollitz v. Gould* (1911) 202 N.Y. 11.

The first case arising after the decision in *Erie R. Co. v. Tompkins*, in which this problem was involved, was *Summers v. Hearst* (S.D.N.Y. 1938) 23 F.Supp. 986. It concerned [former] Equity Rule 27, as Federal Rule 23 was not then in effect. In a well considered opinion Judge Leibell reviewed the decisions and said: "The federal cases that discuss this section of Rule 27 support the view that it states a principle of substantive law." He quoted *Pollitz v. Gould* (1911) 202 N.Y. 11, as saying that the United States Supreme Court "seems to have been more concerned with establishing this rule as one of practice than of substantive law" but that "whether it be regarded as establishing a principle of law or a rule of practice, this authority has been subsequently followed in the United States courts."

He then concluded that, although the federal decisions treat the equity rule as "stating a principle of substantive law", if [former] "Equity Rule 27 is to be modified or revoked in view of *Erie R. Co. v. Tompkins*, it is not the province of this Court to suggest it, much less impliedly to follow that course by disregarding the mandatory provisions of the Rule."

Some other federal decisions since 1938 touch the question.

In *Piccard v. Sperry Corporation* (S.D.N.Y. 1941) 36 F.Supp. 1006, 1009–10, affirmed without opinion (C.C.A.2d, 1941) 120 F.(2d) 328, a shareholder, not such at the time of the transactions complained of, sought to intervene. The court held an intervenor was as much subject to Rule 23 as an original plaintiff; and that the requirement of Rule 23(b) was "a matter of practice," not substance, and applied in New York where the state law was otherwise, despite *Erie R. Co. v. Tompkins*. In *York v. Guaranty Trust Co. of New York* (C.C.A.2d, 1944) 143 F.(2d) 503, rev'd on other grounds (1945) 65 S.Ct. 1464, the court said: "Restrictions on the bringing of stockholders' actions, such as those imposed by F.R.C.P. 23(b) or other state statutes are procedural," citing the *Piccard* and other cases.

In *Gallup v. Caldwell* (C.C.A.3d, 1941) 120 F.(2d) 90, 95, arising in New Jersey, the point was raised but not decided, the court saying that it was not satisfied that the then New Jersey rule differed from Rule 23(b), and that "under the circumstances the proper course was to follow Rule 23(b)."

In *Mullins v. De Soto Securities Co.* (W.D.La. 1942) 45 F.Supp. 871, 878, the point was not decided, because the court found the Louisiana rule to be the same as that stated in Rule 23(b).

In *Toebelman v. Missouri-Kansas Pipe Line Co.* (D.Del. 1941) 41 F.Supp. 334, 340, the court dealt only with another part of Rule 23(b), relating to prior demands on the stockholders and did not discuss *Erie R. Co. v. Tompkins*, or its effect on the rule.

In *Perrott v. United States Banking Corp.* (D.Del. 1944) 53 F.Supp. 953, it appeared that the Delaware law does not require the plaintiff to have owned shares at the time of the transaction complained of. The court sustained Rule 23(b), after discussion of the authorities, saying:

"It seems to me the rule does not go beyond procedure. * * * Simply because a particular plaintiff cannot qualify as a proper party to maintain such an action

does not destroy or even whittle at the cause of action. The cause of action exists until a qualified plaintiff can get it started in a federal court.''

In *Bankers Nat. Corp. v. Barr* (S.D.N.Y. 1945) 9 Fed.Rules Serv. 23b.11, Case 1, the court held Rule 23(b) to be one of procedure, but that whether the plaintiff was a stockholder was a substantive question to be settled by state law.

The New York rule, as stated in *Pollitz v. Gould, supra*, has been altered by an act of the New York Legislature (Chapter 667, Laws of 1944, effective April 9, 1944, General Corporation Law, §61) which provides that ''in any action brought by a shareholder in the right of a . . . corporation, it must appear that the plaintiff was a stockholder at the time of the transaction of which he complains, or that his stock thereafter devolved upon him by operation of law.'' At the same time a further and separate provision was enacted, requiring under certain circumstances the giving of security for reasonable expenses and attorney's fees, to which security the corporation in whose right the action is brought and the defendants therein may have recourse. (Chapter 668, Laws of 1944, effective April 9, 1944, General Corporation Law, §61–b.) These provisions are aimed at so-called ''strike'' stockholders' suits and their attendant abuses. *Shielcrawt v. Moffett* (Ct.App. 1945) 294 N.Y. 180, 61 N.E.(2d) 435, rev'g 51 N.Y.S.(2d) 188, aff'g 49 N.Y.S.(2d) 64; *Noel Associates, Inc. v. Merrill* (Sup.Ct. 1944) 184 Misc. 646, 53 N.Y.S.(2d) 143.

Insofar as §61 is concerned, it has been held that the section is procedural in nature. *Klum v. Clinton Trust Co.* (Sup.Ct. 1944) 183 Misc. 340, 48 N.Y.S.(2d) 267; *Noel Associates, Inc. v. Merrill, supra*. In the latter case the court pointed out that ''The 1944 amendment to Section 61 rejected the rule laid down in the *Pollitz* case and substituted, in place thereof, in its precise language, the rule which has long prevailed in the Federal Courts and which is now Rule 23(b) . . .'' There is, nevertheless, a difference of opinion regarding the application of the statute to pending actions. See *Klum v. Clinton Trust Co., supra* (applicable); *Noel Associates, Inc. v. Merrill, supra* (inapplicable).

With respect to §61–b, which may be regarded as a separate problem (*Noel Associates, Inc. v. Merrill, supra*), it has been held that even though the statute is procedural in nature—a matter not definitely decided—the Legislature evinced no intent that the provision should apply to actions pending when it became effective. *Shielcrawt v. Moffett, supra*. As to actions instituted after the effective date of the legislation, the constitutionality of §61–b is in dispute. See *Wolf v. Atkinson* (Sup.Ct. 1944) 182 Misc. 675, 49 N.Y.S.(2d) 703 (constitutional); *Citron v. Mangel Stores Corp.* (Sup.Ct. 1944) — Misc. —, 50 N.Y.S.(2d) 416 (unconstitutional); Zlinkoff, *The American Investor and the Constitutionality of Section 61–B of the New York General Corporation Law* (1945) 54 Yale L.J. 352.

New Jersey also enacted a statute, similar to Chapters 667 and 668 of the New York law. See P.L. 1945, Ch. 131, R.S.Cum.Supp. 14:3–15. The New Jersey provision similar to Chapter 668 (§61–b) differs, however, in that it specifically applies retroactively. It has been held that this provision is procedural and hence will not govern a pending action brought against a New Jersey corporation in the New York courts. *Shielcrawt v. Moffett* (Sup.Ct.N.Y. 1945) 184 Misc. 1074, 56 N.Y.S.(2d) 134.

See also generally, 2 *Moore's Federal Practice* (1938) 2250–2253, and Cum.Supplement §23.05.

The decisions here discussed show that the question is a debatable one, and that there is respectable authority for either view, with a recent trend towards the view that Rule 23(b)(1) is procedural. There is reason to say that the question is one which should not be decided by the Supreme Court *ex parte*, but left to await a judicial decision in a litigated case, and that in the light of the material in this note, the only inference to be drawn from a failure to amend Rule 23(b) would be that the question is postponed to await a litigated case.

The Advisory Committee is unanimously of the opinion that this course should be followed.

If, however, the final conclusion is that the rule deals with a matter of substantive right, then the rule should be amended by adding a provision that Rule 23(b)(1) does not apply in jurisdictions where state law permits a shareholder to maintain a secondary action, although he was not a shareholder at the time of the transactions of which he complains.

NOTES OF ADVISORY COMMITTEE ON RULES—1966 AMENDMENT

Difficulties with the original rule. The categories of class actions in the original rule were defined in terms of the abstract nature of the rights involved: the so-called ''true'' category was defined as involving ''joint, common, or secondary rights''; the ''hybrid'' category, as involving ''several'' rights related to ''specific property''; the ''spurious'' category, as involving ''several'' rights affected by a common question and related to common relief. It was thought that the definitions accurately described the situations amendable to the class-suit device, and also would indicate the proper extent of the judgment in each category, which would in turn help to determine the res judicata effect of the judgment if questioned in a later action. Thus the judgments in ''true'' and ''hybrid'' class actions would extend to the class (although in somewhat different ways); the judgment in a ''spurious'' class action would extend only to the parties including intervenors. See Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 Geo.L.J. 551, 570–76 (1937).

In practice, the terms ''joint,'' ''common,'' etc., which were used as the basis of the Rule 23 classification proved obscure and uncertain. See Chaffee, *Some Problems of Equity* 245–46, 256–57 (1950); Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. of Chi.L.Rev. 684, 707 & n. 73 (1941); Keeffe, Levy & Donovan, *Lee Defeats Ben Hur*, 33 Corn.L.Q. 327, 329–36 (1948); *Developments in the Law: Multiparty Litigation in the Federal Courts*, 71 Harv.L.Rev. 874, 931 (1958); Advisory Committee's Note to Rule 19, as amended. The courts had considerable difficulty with these terms. See, e.g., *Gullo v. Veterans' Coop. H. Assn.*, 13 F.R.D. 11 (D.D.C. 1952); *Shipley v. Pittsburgh & L. E. R. Co.*, 70 F.Supp. 870 (W.D.Pa. 1947); *Deckert v. Independence Shares Corp.*, 27 F.Supp. 763 (E.D.Pa. 1939), rev'd, 108 F.2d 51 (3d Cir. 1939), rev'd, 311 U.S. 282 (1940), on remand, 39 F.Supp. 592 (E.D.Pa. 1941), rev'd sub nom. *Pennsylvania Co. for Ins. on Lives v. Deckert*, 123 F.2d 979 (3d Cir. 1941) (see Chafee, supra, at 264–65).

Nor did the rule provide an adequate guide to the proper extent of the judgments in class actions. First, we find instances of the courts classifying actions as ''true'' or intimating that the judgments would be decisive for the class where these results seemed appropriate but were reached by dint of depriving the word ''several'' of coherent meaning. See, e.g., *System Federation No. 91 v. Reed*, 180 F.2d 991 (6th Cir. 1950); *Wilson v. City of Paducah*, 100 F.Supp. 116 (W.D.Ky. 1951); *Citizens Banking Co. v. Monticello State Bank*, 143 F.2d 261 (8th Cir. 1944); *Redmond v. Commerce Trust Co.*, 144 F.2d 140 (8th Cir. 1944), cert. denied, 323 U.S. 776 (1944); *United States v. American Optical Co.*, 97 F.Supp. 66 (N.D.Ill. 1951); *National Hairdressers' & C. Assn. v. Philad. Co.*, 34 F.Supp. 264 (D.Del. 1940); 41 F.Supp. 701 (D.Del. 1940), aff'd mem., 129 F.2d 1020 (3d Cir. 1942). Second, we find cases classified by the courts as ''spurious'' in which, on a realistic view, it would seem fitting for the judgments to extend to the class. See, e.g., *Knapp v. Bankers Sec. Corp.*, 17 F.R.D. 245 (E.D.Pa. 1954); aff'd 230 F.2d 717 (3d Cir. 1956); *Giesecke v. Denver Tramway Corp.*, 81 F.Supp. 957 (D.Del. 1949); *York v. Guaranty Trust Co.*, 143 F.2d 503 (2d Cir. 1944), rev'd on grounds not here relevant, 326 U.S. 90 (1945) (see Chafee, supra, at 208); cf. *Webster Eisenlohr, Inc. v. Kalodner*, 145 F.2d 316, 320 (3d Cir. 1944), cert. denied, 325 U.S. 807 (1945). But cf. the early decisions, *Duke of Bedford v. Ellis* [1901], A.C. 1; *Sheffield Waterworks v. Yeomans*, L.R. 2 Ch.App. 8 (1866); *Brown v. Vermuden*, 1 Ch.Cas. 272, 22 Eng.Rep. 796 (1676).

The ''spurious'' action envisaged by original Rule 23 was in any event an anomaly because, although de-

nominated a ''class'' action and pleaded as such, it was supposed not to adjudicate the rights or liabilities of any person not a party. It was believed to be an advantage of the ''spurious'' category that it would invite decisions that a member of the ''class'' could, like a member of the class in a ''true'' or ''hybrid'' action, intervene on an ancillary basis without being required to show an independent basis of Federal jurisdiction, and have the benefit of the date of the commencement of the action for purposes of the statute of limitations. See 3 *Moore's Federal Practice*, pars. 23.10[1], 23.12 (2d ed. 1963). These results were attained in some instances but not in others. On the statute of limitations, see *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561 (10th Cir. 1961), pet. cert. dism., 371 U.S. 801 (1963); but cf. *P. W. Husserl, Inc. v. Newman*, 25 F.R.D. 264 (S.D.N.Y. 1960); *Athas v. Day*, 161 F.Supp. 916 (D.Colo. 1958). On ancillary intervention, see *Amen v. Black*, 234 F.2d 12 (10th Cir. 1956), cert. granted, 352 U.S. 888 (1956), dism. on stip., 355 U.S. 600 (1958); but. cf. *Wagner v. Kemper*, 13 F.R.D. 128 (W.D.Mo. 1952). The results, however, can hardly depend upon the mere appearance of a ''spurious'' category in the rule; they should turn no more basic considerations. See discussion of subdivision (c)(1) below.

Finally, the original rule did not squarely address itself to the question of the measures that might be taken during the course of the action to assure procedural fairness, particularly giving notice to members of the class, which may in turn be related in some instances to the extension of the judgment to the class. See Chafee, supra, at 230–31; Keeffe, Levy & Donovan, supra; *Developments in the Law*, supra, 71 Harv.L.Rev. at 937–38; Note, *Binding Effect of Class Actions*, 67 Harv.L.Rev. 1059, 1062–65 (1954); Note, *Federal Class Actions: A Suggested Revision of Rule 23*, 46 Colum.L.Rev. 818, 833–36 (1946); Mich.Gen.Court R. 208.4 (effective Jan. 1, 1963); Idaho R.Civ.P. 23(d); Minn.R.Civ.P. 23.04; N.Dak.R.Civ.P. 23(d).

The amended rule describes in more practical terms the occasions for maintaining class actions; provides that all class actions maintained to the end as such will result in judgments including those whom the court finds to be members of the class, whether or not the judgment is favorable to the class; and refers to the measures which can be taken to assure the fair conduct of these actions.

Subdivision (a) states the prerequisites for maintaining any class action in terms of the numerousness of the class making joinder of the members impracticable, the existence of questions common to the class, and the desired qualifications of the representative parties. See Weinstein, *Revision of Procedure; Some Problems in Class Actions*, 9 Buffalo L.Rev. 433, 458–59 (1960); 2 Barron & Holtzoff, *Federal Practice & Procedure* §562, at 265, §572, at 351–52 (Wright ed. 1961). These are necessary but not sufficient conditions for a class action. See, e.g., *Giordano v. Radio Corp. of Am.*, 183 F.2d 558, 560 (3d Cir. 1950); *Zachman v. Erwin*, 186 F.Supp. 681 (S.D.Tex. 1959); *Baim & Blank, Inc. v. Warren Connelly Co., Inc.*, 19 F.R.D. 108 (S.D.N.Y. 1956). Subdivision (b) describes the additional elements which in varying situations justify the use of a class action.

Subdivision (b)(1). The difficulties which would be likely to arise if resort were had to separate actions by or against the individual members of the class here furnish the reasons for, and the principal key to, the propriety and value of utilizing the class-action device. The considerations stated under clauses (A) and (B) are comparable to certain of the elements which define the persons whose joinder in an action is desirable as stated in Rule 19(a), as amended. See amended Rule 19(a)(2)(i) and (ii), and the Advisory Committee's Note thereto; Hazard, *Indispensable Party; The Historical Origin of a Procedural Phantom*, 61 Colum.L.Rev. 1254, 1259–60 (1961); cf. 3 *Moore*, supra, par. 23.08, at 3435.

Clause (A): One person may have rights against, or be under duties toward, numerous persons constituting a class, and be so positioned that conflicting or varying adjudications in lawsuits with individual members of the class might establish incompatible standards to govern his conduct. The class action device can be used effectively to obviate the actual or virtual dilemma which would thus confront the party opposing the class. The matter has been stated thus: ''The felt necessity for a class action is greatest when the courts are called upon to order or sanction the alteration of the status quo in circumstances such that a large number of persons are in a position to call on a single person to alter the status quo, or to complain if it is altered, and the possibility exists that [the] actor might be called upon to act in inconsistent ways.'' Louisell & Hazard, *Pleading and Procedure; State and Federal* 719 (1962); see *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 366–67 (1921). To illustrate: Separate actions by individuals against a municipality to declare a bond issue invalid or condition or limit it, to prevent or limit the making of a particular appropriation or to compel or invalidate an assessment, might create a risk of inconsistent or varying determinations. In the same way, individual litigations of the rights and duties of riparian owners, or of landowners' rights and duties respecting a claimed nuisance, could create a possibility of incompatible adjudications. Actions by or against a class provide a ready and fair means of achieving unitary adjudication. See *Maricopa County Mun. Water Con. Dist. v. Looney*, 219 F.2d 529 (9th Cir. 1955); *Rank v. Krug*, 142 F.Supp. 1, 154–59 (S.D.Calif. 1956), on app., *State of California v. Rank*, 293 F.2d 340, 348 (9th Cir. 1961); *Gart v. Cole*, 263 F.2d 244 (2d Cir. 1959), cert. denied 359 U.S. 978 (1959); cf. *Martinez v. Maverick Cty. Water Con. & Imp. Dist.*, 219 F.2d 666 (5th Cir. 1955); 3 *Moore*, supra, par. 23.11[2], at 3458–59.

Clause (B): This clause takes in situations where the judgment in a nonclass action by or against an individual member of the class, while not technically concluding the other members, might do so as a practical matter. The vice of an individual actions would lie in the fact that the other members of the class, thus practically concluded, would have had no representation in the lawsuit. In an action by policy holders against a fraternal benefit association attacking a financial reorganization of the society, it would hardly have been practical, if indeed it would have been possible, to confine the effects of a validation of the reorganization to the individual plaintiffs. Consequently a class action was called for with adequate representation of all members of the class. See *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921); *Waybright v. Columbian Mut. Life Ins. Co.*, 30 F.Supp. 885 (W.D.Tenn. 1939); cf. *Smith v. Swormstedt*, 16 How. (57 U.S.) 288 (1853). For much the same reason actions by shareholders to compel the declaration of a dividend the proper recognition and handling of redemption or pre-emption rights, or the like (or actions by the corporation for corresponding declarations of rights), should ordinarily be conducted as class actions, although the matter has been much obscured by the insistence that each shareholder has an individual claim. See *Knapp v. Bankers Securities Corp.*, 17 F.R.D. 245 (E.D.Pa. 1954), aff'd, 230 F.2d 717 (3d Cir. 1956); *Giesecke v. Denver Tramway Corp.*, 81 F.Supp. 957 (D.Del. 1949); *Zahn v. Transamerica Corp.*, 162 F.2d 36 (3d Cir. 1947); *Speed v. Transamerica Corp.*, 100 F.Supp. 461 (D.Del. 1951); *Sobel v. Whittier Corp.*, 95 F.Supp. 643 (E.D.Mich. 1951), app. dism., 195 F.2d 361 (6th Cir. 1952); *Goldberg v. Whittier Corp.*, 111 F.Supp. 382 (E.D.Mich. 1953); *Dann v. Studebaker-Packard Corp.*, 288 F.2d 201 (6th Cir. 1961); *Edgerton v. Armour & Co.*,94 F.Supp. 549 (S.D.Calif. 1950); *Ames v. Mengel Co.*, 190 F.2d 344 (2d Cir. 1951). (These shareholders' actions are to be distinguished from derivative actions by shareholders dealt with in new Rule 23.1). The same reasoning applies to an action which charges a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class of security holders or other beneficiaries, and which requires an accounting or like measures to restore the subject of the trust. See *Bosenberg v. Chicago T. & T. Co.*, 128 F.2d 245 (7th Cir. 1942); *Citizens Banking Co. v. Monticello State Bank*, 143 F.2d 261 (8th Cir. 1944); *Redmond v. Commerce Trust Co.*, 144 F.2d 140 (8th Cir. 1944), cert. denied, 323 U.S. 776

(1944); cf. *York v. Guaranty Trust Co.*, 143 F.2d 503 (2d Cir. 1944), rev'd on grounds not here relevant, 326 U.S. 99 (1945).

In various situations an adjudication as to one or more members of the class will necessarily or probably have an adverse practical effect on the interests of other members who should therefore be represented in the lawsuit. This is plainly the case when claims are made by numerous persons against a fund insufficient to satisfy all claims. A class action by or against representative members to settle the validity of the claims as a whole, or in groups, followed by separate proof of the amount of each valid claim and proportionate distribution of the fund, meets the problem. Cf. *Dickinson v. Burnham*, 197 F.2d 973 (2d Cir. 1952), cert. denied, 344 U.S. 875 (1952); 3 Moore, supra, at par. 23.09. The same reasoning applies to an action by a creditor to set aside a fraudulent conveyance by the debtor and to appropriate the property to his claim, when the debtor's assets are insufficient to pay all creditors' claims. See *Hefferman v. Bennett & Armour*, 110 Cal.App.2d 564, 243 P.2d 846 (1952); cf. *City & County of San Francisco v. Market Street Ry.*, 95 Cal.App.2d 648, 213 P.2d 780 (1950). Similar problems, however, can arise in the absence of a fund either present or potential. A negative or mandatory injunction secured by one of a numerous class may disable the opposing party from performing claimed duties toward the other members of the class or materially affect his ability to do so. An adjudication as to movie ''clearances and runs'' nominally affecting only one exhibitor would often have practical effects on all the exhibitors in the same territorial area. Cf. *United States v. Paramount Pictures, Inc.*, 66 F.Supp. 323, 341–46 (S.D.N.Y. 1946); 334 U.S. 131, 144–48 (1948). Assuming a sufficiently numerous class of exhibitors, a class action would be advisable. (Here representation of subclasses of exhibitors could become necessary; see subdivision (c)(3)(B).)

Subdivision (b)(2). This subdivision is intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate. Declaratory relief ''corresponds'' to injunctive relief when as a practical matter it affords injunctive relief or serves as a basis for later injunctive relief. The subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages. Action or inaction is directed to a class within the meaning of this subdivision even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class.

Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration. See *Potts v. Flax*, 313 F.2d 284 (5th Cir. 1963); *Bailey v. Patterson*, 323 F.2d 201 (5th Cir. 1963), cert. denied, 377 U.S. 972 (1964); *Brunson v. Board of Trustees of School District No. 1, Clarendon City, S.C.*, 311 F.2d 107 (4th Cir. 1962), cert. denied, 373 U.S. 933 (1963); *Green v. School Bd. of Roanoke, Va.*, 304 F.2d 118 (4th Cir. 1962); *Orleans Parish School Bd. v. Bush*, 242 F.2d 156 (5th Cir. 1957), cert. denied, 354 U.S. 921 (1957); *Mannings v. Board of Public Inst. of Hillsborough County, Fla.*, 277 F.2d 370 (5th Cir. 1960); *Northcross v. Board of Ed. of City of Memphis*, 302 F.2d 818 (6th Cir. 1962), cert. denied 370 U.S. 944 (1962); *Frasier v. Board of Trustees of Univ. of N.C.*, 134 F.Supp. 589 (M.D.N.C. 1955, 3-judge court), aff'd, 350 U.S. 979 (1956). Subdivision (b)(2) is not limited to civil-rights cases. Thus an action looking to specific or declaratory relief could be brought by a numerous class of purchasers, say retailers of a given description, against a seller alleged to have undertaken to sell to that class at prices higher than those set for other purchasers, say retailers of another description, when the applicable law forbids such a pricing differential. So also a patentee of a machine, charged with selling or licensing the machine on condition that purchasers or licensees also purchase or obtain licenses to use an ancillary unpatented machine, could be sued on a class basis by a numerous group of purchasers or licensees, or by a numerous group of competing sellers or licensors of the unpatented machine, to test the legality of the ''tying'' condition.

Subdivision (b)(3). In the situations to which this subdivision relates, class-action treatment is not as clearly called for as in those described above, but it may nevertheless be convenient and desirable depending upon the particular facts. Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote, uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results. Cf. Chafee, supra, at 201.

The court is required to find, as a condition of holding that a class action may be maintained under this subdivision, that the questions common to the class predominate over the questions affecting individual members. It is only where this predominance exists that economies can be achieved by means of the class-action device. In this view, a fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class. On the other hand, although having some common core, a fraud case may be unsuited for treatment as a class action if there was material variation in the representation made or in the kinds or degrees of reliance by the persons to whom they were addressed. See *Oppenheimer v. F. J. Young & Co., Inc.*, 144 F.2d 387 (2d Cir. 1944); *Miller v. National City Bank of N.Y.*, 166 F.2d 723 (2d Cir. 1948); and for like problems in other contexts, see *Hughes v. Encyclopaedia Brittanica*, 199 F.2d 295 (7th Cir. 1952); *Sturgeon v. Great Lakes Steel Corp.*, 143 F.2d 819 (6th Cir. 1944). A ''mass accident'' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried. See *Pennsylvania R.R. v. United States*, 111 F.Supp. 80 (D.N.J. 1953); cf. Weinstein, supra, 9 Buffalo L.Rev. at 469. Private damage claims by numerous individuals arising out of concerted antitrust violations may or may not involve predominating common questions. See *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561 (10th Cir. 1961), pet. cert. dism., 371 U.S. 801 (1963); cf. *Weeks v. Bareco Oil Co.*, 125 F.2d 84 (7th Cir. 1941); *Kainz v. Anheuser-Busch, Inc.*, 194 F.2d 737 (7th Cir. 1952); *Hess v. Anderson, Clayton & Co.*, 20 F.R.D. 466 (S.D.Calif. 1957).

That common questions predominate is not itself sufficient to justify a class action under subdivision (b)(3), for another method of handling the litigious situation may be available which has greater practical advantages. Thus one or more actions agreed to by the parties as test or model actions may be preferable to a class action; or it may prove feasible and preferable to consolidate actions. Cf. Weinstein, supra, 9 Buffalo L.Rev. at 438–54. Even when a number of separate actions are proceeding simultaneously, experience shows that the burdens on the parties and the courts can sometimes be reduced by arrangements for avoiding repetitious discovery or the like. Currently the Coordinating Committee on Multiple Litigation in the United States District Courts (a subcommittee of the Committee on Trial Practice and Technique of the Judicial Conference of the United States) is charged with developing methods for expediting such massive litigation. To reinforce the point that the court with the aid of the parties ought to assess the relative advantages of alternative procedures for handling the total controversy, subdivision (b)(3) requires, as a further condi-

tion of maintaining the class action, that the court shall find that that procedure is ''superior'' to the others in the particular circumstances.

Factors (A)–(D) are listed, non-exhaustively, as pertinent to the findings. The court is to consider the interests of individual members of the class in controlling their own litigations and carrying them on as they see fit. See *Weeks v. Bareco Oil Co.*, 125 F.2d 84, 88–90, 93–94 (7th Cir. 1941) (anti-trust action); see also *Pentland v. Dravo Corp.*, 152 F.2d 851 (3d Cir. 1945), and Chaffee, supra, at 273–75, regarding policy of Fair Labor Standards Act of 1938, §16(b), 29 U.S.C. §216(b), prior to amendment by Portal-to-Portal Act of 1947, §5(a). [The present provisions of 29 U.S.C. §216(b) are not intended to be affected by Rule 23, as amended.]

In this connection the court should inform itself of any litigation actually pending by or against the individuals. The interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action. On the other hand, these interests may be theoretic rather than practical; the class may have a high degree of cohesion and prosecution of the action through representatives would be quite unobjectionable, or the amounts at stake for individuals may be so small that separate suits would be impracticable. The burden that separate suits would impose on the party opposing the class, or upon the court calendars, may also fairly be considered. (See the discussion, under subdivision (c)(2) below, of the right of members to be excluded from the class upon their request.)

Also pertinent is the question of the desirability of concentrating the trial of the claims in the particular forum by means of a class action, in contrast to allowing the claims to be litigated separately in forums to which they would ordinarily be brought. Finally, the court should consider the problems of management which are likely to arise in the conduct of a class action.

Subdivision (c)(1). In order to give clear definition to the action, this provision requires the court to determine, as early in the proceedings as may be practicable, whether an action brought as a class action is to be so maintained. The determination depends in each case on satisfaction of the terms of subdivision (a) and the relevant provisions of subdivision (b).

An order embodying a determination can be conditional; the court may rule, for example, that a class action may be maintained only if the representation is improved through intervention of additional parties of a stated type. A determination once made can be altered or amended before the decision on the merits if, upon fuller development of the facts, the original determination appears unsound. A negative determination means that the action should be stripped of its character as a class action. See subdivision (d)(4). Although an action thus becomes a nonclass action, the court may still be receptive to interventions before the decision on the merits so that the litigation may cover as many interests as can be conveniently handled; the questions whether the intervenors in the nonclass action shall be permitted to claim ''ancillary'' jurisdiction or the benefit of the date of the commencement of the action for purposes of the statute of limitations are to be decided by reference to the laws governing jurisdiction and limitations as they apply in particular contexts.

Whether the court should require notice to be given to members of the class of its intention to make a determination, or of the order embodying it, is left to the court's discretion under subdivision (d)(2).

Subdivision (c)(2) makes special provision for class actions maintained under subdivision (b)(3). As noted in the discussion of the latter subdivision, the interests of the individuals in pursuing their own litigations may be so strong here as to warrant denial of a class action altogether. Even when a class action is maintained under subdivision (b)(3), this individual interest is respected. Thus the court is required to direct notice to the members of the class of the right of each member to be excluded from the class upon his request. A member who does not request exclusion may, if he wishes, enter an appearance in the action through his counsel; whether or not he does so, the judgment in the action will embrace him.

The notice setting forth the alternatives open to the members of the class, is to be the best practicable under the circumstances, and shall include individual notice to the members who can be identified through reasonable effort. (For further discussion of this notice, see the statement under subdivision (d)(2) below.)

Subdivision (c)(3). The judgment in a class action maintained as such to the end will embrace the class, that is, in a class action under subdivision (b)(1) or (b)(2), those found by the court to be class members; in a class action under subdivision (b)(3), those to whom the notice prescribed by subdivision (c)(2) was directed, excepting those who requested exclusion or who are ultimately found by the court not to be members of the class. The judgment has this scope whether it is favorable or unfavorable to the class. In a (b)(1) or (b)(2) action the judgment ''describes'' the members of the class, but need not specify the individual members; in a (b)(3) action the judgment ''specifies'' the individual members who have been identified and described the others.

Compare subdivision (c)(4) as to actions conducted as class actions only with respect to particular issues. Where the class-action character of the lawsuit is based solely on the existence of a ''limited fund,'' the judgment, while extending to all claims of class members against the fund, has ordinarily left unaffected the personal claims of nonappearing members against the debtor. See 3 Moore, supra, par. 23.11[4].

Hitherto, in a few actions conducted as ''spurious'' class actions and thus nominally designed to extend only to parties and others intervening *before* the determination of liability, courts have held or intimated that class members might be permitted to intervene *after* a decision on the merits favorable to their interests, in order to secure the benefits of the decision for themselves, although they would presumably be unaffected by an unfavorable decision. See, as to the propriety of this so-called ''one-way'' intervention in ''spurious'' actions, the conflicting views expressed in *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561 (10th Cir. 1961), pet. cert. dism., 371 U.S. 801 (1963); *York v. Guaranty Trust Co.*, 143 F.2d 503, 529 (2d Cir. 1944), rev'd on grounds not here relevant, 326 U.S. 99 (1945); *Pentland v. Dravo Corp.*, 152 F.2d 851, 856 (3d Cir. 1945); *Speed v. Transamerica Corp.*, 100 F.Supp. 461, 463 (D.Del. 1951); *State Wholesale Grocers v. Great Atl. & Pac. Tea Co.*, 24 F.R.D. 510 (N.D.Ill. 1959); *Alabama Ind. Serv. Stat. Assn. v. Shell Pet Corp.*, 28 F.Supp. 386, 390 (N.D.Ala. 1939); *Tolliver v. Cudahy Packing Co.*, 39 F.Supp. 337, 339 (E.D.Tenn. 1941); Kalven & Rosenfield, supra, 8 U. of Chi.L.Rev. 684 (1941); Comment, 53 Nw.U.L.Rev. 627, 632–33 (1958); Developments in the Law, supra, 71 Harv.L.Rev. at 935; 2 Barron & Holtzoff, supra, §568; but cf. *Lockwood v. Hercules Powder Co.*, 7 F.R.D. 24, 28–29 (W.D.Mo. 1947); *Abram v. San Joaquin Cotton Oil Co.*, 46 F.Supp. 969, 976–77 (S.D.Calif. 1942); Chaffee, supra, at 280, 285; 3 *Moore*, supra, par. 23.12, at 3476. Under proposed subdivision (c)(3), one-way intervention is excluded; the action will have been early determined to be a class or nonclass action, and in the former case the judgment, whether or not favorable, will include the class, as above stated.

Although thus declaring that the judgment in a class action includes the class, as defined, subdivision (c)(3) does not disturb the recognized principle that the court conducting the action cannot predetermine the *res judicata* effect of the judgment; this can be tested only in a subsequent action. See Restatement, *Judgments* §86, comment (h), §116 (1942). The court, however, in framing the judgment in any suit brought as a class action, must decide what its extent or coverage shall be, and if the matter is carefully considered, questions of *res judicata* are less likely to be raised at a later time and if raised will be more satisfactorily answered. See Chafee, supra, at 294; Weinstein, supra, 9 Buffalo L.Rev. at 460.

Subdivision (c)(4). This provision recognizes that an action may be maintained as a class action as to particular issues only. For example, in a fraud or similar case the action may retain its ''class'' character only through the adjudication of liability to the class; the members of the class may thereafter be required to come in individually and prove the amounts of their respective claims.

Two or more classes may be represented in a single action. Where a class is found to include subclasses divergent in interest, the class may be divided correspondingly, and each subclass treated as a class.

Subdivision (d) is concerned with the fair and efficient conduct of the action and lists some types of orders which may be appropriate.

The court should consider how the proceedings are to be arranged in sequence, and what measures should be taken to simplify the proof and argument. See subdivision (d)(1). The orders resulting from this consideration, like the others referred to in subdivision (d), may be combined with a pretrial order under Rule 16, and are subject to modification as the case proceeds.

Subdivision (d)(2) sets out a non-exhaustive list of possible occasions for orders requiring notice to the class. Such notice is not a novel conception. For example, in ''limited fund'' cases, members of the class have been notified to present individual claims after the basic class decision. Notice has gone to members of a class so that they might express any opposition to the representation, see *United States v. American Optical Co.*, 97 F.Supp. 66 (N.D.Ill. 1951), and 1950–51 CCH Trade Cases 64573–74 (par. 62869); cf. *Weeks v. Bareco Oil Co.*, 125 F.2d 84, 94 (7th Cir. 1941), and notice may encourage interventions to improve the representation of the class. Cf. *Oppenheimer v. F. J. Young & Co.*, 144 F.2d 387 (2d Cir. 1944). Notice has been used to poll members on a proposed modification of a consent decree. See record in *Sam Fox Publishing Co. v. United States*, 366 U.S. 683 (1961).

Subdivision (d)(2) does not require notice at any stage, but rather calls attention to its availability and invokes the court's discretion. In the degree that there is cohesiveness or unity in the class and the representation is effective, the need for notice to the class will tend toward a minimum. These indicators suggest that notice under subdivision (d)(2) may be particularly useful and advisable in certain class actions maintained under subdivision (b)(3), for example, to permit members of the class to object to the representation. Indeed, under subdivision (c)(2), notice must be ordered, and is not merely discretionary, to give the members in a subdivision (b)(3) class action an opportunity to secure exclusion from the class. This mandatory notice pursuant to subdivision (c)(2), together with any discretionary notice which the court may find it advisable to give under subdivision (d)(2), is designed to fulfill requirements of due process to which the class action procedure is of course subject. See *Hansberry v. Lee*, 311 U.S. 32 (1940); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); cf. *Dickinson v. Burnham*, 197 F.2d 973, 979 (2d Cir. 1952), and studies cited at 979 n. 4; see also *All American Airways, Inc. v. Elderd*, 209 F.2d 247, 249 (2d Cir. 1954); *Gart v. Cole*, 263 F.2d 244, 248–49 (2d Cir. 1959), cert. denied, 359 U.S. 978 (1959).

Notice to members of the class, whenever employed under amended Rule 23, should be accommodated to the particular purpose but need not comply with the formalities for service of process. See Chafee, supra, at 230–31; *Brendle v. Smith*, 7 F.R.D. 119 (S.D.N.Y. 1946). The fact that notice is given at one stage of the action does not mean that it must be given at subsequent stages. Notice is available fundamentally ''for the protection of the members of the class or otherwise for the fair conduct of the action'' and should not be used merely as a device for the undesirable solicitation of claims. See the discussion in *Cherner v. Transitron Electronic Corp.*, 201 F.Supp. 934 (D.Mass. 1962); *Hormel v. United States*, 17 F.R.D. 303 (S.D.N.Y. 1955).

In appropriate cases the court should notify interested government agencies of the pendency of the action or of particular steps therein.

Subdivision (d)(3) reflects the possibility of conditioning the maintenance of a class action, e.g., on the strengthening of the representation, see subdivision (c)(1) above; and recognizes that the imposition of conditions on intervenors may be required for the proper and efficient conduct of the action.

As to orders under subdivision (d)(4), see subdivision (c)(1) above.

Subdivision (e) requires approval of the court, after notice, for the dismissal or compromise of any class action.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

COMMITTEE NOTES ON RULES—1998 AMENDMENT

Subdivision (f). This permissive interlocutory appeal provision is adopted under the power conferred by 28 U.S.C. §1292(e). Appeal from an order granting or denying class certification is permitted in the sole discretion of the court of appeals. No other type of Rule 23 order is covered by this provision. The court of appeals is given unfettered discretion whether to permit the appeal, akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari. This discretion suggests an analogy to the provision in 28 U.S.C. §1292(b) for permissive appeal on certification by a district court. Subdivision (f), however, departs from the §1292(b) model in two significant ways. It does not require that the district court certify the certification ruling for appeal, although the district court often can assist the parties and court of appeals by offering advice on the desirability of appeal. And it does not include the potentially limiting requirements of §1292(b) that the district court order ''involve[] a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.''

The courts of appeals will develop standards for granting review that reflect the changing areas of uncertainty in class litigation. The Federal Judicial Center study supports the view that many suits with class-action allegations present familiar and almost routine issues that are no more worthy of immediate appeal than many other interlocutory rulings. Yet several concerns justify expansion of present opportunities to appeal. An order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation. An order granting certification, on the other hand, may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability. These concerns can be met at low cost by establishing in the court of appeals a discretionary power to grant interlocutory review in cases that show appeal-worthy certification issues.

Permission to appeal may be granted or denied on the basis of any consideration that the court of appeals finds persuasive. Permission is most likely to be granted when the certification decision turns on a novel or unsettled question of law, or when, as a practical matter, the decision on certification is likely dispositive of the litigation.

The district court, having worked through the certification decision, often will be able to provide cogent advice on the factors that bear on the decision whether to permit appeal. This advice can be particularly valuable if the certification decision is tentative. Even as to a firm certification decision, a statement of reasons bearing on the probable benefits and costs of immediate appeal can help focus the court of appeals decision, and may persuade the disappointed party that an attempt to appeal would be fruitless.

The 10-day period for seeking permission to appeal is designed to reduce the risk that attempted appeals will

disrupt continuing proceedings. It is expected that the courts of appeals will act quickly in making the preliminary determination whether to permit appeal. Permission to appeal does not stay trial court proceedings. A stay should be sought first from the trial court. If the trial court refuses a stay, its action and any explanation of its views should weigh heavily with the court of appeals.

Appellate Rule 5 has been modified to establish the procedure for petitioning for leave to appeal under subdivision (f).

Changes Made after Publication (GAP Report). No changes were made in the text of Rule 23(f) as published.

Several changes were made in the published Committee Note. (1) References to 28 U.S.C. §1292(b) interlocutory appeals were revised to dispel any implication that the restrictive elements of §1292(b) should be read in to Rule 23(f). New emphasis was placed on court of appeals discretion by making explicit the analogy to certiorari discretion. (2) Suggestions that the new procedure is a ''modest'' expansion of appeal opportunities, to be applied with ''restraint,'' and that permission ''almost always will be denied when the certification decision turns on case-specific matters of fact and district court discretion,'' were deleted. It was thought better simply to observe that courts of appeals will develop standards ''that reflect the changing areas of uncertainty in class litigation.''

COMMITTEE NOTES ON RULES—2003 AMENDMENT

Subdivision (c). Subdivision (c) is amended in several respects. The requirement that the court determine whether to certify a class ''as soon as practicable after commencement of an action'' is replaced by requiring determination ''at an early practicable time.'' The notice provisions are substantially revised.

Paragraph (1). Subdivision (c)(1)(A) is changed to require that the determination whether to certify a class be made ''at an early practicable time.'' The ''as soon as practicable'' exaction neither reflects prevailing practice nor captures the many valid reasons that may justify deferring the initial certification decision. See Willging, Hooper & Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 26–36* (Federal Judicial Center 1996).

Time may be needed to gather information necessary to make the certification decision. Although an evaluation of the probable outcome on the merits is not properly part of the certification decision, discovery in aid of the certification decision often includes information required to identify the nature of the issues that actually will be presented at trial. In this sense it is appropriate to conduct controlled discovery into the ''merits,'' limited to those aspects relevant to making the certification decision on an informed basis. Active judicial supervision may be required to achieve the most effective balance that expedites an informed certification determination without forcing an artificial and ultimately wasteful division between ''certification discovery'' and ''merits discovery.'' A critical need is to determine how the case will be tried. An increasing number of courts require a party requesting class certification to present a ''trial plan'' that describes the issues likely to be presented at trial and tests whether they are susceptible of class-wide proof. See Manual For Complex Litigation Third, §21.213, p. 44; §30.11, p. 214; §30.12, p. 215.

Other considerations may affect the timing of the certification decision. The party opposing the class may prefer to win dismissal or summary judgment as to the individual plaintiffs without certification and without binding the class that might have been certified. Time may be needed to explore designation of class counsel under Rule 23(g), recognizing that in many cases the need to progress toward the certification determination may require designation of interim counsel under Rule 23(g)(2)(A).

Although many circumstances may justify deferring the certification decision, active management may be necessary to ensure that the certification decision is not unjustifiably delayed.

Subdivision (c)(1)(C) reflects two amendments. The provision that a class certification ''may be conditional'' is deleted. A court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met. The provision that permits alteration or amendment of an order granting or denying class certification is amended to set the cut-off point at final judgment rather than ''the decision on the merits.'' This change avoids the possible ambiguity in referring to ''the decision on the merits.'' Following a determination of liability, for example, proceedings to define the remedy may demonstrate the need to amend the class definition or subdivide the class. In this setting the final judgment concept is pragmatic. It is not the same as the concept used for appeal purposes, but it should be flexible, particularly in protracted litigation.

The authority to amend an order under Rule 23(c)(1) before final judgment does not restore the practice of ''one-way intervention'' that was rejected by the 1966 revision of Rule 23. A determination of liability after certification, however, may show a need to amend the class definition. Decertification may be warranted after further proceedings.

If the definition of a class certified under Rule 23(b)(3) is altered to include members who have not been afforded notice and an opportunity to request exclusion, notice—including an opportunity to request exclusion—must be directed to the new class members under Rule 23(c)(2)(B).

Paragraph (2). The first change made in Rule 23(c)(2) is to call attention to the court's authority—already established in part by Rule 23(d)(2)—to direct notice of certification to a Rule 23(b)(1) or (b)(2) class. The present rule expressly requires notice only in actions certified under Rule 23(b)(3). Members of classes certified under Rules 23(b)(1) or (b)(2) have interests that may deserve protection by notice.

The authority to direct notice to class members in a (b)(1) or (b)(2) class action should be exercised with care. For several reasons, there may be less need for notice than in a (b)(3) class action. There is no right to request exclusion from a (b)(1) or (b)(2) class. The characteristics of the class may reduce the need for formal notice. The cost of providing notice, moreover, could easily cripple actions that do not seek damages. The court may decide not to direct notice after balancing the risk that notice costs may deter the pursuit of class relief against the benefits of notice.

When the court does direct certification notice in a (b)(1) or (b)(2) class action, the discretion and flexibility established by subdivision (c)(2)(A) extend to the method of giving notice. Notice facilitates the opportunity to participate. Notice calculated to reach a significant number of class members often will protect the interests of all. Informal methods may prove effective. A simple posting in a place visited by many class members, directing attention to a source of more detailed information, may suffice. The court should consider the costs of notice in relation to the probable reach of inexpensive methods.

If a Rule 23(b)(3) class is certified in conjunction with a (b)(2) class, the (c)(2)(B) notice requirements must be satisfied as to the (b)(3) class.

The direction that class-certification notice be couched in plain, easily understood language is a reminder of the need to work unremittingly at the difficult task of communicating with class members. It is difficult to provide information about most class actions that is both accurate and easily understood by class members who are not themselves lawyers. Factual uncertainty, legal complexity, and the complication of class-action procedure raise the barriers high. The Federal Judicial Center has created illustrative clear-notice forms that provide a helpful starting point for actions similar to those described in the forms.

Subdivision (e). Subdivision (e) is amended to strengthen the process of reviewing proposed class-ac-

tion settlements. Settlement may be a desirable means of resolving a class action. But court review and approval are essential to assure adequate representation of class members who have not participated in shaping the settlement.

Paragraph (1). Subdivision (e)(1)(A) expressly recognizes the power of a class representative to settle class claims, issues, or defenses.

Rule 23(e)(1)(A) resolves the ambiguity in former Rule 23(e)'s reference to dismissal or compromise of ''a class action.'' That language could be—and at times was—read to require court approval of settlements with putative class representatives that resolved only individual claims. See Manual for Complex Litigation Third, §30.41. The new rule requires approval only if the claims, issues, or defenses of a certified class are resolved by a settlement, voluntary dismissal, or compromise.

Subdivision (e)(1)(B) carries forward the notice requirement of present Rule 23(e) when the settlement binds the class through claim or issue preclusion; notice is not required when the settlement binds only the individual class representatives. Notice of a settlement binding on the class is required either when the settlement follows class certification or when the decisions on certification and settlement proceed simultaneously.

Reasonable settlement notice may require individual notice in the manner required by Rule 23(c)(2)(B) for certification notice to a Rule 23(b)(3) class. Individual notice is appropriate, for example, if class members are required to take action—such as filing claims—to participate in the judgment, or if the court orders a settlement opt-out opportunity under Rule 23(e)(3).

Subdivision (e)(1)(C) confirms and mandates the already common practice of holding hearings as part of the process of approving settlement, voluntary dismissal, or compromise that would bind members of a class.

Subdivision (e)(1)(C) states the standard for approving a proposed settlement that would bind class members. The settlement must be fair, reasonable, and adequate. A helpful review of many factors that may deserve consideration is provided by *In re: Prudential Ins. Co. America Sales Practice Litigation Agent Actions*, 148 F.3d 283, 316–324 (3d Cir. 1998). Further guidance can be found in the Manual for Complex Litigation.

The court must make findings that support the conclusion that the settlement is fair, reasonable, and adequate. The findings must be set out in sufficient detail to explain to class members and the appellate court the factors that bear on applying the standard.

Settlement review also may provide an occasion to review the cogency of the initial class definition. The terms of the settlement themselves, or objections, may reveal divergent interests of class members and demonstrate the need to redefine the class or to designate subclasses. Redefinition of a class certified under Rule 23(b)(3) may require notice to new class members under Rule 23(c)(2)(B). See Rule 23(c)(1)(C).

Paragraph (2). Subdivision (e)(2) requires parties seeking approval of a settlement, voluntary dismissal, or compromise under Rule 23(e)(1) to file a statement identifying any agreement made in connection with the settlement. This provision does not change the basic requirement that the parties disclose all terms of the settlement or compromise that the court must approve under Rule 23(e)(1). It aims instead at related undertakings that, although seemingly separate, may have influenced the terms of the settlement by trading away possible advantages for the class in return for advantages for others. Doubts should be resolved in favor of identification.

Further inquiry into the agreements identified by the parties should not become the occasion for discovery by the parties or objectors. The court may direct the parties to provide to the court or other parties a summary or copy of the full terms of any agreement identified by the parties. The court also may direct the parties to provide a summary or copy of any agreement not identified by the parties that the court considers relevant to its review of a proposed settlement. In exercising discretion under this rule, the court may act in steps, calling first for a summary of any agreement that may have affected the settlement and then for a complete version if the summary does not provide an adequate basis for review. A direction to disclose a summary or copy of an agreement may raise concerns of confidentiality. Some agreements may include information that merits protection against general disclosure. And the court must provide an opportunity to claim work-product or other protections.

Paragraph (3). Subdivision (e)(3) authorizes the court to refuse to approve a settlement unless the settlement affords class members a new opportunity to request exclusion from a class certified under Rule 23(b)(3) after settlement terms are known. An agreement by the parties themselves to permit class members to elect exclusion at this point by the settlement agreement may be one factor supporting approval of the settlement. Often there is an opportunity to opt out at this point because the class is certified and settlement is reached in circumstances that lead to simultaneous notice of certification and notice of settlement. In these cases, the basic opportunity to elect exclusion applies without further complication. In some cases, particularly if settlement appears imminent at the time of certification, it may be possible to achieve equivalent protection by deferring notice and the opportunity to elect exclusion until actual settlement terms are known. This approach avoids the cost and potential confusion of providing two notices and makes the single notice more meaningful. But notice should not be delayed unduly after certification in the hope of settlement.

Rule 23(e)(3) authorizes the court to refuse to approve a settlement unless the settlement affords a new opportunity to elect exclusion in a case that settles after a certification decision if the earlier opportunity to elect exclusion provided with the certification notice has expired by the time of the settlement notice. A decision to remain in the class is likely to be more carefully considered and is better informed when settlement terms are known.

The opportunity to request exclusion from a proposed settlement is limited to members of a (b)(3) class. Exclusion may be requested only by individual class members; no class member may purport to opt out other class members by way of another class action.

The decision whether to approve a settlement that does not allow a new opportunity to elect exclusion is confided to the court's discretion. The court may make this decision before directing notice to the class under Rule 23(e)(1)(B) or after the Rule 23(e)(1)(C) hearing. Many factors may influence the court's decision. Among these are changes in the information available to class members since expiration of the first opportunity to request exclusion, and the nature of the individual class members' claims.

The terms set for permitting a new opportunity to elect exclusion from the proposed settlement of a Rule 23(b)(3) class action may address concerns of potential misuse. The court might direct, for example, that class members who elect exclusion are bound by rulings on the merits made before the settlement was proposed for approval. Still other terms or conditions may be appropriate.

Paragraph (4). Subdivision (e)(4) confirms the right of class members to object to a proposed settlement, voluntary dismissal, or compromise. The right is defined in relation to a disposition that, because it would bind the class, requires court approval under subdivision (e)(1)(C).

Subdivision (e)(4)(B) requires court approval for withdrawal of objections made under subdivision (e)(4)(A). Review follows automatically if the objections are withdrawn on terms that lead to modification of the settlement with the class. Review also is required if the objector formally withdraws the objections. If the objector simply abandons pursuit of the objection, the court may inquire into the circumstances.

Approval under paragraph (4)(B) may be given or denied with little need for further inquiry if the objection

and the disposition go only to a protest that the individual treatment afforded the objector under the proposed settlement is unfair because of factors that distinguish the objector from other class members. Different considerations may apply if the objector has protested that the proposed settlement is not fair, reasonable, or adequate on grounds that apply generally to a class or subclass. Such objections, which purport to represent class-wide interests, may augment the opportunity for obstruction or delay. If such objections are surrendered on terms that do not affect the class settlement or the objector's participation in the class settlement, the court often can approve withdrawal of the objections without elaborate inquiry.

Once an objector appeals, control of the proceeding lies in the court of appeals. The court of appeals may undertake review and approval of a settlement with the objector, perhaps as part of appeal settlement procedures, or may remand to the district court to take advantage of the district court's familiarity with the action and settlement.

Subdivision (g). Subdivision (g) is new. It responds to the reality that the selection and activity of class counsel are often critically important to the successful handling of a class action. Until now, courts have scrutinized proposed class counsel as well as the class representative under Rule 23(a)(4). This experience has recognized the importance of judicial evaluation of the proposed lawyer for the class, and this new subdivision builds on that experience rather than introducing an entirely new element into the class certification process. Rule 23(a)(4) will continue to call for scrutiny of the proposed class representative, while this subdivision will guide the court in assessing proposed class counsel as part of the certification decision. This subdivision recognizes the importance of class counsel, states the obligation to represent the interests of the class, and provides a framework for selection of class counsel. The procedure and standards for appointment vary depending on whether there are multiple applicants to be class counsel. The new subdivision also provides a method by which the court may make directions from the outset about the potential fee award to class counsel in the event the action is successful.

Paragraph (1) sets out the basic requirement that class counsel be appointed if a class is certified and articulates the obligation of class counsel to represent the interests of the class, as opposed to the potentially conflicting interests of individual class members. It also sets out the factors the court should consider in assessing proposed class counsel.

Paragraph (1)(A) requires that the court appoint class counsel to represent the class. Class counsel must be appointed for all classes, including each subclass that the court certifies to represent divergent interests.

Paragraph (1)(A) does not apply if "a statute provides otherwise." This recognizes that provisions of the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104–67, 109 Stat. 737 (1995) (codified in various sections of 15 U.S.C.), contain directives that bear on selection of a lead plaintiff and the retention of counsel. This subdivision does not purport to supersede or to affect the interpretation of those provisions, or any similar provisions of other legislation.

Paragraph 1(B) recognizes that the primary responsibility of class counsel, resulting from appointment as class counsel, is to represent the best interests of the class. The rule thus establishes the obligation of class counsel, an obligation that may be different from the customary obligations of counsel to individual clients. Appointment as class counsel means that the primary obligation of counsel is to the class rather than to any individual members of it. The class representatives do not have an unfettered right to "fire" class counsel. In the same vein, the class representatives cannot command class counsel to accept or reject a settlement proposal. To the contrary, class counsel must determine whether seeking the court's approval of a settlement would be in the best interests of the class as a whole.

Paragraph (1)(C) articulates the basic responsibility of the court to appoint class counsel who will provide the adequate representation called for by paragraph (1)(B). It identifies criteria that must be considered and invites the court to consider any other pertinent matters. Although couched in terms of the court's duty, the listing also informs counsel seeking appointment about the topics that should be addressed in an application for appointment or in the motion for class certification.

The court may direct potential class counsel to provide additional information about the topics mentioned in paragraph (1)(C) or about any other relevant topic. For example, the court may direct applicants to inform the court concerning any agreements about a prospective award of attorney fees or nontaxable costs, as such agreements may sometimes be significant in the selection of class counsel. The court might also direct that potential class counsel indicate how parallel litigation might be coordinated or consolidated with the action before the court.

The court may also direct counsel to propose terms for a potential award of attorney fees and nontaxable costs. Attorney fee awards are an important feature of class action practice, and attention to this subject from the outset may often be a productive technique. Paragraph (2)(C) therefore authorizes the court to provide directions about attorney fees and costs when appointing class counsel. Because there will be numerous class actions in which this information is not likely to be useful, the court need not consider it in all class actions.

Some information relevant to class counsel appointment may involve matters that include adversary preparation in a way that should be shielded from disclosure to other parties. An appropriate protective order may be necessary to preserve confidentiality.

In evaluating prospective class counsel, the court should weigh all pertinent factors. No single factor should necessarily be determinative in a given case. For example, the resources counsel will commit to the case must be appropriate to its needs, but the court should be careful not to limit consideration to lawyers with the greatest resources.

If, after review of all applicants, the court concludes that none would be satisfactory class counsel, it may deny class certification, reject all applications, recommend that an application be modified, invite new applications, or make any other appropriate order regarding selection and appointment of class counsel.

Paragraph (2). This paragraph sets out the procedure that should be followed in appointing class counsel. Although it affords substantial flexibility, it provides the framework for appointment of class counsel in all class actions. For counsel who filed the action, the materials submitted in support of the motion for class certification may suffice to justify appointment so long as the information described in paragraph (g)(1)(C) is included. If there are other applicants, they ordinarily would file a formal application detailing their suitability for the position.

In a plaintiff class action the court usually would appoint as class counsel only an attorney or attorneys who have sought appointment. Different considerations may apply in defendant class actions.

The rule states that the court should appoint "class counsel." In many instances, the applicant will be an individual attorney. In other cases, however, an entire firm, or perhaps numerous attorneys who are not otherwise affiliated but are collaborating on the action will apply. No rule of thumb exists to determine when such arrangements are appropriate; the court should be alert to the need for adequate staffing of the case, but also to the risk of overstaffing or an ungainly counsel structure.

Paragraph (2)(A) authorizes the court to designate interim counsel during the pre-certification period if necessary to protect the interests of the putative class. Rule 23(c)(1)(B) directs that the order certifying the class include appointment of class counsel. Before class

certification, however, it will usually be important for an attorney to take action to prepare for the certification decision. The amendment to Rule 23(c)(1) recognizes that some discovery is often necessary for that determination. It also may be important to make or respond to motions before certification. Settlement may be discussed before certification. Ordinarily, such work is handled by the lawyer who filed the action. In some cases, however, there may be rivalry or uncertainty that makes formal designation of interim counsel appropriate. Rule 23(g)(2)(A) authorizes the court to designate interim counsel to act on behalf of the putative class before the certification decision is made. Failure to make the formal designation does not prevent the attorney who filed the action from proceeding in it. Whether or not formally designated interim counsel, an attorney who acts on behalf of the class before certification must act in the best interests of the class as a whole. For example, an attorney who negotiates a precertification settlement must seek a settlement that is fair, reasonable, and adequate for the class.

Rule 23(c)(1) provides that the court should decide whether to certify the class ''at an early practicable time,'' and directs that class counsel should be appointed in the order certifying the class. In some cases, it may be appropriate for the court to allow a reasonable period after commencement of the action for filing applications to serve as class counsel. The primary ground for deferring appointment would be that there is reason to anticipate competing applications to serve as class counsel. Examples might include instances in which more than one class action has been filed, or in which other attorneys have filed individual actions on behalf of putative class members. The purpose of facilitating competing applications in such a case is to afford the best possible representation for the class. Another possible reason for deferring appointment would be that the initial applicant was found inadequate, but it seems appropriate to permit additional applications rather than deny class certification.

Paragraph (2)(B) states the basic standard the court should use in deciding whether to certify the class and appoint class counsel in the single applicant situation—that the applicant be able to provide the representation called for by paragraph (1)(B) in light of the factors identified in paragraph (1)(C).

If there are multiple adequate applicants, paragraph (2)(B) directs the court to select the class counsel best able to represent the interests of the class. This decision should also be made using the factors outlined in paragraph (1)(C), but in the multiple applicant situation the court is to go beyond scrutinizing the adequacy of counsel and make a comparison of the strengths of the various applicants. As with the decision whether to appoint the sole applicant for the position, no single factor should be dispositive in selecting class counsel in cases in which there are multiple applicants. The fact that a given attorney filed the instant action, for example, might not weigh heavily in the decision if that lawyer had not done significant work identifying or investigating claims. Depending on the nature of the case, one important consideration might be the applicant's existing attorney-client relationship with the proposed class representative.

Paragraph (2)(C) builds on the appointment process by authorizing the court to include provisions regarding attorney fees in the order appointing class counsel. Courts may find it desirable to adopt guidelines for fees or nontaxable costs, or to direct class counsel to report to the court at regular intervals on the efforts undertaken in the action, to facilitate the court's later determination of a reasonable attorney fee.

Subdivision (h). Subdivision (h) is new. Fee awards are a powerful influence on the way attorneys initiate, develop, and conclude class actions. Class action attorney fee awards have heretofore been handled, along with all other attorney fee awards, under Rule 54(d)(2), but that rule is not addressed to the particular concerns of class actions. This subdivision is designed to work in tandem with new subdivision (g) on appointment of class counsel, which may afford an opportunity for the court to provide an early framework for an eventual fee award, or for monitoring the work of class counsel during the pendency of the action.

Subdivision (h) applies to ''an action certified as a class action.'' This includes cases in which there is a simultaneous proposal for class certification and settlement even though technically the class may not be certified unless the court approves the settlement pursuant to review under Rule 23(e). When a settlement is proposed for Rule 23(e) approval, either after certification or with a request for certification, notice to class members about class counsel's fee motion would ordinarily accompany the notice to the class about the settlement proposal itself.

This subdivision does not undertake to create new grounds for an award of attorney fees or nontaxable costs. Instead, it applies when such awards are authorized by law or by agreement of the parties. Against that background, it provides a format for all awards of attorney fees and nontaxable costs in connection with a class action, not only the award to class counsel. In some situations, there may be a basis for making an award to other counsel whose work produced a beneficial result for the class, such as attorneys who acted for the class before certification but were not appointed class counsel, or attorneys who represented objectors to a proposed settlement under Rule 23(e) or to the fee motion of class counsel. Other situations in which fee awards are authorized by law or by agreement of the parties may exist.

This subdivision authorizes an award of ''reasonable'' attorney fees and nontaxable costs. This is the customary term for measurement of fee awards in cases in which counsel may obtain an award of fees under the ''common fund'' theory that applies in many class actions, and is used in many fee-shifting statutes. Depending on the circumstances, courts have approached the determination of what is reasonable in different ways. In particular, there is some variation among courts about whether in ''common fund'' cases the court should use the lodestar or a percentage method of determining what fee is reasonable. The rule does not attempt to resolve the question whether the lodestar or percentage approach should be viewed as preferable.

Active judicial involvement in measuring fee awards is singularly important to the proper operation of the class-action process. Continued reliance on caselaw development of fee-award measures does not diminish the court's responsibility. In a class action, the district court must ensure that the amount and mode of payment of attorney fees are fair and proper whether the fees come from a common fund or are otherwise paid. Even in the absence of objections, the court bears this responsibility.

Courts discharging this responsibility have looked to a variety of factors. One fundamental focus is the result actually achieved for class members, a basic consideration in any case in which fees are sought on the basis of a benefit achieved for class members. The Private Securities Litigation Reform Act of 1995 explicitly makes this factor a cap for a fee award in actions to which it applies. See 15 U.S.C. §§77z–1(a)(6); 78u–4(a)(6) (fee award should not exceed a ''reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class''). For a percentage approach to fee measurement, results achieved is the basic starting point.

In many instances, the court may need to proceed with care in assessing the value conferred on class members. Settlement regimes that provide for future payments, for example, may not result in significant actual payments to class members. In this connection, the court may need to scrutinize the manner and operation of any applicable claims procedure. In some cases, it may be appropriate to defer some portion of the fee award until actual payouts to class members are known. Settlements involving nonmonetary provisions for class members also deserve careful scrutiny to ensure that these provisions have actual value to the

class. On occasion the court's Rule 23(e) review will provide a solid basis for this sort of evaluation, but in any event it is also important to assessing the fee award for the class.

At the same time, it is important to recognize that in some class actions the monetary relief obtained is not the sole determinant of an appropriate attorney fees award. Cf. *Blanchard v. Bergeron*, 489 U.S. 87, 95 (1989) (cautioning in an individual case against an ''undesirable emphasis'' on ''the importance of the recovery of damages in civil rights litigation'' that might ''shortchange efforts to seek effective injunctive or declaratory relief'').

Any directions or orders made by the court in connection with appointing class counsel under Rule 23(g) should weigh heavily in making a fee award under this subdivision.

Courts have also given weight to agreements among the parties regarding the fee motion, and to agreements between class counsel and others about the fees claimed by the motion. Rule 54(d)(2)(B) provides: ''If directed by the court, the motion shall also disclose the terms of any agreement with respect to fees to be paid for the services for which claim is made.'' The agreement by a settling party not to oppose a fee application up to a certain amount, for example, is worthy of consideration, but the court remains responsible to determine a reasonable fee. ''Side agreements'' regarding fees provide at least perspective pertinent to an appropriate fee award.

In addition, courts may take account of the fees charged by class counsel or other attorneys for representing individual claimants or objectors in the case. In determining a fee for class counsel, the court's objective is to ensure an overall fee that is fair for counsel and equitable within the class. In some circumstances individual fee agreements between class counsel and class members might have provisions inconsistent with those goals, and the court might determine that adjustments in the class fee award were necessary as a result.

Finally, it is important to scrutinize separately the application for an award covering nontaxable costs. If costs were addressed in the order appointing class counsel, those directives should be a presumptive starting point in determining what is an appropriate award.

Paragraph (1). Any claim for an award of attorney fees must be sought by motion under Rule 54(d)(2), which invokes the provisions for timing of appeal in Rule 58 and Appellate Rule 4. Owing to the distinctive features of class action fee motions, however, the provisions of this subdivision control disposition of fee motions in class actions, while Rule 54(d)(2) applies to matters not addressed in this subdivision.

The court should direct when the fee motion must be filed. For motions by class counsel in cases subject to court review of a proposed settlement under Rule 23(e), it would be important to require the filing of at least the initial motion in time for inclusion of information about the motion in the notice to the class about the proposed settlement that is required by Rule 23(e). In cases litigated to judgment, the court might also order class counsel's motion to be filed promptly so that notice to the class under this subdivision (h) can be given.

Besides service of the motion on all parties, notice of class counsel's motion for attorney fees must be ''directed to the class in a reasonable manner.'' Because members of the class have an interest in the arrangements for payment of class counsel whether that payment comes from the class fund or is made directly by another party, notice is required in all instances. In cases in which settlement approval is contemplated under Rule 23(e), notice of class counsel's fee motion should be combined with notice of the proposed settlement, and the provision regarding notice to the class is parallel to the requirements for notice under Rule 23(e). In adjudicated class actions, the court may calibrate the notice to avoid undue expense.

Paragraph (2). A class member and any party from whom payment is sought may object to the fee motion. Other parties—for example, nonsettling defendants—may not object because they lack a sufficient interest in the amount the court awards. The rule does not specify a time limit for making an objection. In setting the date objections are due, the court should provide sufficient time after the full fee motion is on file to enable potential objectors to examine the motion.

The court may allow an objector discovery relevant to the objections. In determining whether to allow discovery, the court should weigh the need for the information against the cost and delay that would attend discovery. See Rule 26(b)(2). One factor in determining whether to authorize discovery is the completeness of the material submitted in support of the fee motion, which depends in part on the fee measurement standard applicable to the case. If the motion provides thorough information, the burden should be on the objector to justify discovery to obtain further information.

Paragraph (3). Whether or not there are formal objections, the court must determine whether a fee award is justified and, if so, set a reasonable fee. The rule does not require a formal hearing in all cases. The form and extent of a hearing depend on the circumstances of the case. The rule does require findings and conclusions under Rule 52(a).

Paragraph (4). By incorporating Rule 54(d)(2), this provision gives the court broad authority to obtain assistance in determining the appropriate amount to award. In deciding whether to direct submission of such questions to a special master or magistrate judge, the court should give appropriate consideration to the cost and delay that such a process might entail.

Changes Made After Publication and Comment. Rule 23(c)(1)(B) is changed to incorporate the counsel-appointment provisions of Rule 23(g). The statement of the method and time for requesting exclusion from a (b)(3) class has been moved to the notice of certification provision in Rule 23(c)(2)(B).

Rule 23(c)(1)(C) is changed by deleting all references to ''conditional'' certification.

Rule 23(c)(2)(A) is changed by deleting the requirement that class members be notified of certification of a (b)(1) or (b)(2) class. The new version provides only that the court may direct appropriate notice to the class.

Rule 23(c)(2)(B) is revised to require that the notice of class certification define the certified class in terms identical to the terms used in (c)(1)(B), and to incorporate the statement transferred from (c)(1)(B) on ''when and how members may elect to be excluded.''

Rule 23(e)(1) is revised to delete the requirement that the parties must win court approval for a precertification dismissal or settlement.

Rule 23(e)(2) is revised to change the provision that the court may direct the parties to file a copy or summary of any agreement or understanding made in connection with a proposed settlement. The new provision directs the parties to a proposed settlement to identify any agreement made in connection with the settlement.

Rule 23(e)(3) is proposed in a restyled form of the second version proposed for publication.

Rule 23(e)(4)(B) is restyled.

Rule 23(g)(1)(C) is a transposition of criteria for appointing class counsel that was published as Rule 23(g)(2)(B). The criteria are rearranged, and expanded to include consideration of experience in handling claims of the type asserted in the action and of counsel's knowledge of the applicable law.

Rule 23(g)(2)(A) is a new provision for designation of interim counsel to act on behalf of a putative class before a certification determination is made.

Rule 23(g)(2)(B) is revised to point up the differences between appointment of class counsel when there is only one applicant and when there are competing applicants. When there is only one applicant the court must determine that the applicant is able to fairly and adequately represent class interests. When there is more than one applicant the court must appoint the applicant best able to represent class interests.

Rule 23(h) is changed to require that notice of an attorney-fee motion by class counsel be ''directed to class members,'' rather than ''given to all class members.''

Rule 23.1. Derivative Actions by Shareholders

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which the plaintiff complains or that the plaintiff's share or membership thereafter devolved on the plaintiff by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for the plaintiff's failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

(As added Feb. 28, 1966, eff. July 1, 1966; amended Mar. 2, 1987, eff. Aug. 1, 1987.)

NOTES OF ADVISORY COMMITTEE ON RULES—1966

A derivative action by a shareholder of a corporation or by a member of an unincorporated association has distinctive aspects which require the special provisions set forth in the new rule. The next-to-the-last sentence recognizes that the question of adequacy of representation may arise when the plaintiff is one of a group of shareholders or members. *Cf.* 3 *Moore's Federal Practice*, par. 23.08 (2d ed. 1963).

The court has inherent power to provide for the conduct of the proceedings in a derivative action, including the power to determine the course of the proceedings and require that any appropriate notice be given to shareholders or members.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

Rule 23.2. Actions Relating to Unincorporated Associations

An action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties may be maintained only if it appears that the representative parties will fairly and adequately protect the interests of the association and its members. In the conduct of the action the court may make appropriate orders corresponding with those described in Rule 23(d), and the procedure for dismissal or compromise of the action shall correspond with that provided in Rule 23(e).

(As added Feb. 28, 1966, eff. July 1, 1966.)

NOTES OF ADVISORY COMMITTEE ON RULES—1966

Although an action by or against representatives of the membership of an unincorporated association has often been viewed as a class action, the real or main purpose of this characterization has been to give ''entity treatment'' to the association when for formal reasons it cannot sue or be sued as a jural person under Rule 17(b). See Louisell & Hazard, *Pleading and Procedure: State and Federal* 718 (1962); 3 *Moore's Federal Practice*, par. 23.08 (2d ed. 1963); Story, J. in *West v. Randall*, 29 Fed.Cas. 718, 722–23, No. 17,424 (C.C.D.R.I. 1820); and, for examples, *Gibbs v. Buck*, 307 U.S. 66 (1939); *Tunstall v. Brotherhood of Locomotive F. & E.*, 148 F.2d 403 (4th Cir. 1945); *Oskoian v. Canuel*, 269 F.2d 311 (1st Cir. 1959). Rule 23.2 deals separately with these actions, referring where appropriate to Rule 23.

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. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. 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 serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 12, 2006, eff. Dec. 1, 2006.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

The right to intervene given by the following and similar statutes is preserved, but the procedure for its assertion is governed by this rule:

U.S.C., Title 28:

§ 45a [now 2323] (Special attorneys; participation by Interstate Commerce Commission; intervention) (in certain cases under interstate commerce laws)

§ 48 [now 2322] (Suits to be against United States; intervention by United States)

§ 401 [now 2403] (Intervention by United States; constitutionality of Federal statute)

U.S.C., Title 40:

§ 276a–2(b) [now 3144] (Bonds of contractors for public buildings or works; rights of persons furnishing labor and materials).

Compare with the last sentence of [former] Equity Rule 37 (Parties Generally—Intervention). This rule amplifies and restates the present federal practice at law and in equity. For the practice in admiralty see Admiralty Rules 34 (How Third Party May Intervene) and 42 (Claims Against Proceeds in Registry). See generally Moore and Levi, *Federal Intervention: I The Right to Intervene and Reorganization* (1936), 45 Yale L.J. 565. Under the codes two types of intervention are provided, one for the recovery of specific real or personal property (2 Ohio Gen.Code Ann. (Page, 1926) § 11263; Wyo.Rev.Stat.Ann. (Courtright, 1931) § 89–522), and the other allowing intervention generally when the applicant has an interest in the matter in litigation (1 Colo.Stat.Ann. (1935) Code Civ.Proc. § 22; La.Code Pract. (Dart, 1932) Arts. 389–394; Utah Rev.Stat.Ann. (1933) § 104–3–24). The English intervention practice is based upon various rules and decisions and falls into the two categories of absolute right and discretionary right. For the absolute right see English Rules Under the Judicature Act (The Annual Practice, 1937) O. 12, r. 24 (admiralty), r. 25 (land), r. 23 (probate); O. 57, r. 12 (execution); J. A. (1925) §§ 181, 182, 183(2) (divorce); *In re Metropolitan Amalgamated Estates, Ltd.*, (1912) 2 Ch. 497 (receivership); *Wilson v. Church*, 9 Ch.D. 552 (1878) (representative action). For the discretionary right see O. 16, r. 11 (nonjoinder) and *Re Fowler*, 142 L. T. Jo. 94 (Ch. 1916), *Vavasseur v. Krupp*, 9 Ch.D. 351 (1878) (persons out of the jurisdiction).

NOTES OF ADVISORY COMMITTEE ON RULES—1946 AMENDMENTS

Note. Subdivision (a). The addition to subdivision (a)(3) covers the situation where property may be in the actual custody of some other officer or agency—such as the Secretary of the Treasury—but the control and disposition of the property is lodged in the court wherein the action is pending.

Subdivision (b). The addition in subdivision (b) permits the intervention of governmental officers or agencies in proper cases and thus avoids exclusionary constructions of the rule. For an example of the latter, see *Matter of Bender Body Co.* (Ref.Ohio 1941) 47 F.Supp. 224, aff'd as moot (N.D.Ohio 1942) 47 F.Supp. 224, 234, holding that the Administrator of the Office of Price Administration, then acting under the authority of an Executive Order of the President, could not intervene in a bankruptcy proceeding to protest the sale of assets above ceiling prices. Compare, however, *Securities and Exchange Commission v. United States Realty & Improvement Co.* (1940) 310 U.S. 434, where permissive intervention of the Commission to protect the public interest in an arrangement proceeding under Chapter XI of the Bankruptcy Act was upheld. See also dissenting opinion in *Securities and Exchange Commission v. Long Island Lighting Co.* (C.C.A.2d, 1945) 148 F.(2d) 252, judgment vacated as moot and case remanded with direction to dismiss complaint (1945) 325 U.S. 833. For discussion see Commentary, *Nature of Permissive Intervention Under Rule 24b* (1940) 3 Fed.Rules Serv. 704; Berger, *Intervention by Public Agencies in Private Litigation in the Federal Courts* (1940) 50 Yale L.J. 65.

Regarding the construction of subdivision (b)(2), see *Allen Calculators, Inc. v. National Cash Register Co.* (1944) 322 U.S. 137.

NOTES OF ADVISORY COMMITTEE ON RULES—1948 AMENDMENT

The amendment substitutes the present statutory reference.

NOTES OF ADVISORY COMMITTEE ON RULES—1963 AMENDMENT

This amendment conforms to the amendment of Rule 5(a). See the Advisory Committee's Note to that amendment.

NOTES OF ADVISORY COMMITTEE ON RULES—1966 AMENDMENT

In attempting to overcome certain difficulties which have arisen in the application of present Rule 24(a)(2) and (3), this amendment draws upon the revision of the related Rules 19 (joinder of persons needed for just adjudication) and 23 (class actions), and the reasoning underlying that revision.

Rule 24(a)(3) as amended in 1948 provided for intervention of right where the applicant established that he would be adversely affected by the distribution or disposition of property involved in an action to which he had not been made a party. Significantly, some decided cases virtually disregarded the language of this provision. Thus Professor Moore states: "The concept of a fund has been applied so loosely that it is possible for a court to find a fund in almost any in personam action." 4 *Moore's Federal Practice*, par. 24.09[3], at 55 (2d ed. 1962), and see, e.g., *Formulabs, Inc. v. Hartley Pen Co.*, 275 F.2d 52 (9th Cir. 1960). This development was quite natural, for Rule 24(a)(3) was unduly restricted. If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene, and his right to do so should not depend on whether there is a fund to be distributed or otherwise disposed of. Intervention of right is here seen to be a kind of counterpart to Rule 19(a)(2)(i) on joinder of persons needed for a just adjudication: where, upon motion of a party in an action, an absentee should be joined so that he may protect his interest which as a practical matter may be substantially impaired by the disposition of the action, he ought to have a right to intervene in the action on his own motion. See Louisell & Hazard, *Pleading and Procedure: State and Federal* 749–50 (1962).

The general purpose of original Rule 24(a)(2) was to entitle an absentee, purportedly represented by a party, to intervene in the action if he could establish with fair probability that the representation was inadequate. Thus, where an action is being prosecuted or defended by a trustee, a beneficiary of the trust should have a right to intervene if he can show that the trustee's representation of his interest probably is inadequate; similarly a member of a class should have the right to intervene in a class action if he can show the inadequacy of the representation of his interest by the representative parties before the court.

Original Rule 24(a)(2), however, made it a condition of intervention that "the applicant is or may be bound by a judgment in the action," and this created difficulties with intervention in class actions. If the "bound" language was read literally in the sense of res judicata, it could defeat intervention in some meritorious cases. A member of a class to whom a judgment in a class action extended by its terms (see Rule 23(c)(3), as amended) might be entitled to show in a later action, when the judgment in the class action was claimed to operate as res judicata against him, that the "representative" in the class action had not in fact adequately represented him. If he could make this showing, the class-action judgment might be held not to bind him. See *Hansberry v. Lee*, 311 U.S. 32 (1940). If a class member sought to intervene in the class action proper, while it was still pending, on grounds of inadequacy of representation, he could be met with the argument: if the representation was in fact inadequate, he would not be "bound" by the judgment when it was subsequently asserted against him as res judicata, hence he was not entitled to intervene; if the representation was in fact adequate, there was no occasion or ground for intervention. See *Sam Fox Publishing Co. v. United States*, 366 U.S. 683 (1961); cf. *Sutphen Estates, Inc. v. United States*, 342 U.S. 19 (1951). This reasoning might be linguistically justified by

original Rule 24(a)(2); but it could lead to poor results. Compare the discussion in *International M. & I. Corp. v. Von Clemm*, 301 F.2d 857 (2d Cir. 1962); *Atlantic Refining Co. v. Standard Oil Co.*, 304 F.2d 387 (D.C.Cir. 1962). A class member who claims that his ''representative'' does not adequately represent him, and is able to establish that proposition with sufficient probability, should not be put to the risk of having a judgment entered in the action which by its terms extends to him, and be obliged to test the validity of the judgment as applied to his interest by a later collateral attack. Rather he should, as a general rule, be entitled to intervene in the action.

The amendment provides that an applicant is entitled to intervene in an action when his position is comparable to that of a person under Rule 19(a)(2)(i), as amended, unless his interest is already adequately represented in the action by existing parties. The Rule 19(a)(2)(i) criterion imports practical considerations, and the deletion of the ''bound'' language similarly frees the rule from undue preoccupation with strict considerations of res judicata.

The representation whose adequacy comes into question under the amended rule is not confined to formal representation like that provided by a trustee for his beneficiary or a representative party in a class action for a member of the class. A party to an action may provide practical representation to the absentee seeking intervention although no such formal relationship exists between them, and the adequacy of this practical representation will then have to be weighed. See *International M. & I. Corp. v. Von Clemm*, and *Atlantic Refining Co. v. Standard Oil Co.*, both supra; *Wolpe v. Poretsky*, 144 F.2d 505 (D.C.Cir. 1944), cert. denied, 323 U.S. 777 (1944); cf. *Ford Motor Co. v. Bisanz Bros.*, 249 F.2d 22 (8th Cir. 1957); and generally, Annot., 84 A.L.R.2d 1412 (1961).

An intervention of right under the amended rule may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1991 AMENDMENT

Language is added to bring Rule 24(c) into conformity with the statute cited, resolving some confusion reflected in district court rules. As the text provides, counsel challenging the constitutionality of legislation in an action in which the appropriate government is not a party should call the attention of the court to its duty to notify the appropriate governmental officers. The statute imposes the burden of notification on the court, not the party making the constitutional challenge, partly in order to protect against any possible waiver of constitutional rights by parties inattentive to the need for notice. For this reason, the failure of a party to call the court's attention to the matter cannot be treated as a waiver.

COMMITTEE NOTES ON RULES—2006 AMENDMENT

New Rule 5.1 replaces the final three sentences of Rule 24(c), implementing the provisions of 28 U.S.C. §2403. Section 2403 requires notification to the Attorney General of the United States when the constitutionality of an Act of Congress is called in question, and to the state attorney general when the constitutionality of a state statute is drawn into question.

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, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons, and may be served in any judicial district. 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 or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, 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.

(1) When a public officer is a party to an action in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and the officer's successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

(2) A public officer who sues or is sued in an official capacity may be described as a party by the officer's official title rather than by name; but the court may require the officer's name to be added.

(As amended Dec. 29, 1948, eff. Oct. 20, 1949; Apr. 17, 1961, eff. July 19, 1961; Jan. 21, 1963, eff. July 1, 1963; Mar. 2, 1987, eff. Aug. 1, 1987.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

Note to Subdivision (a). 1. The first paragraph of this rule is based upon [former] Equity Rule 45 (Death of Party—Revivor) and U.S.C., Title 28, [former] §778 (Death of parties; substitution of executor or administrator). The *scire facias* procedure provided for in the statute cited is superseded and the writ is abolished by Rule 81 (b). Paragraph two states the content of U.S.C., Title 28, [former] §779 (Death of one of several plaintiffs or defendants). With these two paragraphs compare generally English Rules Under the Judicature Act (The Annual Practice, 1937) O. 17, r.r. 1–10.

2. This rule modifies U.S.C., Title 28, [former] §§778 (Death of parties; substitution of executor or administrator), 779 (Death of one of several plaintiffs or defendants), and 780 (Survival of actions, suits, or proceedings, etc.) insofar as they differ from it.

Note to Subdivisions (b) and (c). These are a combination and adaptation of N.Y.C.P.A. (1937) §83 and Calif.Code Civ.Proc. (Deering, 1937) §385; see also 4 Nev.Comp.Laws (Hillyer, 1929) §8561.

Note to Subdivision (d). With the first and last sentences compare U.S.C., Title 28, [former] §780 (Survival of actions, suits, or proceedings, etc.). With the second sentence of this subdivision compare *Ex parte La Prade*, 289 U.S. 444 (1933).

NOTES OF ADVISORY COMMITTEE ON RULES—1948 AMENDMENT

The Act of February 13, 1925, 43 Stat. 941, U.S.C. Title 28, §780, is repealed and not included in revised Title 28, for the stated reason that it is ''Superseded by Rules 25 and 81 of the Federal Rules of Civil Procedure.'' See Report from the Committee on the Judiciary, House of Representatives, to Accompany H.R. 3214, House Rept. 308 (80th Cong., 1st Sess.), p. A239. Those officers which that Act specified but which were not enumerated in Rule 25(d), namely, officers of ''the Canal Zone, or of a Territory or an insular possession of the United States, . . . or other governmental agency of such Territory or insular possession,'' should now be specifically enumerated in the rule and the amendment so provides.

NOTES OF ADVISORY COMMITTEE ON RULES—1961 AMENDMENT

Subdivision (d)(1). Present Rule 25(d) is generally considered to be unsatisfactory. 4 *Moore's Federal Practice* ¶25.01[7] (2d ed. 1950); Wright, *Amendments to the Federal Rules: The Function of a Continuing Rules Committee*, 7 Vand.L.Rev. 521, 529 (1954); *Developments in the Law—Remedies Against the United States and Its Officials*, 70 Harv.L.Rev. 827, 931–34 (1957). To require, as a condition of substituting a successor public officer as a party to a pending action, that an application be made with a showing that there is substantial need for continuing the litigation, can rarely serve any useful purpose and fosters a burdensome formality. And to prescribe a short, fixed time period for substitution which cannot be extended even by agreement, see *Snyder v. Buck*, 340 U.S. 15, 19 (1950), with the penalty of dismissal of the action, ''makes a trap for unsuspecting litigants which seems unworthy of a great government.'' *Vibra Brush Corp. v. Schaffer*, 256 F.2d 681, 684 (2d Cir. 1958). Although courts have on occasion found means of undercutting the rule, *e.g. Acheson v. Furusho*, 212 F.2d 284 (9th Cir. 1954) (substitution of defendant officer unnecessary on theory that only a declaration of status was sought), it has operated harshly in many instances, *e.g. Snyder v. Buck, supra; Poindexter v. Folsom*, 242 F.2d 516 (3d Cir. 1957).

Under the amendment, the successor is automatically substituted as a party without an application or showing of need to continue the action. An order of substitution is not required, but may be entered at any time if a party desires or the court thinks fit.

The general term ''public officer'' is used in preference to the enumeration which appears in the present rule. It comprises Federal, State, and local officers.

The expression ''in his official capacity'' is to be interpreted in its context as part of a simple procedural rule for substitution; care should be taken not to distort its meaning by mistaken analogies to the doctrine of sovereign immunity from suit or the Eleventh Amendment. The amended rule will apply to all actions brought by public officers for the government, and to any action brought in form against a named officer, but intrinsically against the government or the office or the incumbent thereof whoever he may be from time to time during the action. Thus the amended rule will apply to actions against officers to compel performance of official duties or to obtain judicial review of their orders. It will also apply to actions to prevent officers from acting in excess of their authority or under authority not validly conferred, *cf. Philadelphia Co. v. Stimson*, 223 U.S. 605 (1912), or from enforcing unconstitutional enactments, *cf. Ex parte Young*, 209 U.S. 123 (1908); *Ex parte La Prade*, 289 U.S. 444 (1933). In general it will apply whenever effective relief would call for corrective behavior by the one then having official status and power, rather than one who has lost that status and power through ceasing to hold office. *Cf. Land v. Dollar*, 330 U.S. 731 (1947); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). Excluded from the operation of the amended rule will be the relatively infrequent actions which are directed to securing money judgments against the named officers enforceable against their personal assets; in these cases Rule 25(a)(1), not Rule 25(d), applies to the question of substitution. Examples are actions against officers seeking to make them pay damages out of their own pockets for defamatory utterances or other misconduct in some way related to the office, see *Barr v. Matteo*, 360 U.S. 564 (1959); *Howard v. Lyons*, 360 U.S. 593 (1959); *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950). Another example is the anomalous action for a tax refund against a collector of internal revenue, see *Ignelzi v. Granger*, 16 F.R.D. 517 (W.D.Pa. 1955), 28 U.S.C. §2006, 4 Moore, *supra*, ¶25.05, p. 531; but see 28 U.S.C. §1346(a)(1), authorizing the bringing of such suits against the United States rather than the officer.

Automatic substitution under the amended rule, being merely a procedural device for substituting a successor for a past officeholder as a party, is distinct from and does not affect any substantive issues which may be involved in the action. Thus a defense of immunity from suit will remain in the case despite a substitution.

Where the successor does not intend to pursue the policy of his predecessor which gave rise to the lawsuit, it will be open to him, after substitution, as plaintiff to seek voluntary dismissal of the action, or as defendant to seek to have the action dismissed as moot or to take other appropriate steps to avert a judgment or decree. Contrast *Ex parte La Prade, supra; Allen v. Regents of the University System*, 304 U.S. 439 (1938); *McGrath v. National Assn. of Mfgrs.*, 344 U.S. 804 (1952); *Danenberg v. Cohen*, 213 F.2d 944 (7th Cir. 1954).

As the present amendment of Rule 25(d)(1) eliminates a specified time period to secure substitution of public officers, the reference in Rule 6(b) (regarding enlargement of time) to Rule 25 will no longer apply to these public-officer substitutions.

As to substitution on appeal, the rules of the appellate courts should be consulted.

Subdivision (d)(2). This provision, applicable in ''official capacity'' cases as described above, will encourage the use of the official title without any mention of the officer individually, thereby recognizing the intrinsic character of the action and helping to eliminate concern with the problem of substitution. If for any reason it seems necessary or desirable to add the individual's name, this may be done upon motion or on the court's initiative without dismissal of the action; thereafter the procedure of amended Rule 25(d)(1) will apply if the individual named ceases to hold office.

For examples of naming the office or title rather than the officeholder, see Annot., 102 A.L.R. 943, 948–52; Comment, 50 Mich.L.Rev. 443, 450 (1952); *cf.* 26 U.S.C. §7484. Where an action is brought by or against a board or agency with continuity of existence, it has been often decided that there is no need to name the individual members and substitution is unnecessary when the personnel changes. 4 Moore, *supra*, ¶25.09, p. 536. The practice encouraged by amended Rule 25(d)(2) is similar.

NOTES OF ADVISORY COMMITTEE ON RULES—1963 AMENDMENT

Present Rule 25(a)(1), together with present Rule 6(b), results in an inflexible requirement that an action be

dismissed as to a deceased party if substitution is not carried out within a fixed period measured from the time of the death. The hardships and inequities of this unyielding requirement plainly appear from the cases. See *e.g.*, *Anderson v. Yungkau*, 329 U.S. 482, 67 S.Ct. 428, 91 L.Ed. 436 (1947); *Iovino v. Waterson*, 274 F.2d 41 (1959), *cert. denied*, *Carlin v. Sovino*, 362 U.S. 949, 80 S.Ct. 860, 4 L.Ed.2d 867 (1960); *Perry v. Allen*, 239 F.2d 107 (5th Cir. 1956); *Starnes v. Pennsylvania R.R.*, 26 F.R.D. 625 (E.D.N.Y.), *aff'd per curiam*, 295 F.2d 704 (2d Cir. 1961), cert. denied, 369 U.S. 813, 82 S.Ct. 688, 7 L.Ed.2d 612 (1962); *Zdanok v. Glidden Co.*, 28 F.R.D. 346 (S.D.N.Y. 1961). See also 4 *Moore's Federal Practice* ¶25.01[9] (Supp. 1960); 2 Barron & Holtzoff, *Federal Practice & Procedure* §621, at 420–21 (Wright ed. 1961).

The amended rule establishes a time limit for the motion to substitute based not upon the time of the death, but rather upon the time information of the death as provided by the means of a suggestion of death upon the record, i.e., service of a statement of the fact of the death. Cf. Ill.Ann.Stat., ch. 110, §54(2) (Smith-Hurd 1956). The motion may not be made later than 90 days after the service of the statement unless the period is extended pursuant to Rule 6(b), as amended. See the Advisory Committee's Note to amended Rule 6(b). See also the new Official Form 30.

A motion to substitute may be made by any party or by the representative of the deceased party without awaiting the suggestion of death. Indeed, the motion will usually be so made. If a party or the representative of the deceased party desires to limit the time within which another may make the motion, he may do so by suggesting the death upon the record.

A motion to substitute made within the prescribed time will ordinarily be granted, but under the permissive language of the first sentence of the amended rule (''the court may order'') it may be denied by the court in the exercise of a sound discretion if made long after the death—as can occur if the suggestion of death is not made or is delayed—and circumstances have arisen rendering it unfair to allow substitution. Cf. *Anderson v. Yungkau*, supra, 329 U.S. at 485, 486, 67 S.Ct. at 430, 431, 91 L.Ed. 436, where it was noted under the present rule that settlement and distribution of the state of a deceased defendant might be so far advanced as to warrant denial of a motion for substitution even though made within the time limit prescribed by that rule. Accordingly, a party interested in securing substitution under the amended rule should not assume that he can rest indefinitely awaiting the suggestion of death before he makes his motion to substitute.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

V. DEPOSITIONS AND DISCOVERY

NOTES OF ADVISORY COMMITTEE ON RULES—1970 AMENDMENTS TO DISCOVERY RULES

This statement is intended to serve as a general introduction to the amendments of Rules 26–37, concerning discovery, as well as related amendments of other rules. A separate note of customary scope is appended to amendments proposed for each rule. This statement provides a framework for the consideration of individual rule changes.

Changes in the Discovery Rules

The discovery rules, as adopted in 1938, were a striking and imaginative departure from tradition. It was expected from the outset that they would be important, but experience has shown them to play an even larger role than was initially foreseen. Although the discovery rules have been amended since 1938, the changes were relatively few and narrowly focused, made in order to remedy specific defects. The amendments now proposed reflect the first comprehensive review of the discovery rules undertaken since 1938. These amendments make substantial changes in the discovery rules. Those summarized here are among the more important changes.

Scope of Discovery. New provisions are made and existing provisions changed affecting the scope of discovery: (1) The contents of insurance policies are made discoverable (Rule 26(b)(2)). (2) A showing of good cause is no longer required for discovery of documents and things and entry upon land (Rule 34). However, a showing of need is required for discovery of ''trial preparation'' materials other than a party's discovery of his own statement and a witness' discovery of his own statement; and protection is afforded against disclosure in such documents of mental impressions, conclusions, opinions, or legal theories concerning the litigation. (Rule 26(b)(3)). (3) Provision is made for discovery with respect to experts retained for trial preparation, and particularly those experts who will be called to testify at trial (Rule 26(b)(4)). (4) It is provided that interrogatories and requests for admission are not objectionable simply because they relate to matters of opinion or contention, subject of course to the supervisory power of the court (Rules 33(b), 36(a)). (5) Medical examination is made available as to certain nonparties. (Rule 35(a)).

Mechanics of Discovery. A variety of changes are made in the mechanics of the discovery process, affecting the sequence and timing of discovery, the respective obligations of the parties with respect to requests, responses, and motions for court orders, and the related powers of the court to enforce discovery requests and to protect against their abusive use. A new provision eliminates the automatic grant of priority in discovery to one side (Rule 26(d)). Another provides that a party is not under a duty to supplement his responses to requests for discovery, except as specified (Rule 26(e)).

Other changes in the mechanics of discovery are designed to encourage extrajudicial discovery with a minimum of court intervention. Among these are the following: (1) The requirement that a plaintiff seek leave of court for early discovery requests is eliminated or reduced, and motions for a court order under Rule 34 are made unnecessary. Motions under Rule 35 are continued. (2) Answers and objections are to be served together and an enlargement of the time for response is provided. (3) The party seeking discovery, rather than the objecting party, is made responsible for invoking judicial determination of discovery disputes not resolved by the parties. (4) Judicial sanctions are tightened with respect to unjustified insistence upon or objection to discovery. These changes bring Rules 33, 34, and 36 substantially into line with the procedure now provided for depositions.

Failure to amend Rule 35 in the same way is based upon two considerations. First, the Columbia Survey (described below) finds that only about 5 percent of medical examinations require court motions, of which about half result in court orders. Second and of greater importance, the interest of the person to be examined in the privacy of his person was recently stressed by the Supreme Court in *Schlagenhauf v. Holder*, 379 U.S. 104 (1964). The court emphasized the trial judge's responsibility to assure that the medical examination was justified, particularly as to its scope.

Rearrangement of Rules. A limited rearrangement of the discovery rules has been made, whereby certain provisions are transferred from one rule to another. The reasons for this rearrangement are discussed below in a separate section of this statement, and the details are set out in a table at the end of this statement.

Optional Procedures. In two instances, new optional procedures have been made available. A new procedure is provided to a party seeking to take the deposition of a corporation or other organization (Rule 30(b)(6)). A party on whom interrogatories have been served requesting information derivable from his business records may under specified circumstances produce the records rather than give answers (Rule 33(c)).

Other Changes. This summary of changes is by no means exhaustive. Various changes have been made in

order to improve, tighten, or clarify particular provisions, to resolve conflicts in the case law, and to improve language. All changes, whether mentioned here or not, are discussed in the appropriate note for each rule.

A Field Survey of Discovery Practice

Despite widespread acceptance of discovery as an essential part of litigation, disputes have inevitably arisen concerning the values claimed for discovery and abuses alleged to exist. Many disputes about discovery relate to particular rule provisions or court decisions and can be studied in traditional fashion with a view to specific amendment. Since discovery is in large measure extra-judicial, however, even these disputes may be enlightened by a study of discovery ''in the field.'' And some of the larger questions concerning discovery can be pursued only by a study of its operation at the law office level and in unreported cases.

The Committee, therefore, invited the Project for Effective Justice of Columbia Law School to conduct a field survey of discovery. Funds were obtained from the Ford Foundation and the Walter E. Meyer Research Institute of Law, Inc. The survey was carried on under the direction of Prof. Maurice Rosenberg of Columbia Law School. The Project for Effective Justice has submitted a report to the Committee entitled ''Field Survey of Federal Pretrial Discovery'' (hereafter referred to as the Columbia Survey). The Committee is deeply grateful for the benefit of this extensive undertaking and is most appreciative of the cooperation of the Project and the funding organizations. The Committee is particularly grateful to Professor Rosenberg who not only directed the survey but has given much time in order to assist the Committee in assessing the results.

The Columbia Survey concludes, in general, that there is no empirical evidence to warrant a fundamental change in the philosophy of the discovery rules. No widespread or profound failings are disclosed in the scope or availability of discovery. The costs of discovery do not appear to be oppressive, as a general matter, either in relation to ability to pay or to the stakes of the litigation. Discovery frequently provides evidence that would not otherwise be available to the parties and thereby makes for a fairer trial or settlement. On the other hand, no positive evidence is found that discovery promotes settlement.

More specific findings of the Columbia Survey are described in other Committee notes, in relation to particular rule provisions and amendments. Those interested in more detailed information may obtain it from the Project for Effective Justice.

Rearrangement of the Discovery Rules

The present discovery rules are structured entirely in terms of individual discovery devices, except for Rule 27 which deals with perpetuation of testimony, and Rule 37 which provides sanctions to enforce discovery. Thus, Rules 26 and 28 to 32 are in terms addressed only to the taking of a deposition of a party or third person. Rules 33 to 36 then deal in succession with four additional discovery devices: Written interrogatories to parties, production for inspection of documents and things, physical or mental examination and requests for admission.

Under the rules as promulgated in 1938, therefore, each of the discovery devices was separate and self-contained. A defect of this arrangement is that there is no natural location in the discovery rules for provisions generally applicable to all discovery or to several discovery devices. From 1938 until the present, a few amendments have applied a discovery provision to several rules. For example, in 1948, the scope of deposition discovery in Rule 26(b) and the provision for protective orders in Rule 30(b) were incorporated by reference in Rules 33 and 34. The arrangement was adequate so long as there were few provisions governing discovery generally and these provisions were relatively simple.

As will be seen, however, a series of amendments are now proposed which govern most or all of the discovery devices. Proposals of a similar nature will probably be made in the future. Under these circumstances, it is very desirable, even necessary, that the discovery rules contain one rule addressing itself to discovery generally.

Rule 26 is obviously the most appropriate rule for this purpose. One of its subdivisions, Rule 26(b), in terms governs only scope of deposition discovery, but it has been expressly incorporated by reference in Rules 33 and 34 and is treated by courts as setting a general standard. By means of a transfer to Rule 26 of the provisions for protective orders now contained in Rule 30(b), and a transfer from Rule 26 of provisions addressed exclusively to depositions, Rule 26 is converted into a rule concerned with discovery generally. It becomes a convenient vehicle for the inclusion of new provisions dealing with the scope, timing, and regulation of discovery. Few additional transfers are needed. See table showing rearrangement of rules, set out below.

There are, to be sure, disadvantages in transferring any provision from one rule to another. Familiarity with the present pattern, reinforced by the references made by prior court decisions and the various secondary writings about the rules, is not lightly to be sacrificed. Revision of treatises and other references works is burdensome and costly. Moreover, many States have adopted the existing pattern as a model for their rules.

On the other hand, the amendments now proposed will in any event require revision of texts and reference works as well as reconsideration by States following the Federal model. If these amendments are to be incorporated in an understandable way, a rule with general discovery provisions is needed. As will be seen, the proposed rearrangement produces a more coherent and intelligible pattern for the discovery rules taken as a whole. The difficulties described are those encountered whenever statutes are reexamined and revised. Failure to rearrange the discovery rules now would freeze the present scheme, making future change even more difficult.

Table Showing Rearrangement of Rules

Existing Rule No.	*New Rule No.*
26(a)	30(a), 31(a)
26(c)	30(c)
26(d)	32(a)
26(e)	32(b)
26(f)	32(c)
30(a)	30(b)
30(b)	26(c)
32	32(d)

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

(a) REQUIRED DISCLOSURES; METHODS TO DISCOVER ADDITIONAL MATTER.

(1) *Initial Disclosures*. Except in categories of proceedings specified in Rule 26(a)(1)(E), or to the extent otherwise stipulated or directed by order, a party must, without awaiting a discovery request, provide to other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment, identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all documents, electronically stored information, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment;

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

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

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

(i) an action for review on an administrative record;

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

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

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

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

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

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

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

(ix) an action to enforce an arbitration award.

These disclosures must be made at or within 14 days after the Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in the circumstances of the action and states the objection in the Rule 26(f) discovery plan. In ruling on the objection, the court must determine what disclosures—if any—are to be made, and set the time for disclosure. Any party first served or otherwise joined after the Rule 26(f) conference must make these disclosures within 30 days after being served or joined unless a different time is set by stipulation or court order. A party must make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) *Disclosure of Expert Testimony*.

(A) In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(C) These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), within 30 days after the disclosure made by the other party. The parties shall supplement these disclosures when required under subdivision (e)(1).

(3) *Pretrial Disclosures*. In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to other parties and promptly file with the court the following information regarding the evidence that it may present at trial other than solely for impeachment:

(A) the name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises;

(B) the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and

(C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

Unless otherwise directed by the court, these disclosures must be made at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by the court, a party may serve and promptly file a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(B), and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under Rule 26(a)(3)(C). Objections not so disclosed, other than objections

under Rules 402 and 403 of the Federal Rules of Evidence, are waived unless excused by the court for good cause.

(4) *Form of Disclosures*. Unless the court orders otherwise, all disclosures under Rules 26(a)(1) through (3) must be made in writing, signed, and served.

(5) *Methods to Discover Additional Matter*. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property under Rule 34 or 45(a)(1)(C), for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) DISCOVERY SCOPE AND LIMITS. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General*. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any 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. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii).

(2) *Limitations*.

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

(B) A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(C) The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Rule 26(c).

(3) *Trial Preparation: Materials*. Subject to the provisions of subdivision (b)(4) 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 the 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.

(4) *Trial Preparation: Experts*.

(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under subdivision (a)(2)(B), the deposition shall not be conducted until after the report is provided.

(B) A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reason-

able fee for time spent in responding to discovery under this subdivision; and (ii) with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(5) *Claims of Privilege or Protection of Trial-Preparation Materials.*

(A) *Information Withheld.* When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial-preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(B) *Information Produced.* If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

(c) PROTECTIVE ORDERS. Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

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

(2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters;

(5) that discovery be conducted with no one present except persons designated by the court;

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

(7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or other person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) TIMING AND SEQUENCE OF DISCOVERY. Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E), or when authorized under these rules or by order or agreement of the parties, a party may not seek discovery from any source before the parties have conferred as required by Rule 26(f). Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, does not operate to delay any other party's discovery.

(e) SUPPLEMENTATION OF DISCLOSURES AND RESPONSES. A party who has made a disclosure under subdivision (a) or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if ordered by the court or in the following circumstances:

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

(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

(f) CONFERENCE OF PARTIES; PLANNING FOR DISCOVERY. Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E) or when otherwise ordered, the parties must, as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), confer to consider the nature and basis of their claims and defenses and the possi-

bilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by Rule 26(a)(1), to discuss any issues relating to preserving discoverable information, and to develop a proposed discovery plan that indicates the parties' views and proposals concerning:

(1) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement as to when disclosures under Rule 26(a)(1) were made or will be made;

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

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

(4) any issues relating to claims of privilege or of protection as trial-preparation material, including—if the parties agree on a procedure to assert such claims after production—whether to ask the court to include their agreement in an order;

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

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

The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. A court may order that the parties or attorneys attend the conference in person. If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule (i) require that the conference between the parties occur fewer than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b), and (ii) require that the written report outlining the discovery plan be filed fewer than 14 days after the conference between the parties, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

(g) SIGNING OF DISCLOSURES, DISCOVERY REQUESTS, RESPONSES, AND OBJECTIONS.

(1) Every disclosure made pursuant to subdivision (a)(1) or subdivision (a)(3) shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the disclosure and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.

(2) Every discovery request, response, or objection made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response, or objection is:

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

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

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

If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

(3) If without substantial justification a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the disclosure, 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.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Mar. 30, 1970, eff. July 1, 1970; Apr. 29, 1980, eff. Aug. 1, 1980; Apr. 28, 1983, eff. Aug. 1, 1983; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 12, 2006, eff. Dec. 1, 2006.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

Note to Subdivision (a). This rule freely authorizes the taking of depositions under the same circumstances and by the same methods whether for the purpose of discovery or for the purpose of obtaining evidence. Many states have adopted this practice on account of its simplicity and effectiveness, safeguarding it by imposing such restrictions upon the subsequent use of the deposition at the trial or hearing as are deemed advisable. See Ark.Civ.Code (Crawford, 1934) §§606–607; Calif.Code Civ.Proc. (Deering, 1937) §2021; 1 Colo.Stat.Ann. (1935) Code Civ.Proc. §376; Idaho Code Ann. (1932) §16–906; Ill. Rules of Pract., Rule 19 (Ill.Rev.Stat. (1937) ch. 110, §259.19); Ill.Rev.Stat. (1937) ch. 51, §24; 2 Ind.Stat.Ann. (Burns, 1933) §§2–1501, 2–1506; Ky.Codes (Carroll, 1932) Civ.Pract. §557; 1 Mo.Rev.Stat. (1929) §1753; 4 Mont.Rev.Codes Ann. (1935) §10645; Neb.Comp.Stat. (1929) ch. 20, §§1246–7; 4 Nev.Comp.Laws (Hillyer, 1929) §9001; 2 N.H.Pub.Laws (1926) ch. 337, §1; N.C.Code Ann. (1935) §1809; 2 N.D.Comp.Laws Ann. (1913) §§7889–7897; 2 Ohio Gen.Code Ann. (Page, 1926) §§11525–6; 1 Ore.Code Ann. (1930) Title 9, §1503; 1 S.D.Comp.Laws (1929) §§2713–16; Tex.Stat. (Vernon, 1928) arts. 3738, 3752, 3769; Utah Rev.Stat.Ann. (1933) §104–51–7; Wash. Rules of Practice adopted by the Supreme Ct., Rule 8, 2

Wash.Rev.Stat.Ann. (Remington, 1932) §308–8; W.Va.Code (1931) ch. 57, art. 4, §1. Compare [former] Equity Rules 47 (Depositions—To be Taken in Exceptional Instances); 54 (Depositions Under Revised Statutes, Sections 863, 865, 866, 867—Cross-Examination); 58 (Discovery—Interrogatories—Inspection and Production of Documents—Admission of Execution or Genuineness).

This and subsequent rules incorporate, modify, and broaden the provisions for depositions under U.S.C., Title 28, [former] §§639 (Depositions *de bene esse;* when and where taken; notice), 640 (Same; mode of taking), 641 (Same; transmission to court), 644 (Depositions under *dedimus potestatem* and *in perpetuam*), 646 (Deposition under *dedimus potestatem;* how taken). These statutes are superseded insofar as they differ from this and subsequent rules. U.S.C., Title 28, [former] §643 (Depositions; taken in mode prescribed by State laws) is superseded by the third sentence of Subdivision (a).

While a number of states permit discovery only from parties or their agents, others either make no distinction between parties or agents of parties and ordinary witnesses, or authorize the taking of ordinary depositions, without restriction, from any persons who have knowledge of relevant facts. See Ark.Civ.Code (Crawford, 1934) §§606–607; 1 Idaho Code Ann. (1932) §16–906; Ill. Rules of Pract., Rule 19 (Ill.Rev.Stat. (1937) ch. 110, §259.19); Ill.Rev.Stat. (1937) ch. 51, §24; 2 Ind.Stat.Ann. (Burns, 1933) §2–1501; Ky.Codes (Carroll, 1932) Civ.Pract. §§554–558; 2 Md.Ann.Code (Bagby, 1924) Art. 35, §21; 2 Minn.Stat. (Mason, 1927) §9820; 1 Mo.Rev.Stat. (1929) §§1753, 1759; Neb.Comp.Stat. (1929) ch. 20, §§1246–7; 2 N.H.Pub.Laws (1926) ch. 337, §1; 2 N.D.Comp.Laws Ann. (1913) §7897; 2 Ohio Gen.Code Ann. (Page, 1926) §§11525–6; 1 S.D.Comp.Laws (1929) §§2713–16; Tex.Stat. (Vernon, 1928) arts. 3738, 3752, 3769; Utah Rev.Stat.Ann. (1933) §104–51–7; Wash. Rules of Practice adopted by Supreme Ct., Rule 8, 2 Wash.Rev.Stat.Ann. (Remington, 1932) §308–8; W.Va.Code (1931) ch. 57, art. 4, §1.

The more common practice in the United States is to take depositions on notice by the party desiring them, without any order from the court, and this has been followed in these rules. See Calif.Code Civ.Proc. (Deering 1937) §2031; 2 Fla.Comp.Gen.Laws Ann. (1927) §§4405–7; 1 Idaho Code Ann. (1932) §16–902; Ill. Rules of Pract., Rule 19 (Ill.Rev.Stat. (1937) ch. 110, §25919); Ill.Rev.Stat. (1937) ch. 51, §24; 2 Ind.Stat.Ann. (Burns, 1933) §2–1502; Kan.Gen.Stat.Ann. (1935) §60–2827; Ky.Codes (Carroll, 1932) Civ.Pract. §565; 2 Minn.Stat. (Mason, 1927) §9820; 1 Mo.Rev.Stat. (1929) §1761; 4 Mont.Rev.Codes Ann. (1935) §10651; Nev.Comp.Laws (Hillyer, 1929) §9002; N.C.Code Ann. (1935) §1809; 2 N.D.Comp.Laws Ann. (1913) §7895; Utah Rev.Stat.Ann. (1933) §104–51–8.

Note to Subdivision (b). While the old chancery practice limited discovery to facts supporting the case of the party seeking it, this limitation has been largely abandoned by modern legislation. See Ala.Code Ann. (Michie, 1928) §§7764–7773; 2 Ind.Stat.Ann. (Burns, 1933) §§2–1028, 2–1506, 2–1728–2–1732; Iowa Code (1935) §11185; Ky.Codes (Carroll, 1932) Civ.Pract. §§557, 606 (8); La.Code Pract. (Dart, 1932) arts. 347–356; 2 Mass.Gen.Laws (Ter.Ed., 1932) ch. 231, §§61–67; 1 Mo.Rev.Stat. (1929) §§1753, 1759; Neb.Comp.Stat. (1929) §§20–1246, 20–1247; 2 N.H.Pub.Laws (1926) ch. 337, §1; 2 Ohio Gen.Code Ann. (Page, 1926) §§11497, 11526; Tex.Stat. (Vernon, 1928) arts. 3738, 3753, 3769; Wis.Stat. (1935) §326.12; Ontario Consol.Rules of Pract. (1928) Rules 237–347; Quebec Code of Civ.Proc. (Curran, 1922) §§286–290.

Note to Subdivisions (d), (e), and (f). The restrictions here placed upon the use of depositions at the trial or hearing are substantially the same as those provided in U.S.C., Title 28, [former] §641, for depositions taken, *de bene esse*, with the additional provision that any deposition may be used when the court finds the existence of exceptional circumstances. Compare English Rules Under the Judicature Act (The Annual Practice, 1937) O. 37, r. 18 (with additional provision permitting use of deposition by consent of the parties). See also [former] Equity Rule 64 (Former Depositions, Etc., May be Used Before Master); and 2 Minn. Stat. (Mason, 1927) §9835 (Use in a subsequent action of a deposition filed in a previously dismissed action between the same parties and involving the same subject matter).

NOTES OF ADVISORY COMMITTEE ON RULES—1946 AMENDMENT

Subdivision (a). The amendment eliminates the requirement of leave of court for the taking of a deposition except where a plaintiff seeks to take a deposition within 20 days after the commencement of the action. The retention of the requirement where a deposition is sought by a plaintiff within 20 days of the commencement of the action protects a defendant who has not had an opportunity to retain counsel and inform himself as to the nature of the suit; the plaintiff, of course, needs no such protection. The present rule forbids the plaintiff to take a deposition, without leave of court, before the answer is served. Sometimes the defendant delays the serving of an answer for more than 20 days, but as 20 days are sufficient time for him to obtain a lawyer, there is no reason to forbid the plaintiff to take a deposition without leave merely because the answer has not been served. In all cases, Rule 30(a) empowers the court, for cause shown, to alter the time of the taking of a deposition, and Rule 30(b) contains provisions giving ample protection to persons who are unreasonably pressed. The modified practice here adopted is along the line of that followed in various states. See, *e.g.*, 8 Mo.Rev.Stat.Ann. (1939) §1917; 2 Burns' Ind.Stat.Ann. (1933) §2–1506.

Subdivision (b). The amendments to subdivision (b) make clear the broad scope of examination and that it may cover not only evidence for use at the trial but also inquiry into matters in themselves inadmissible as evidence but which will lead to the discovery of such evidence. The purpose of discovery is to allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case. *Engl v. Aetna Life Ins. Co.* (C.C.A.2d, 1943) 139 F.(2d) 469; *Mahler v. Pennsylvania R. Co.* (E.D.N.Y. 1945) 8 Fed.Rules Serv. 33.351, Case 1. In such a preliminary inquiry admissibility at trial should not be the test as to whether the information sought is within the scope of proper examination. Such a standard unnecessarily curtails the utility of discovery practice. Of course, matters entirely without bearing either as direct evidence or as leads to evidence are not within the scope of inquiry, but to the extent that the examination develops useful information, it functions successfully as an instrument of discovery, even if it produces no testimony directly admissible. *Lewis v. United Air Lines Transportation Corp.* (D.Conn. 1939) 27 F.Supp. 946; *Engl v. Aetna Life Ins. Co.*, supra; Mahler v. Pennsylvania R. Co., supra; Bloomer v. Sirian Lamp Co. (D.Del. 1944) 8 Fed.Rules Serv. 26b.31, Case 3; *Rousseau v. Langley* (S.D.N.Y. 1945) 9 Fed.Rules Serv. 34.41, Case 1 (Rule 26 contemplates ''examinations not merely for the narrow purpose of adducing testimony which may be offered in evidence but also for the broad discovery of information which may be useful in preparation for trial.''); *Olson Transportation Co. v. Socony-Vacuum Co.* (E.D.Wis. 1944) 8 Fed.Rules Serv. 34.41, Case 2 (''. . . the Rules . . . permit 'fishing' for evidence as they should.''); Note (1945) 45 Col.L.Rev. 482. Thus hearsay, while inadmissible itself, may suggest testimony which properly may be proved. Under Rule 26 (b) several cases, however, have erroneously limited discovery on the basis of admissibility, holding that the word ''relevant'' in effect meant ''material and competent under the rules of evidence''. *Poppino v. Jones Store Co.* (W.D.Mo. 1940) 3 Fed.Rules Serv. 26b.5, Case 1; *Benevento v. A. & P. Food Stores, Inc.* (E.D.N.Y. 1939) 26 F.Supp. 424. Thus it has been said that inquiry might not be made into statements or other matters which, when disclosed, amounted only to hearsay. See *Maryland for use of Montvila v. Pan-American Bus Lines, Inc.* (D.Md. 1940) 3 Fed.Rules Serv. 26b.211, Case 3; *Gitto v. ''Italia,'' Societa Anonima Di Navigazione* (E.D.N.Y. 1940) 31

F.Supp. 567; *Rose Silk Mills, Inc. v. Insurance Co. of North America* (S.D.N.Y. 1939) 29 F.Supp. 504; *Colpak v. Hetterick* (E.D.N.Y. 1941) 40 F.Supp. 350; *Matthies v. Peter F. Connolly Co.* (E.D.N.Y. 1941) 6 Fed.Rules Serv. 30a.22, Case 1, 2 F.R.D. 277; *Matter of Examination of Citizens Casualty Co. of New York* (S.D.N.Y. 1942) 7 Fed.Rules Serv. 26b.211, Case 1; *United States v. Silliman* (D.N.J. 1944) 8 Fed.Rules Serv. 26b.52, Case 1. The contrary and better view, however, has often been stated. See, *e.g.*, *Engl v. Aetna Life Ins. Co., supra; Stevenson v. Melady* (S.D.N.Y. 1940) 3 Fed.Rules Serv. 26b.31, Case 1, 1 F.R.D. 329; *Lewis v. United Air Lines Transport Corp., supra; Application of Zenith Radio Corp.* (E.D.Pa. 1941) 4 Fed.Rules Serv. 30b.21, Case 1, 1 F.R.D. 627; *Steingut v. Guaranty Trust Co. of New York* (S.D.N.Y. 1941) 4 Fed.Rules Serv. 26b.5. Case 2; *DeSeversky v. Republic Aviation Corp* (E.D.N.Y. 1941) 5 Fed.Rules Serv. 26b.31, Case 5; *Moore v. George A. Hormel & Co.* (S.D.N.Y. 1942) 6 Fed.Rules Serv. 30b.41, Case 1, 2 F.R.D. 340; *Hercules Powder Co. v. Rohm & Haas Co.* (D.Del. 1943) 7 Fed.Rules Serv. 45b.311, Case 2, 3 F.R.D. 302; *Bloomer v. Sirian Lamp Co., supra; Crosby Steam Gage & Valve Co. v. Manning, Maxwell & Moore, Inc.* (D.Mass. 1944) 8 Fed.Rules Serv. 26b.31, Case 1; *Patterson Oil Terminals, Inc. v. Charles Kurz & Co., Inc.* (E.D.Pa. 1945) 9 Fed.Rules Serv. 33.321, Case 2; *Pueblo Trading Co. v. Reclamation Dist. No. 1500* (N.D.Cal. 1945) 9 Fed.Rules Serv. 33.321, Case 4, 4 F.R.D. 471. See also discussion as to the broad scope of discovery in *Hoffman v. Palmer* (C.C.A.2d, 1942) 129 F.(2d) 976, 995–997, aff'd on other grounds (1942) 318 U.S. 109; Note (1945) 45 Col.L.Rev. 482.

NOTES OF ADVISORY COMMITTEE ON RULES—1963 AMENDMENT

This amendment conforms to the amendment of Rule 28(b). See the next-to-last paragraph of the Advisory Committee's Note to that amendment.

NOTES OF ADVISORY COMMITTEE ON RULES—1966 AMENDMENT

The requirement that the plaintiff obtain leave of court in order to serve notice of taking of a deposition within 20 days after commencement of the action gives rises to difficulties when the prospective deponent is about to become unavailable for examination. The problem is not confined to admiralty, but has been of special concern in that context because of the mobility of vessels and their personnel. When Rule 26 was adopted as Admiralty Rule 30A in 1961, the problem was alleviated by permitting depositions *de bene esse*, for which leave of court is not required. See Advisory Committee's Note to Admiralty Rule 30A (1961).

A continuing study is being made in the effort to devise a modification of the 20-day rule appropriate to both the civil and admiralty practice to the end that Rule 26(a) shall state a uniform rule applicable alike to what are now civil actions and suits in admiralty. Meanwhile, the exigencies of maritime litigation require preservation, for the time being at least, of the traditional de bene esse procedure for the post-unification counterpart of the present suit in admiralty. Accordingly, the amendment provides for continued availability of that procedure in admiralty and maritime claims within the meaning of Rule 9(h).

NOTES OF ADVISORY COMMITTEE ON RULES—1970 AMENDMENT

A limited rearrangement of the discovery rules is made, whereby certain rule provisions are transferred, as follows: Existing Rule 26(a) is transferred to Rules 30(a) and 31(a). Existing Rule 26(c) is transferred to Rule 30(c). Existing Rules 26(d), (e), and (f) are transferred to Rule 32. Revisions of the transferred provisions, if any, are discussed in the notes appended to Rules 30, 31, and 32. In addition, Rule 30(b) is transferred to Rule 26(c). The purpose of this rearrangement is to establish Rule 26 as a rule governing discovery in general. (The reasons are set out in the Advisory Committee's explanatory statement.)

Subdivision (a)—Discovery Devices. This is a new subdivision listing all of the discovery devices provided in the discovery rules and establishing the relationship between the general provisions of Rule 26 and the specific rules for particular discovery devices. The provision that the frequency of use of these methods is not limited confirms existing law. It incorporates in general form a provision now found in Rule 33.

Subdivision (b)—Scope of Discovery. This subdivision is recast to cover the scope of discovery generally. It regulates the discovery obtainable through any of the discovery devices listed in Rule 26(a).

All provisions as to scope of discovery are subject to the initial qualification that the court may limit discovery in accordance with these rules. Rule 26(c) (transferred from 30(b)) confers broad powers on the courts to regulate or prevent discovery even though the materials sought are within the scope of 26(b), and these powers have always been freely exercised. For example, a party's income tax return is generally held not privileged, 2A Barron & Holtzoff, *Federal Practice and Procedure*, §65.2 (Wright ed. 1961), and yet courts have recognized that interests in privacy may call for a measure of extra protection. *E.g.*, *Wiesenberger v. W. E. Hutton & Co.*, 35 F.R.D. 556 (S.D.N.Y. 1964). Similarly, the courts have in appropriate circumstances protected materials that are primarily of an impeaching character. These two types of materials merely illustrate the many situations, not capable of governance by precise rule, in which courts must exercise judgment. The new subsections in Rule 26(d) do not change existing law with respect to such situations.

Subdivision (b)(1)—In General. The language is changed to provide for the scope of discovery in general terms. The existing subdivision, although in terms applicable only to depositions, is incorporated by reference in existing Rules 33 and 34. Since decisions as to relevance to the subject matter of the action are made for discovery purposes well in advance of trial, a flexible treatment of relevance is required and the making of discovery, whether voluntary or under court order, is not a concession or determination of relevance for purposes of trial. *Cf.* 4 *Moore's Federal Practice* ¶26–16[1] (2d ed. 1966).

Subdivision (b)(2)—Insurance Policies. Both cases and commentators are sharply in conflict on the question whether defendant's liability insurance coverage is subject to discovery in the usual situation when the insurance coverage is not itself admissible and does not bear on another issue on the case. Examples of Federal cases requiring disclosure and supporting comments: *Cook v. Welty*, 253 F.Supp. 875 (D.D.C. 1966) (cases cited); *Johanek v. Aberle*, 27 F.R.D. 272 (D.Mont. 1961); Williams, *Discovery of Dollar Limits in Liability Policies in Automobile Tort Cases*, 10 Ala.L.Rev. 355 (1958); Thode, *Some Reflections on the 1957 Amendments to the Texas Rules*, 37 Tex.L.Rev. 33, 40–42 (1958). Examples of Federal cases refusing disclosure and supporting comments: *Bisserier v. Manning*, 207 F.Supp. 476 (D.N.J. 1962); *Cooper v. Stender*, 30 F.R.D. 389 (E.D.Tenn. 1962); Frank, *Discovery and Insurance Coverage*, 1959 Ins.L.J. 281; *Fournier, Pre-Trial Discovery of Insurance Coverage and Limits*, 28 Ford L.Rev. 215 (1959).

The division in reported cases is close. State decisions based on provisions similar to the federal rules are similarly divided. See cases collected in 2A Barron & Holtzoff, *Federal Practice and Procedure* §647.1, nn. 45.5, 45.6 (Wright ed. 1961). It appears to be difficult if not impossible to obtain appellate review of the issue. Resolution by rule amendment is indicated. The question is essentially procedural in that it bears upon preparation for trial and settlement before trial, and courts confronting the question, however, they have decided it, have generally treated it as procedural and governed by the rules.

The amendment resolves this issue in favor of disclosure. Most of the decisions denying discovery, some explicitly, reason from the text of Rule 26(b) that it permits discovery only of matters which will be admissible in evidence or appear reasonably calculated to lead to

such evidence; they avoid considerations of policy, regarding them as foreclosed. See *Bisserier v. Manning, supra*. Some note also that facts about a defendant's financial status are not discoverable as such, prior to judgment with execution unsatisfied, and fear that, if courts hold insurance coverage discoverable, they must extend the principle to other aspects of the defendant's financial status. The cases favoring disclosure rely heavily on the practical significance of insurance in the decisions lawyers make about settlement and trial preparation. In *Clauss v. Danker*, 264 F.Supp. 246 (S.D.N.Y. 1967), the court held that the rules forbid disclosure but called for an amendment to permit it.

Disclosure of insurance coverage will enable counsel for both sides to make the same realistic appraisal of the case, so that settlement and litigation strategy are based on knowledge and not speculation. It will conduce to settlement and avoid protracted litigation in some cases, though in others it may have an opposite effect. The amendment is limited to insurance coverage, which should be distinguished from any other facts concerning defendant's financial status (1) because insurance is an asset created specifically to satisfy the claim; (2) because the insurance company ordinarily controls the litigation; (3) because information about coverage is available only from defendant or his insurer; and (4) because disclosure does not involve a significant invasion of privacy.

Disclosure is required when the insurer "may be liable" on part or all of the judgment. Thus, an insurance company must disclose even when it contests liability under the policy, and such disclosure does not constitute a waiver of its claim. It is immaterial whether the liability is to satisfy the judgment directly or merely to indemnify or reimburse another after he pays the judgment.

The provision applies only to persons "carrying on an insurance business" and thus covers insurance companies and not the ordinary business concern that enters into a contract of indemnification. *Cf.* N.Y.Ins. Law §41. Thus, the provision makes no change in existing law on discovery of indemnity agreements other than insurance agreements by persons carrying on an insurance business. Similarly, the provision does not cover the business concern that creates a reserve fund for purposes of self-insurance.

For some purposes other than discovery, an application for insurance is treated as a part of the insurance agreement. The provision makes clear that, for discovery purposes, the application is not to be so treated. The insurance application may contain personal and financial information concerning the insured, discovery of which is beyond the purpose of this provision.

In no instance does disclosure make the facts concerning insurance coverage admissible in evidence.

Subdivision (b)(3)—Trial Preparation: Materials. Some of the most controversial and vexing problems to emerge from the discovery rules have arisen out of requests for the production of documents or things prepared in anticipation of litigation or for trial. The existing rules make no explicit provision for such materials. Yet, two verbally distinct doctrines have developed, each conferring a qualified immunity on these materials—the "good cause" requirement in Rule 34 (now generally held applicable to discovery of documents via deposition under Rule 45 and interrogatories under Rule 33) and the work-product doctrine of *Hickman v. Taylor*, 329 U.S. 495 (1947). Both demand a showing of justification before production can be had, the one of "good cause" and the other variously described in the *Hickman* case: "necessity or justification," "denial * * * would unduly prejudice the preparation of petitioner's case," or "cause hardship or injustice" 329 U.S. at 509–510.

In deciding the *Hickman* case, the Supreme Court appears to have expressed a preference in 1947 for an approach to the problem of trial preparation materials by judicial decision rather than by rule. Sufficient experience has accumulated, however, with lower court applications of the *Hickman* decision to warrant a reappraisal.

The major difficulties visible in the existing case law are (1) confusion and disagreement as to whether "good cause" is made out by a showing of relevance and lack of privilege, or requires an additional showing of necessity, (2) confusion and disagreement as to the scope of the *Hickman* work-product doctrine, particularly whether it extends beyond work actually performed by lawyers, and (3) the resulting difficulty of relating the "good cause" required by Rule 34 and the "necessity or justification" of the work-product doctrine, so that their respective roles and the distinctions between them are understood.

Basic Standard. Since Rule 34 in terms requires a showing of "good cause" for the production of all documents and things, whether or not trial preparation is involved, courts have felt that a single formula is called for and have differed over whether a showing of relevance and lack of privilege is enough or whether more must be shown. When the facts of the cases are studied, however, a distinction emerges based upon the type of materials. With respect to documents not obtained or prepared with an eye to litigation, the decisions, while not uniform, reflect a strong and increasing tendency to relate "good cause" to a showing that the documents are relevant to the subject matter of the action. *E.g., Connecticut Mutual Life Ins. Co. v. Shields*, 17 F.R.D. 273 (S.D.N.Y. 1959), with cases cited; *Houdry Process Corp. v. Commonwealth Oil Refining Co.*, 24 F.R.D. 58 (S.D.N.Y. 1955); see *Bell v. Commercial Ins. Co.*, 280 F.2d 514, 517 (3d Cir. 1960). When the party whose documents are sought shows that the request for production is unduly burdensome or oppressive, courts have denied discovery for lack of "good cause", although they might just as easily have based their decision on the protective provisions of existing Rule 30(b) (new Rule 26(c)). *E.g., Lauer v. Tankrederi*, 39 F.R.D. 334 (E.D.Pa. 1966).

As to trial-preparation materials, however, the courts are increasingly interpreting "good cause" as requiring more than relevance. When lawyers have prepared or obtained the materials for trial, all courts require more than relevance; so much is clearly commanded by *Hickman*. But even as to the preparatory work of nonlawyers, while some courts ignore work-product and equate "good cause" with relevance, *e.g., Brown v. New York, N.H. & H. RR.*, 17 F.R.D. 324 (S.D.N.Y. 1955), the more recent trend is to read "good cause" as requiring inquiry into the importance of and need for the materials as well as into alternative sources for securing the same information. In *Guilford Nat'l Bank v. Southern Ry.*, 297 F.2d 921 (4th Cir. 1962), statements of witnesses obtained by claim agents were held not discoverable because both parties had had equal access to the witnesses at about the same time, shortly after the collision in question. The decision was based solely on Rule 34 and "good cause"; the court declined to rule on whether the statements were work-product. The court's treatment of "good cause" is quoted at length and with approval in *Schlagenhauf v. Holder*, 379 U.S. 104, 117–118 (1964). See also *Mitchell v. Bass*, 252 F.2d 513 (8th Cir. 1958); *Hauger v. Chicago, R.I. & Pac. RR.*, 216 F.2d 501 (7th Cir. 1954); *Burke v. United States*, 32 F.R.D. 213 (E.D.N.Y. 1963). While the opinions dealing with "good cause" do not often draw an explicit distinction between trial preparation materials and other materials, in fact an overwhelming proportion of the cases in which special showing is required are cases involving trial preparation materials.

The rules are amended by eliminating the general requirement of "good cause" from Rule 34 but retaining a requirement of a special showing for trial preparation materials in this subdivision. The required showing is expressed, not in terms of "good cause" whose generality has tended to encourage confusion and controversy, but in terms of the elements of the special showing to be made: substantial need of the materials in the preparation of the case and inability without undue hardship to obtain the substantial equivalent of the materials by other means.

These changes conform to the holdings of the cases, when viewed in light of their facts. Apart from trial

preparation, the fact that the materials sought are documentary does not in and of itself require a special showing beyond relevance and absence of privilege. The protective provisions are of course available, and if the party from whom production is sought raises a special issue of privacy (as with respect to income tax returns or grand jury minutes) or points to evidence primarily impeaching, or can show serious burden or expense, the court will exercise its traditional power to decide whether to issue a protective order. On the other hand, the requirement of a special showing for discovery of trial preparation materials reflects the view that each side's informal evaluation of its case should be protected, that each side should be encouraged to prepare independently, and that one side should not automatically have the benefit of the detailed preparatory work of the other side. See Field and McKusick, *Maine Civil Practice* 264 (1959).

Elimination of a ''good cause'' requirement from Rule 34 and the establishment of a requirement of a special showing in this subdivision will eliminate the confusion caused by having two verbally distinct requirements of justification that the courts have been unable to distinguish clearly. Moreover, the language of the subdivision suggests the factors which the courts should consider in determining whether the requisite showing has been made. The importance of the materials sought to the party seeking them in preparation of his case and the difficulty he will have obtaining them by other means are factors noted in the *Hickman* case. The courts should also consider the likelihood that the party, even if he obtains the information by independent means, will not have the substantial equivalent of the documents the production of which he seeks.

Consideration of these factors may well lead the court to distinguish between witness statements taken by an investigator, on the one hand, and other parts of the investigative file, on the other. The court in *Southern Ry. v. Lanham*, 403 F.2d 119 (5th Cir. 1968), while it naturally addressed itself to the ''good cause'' requirements of Rule 34, set forth as controlling considerations the factors contained in the language of this subdivision. The analysis of the court suggests circumstances under which witness statements will be discoverable. The witness may have given a fresh and contemporaneous account in a written statement while he is available to the party seeking discovery only a substantial time thereafter. *Lanham, supra* at 127–128; *Guilford, supra* at 926. Or he may be reluctant or hostile. *Lanham, supra* at 128–129; *Brookshire v. Pennsylvania RR.*, 14 F.R.D. 154 (N.D.Ohio 1953); *Diamond v. Mohawk Rubber Co.*, 33 F.R.D. 264 (D.Colo. 1963). Or he may have a lapse of memory. *Tannenbaum v. Walker*, 16 F.R.D. 570 (E.D.Pa. 1954). Or he may probably be deviating from his prior statement. *Cf. Hauger v. Chicago, R.I. & Pac. RR.*, 216 F.2d 501 (7th Cir. 1954). On the other hand, a much stronger showing is needed to obtain evaluative materials in an investigator's reports. *Lanham, supra* at 131–133; *Pickett v. L. R. Ryan, Inc.*, 237 F.Supp. 198 (E.D.S.C. 1965).

Materials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes are not under the qualified immunity provided by this subdivision. *Gossman v. A. Duie Pyle, Inc.*, 320 F.2d 45 (4th Cir. 1963); *cf. United States v. New York Foreign Trade Zone Operators, Inc.*, 304 F.2d 792 (2d Cir. 1962). No change is made in the existing doctrine, noted in the *Hickman* case, that one party may discover relevant facts known or available to the other party, even though such facts are contained in a document which is not itself discoverable.

Treatment of Lawyers; Special Protection of Mental Impressions, Conclusions, Opinions, and Legal Theories Concerning the Litigation.—The courts are divided as to whether the work-product doctrine extends to the preparatory work only of lawyers. The *Hickman* case left this issue open since the statements in that case were taken by a lawyer. As to courts of appeals, compare *Alltmont v. United States*, 177 F.2d 971, 976 (3d Cir. 1949), *cert. denied*, 339 U.S. 967 (1950) (*Hickman* applied to statements obtained by FBI agents on theory it should apply to ''all statements of prospective witnesses which a party has obtained for his trial counsel's use''), with *Southern Ry. v. Campbell*, 309 F.2d 569 (5th Cir. 1962) (statements taken by claim agents not work-product), and *Guilford Nat'l Bank v. Southern Ry.*, 297 F.2d 921 (4th Cir. 1962) (avoiding issue of work-product as to claim agents, deciding case instead under Rule 34 ''good cause''). Similarly, the district courts are divided on statements obtained by claim agents, compare, *e.g., Brown v. New York, N.H. & H. RR.*, 17 F.R.D. 324 (S.D.N.Y. 1955) with *Hanke v. Milwaukee Electric Ry. & Transp. Co.*, 7 F.R.D. 540 (E.D. Wis. 1947); investigators, compare *Burke v. United States*, 32 F.R.D. 213 (E.D.N.Y.1963) with *Snyder v. United States*, 20 F.R.D. 7 (E.D.N.Y.1956); and insurers, compare *Gottlieb v. Bresler*, 24 F.R.D. 371 (D.D.C.1959) with *Burns v. Mulder*, 20 F.R.D. 605 (ED.Pa 1957). See 4 *Moore's Federal Practice* ¶26.23 [8.1] (2d ed. 1966); 2A Barron & Holtzoff, *Federal Practice and Procedure* §652.2 (Wright ed. 1961).

A complication is introduced by the use made by courts of the ''good cause'' requirement of Rule 34, as described above. A court may conclude that trial preparation materials are not work-product because not the result of lawyer's work and yet hold that they are not producible because ''good cause'' has not been shown. *Cf. Guilford Nat'l Bank v. Southern Ry.*, 297 F.2d 921 (4th Cir. 1962), cited and described above. When the decisions on ''good cause'' are taken into account, the weight of authority affords protection of the preparatory work of both lawyers and nonlawyers (though not necessarily to the same extent) by requiring more than a showing of relevance to secure production.

Subdivision (b)(3) reflects the trend of the cases by requiring a special showing, not merely as to materials prepared by an attorney, but also as to materials prepared in anticipation of litigation or preparation for trial by or for a party or any representative acting on his behalf. The subdivision then goes on to protect against disclosure the mental impressions, conclusions, opinions, or legal theories concerning the litigation of an attorney or other representative of a party. The *Hickman* opinion drew special attention to the need for protecting an attorney against discovery of memoranda prepared from recollection of oral interviews. The courts have steadfastly safeguarded against disclosure of lawyers' mental impressions and legal theories, as well as mental impressions and subjective evaluations of investigators and claim-agents. In enforcing this provision of the subdivision, the courts will sometimes find it necessary to order disclosure of a document but with portions deleted.

Rules 33 and 36 have been revised in order to permit discovery calling for opinions, contentions, and admissions relating not only to fact but also to the application of law to fact. Under those rules, a party and his attorney or other representative may be required to disclose, to some extent, mental impressions, opinions, or conclusions. But documents or parts of documents containing these matters are protected against discovery by this subdivision. Even though a party may ultimately have to disclose in response to interrogatories or requests to admit, he is entitled to keep confidential documents containing such matters prepared for internal use.

Party's Right to Own Statement.—An exception to the requirement of this subdivision enables a party to secure production of his own statement without any special showing. The cases are divided. Compare, *e.g., Safeway Stores, Inc. v. Reynolds*, 176 F.2d 476 (D.C. Cir. 1949); *Shupe v. Pennsylvania RR.*, 19 F.R.D. 144 (W.D.Pa. 1956); with *e.g., New York Central RR. v. Carr*, 251 F.2d 433 (4th Cir. 1957); *Belback v. Wilson Freight Forwarding Co.*, 40 F.R.D. 16 (W.D.Pa. 1966).

Courts which treat a party's statement as though it were that of any witness overlook the fact that the party's statement is, without more, admissible in evidence. Ordinarily, a party gives a statement without

insisting on a copy because he does not yet have a lawyer and does not understand the legal consequences of his actions. Thus, the statement is given at a time when he functions at a disadvantage. Discrepancies between his trial testimony and earlier statement may result from lapse of memory or ordinary inaccuracy; a written statement produced for the first time at trial may give such discrepancies a prominence which they do not deserve. In appropriate cases the court may order a party to be deposed before his statement is produced. *E.g.*, *Smith v. Central Linen Service Co.*, 39 F.R.D. 15 (D.Md. 1966); *McCoy v. General Motors Corp.*, 33 F.R.D. 354 (W.D.Pa. 1963).

Commentators strongly support the view that a party be able to secure his statement without a showing. 4 *Moore's Federal Practice* ¶26.23 [8.4] (2d ed. 1966); 2A Barron & Holtzoff, *Federal Practice and Procedure* §652.3 (Wright ed. 1961); see also Note, *Developments in the Law—Discovery*, 74 Harv.L.Rev. 940, 1039 (1961). The following states have by statute or rule taken the same position: *Statutes*: Fla.Stat.Ann. §92.33; Ga.Code Ann. §38–2109(b); La.Stat.Ann.R.S. 13:3732; Mass.Gen.Laws Ann. c. 271, §44; Minn.Stat.Ann. §602.01; N.Y.C.P.L.R. §3101(e). *Rules*: Mo.R.C.P. 56.01(a); N.Dak.R.C.P. 34(b); Wyo.R.C.P. 34(b); *cf.* Mich.G.C.R. 306.2.

In order to clarify and tighten the provision on statements by a party, the term ''statement'' is defined. The definition is adapted from 18 U.S.C. §3500(e) (Jencks Act). The statement of a party may of course be that of plaintiff or defendant, and it may be that of an individual or of a corporation or other organization.

Witness' Right to Own Statement.—A second exception to the requirement of this subdivision permits a non-party witness to obtain a copy of his own statement without any special showing. Many, though not all, of the considerations supporting a party's right to obtain his statement apply also to the non-party witness. Insurance companies are increasingly recognizing that a witness is entitled to a copy of his statement and are modifying their regular practice accordingly.

Subdivision (b)(4)—Trial Preparation: Experts. This is a new provision dealing with discovery of information (including facts and opinions) obtained by a party from an expert retained by that party in relation to litigation or obtained by the expert and not yet transmitted to the party. The subdivision deals separately with those experts whom the party expects to call as trial witnesses and with those experts who have been retained or specially employed by the party but who are not expected to be witnesses. It should be noted that the subdivision does not address itself to the expert whose information was not acquired in preparation for trial but rather because he was an actor or viewer with respect to transactions or occurrences that are part of the subject matter of the lawsuit. Such an expert should be treated as an ordinary witness.

Subsection (b)(4)(A) deals with discovery of information obtained by or through experts who will be called as witnesses at trial. The provision is responsive to problems suggested by a relatively recent line of authorities. Many of these cases present intricate and difficult issues as to which expert testimony is likely to be determinative. Prominent among them are food and drug, patent, and condemnation cases. See, *e.g.*, *United States v. Nysco Laboratories, Inc.*, 26 F.R.D. 159, 162 (E.D.N.Y. 1960) (food and drug); *E. I. du Pont de Nemours & Co. v. Phillips Petroleum Co.*, 24 F.R.D. 416, 421 (D.Del. 1959) (patent); *Cold Metal Process Co. v. Aluminum Co. of America*, 7 F.R.D. 425 (N.D.Ohio 1947), aff'd. *Sachs v. Aluminum Co. of America*, 167 F.2d 570 (6th Cir. 1948) (same); *United States v. 50.34 Acres of Land*, 13 F.R.D. 19 (E.D.N.Y. 1952) (condemnation).

In cases of this character, a prohibition against discovery of information held by expert witnesses produces in acute form the very evils that discovery has been created to prevent. Effective cross-examination of an expert witness requires advance preparation. The lawyer even with the help of his own experts frequently cannot anticipate the particular approach his adversary's expert will take or the data on which he will base his judgment on the stand. McGlothlin, *Some Practical Problems in Proof of Economic, Scientific, and Technical Facts*, 23 F.R.D. 467, 478 (1958). A California study of discovery and pretrial in condemnation cases notes that the only substitute for discovery of experts' valuation materials is ''lengthy—and often fruitless—cross-examination during trial,'' and recommends pretrial exchange of such material. Calif.Law Rev.Comm'n, Discovery in Eminent Domain Proceedings 707–710 (Jan.1963). Similarly, effective rebuttal requires advance knowledge of the line of testimony of the other side. If the latter is foreclosed by a rule against discovery, then the narrowing of issues and elimination of surprise which discovery normally produces are frustrated.

These considerations appear to account for the broadening of discovery against experts in the cases cited where expert testimony was central to the case. In some instances, the opinions are explicit in relating expanded discovery to improved cross-examination and rebuttal at trial. *Franks v. National Dairy Products Corp.*, 41 F.R.D. 234 (W.D.Tex. 1966); *United States v. 23.76 Acres*, 32 F.R.D. 593 (D.Md. 1963); see also an unpublished opinion of Judge Hincks, quoted in *United States v. 48 Jars, etc.*, 23 F.R.D. 192, 198 (D.D.C. 1958). On the other hand, the need for a new provision is shown by the many cases in which discovery of expert trial witnesses is needed for effective cross-examination and rebuttal, and yet courts apply the traditional doctrine and refuse disclosure. *E.g.*, *United States v. Certain Parcels of Land*, 25 F.R.D. 192 (N.D.Cal. 1959); *United States v. Certain Acres*, 18 F.R.D. 98 (M.D.Ga. 1955).

Although the trial problems flowing from lack of discovery of expert witnesses are most acute and noteworthy when the case turns largely on experts, the same problems are encountered when a single expert testifies. Thus, subdivision (b)(4)(A) draws no line between complex and simple cases, or between cases with many experts and those with but one. It establishes by rule substantially the procedure adopted by decision of the court in *Knighton v. Villian & Fassio*, 39 F.R.D. 11 (D.Md. 1965). For a full analysis of the problem and strong recommendations to the same effect, see Friedenthal, *Discovery and Use of an Adverse Party's Expert Information*, 14 Stan.L.Rev. 455, 485–488 (1962); Long, *Discovery and Experts under the Federal Rules of Civil Procedure*, 38 F.R.D. 111 (1965).

Past judicial restrictions on discovery of an adversary's expert, particularly as to his opinions, reflect the fear that one side will benefit unduly from the other's better preparation. The procedure established in subsection (b)(4)(A) holds the risk to a minimum. Discovery is limited to trial witnesses, and may be obtained only at a time when the parties know who their expert witnesses will be. A party must as a practical matter prepare his own case in advance of that time, for he can hardly hope to build his case out of his opponent's experts.

Subdivision (b)(4)(A) provides for discovery of an expert who is to testify at the trial. A party can require one who intends to use the expert to state the substance of the testimony that the expert is expected to give. The court may order further discovery, and it has ample power to regulate its timing and scope and to prevent abuse. Ordinarily, the order for further discovery shall compensate the expert for his time, and may compensate the party who intends to use the expert for past expenses reasonably incurred in obtaining facts or opinions from the expert. Those provisions are likely to discourage abusive practices.

Subdivision (b)(4)(B) deals with an expert who has been retained or specially employed by the party in anticipation of litigation or preparation for trial (thus excluding an expert who is simply a general employee of the party not specially employed on the case), but who is not expected to be called as a witness. Under its provisions, a party may discover facts known or opinions held by such an expert only on 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.

Subdivision (b)(4)(B) is concerned only with experts retained or specially consulted in relation to trial preparation. Thus the subdivision precludes discovery against experts who were informally consulted in preparation for trial, but not retained or specially employed. As an ancillary procedure, a party may on a proper showing require the other party to name experts retained or specially employed, but not those informally consulted.

These new provisions of subdivision (b)(4) repudiate the few decisions that have held an expert's information privileged simply because of his status as an expert, *e.g., American Oil Co. v. Pennsylvania Petroleum Products Co.*, 23 F.R.D. 680, 685–686 (D.R.I. 1959). See *Louisell, Modern California Discovery* 315–316 (1963). They also reject as ill-considered the decisions which have sought to bring expert information within the work-product doctrine. See *United States v. McKay*, 372 F.2d 174, 176–177 (5th Cir. 1967). The provisions adopt a form of the more recently developed doctrine of ''unfairness''. See *e.g., United States v. 23.76 Acres of Land*, 32 F.R.D. 593, 597 (D.Md. 1963); Louisell, *supra*, at 317–318; 4 *Moore's Federal Practice* § 26.24 (2d ed. 1966).

Under subdivision (b)(4)(C), the court is directed or authorized to issue protective orders, including an order that the expert be paid a reasonable fee for time spent in responding to discovery, and that the party whose expert is made subject to discovery be paid a fair portion of the fees and expenses that the party incurred in obtaining information from the expert. The court may issue the latter order as a condition of discovery, or it may delay the order until after discovery is completed. These provisions for fees and expenses meet the objection that it is unfair to permit one side to obtain without cost the benefit of an expert's work for which the other side has paid, often a substantial sum. *E.g., Lewis v. United Air Lines Transp. Corp.*, 32 F.Supp. 21 (W.D.Pa. 1940); *Walsh v. Reynolds Metal Co.*, 15 F.R.D. 376 (D.N.J. 1954). On the other hand, a party may not obtain discovery simply by offering to pay fees and expenses. *Cf. Boynton v. R. J. Reynolds Tobacco Co.*, 36 F.Supp. 593 (D.Mass. 1941).

In instances of discovery under subdivision (b)(4)(B), the court is directed to award fees and expenses to the other party, since the information is of direct value to the discovering party's preparation of his case. In ordering discovery under (b)(4)(A)(ii), the court has discretion whether to award fees and expenses to the other party; its decision should depend upon whether the discovering party is simply learning about the other party's case or is going beyond this to develop his own case. Even in cases where the court is directed to issue a protective order, it may decline to do so if it finds that manifest injustice would result. Thus, the court can protect, when necessary and appropriate, the interests of an indigent party.

Subdivision (c)—Protective Orders. The provisions of existing Rule 30(b) are transferred to this subdivision (c), as part of the rearrangement of Rule 26. The language has been changed to give it application to discovery generally. The subdivision recognizes the power of the court in the district where a deposition is being taken to make protective orders. Such power is needed when the deposition is being taken far from the court where the action is pending. The court in the district where the deposition is being taken may, and frequently will, remit the deponent or party to the court where the action is pending.

In addition, drafting changes are made to carry out and clarify the sense of the rule. Insertions are made to avoid any possible implication that a protective order does not extend to ''time'' as well as to ''place'' or may not safeguard against ''undue burden or expense.''

The new reference to trade secrets and other confidential commercial information reflects existing law. The courts have not given trade secrets automatic and complete immunity against disclosure, but have in each case weighed their claim to privacy against the need for disclosure. Frequently, they have been afforded a limited protection. See, *e.g., Covey Oil Co. v. Continental Oil Co.*, 340 F.2d 993 (10th Cir. 1965); *Julius M. Ames Co. v. Bostitch, Inc.*, 235 F.Supp. 856 (S.D.N.Y. 1964).

The subdivision contains new matter relating to sanctions. When a motion for a protective order is made and the court is disposed to deny it, the court may go a step further and issue an order to provide or permit discovery. This will bring the sanctions of Rule 37(b) directly into play. Since the court has heard the contentions of all interested persons, an affirmative order is justified. See *Rosenberg, Sanctions to Effectuate Pretrial Discovery*, 58 Col.L.Rev. 480, 492–493 (1958). In addition, the court may require the payment of expenses incurred in relation to the motion.

Subdivision (d)—Sequence and Priority. This new provision is concerned with the sequence in which parties may proceed with discovery and with related problems of timing. The principal effects of the new provision are first, to eliminate any fixed priority in the sequence of discovery, and second, to make clear and explicit the court's power to establish priority by an order issued in a particular case.

A priority rule developed by some courts, which confers priority on the party who first serves notice of taking a deposition, is unsatisfactory in several important respects:

First, this priority rule permits a party to establish a priority running to all depositions as to which he has given earlier notice. Since he can on a given day serve notice of taking many depositions he is in a position to delay his adversary's taking of depositions for an inordinate time. Some courts have ruled that deposition priority also permits a party to delay his answers to interrogatories and production of documents. *E.g., E. I. du Pont de Nemours & Co. v. Phillips Petroleum Co.*, 23 F.R.D. 237 (D.Del. 1959); *but cf. Sturdevant v. Sears, Roebuck & Co.*, 32 F.R.D. 426 (W.D.Mo. 1963).

Second, since notice is the key to priority, if both parties wish to take depositions first a race results. See *Caldwell-Clements, Inc. v. McGraw-Hill Pub. Co.*, 11 F.R.D. 156 (S.D.N.Y. 1951) (description of tactics used by parties). But the existing rules on notice of deposition create a race with runners starting from different positions. The plaintiff may not give notice without leave of court until 20 days after commencement of the action, whereas the defendant may serve notice at any time after commencement. Thus, a careful and prompt defendant can almost always secure priority. This advantage of defendants is fortuitous, because the purpose of requiring plaintiff to wait 20 days is to afford defendant an opportunity to obtain counsel, not to confer priority.

Third, although courts have ordered a change in the normal sequence of discovery on a number of occasions, *e.g., Kaeppler v. James H. Matthews & Co.*, 200 F.Supp. 229 (E.D.Pa. 1961); *Park & Tilford Distillers Corp. v. Distillers Co.*, 19 F.R.D. 169 (S.D.N.Y. 1956), and have at all times avowed discretion to vary the usual priority, most commentators are agreed that courts in fact grant relief only for ''the most obviously compelling reasons.'' 2A Barron & Holtzoff, *Federal Practice and Procedure* 447–47 (Wright ed. 1961); see also Younger, *Priority of Pretrial Examination in the Federal Courts—A Comment*, 34 N.Y.U.L.Rev. 1271 (1959); Freund, *The Pleading and Pretrial of an Antitrust Claim*, 46 Corn.L.Q. 555, 564, (1964). Discontent with the fairness of actual practice has been evinced by other observers. Comments, 59 Yale L.J. 117, 134–136 (1949); Yudkin, *Some Refinements in Federal Discovery Procedure*, 11 Fed.B.J. 289, 296–297 (1951); *Developments in the Law-Discovery*, 74 Harv.L.Rev. 940, 954–958 (1961).

Despite these difficulties, some courts have adhered to the priority rule, presumably because it provides a test which is easily understood and applied by the parties without much court intervention. It thus permits deposition discovery to function extrajudicially, which the rules provide for and the courts desire. For these same reasons, courts are reluctant to make numerous exceptions to the rule.

The Columbia Survey makes clear that the problem of priority does not affect litigants generally. It found

that most litigants do not move quickly to obtain discovery. In over half of the cases, both parties waited at least 50 days. During the first 20 days after commencement of the action—the period when defendant might assure his priority by noticing depositions—16 percent of the defendants acted to obtain discovery. A race could not have occurred in more than 16 percent of the cases and it undoubtedly occurred in fewer. On the other hand, five times as many defendants as plaintiffs served notice of deposition during the first 19 days. To the same effect, see Comment, *Tactical Use and Abuse of Depositions Under the Federal Rules*, 59 Yale L.J. 117, 134 (1949).

These findings do not mean, however, that the priority rule is satisfactory or that a problem of priority does not exist. The court decisions show that parties do bottle on this issue and carry their disputes to court. The statistics show that these court cases are not typical. By the same token, they reveal that more extensive exercise of judicial discretion to vary the priority will not bring a flood of litigation, and that a change in the priority rule will in fact affect only a small fraction of the cases.

It is contended by some that there is no need to alter the existing priority practice. In support, it is urged that there is no evidence that injustices in fact result from present practice and that, in any event, the courts can and do promulgate local rules, as in New York, to deal with local situations and issue orders to avoid possible injustice in particular cases.

Subdivision (d) is based on the contrary view that the rule of priority based on notice is unsatisfactory and unfair in its operation. Subdivision (d) follows an approach adapted from Civil Rule 4 of the District Court for the Southern District of New York. That rule provides that starting 40 days after commencement of the action, unless otherwise ordered by the court, the fact that one part is taking a deposition shall not prevent another party from doing so ''concurrently.'' In practice, the depositions are not usually taken simultaneously; rather, the parties work out arrangements for alternation in the taking of depositions. One party may take a complete deposition and then the other, or, if the depositions are extensive, one party deposes for a set time, and then the other. See *Caldwell-Clements, Inc. v. McGraw-Hill Pub. Co.*, 11 F.R.D. 156 (S.D.N.Y. 1951).

In principle, one party's initiation of discovery should not wait upon the other's completion, unless delay is dictated by special considerations. Clearly the principle is feasible with respect to all methods of discovery other than depositions. And the experience of the Southern District of New York shows that the principle can be applied to depositions as well. The courts have not had an increase in motion business on this matter. Once it is clear to lawyers that they bargain on an equal footing, they are usually able to arrange for an orderly succession of depositions without judicial intervention. Professor Moore has called attention to Civil Rule 4 and suggested that it may usefully be extended to other areas. 4 *Moore's Federal Practice* 1154 (2d ed. 1966).

The court may upon motion and by order grant priority in a particular case. But a local court rule purporting to confer priority in certain classes of cases would be inconsistent with this subdivision and thus void.

Subdivision (e)—Supplementation of Responses. The rules do not now state whether interrogatories (and questions at deposition as well as requests for inspection and admissions) impose a ''continuing burden'' on the responding party to supplement his answers if he obtains new information. The issue is acute when new information renders substantially incomplete or inaccurate an answer which was complete and accurate when made. It is essential that the rules provide an answer to this question. The parties can adjust to a rule either way, once they know what it is. See 4 Moore's Federal Practice ¶ 33.25[4] (2d ed. 1966).

Arguments can be made both ways. Imposition of a continuing burden reduces the proliferation of additional sets of interrogatories. Some courts have adopted local rules establishing such a burden. *E.g.*, E.D.Pa.R. 20(f), quoted in *Taggart v. Vermont Transp. Co.*, 32 F.R.D. 587 (E.D.Pa. 1963); D.Me.R.15(c). Others have imposed the burden by decision, *E.g.*, *Chenault v. Nebraska Farm Products, Inc.*, 9 F.R.D. 529, 533 (D.Nebr. 1949). On the other hand, there are serious objections to the burden, especially in protracted cases. Although the party signs the answers, it is his lawyer who understands their significance and bears the responsibility to bring answers up to date. In a complex case all sorts of information reaches the party, who little understands its bearing on answers previously given to interrogatories. In practice, therefore, the lawyer under a continuing burden must periodically recheck all interrogatories and canvass all new information. But a full set of new answers may no longer be needed by the interrogating party. Some issues will have been dropped from the case, some questions are now seen as unimportant, and other questions must in any event be reformulated. See *Novick v. Pennsylvania RR.*, 18 F.R.D. 296, 298 (W.D.Pa. 1955).

Subdivision (e) provides that a party is not under a continuing burden except as expressly provided. *Cf.* Note, 68 Harv.L.Rev. 673, 677 (1955). An exception is made as to the identity of persons having knowledge of discoverable matters, because of the obvious importance to each side of knowing all witnesses and because information about witnesses routinely comes to each lawyer's attention. Many of the decisions on the issue of a continuing burden have in fact concerned the identity of witnesses. An exception is also made as to expert trial witnesses in order to carry out the provisions of Rule 26(b)(4). See *Diversified Products Corp. v. Sports Center Co.*, 42 F.R.D. 3 (D.Md. 1967).

Another exception is made for the situation in which a party, or more frequently his lawyer, obtains actual knowledge that a prior response is incorrect. This exception does not impose a duty to check the accuracy of prior responses, but it prevents knowing concealment by a party or attorney. Finally, a duty to supplement may be imposed by order of the court in a particular case (including an order resulting from a pretrial conference) or by agreement of the parties. A party may of course make a new discovery request which requires supplementation of prior responses.

The duty will normally be enforced, in those limited instances where it is imposed, through sanctions imposed by the trial court, including exclusion of evidence, continuance, or other action, as the court may deem appropriate.

NOTES OF ADVISORY COMMITTEE ON RULES—1980 AMENDMENT

Subdivision (f). This subdivision is new. There has been widespread criticism of abuse of discovery. The Committee has considered a number of proposals to eliminate abuse, including a change in Rule 26(b)(1) with respect to the scope of discovery and a change in Rule 33(a) to limit the number of questions that can be asked by interrogatories to parties.

The Committee believes that abuse of discovery, while very serious in certain cases, is not so general as to require such basic changes in the rules that govern discovery in all cases. A very recent study of discovery in selected metropolitan districts tends to support its belief. P. Connolly, E. Holleman, & M. Kuhlman, *Judicial Controls and the Civil Litigative Process: Discovery* (Federal Judicial Center, 1978). In the judgment of the Committee abuse can best be prevented by intervention by the court as soon as abuse is threatened.

To this end this subdivision provides that counsel who has attempted without success to effect with opposing counsel a reasonable program or plan for discovery is entitled to the assistance of the court.

It is not contemplated that requests for discovery conferences will be made routinely. A relatively narrow discovery dispute should be resolved by resort to Rules 26(c) or 37(a), and if it appears that a request for a conference is in fact grounded in such a dispute, the court may refer counsel to those rules. If the court is per-

suaded that a request is frivolous or vexatious, it can strike it. See Rules 11 and 7(b)(2).

A number of courts routinely consider discovery matters in preliminary pretrial conferences held shortly after the pleadings are closed. This subdivision does not interfere with such a practice. It authorizes the court to combine a discovery conference with a pretrial conference under Rule 16 if a pretrial conference is held sufficiently early to prevent or curb abuse.

NOTES OF ADVISORY COMMITTEE ON RULES—1983 AMENDMENT

Excessive discovery and evasion or resistance to reasonable discovery requests pose significant problems. Recent studies have made some attempt to determine the sources and extent of the difficulties. See Brazil, *Civil Discovery: Lawyers' Views of its Effectiveness, Principal Problems and Abuses*, American Bar Foundation (1980); Connolly, Holleman & Kuhlman, *Judicial Controls and the Civil Litigative Process: Discovery*, Federal Judicial Center (1978); Ellington, *A Study of Sanctions for Discovery Abuse*, Department of Justice (1979); Schroeder & Frank, *The Proposed Changes in the Discovery Rules*, 1978 Ariz.St.L.J. 475.

The purpose of discovery is to provide a mechanism for making relevant information available to the litigants. ''Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.'' *Hickman v. Taylor*, 329 U.S. 495, 507 (1947). Thus the spirit of the rules is violated when advocates attempt to use discovery tools as tactical weapons rather than to expose the facts and illuminate the issues by overuse of discovery or unnecessary use of defensive weapons or evasive responses. All of this results in excessively costly and time-consuming activities that are disproportionate to the nature of the case, the amount involved, or the issues or values at stake.

Given our adversary tradition and the current discovery rules, it is not surprising that there are many opportunities, if not incentives, for attorneys to engage in discovery that, although authorized by the broad, permissive terms of the rules, nevertheless results in delay. See Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 Vand.L.Rev. 1259 (1978). As a result, it has been said that the rules have ''not infrequently [been] exploited to the disadvantage of justice.'' *Herbert v. Lando*, 441 U.S. 153, 179 (1979) (Powell, J., concurring). These practices impose costs on an already overburdened system and impede the fundamental goal of the ''just, speedy, and inexpensive determination of every action.'' Fed.R.Civ.P. 1.

Subdivision (a); Discovery Methods. The deletion of the last sentence of Rule 26(a)(1), which provided that unless the court ordered otherwise under Rule 26(c) ''the frequency of use'' of the various discovery methods was not to be limited, is an attempt to address the problem of duplicative, redundant, and excessive discovery and to reduce it. The amendment, in conjunction with the changes in Rule 26(b)(1), is designed to encourage district judges to identify instances of needless discovery and to limit the use of the various discovery devices accordingly. The question may be raised by one of the parties, typically on a motion for a protective order, or by the court on its own initiative. It is entirely appropriate to consider a limitation on the frequency of use of discovery at a discovery conference under Rule 26(f) or at any other pretrial conference authorized by these rules. In considering the discovery needs of a particular case, the court should consider the factors described in Rule 26(b)(1).

Subdivision (b); Discovery Scope and Limits. Rule 26(b)(1) has been amended to add a sentence to deal with the problem of over-discovery. The objective is to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry. The new sentence is intended to encourage judges to be more aggressive in identifying and discouraging discovery overuse. The grounds mentioned in the amended rule for limiting discovery reflect the existing practice of many courts in issuing protective orders under Rule 26(c). See *e.g.*, *Carlson Cos. v. Sperry & Hutchinson Co.*, 374 F.Supp. 1080 (D.Minn. 1974); *Dolgow v. Anderson*, 53 F.R.D. 661 (E.D.N.Y. 1971); *Mitchell v. American Tobacco Co.*, 33 F.R.D. 262 (M.D.Pa. 1963); *Welty v. Clute*, 1 F.R.D. 446 (W.D.N.Y. 1941). On the whole, however, district judges have been reluctant to limit the use of the discovery devices. See, *e.g.*, *Apco Oil Co. v. Certified Transp., Inc.*, 46 F.R.D. 428 (W.D.Mo. 1969). See generally 8 Wright & Miller, *Federal Practice and Procedure: Civil* §§ 2036, 2037, 2039, 2040 (1970).

The first element of the standard, Rule 26(b)(1)(i), is designed to minimize redundancy in discovery and encourage attorneys to be sensitive to the comparative costs of different methods of securing information. Subdivision (b)(1)(ii) also seeks to reduce repetitiveness and to oblige lawyers to think through their discovery activities in advance so that full utilization is made of each deposition, document request, or set of interrogatories. The elements of Rule 26(b)(1)(iii) address the problem of discovery that is disproportionate to the individual lawsuit as measured by such matters as its nature and complexity, the importance of the issues at stake in a case seeking damages, the limitations on a financially weak litigant to withstand extensive opposition to a discovery program or to respond to discovery requests, and the significance of the substantive issues, as measured in philosophic, social, or institutional terms. Thus the rule recognizes that many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved. The court must apply the standards in an even-handed manner that will prevent use of discovery to wage a war of attrition or as a device to coerce a party, whether financially weak or affluent.

The rule contemplates greater judicial involvement in the discovery process and thus acknowledges the reality that it cannot always operate on a self-regulating basis. See Connolly, Holleman & Kuhlman, *Judicial Controls and the Civil Litigative Process: Discovery* 77, Federal Judicial Center (1978). In an appropriate case the court could restrict the number of depositions, interrogatories, or the scope of a production request. But the court must be careful not to deprive a party of discovery that is reasonably necessary to afford a fair opportunity to develop and prepare the case.

The court may act on motion, or its own initiative. It is entirely appropriate to resort to the amended rule in conjunction with a discovery conference under Rule 26(f) or one of the other pretrial conferences authorized by the rules.

Subdivision (g); Signing of Discovery Requests, Responses, and Objections. Rule 26(g) imposes an affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26 through 37. In addition, Rule 26(g) is designed to curb discovery abuse by explicitly encouraging the imposition of sanctions. The subdivision provides a deterrent to both excessive discovery and evasion by imposing a certification requirement that obliges each attorney to stop and think about the legitimacy of a discovery request, a response thereto, or an objection. The term ''response'' includes answers to interrogatories and to requests to admit as well as responses to production requests.

If primary responsibility for conducting discovery is to continue to rest with the litigants, they must be obliged to act responsibly and avoid abuse. With this in mind, Rule 26(g), which parallels the amendments to Rule 11, requires an attorney or unrepresented party to sign each discovery request, response, or objection. Motions relating to discovery are governed by Rule 11. However, since a discovery request, response, or objection usually deals with more specific subject matter than motions or papers, the elements that must be certified in connection with the former are spelled out more completely. The signature is a certification of the elements set forth in Rule 26(g).

Although the certification duty requires the lawyer to pause and consider the reasonableness of his request, response, or objection, it is not meant to discourage or restrict necessary and legitimate discovery. The rule simply requires that the attorney make a reasonable inquiry into the factual basis of his response, request, or objection.

The duty to make a ''reasonable inquiry'' is satisfied if the investigation undertaken by the attorney and the conclusions drawn therefrom are reasonable under the circumstances. It is an objective standard similar to the one imposed by Rule 11. See the Advisory Committee Note to Rule 11. See also *Kinee v. Abraham Lincoln Fed. Sav. & Loan Ass'n*, 365 F.Supp. 975 (E.D.Pa. 1973). In making the inquiry, the attorney may rely on assertions by the client and on communications with other counsel in the case as long as that reliance is appropriate under the circumstances. Ultimately, what is reasonable is a matter for the court to decide on the totality of the circumstances.

Rule 26(g) does not require the signing attorney to certify the truthfulness of the client's factual responses to a discovery request. Rather, the signature certifies that the lawyer has made a reasonable effort to assure that the client has provided all the information and documents available to him that are responsive to the discovery demand. Thus, the lawyer's certification under Rule 26(g) should be distinguished from other signature requirements in the rules, such as those in Rules 30(e) and 33.

Nor does the rule require a party or an attorney to disclose privileged communications or work product in order to show that a discovery request, response, or objection is substantially justified. The provisions of Rule 26(c), including appropriate orders after *in camera* inspection by the court, remain available to protect a party claiming privilege or work product protection.

The signing requirement means that every discovery request, response, or objection should be grounded on a theory that is reasonable under the precedents or a good faith belief as to what should be the law. This standard is heavily dependent on the circumstances of each case. The certification speaks as of the time it is made. The duty to supplement discovery responses continues to be governed by Rule 26(e).

Concern about discovery abuse has led to widespread recognition that there is a need for more aggressive judicial control and supervision. *ACF Industries, Inc. v. EEOC*, 439 U.S. 1081 (1979) (certiorari denied) (Powell, J., dissenting). Sanctions to deter discovery abuse would be more effective if they were diligently applied ''not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.'' *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 643 (1976). See also Note, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions*, 91 Harv. L. Rev. 1033 (1978). Thus the premise of Rule 26(g) is that imposing sanctions on attorneys who fail to meet the rule's standards will significantly reduce abuse by imposing disadvantages therefor.

Because of the asserted reluctance to impose sanctions on attorneys who abuse the discovery rules, see Brazil, *Civil Discovery: Lawyers' Views of its Effectiveness, Principal Problems and Abuses*, American Bar Foundation (1980); Ellington, *A Study of Sanctions for Discovery Abuse*, Department of Justice (1979), Rule 26(g) makes explicit the authority judges now have to impose appropriate sanctions and requires them to use it. This authority derives from Rule 37, 28 U.S.C. §1927, and the court's inherent power. See *Roadway Express, Inc., v. Piper*, 447 U.S. 752 (1980); *Martin v. Bell Helicopter Co.*, 85 F.R.D. 654, 661–62 (D.Col. 1980); Note, *Sanctions Imposed by Courts on Attorneys Who Abuse the Judicial Process*, 44 U.Chi.L.Rev. 619 (1977). The new rule mandates that sanctions be imposed on attorneys who fail to meet the standards established in the first portion of Rule 26(g). The nature of the sanction is a matter of judicial discretion to be exercised in light of the particular circumstances. The court may take into account any failure by the party seeking sanctions to invoke protection under Rule 26(c) at an early stage in the litigation.

The sanctioning process must comport with due process requirements. The kind of notice and hearing required will depend on the facts of the case and the severity of the sanction being considered. To prevent the proliferation of the sanction procedure and to avoid multiple hearings, discovery in any sanction proceeding normally should be permitted only when it is clearly required by the interests of justice. In most cases the court will be aware of the circumstances and only a brief hearing should be necessary.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1993 AMENDMENT

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

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

The rule is based upon the experience of district courts that have required disclosure of some of this information through local rules, court-approved standard interrogatories, and standing orders. Most have required pretrial disclosure of the kind of information described in Rule 26(a)(3). Many have required written reports from experts containing information like that specified in Rule 26(a)(2)(B). While far more limited, the experience of the few state and federal courts that have required pre-discovery exchange of core information such as is contemplated in Rule 26(a)(1) indicates that savings in time and expense can be achieved, particularly if the litigants meet and discuss the issues in the case as a predicate for this exchange and if a judge supports the process, as by using the results to guide further proceedings in the case. Courts in Canada and the United Kingdom have for many years required disclosure of certain information without awaiting a request from an adversary.

Paragraph (1). As the functional equivalent of court-ordered interrogatories, this paragraph requires early disclosure, without need for any request, of four types of information that have been customarily secured early in litigation through formal discovery. The introductory clause permits the court, by local rule, to ex-

empt all or particular types of cases from these disclosure requirement[s] or to modify the nature of the information to be disclosed. It is expected that courts would, for example, exempt cases like Social Security reviews and government collection cases in which discovery would not be appropriate or would be unlikely. By order the court may eliminate or modify the disclosure requirements in a particular case, and similarly the parties, unless precluded by order or local rule, can stipulate to elimination or modification of the requirements for that case. The disclosure obligations specified in paragraph (1) will not be appropriate for all cases, and it is expected that changes in these obligations will be made by the court or parties when the circumstances warrant.

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

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

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

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

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

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

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

Unless the court directs a different time, the disclosures required by subdivision (a)(1) are to be made at or within 10 days after the meeting of the parties under subdivision (f). One of the purposes of this meeting is to refine the factual disputes with respect to which disclosures should be made under paragraphs (1)(A) and (1)(B), particularly if an answer has not been filed by a defendant, or, indeed, to afford the parties an opportunity to modify by stipulation the timing or scope of these obligations. The time of this meeting is generally left to the parties provided it is held at least 14 days before a scheduling conference is held or before a scheduling order is due under Rule 16(b). In cases in which no scheduling conference is held, this will mean that the meeting must ordinarily be held within 75 days after a defendant has first appeared in the case and hence that the initial disclosures would be due no later than 85 days after the first appearance of a defendant.

Before making its disclosures, a party has the obligation under subdivision (g)(1) to make a reasonable in-

quiry into the facts of the case. The rule does not demand an exhaustive investigation at this stage of the case, but one that is reasonable under the circumstances, focusing on the facts that are alleged with particularity in the pleadings. The type of investigation that can be expected at this point will vary based upon such factors as the number and complexity of the issues; the location, nature, number, and availability of potentially relevant witnesses and documents; the extent of past working relationships between the attorney and the client, particularly in handling related or similar litigation; and of course how long the party has to conduct an investigation, either before or after filing of the case. As provided in the last sentence of subdivision (a)(1), a party is not excused from the duty of disclosure merely because its investigation is incomplete. The party should make its initial disclosures based on the pleadings and the information then reasonably available to it. As its investigation continues and as the issues in the pleadings are clarified, it should supplement its disclosures as required by subdivision (e)(1). A party is not relieved from its obligation of disclosure merely because another party has not made its disclosures or has made an inadequate disclosure.

It will often be desirable, particularly if the claims made in the complaint are broadly stated, for the parties to have their Rule 26(f) meeting early in the case, perhaps before a defendant has answered the complaint or had time to conduct other than a cursory investigation. In such circumstances, in order to facilitate more meaningful and useful initial disclosures, they can and should stipulate to a period of more than 10 days after the meeting in which to make these disclosures, at least for defendants who had no advance notice of the potential litigation. A stipulation at an early meeting affording such a defendant at least 60 days after receiving the complaint in which to make its disclosures under subdivision (a)(1)—a period that is two weeks longer than the time formerly specified for responding to interrogatories served with a complaint—should be adequate and appropriate in most cases.

Paragraph (2). This paragraph imposes an additional duty to disclose information regarding expert testimony sufficiently in advance of trial that opposing parties have a reasonable opportunity to prepare for effective cross examination and perhaps arrange for expert testimony from other witnesses. Normally the court should prescribe a time for these disclosures in a scheduling order under Rule 16(b), and in most cases the party with the burden of proof on an issue should disclose its expert testimony on that issue before other parties are required to make their disclosures with respect to that issue. In the absence of such a direction, the disclosures are to be made by all parties at least 90 days before the trial date or the date by which the case is to be ready for trial, except that an additional 30 days is allowed (unless the court specifies another time) for disclosure of expert testimony to be used solely to contradict or rebut the testimony that may be presented by another party's expert. For a discussion of procedures that have been used to enhance the reliability of expert testimony, see M. Graham, *Expert Witness Testimony and the Federal Rules of Evidence: Insuring Adequate Assurance of Trustworthiness*, 1986 *U. Ill. L. Rev.* 90.

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

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

Revised subdivision (b)(4)(A) authorizes the deposition of expert witnesses. Since depositions of experts required to prepare a written report may be taken only after the report has been served, the length of the deposition of such experts should be reduced, and in many cases the report may eliminate the need for a deposition. Revised subdivision (e)(1) requires disclosure of any material changes made in the opinions of an expert from whom a report is required, whether the changes are in the written report or in testimony given at a deposition.

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

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

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

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

Subparagraph (B) requires the party to indicate which of these potential witnesses will be presented by

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

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

Upon receipt of these final pretrial disclosures, other parties have 14 days (unless a different time is specified by the court) to disclose any objections they wish to preserve to the usability of the deposition testimony or to the admissibility of the documentary evidence (other than under Rules 402 and 403 of the Federal Rules of Evidence). Similar provisions have become commonplace either in pretrial orders or by local rules, and significantly expedite the presentation of evidence at trial, as well as eliminate the need to have available witnesses to provide ''foundation'' testimony for most items of documentary evidence. The listing of a potential objection does not constitute the making of that objection or require the court to rule on the objection; rather, it preserves the right of the party to make the objection when and as appropriate during trial. The court may, however, elect to treat the listing as a motion ''in limine'' and rule upon the objections in advance of trial to the extent appropriate.

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

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

Paragraph (5). This paragraph is revised to take note of the availability of revised Rule 45 for inspection from non-parties of documents and premises without the need for a deposition.

Subdivision (b). This subdivision is revised in several respects. First, former paragraph (1) is subdivided into two paragraphs for ease of reference and to avoid renumbering of paragraphs (3) and (4). Textual changes are then made in new paragraph (2) to enable the court to keep tighter rein on the extent of discovery. The information explosion of recent decades has greatly increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument for delay or oppression. Amendments to Rules 30, 31, and 33 place presumptive limits on the number of depositions and interrogatories, subject to leave of court to pursue additional discovery. The revisions in Rule 26(b)(2) are intended to provide the court with broader discretion to impose additional restrictions on the scope and extent of discovery and to authorize courts that develop case tracking systems based on the complexity of cases to increase or decrease by local rule the presumptive number of depositions and interrogatories allowed in particular types or classifications of cases. The revision also dispels any doubt as to the power of the court to impose limitations on the length of depositions under Rule 30 or on the number of requests for admission under Rule 36.

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

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

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

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

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

The rule does not attempt to define for each case what information must be provided when a party asserts a claim of privilege or work product protection. Details concerning time, persons, general subject matter, etc., may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories. A party can seek relief through a protective order under subdivision (c) if compliance with the requirement for providing this information would be an unreasonable burden. In rare circumstances some of the pertinent information affecting applicability of the claim, such as the identity of the client, may itself be privileged; the rule provides that such information need not be disclosed.

The obligation to provide pertinent information concerning withheld privileged materials applies only to items ''otherwise discoverable.'' If a broad discovery request is made—for example, for all documents of a par-

ticular type during a twenty year period—and the responding party believes in good faith that production of documents for more than the past three years would be unduly burdensome, it should make its objection to the breadth of the request and, with respect to the documents generated in that three year period, produce the unprivileged documents and describe those withheld under the claim of privilege. If the court later rules that documents for a seven year period are properly discoverable, the documents for the additional four years should then be either produced (if not privileged) or described (if claimed to be privileged).

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

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

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

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

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

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

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

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

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

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

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

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

The parties are directed under subdivision (a)(1) to make the disclosures required by that subdivision at or within 10 days after this meeting. In many cases the parties should use the meeting to exchange, discuss,

and clarify their respective disclosures. In other cases, it may be more useful if the disclosures are delayed until after the parties have discussed at the meeting the claims and defenses in order to define the issues with respect to which the initial disclosures should be made. As discussed in the Notes to subdivision (a)(1), the parties may also need to consider whether a stipulation extending this 10-day period would be appropriate, as when a defendant would otherwise have less than 60 days after being served in which to make its initial disclosure. The parties should also discuss at the meeting what additional information, although not subject to the disclosure requirements, can be made available informally without the necessity for formal discovery requests.

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

The litigants are expected to attempt in good faith to agree on the contents of the proposed discovery plan. If they cannot agree on all aspects of the plan, their report to the court should indicate the competing proposals of the parties on those items, as well as the matters on which they agree. Unfortunately, there may be cases in which, because of disagreements about time or place or for other reasons, the meeting is not attended by all parties or, indeed, no meeting takes place. In such situations, the report—or reports—should describe the circumstances and the court may need to consider sanctions under Rule 37(g).

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

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

COMMITTEE NOTES ON RULES—2000 AMENDMENT

Purposes of amendments. The Rule 26(a)(1) initial disclosure provisions are amended to establish a nationally uniform practice. The scope of the disclosure obligation is narrowed to cover only information that the disclosing party may use to support its position. In addition, the rule exempts specified categories of proceedings from initial disclosure, and permits a party who contends that disclosure is not appropriate in the circumstances of the case to present its objections to the court, which must then determine whether disclosure should be made. Related changes are made in Rules 26(d) and (f).

The initial disclosure requirements added by the 1993 amendments permitted local rules directing that disclosure would not be required or altering its operation. The inclusion of the ''opt out'' provision reflected the strong opposition to initial disclosure felt in some districts, and permitted experimentation with differing disclosure rules in those districts that were favorable to disclosure. The local option also recognized that—partly in response to the first publication in 1991 of a proposed disclosure rule—many districts had adopted a variety of disclosure programs under the aegis of the Civil Justice Reform Act. It was hoped that developing experience under a variety of disclosure systems would support eventual refinement of a uniform national disclosure practice. In addition, there was hope that local experience could identify categories of actions in which disclosure is not useful.

A striking array of local regimes in fact emerged for disclosure and related features introduced in 1993. *See* D. Stienstra, *Implementation of Disclosure in United States District Courts, With Specific Attention to Courts' Responses to Selected Amendments to Federal Rule of Civil Procedure 26* (Federal Judicial Center, March 30, 1998) (describing and categorizing local regimes). In its final report to Congress on the CJRA experience, the Judicial Conference recommended reexamination of the need for national uniformity, particularly in regard to initial disclosure. Judicial Conference, *Alternative Proposals for Reduction of Cost and Delay: Assessment of Principles, Guidelines and Techniques*, 175 F.R.D. 62, 98 (1997).

At the Committee's request, the Federal Judicial Center undertook a survey in 1997 to develop information on current disclosure and discovery practices. *See* T. Willging, J. Shapard, D. Stienstra & D. Miletich, *Discovery and Disclosure Practice, Problems, and Proposals for Change* (Federal Judicial Center, 1997). In addition, the Committee convened two conferences on discovery involving lawyers from around the country and received reports and recommendations on possible discovery amendments from a number of bar groups. Papers and other proceedings from the second conference are published in 39 Boston Col. L. Rev. 517–840 (1998).

The Committee has discerned widespread support for national uniformity. Many lawyers have experienced difficulty in coping with divergent disclosure and other practices as they move from one district to another. Lawyers surveyed by the Federal Judicial Center ranked adoption of a uniform national disclosure rule second among proposed rule changes (behind increased availability of judges to resolve discovery disputes) as a means to reduce litigation expenses without interfering with fair outcomes. *Discovery and Disclosure Practice, supra*, at 44–45. National uniformity is also a central purpose of the Rules Enabling Act of 1934, as amended, 28 U.S.C. §§2072–2077.

These amendments restore national uniformity to disclosure practice. Uniformity is also restored to other aspects of discovery by deleting most of the provisions authorizing local rules that vary the number of permitted discovery events or the length of depositions. Local rule options are also deleted from Rules 26(d) and (f).

Subdivision (a)(1). The amendments remove the authority to alter or opt out of the national disclosure requirements by local rule, invalidating not only formal local rules but also informal ''standing'' orders of an individual judge or court that purport to create exemptions from—or limit or expand—the disclosure provided under the national rule. *See* Rule 83. Case-specific orders remain proper, however, and are expressly required if a party objects that initial disclosure is not appropriate in the circumstances of the action. Specified categories of proceedings are excluded from initial disclosure under subdivision (a)(1)(E). In addition, the parties can stipulate to forgo disclosure, as was true before. But even in a case excluded by subdivision (a)(1)(E) or in which the parties stipulate to bypass disclosure, the court can order exchange of similar information in managing the action under Rule 16.

The initial disclosure obligation of subdivisions (a)(1)(A) and (B) has been narrowed to identification of witnesses and documents that the disclosing party may use to support its claims or defenses. ''Use'' includes any use at a pretrial conference, to support a motion,

or at trial. The disclosure obligation is also triggered by intended use in discovery, apart from use to respond to a discovery request; use of a document to question a witness during a deposition is a common example. The disclosure obligation attaches both to witnesses and documents a party intends to use and also to witnesses and to documents the party intends to use if—in the language of Rule 26(a)(3)—''the need arises.''

A party is no longer obligated to disclose witnesses or documents, whether favorable or unfavorable, that it does not intend to use. The obligation to disclose information the party may use connects directly to the exclusion sanction of Rule 37(c)(1). Because the disclosure obligation is limited to material that the party may use, it is no longer tied to particularized allegations in the pleadings. Subdivision (e)(1), which is unchanged, requires supplementation if information later acquired would have been subject to the disclosure requirement. As case preparation continues, a party must supplement its disclosures when it determines that it may use a witness or document that it did not previously intend to use.

The disclosure obligation applies to ''claims and defenses,'' and therefore requires a party to disclose information it may use to support its denial or rebuttal of the allegations, claim, or defense of another party. It thereby bolsters the requirements of Rule 11(b)(4), which authorizes denials ''warranted on the evidence,'' and disclosure should include the identity of any witness or document that the disclosing party may use to support such denials.

Subdivision (a)(3) presently excuses pretrial disclosure of information solely for impeachment. Impeachment information is similarly excluded from the initial disclosure requirement.

Subdivisions (a)(1)(C) and (D) are not changed. Should a case be exempted from initial disclosure by Rule 26(a)(1)(E) or by agreement or order, the insurance information described by subparagraph (D) should be subject to discovery, as it would have been under the principles of former Rule 26(b)(2), which was added in 1970 and deleted in 1993 as redundant in light of the new initial disclosure obligation.

New subdivision (a)(1)(E) excludes eight specified categories of proceedings from initial disclosure. The objective of this listing is to identify cases in which there is likely to be little or no discovery, or in which initial disclosure appears unlikely to contribute to the effective development of the case. The list was developed after a review of the categories excluded by local rules in various districts from the operation of Rule 16(b) and the conference requirements of subdivision (f). Subdivision (a)(1)(E) refers to categories of ''proceedings'' rather than categories of ''actions'' because some might not properly be labeled ''actions.'' Case designations made by the parties or the clerk's office at the time of filing do not control application of the exemptions. The descriptions in the rule are generic and are intended to be administered by the parties—and, when needed, the courts—with the flexibility needed to adapt to gradual evolution in the types of proceedings that fall within these general categories. The exclusion of an action for review on an administrative record, for example, is intended to reach a proceeding that is framed as an ''appeal'' based solely on an administrative record. The exclusion should not apply to a proceeding in a form that commonly permits admission of new evidence to supplement the record. Item (vii), excluding a proceeding ancillary to proceedings in other courts, does not refer to bankruptcy proceedings; application of the Civil Rules to bankruptcy proceedings is determined by the Bankruptcy Rules.

Subdivision (a)(1)(E) is likely to exempt a substantial proportion of the cases in most districts from the initial disclosure requirement. Based on 1996 and 1997 case filing statistics, Federal Judicial Center staff estimate that, nationwide, these categories total approximately one-third of all civil filings.

The categories of proceedings listed in subdivision (a)(1)(E) are also exempted from the subdivision (f) conference requirement and from the subdivision (d) moratorium on discovery. Although there is no restriction on commencement of discovery in these cases, it is not expected that this opportunity will often lead to abuse since there is likely to be little or no discovery in most such cases. Should a defendant need more time to respond to discovery requests filed at the beginning of an exempted action, it can seek relief by motion under Rule 26(c) if the plaintiff is unwilling to defer the due date by agreement.

Subdivision (a)(1)(E)'s enumeration of exempt categories is exclusive. Although a case-specific order can alter or excuse initial disclosure, local rules or ''standing'' orders that purport to create general exemptions are invalid. *See* Rule 83.

The time for initial disclosure is extended to 14 days after the subdivision (f) conference unless the court orders otherwise. This change is integrated with corresponding changes requiring that the subdivision (f) conference be held 21 days before the Rule 16(b) scheduling conference or scheduling order, and that the report on the subdivision (f) conference be submitted to the court 14 days after the meeting. These changes provide a more orderly opportunity for the parties to review the disclosures, and for the court to consider the report. In many instances, the subdivision (f) conference and the effective preparation of the case would benefit from disclosure before the conference, and earlier disclosure is encouraged.

The presumptive disclosure date does not apply if a party objects to initial disclosure during the subdivision (f) conference and states its objection in the subdivision (f) discovery plan. The right to object to initial disclosure is not intended to afford parties an opportunity to ''opt out'' of disclosure unilaterally. It does provide an opportunity for an objecting party to present to the court its position that disclosure would be ''inappropriate in the circumstances of the action.'' Making the objection permits the objecting party to present the question to the judge before any party is required to make disclosure. The court must then rule on the objection and determine what disclosures—if any—should be made. Ordinarily, this determination would be included in the Rule 16(b) scheduling order, but the court could handle the matter in a different fashion. Even when circumstances warrant suspending some disclosure obligations, others—such as the damages and insurance information called for by subdivisions (a)(1)(C) and (D)—may continue to be appropriate.

The presumptive disclosure date is also inapplicable to a party who is ''first served or otherwise joined'' after the subdivision (f) conference. This phrase refers to the date of service of a claim on a party in a defensive posture (such as a defendant or third-party defendant), and the date of joinder of a party added as a claimant or an intervenor. Absent court order or stipulation, a new party has 30 days in which to make its initial disclosures. But it is expected that later-added parties will ordinarily be treated the same as the original parties when the original parties have stipulated to forgo initial disclosure, or the court has ordered disclosure in a modified form.

Subdivision (a)(3). The amendment to Rule 5(d) forbids filing disclosures under subdivisions (a)(1) and (a)(2) until they are used in the proceeding, and this change is reflected in an amendment to subdivision (a)(4). Disclosures under subdivision (a)(3), however, may be important to the court in connection with the final pretrial conference or otherwise in preparing for trial. The requirement that objections to certain matters be filed points up the court's need to be provided with these materials. Accordingly, the requirement that subdivision (a)(3) materials be filed has been moved from subdivision (a)(4) to subdivision (a)(3), and it has also been made clear that they—and any objections—should be filed ''promptly.''

Subdivision (a)(4). The filing requirement has been removed from this subdivision. Rule 5(d) has been amended to provide that disclosures under subdivisions (a)(1) and (a)(2) must not be filed until used in the proceed-

ing. Subdivision (a)(3) has been amended to require that the disclosures it directs, and objections to them, be filed promptly. Subdivision (a)(4) continues to require that all disclosures under subdivisions (a)(1), (a)(2), and (a)(3) be in writing, signed, and served.

''Shall'' is replaced by ''must'' under the program to conform amended rules to current style conventions when there is no ambiguity.

Subdivision (b)(1). In 1978, the Committee published for comment a proposed amendment, suggested by the Section of Litigation of the American Bar Association, to refine the scope of discovery by deleting the ''subject matter'' language. This proposal was withdrawn, and the Committee has since then made other changes in the discovery rules to address concerns about overbroad discovery. Concerns about costs and delay of discovery have persisted nonetheless, and other bar groups have repeatedly renewed similar proposals for amendment to this subdivision to delete the ''subject matter'' language. Nearly one-third of the lawyers surveyed in 1997 by the Federal Judicial Center endorsed narrowing the scope of discovery as a means of reducing litigation expense without interfering with fair case resolutions. *Discovery and Disclosure Practice, supra*, at 44–45 (1997). The Committee has heard that in some instances, particularly cases involving large quantities of discovery, parties seek to justify discovery requests that sweep far beyond the claims and defenses of the parties on the ground that they nevertheless have a bearing on the ''subject matter'' involved in the action.

The amendments proposed for subdivision (b)(1) include one element of these earlier proposals but also differ from these proposals in significant ways. The similarity is that the amendments describe the scope of party-controlled discovery in terms of matter relevant to the claim or defense of any party. The court, however, retains authority to order discovery of any matter relevant to the subject matter involved in the action for good cause. The amendment is designed to involve the court more actively in regulating the breadth of sweeping or contentious discovery. The Committee has been informed repeatedly by lawyers that involvement of the court in managing discovery is an important method of controlling problems of inappropriately broad discovery. Increasing the availability of judicial officers to resolve discovery disputes and increasing court management of discovery were both strongly endorsed by the attorneys surveyed by the Federal Judicial Center. *See Discovery and Disclosure Practice, supra*, at 44. Under the amended provisions, if there is an objection that discovery goes beyond material relevant to the parties' claims or defenses, the court would become involved to determine whether the discovery is relevant to the claims or defenses and, if not, whether good cause exists for authorizing it so long as it is relevant to the subject matter of the action. The good-cause standard warranting broader discovery is meant to be flexible.

The Committee intends that the parties and the court focus on the actual claims and defenses involved in the action. The dividing line between information relevant to the claims and defenses and that relevant only to the subject matter of the action cannot be defined with precision. A variety of types of information not directly pertinent to the incident in suit could be relevant to the claims or defenses raised in a given action. For example, other incidents of the same type, or involving the same product, could be properly discoverable under the revised standard. Information about organizational arrangements or filing systems of a party could be discoverable if likely to yield or lead to the discovery of admissible information. Similarly, information that could be used to impeach a likely witness, although not otherwise relevant to the claims or defenses, might be properly discoverable. In each instance, the determination whether such information is discoverable because it is relevant to the claims or defenses depends on the circumstances of the pending action.

The rule change signals to the court that it has the authority to confine discovery to the claims and defenses asserted in the pleadings, and signals to the parties that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings. In general, it is hoped that reasonable lawyers can cooperate to manage discovery without the need for judicial intervention. When judicial intervention is invoked, the actual scope of discovery should be determined according to the reasonable needs of the action. The court may permit broader discovery in a particular case depending on the circumstances of the case, the nature of the claims and defenses, and the scope of the discovery requested.

The amendments also modify the provision regarding discovery of information not admissible in evidence. As added in 1946, this sentence was designed to make clear that otherwise relevant material could not be withheld because it was hearsay or otherwise inadmissible. The Committee was concerned that the ''reasonably calculated to lead to the discovery of admissible evidence'' standard set forth in this sentence might swallow any other limitation on the scope of discovery. Accordingly, this sentence has been amended to clarify that information must be relevant to be discoverable, even though inadmissible, and that discovery of such material is permitted if reasonably calculated to lead to the discovery of admissible evidence. As used here, ''relevant'' means within the scope of discovery as defined in this subdivision, and it would include information relevant to the subject matter involved in the action if the court has ordered discovery to that limit based on a showing of good cause.

Finally, a sentence has been added calling attention to the limitations of subdivision (b)(2)(i), (ii), and (iii). These limitations apply to discovery that is otherwise within the scope of subdivision (b)(1). The Committee has been told repeatedly that courts have not implemented these limitations with the vigor that was contemplated. *See* 8 *Federal Practice & Procedure* §2008.1 at 121. This otherwise redundant cross-reference has been added to emphasize the need for active judicial use of subdivision (b)(2) to control excessive discovery. *Cf. Crawford-El v. Britton*, 118 S. Ct. 1584, 1597 (1998) (quoting Rule 26(b)(2)(iii) and stating that ''Rule 26 vests the trial judge with broad discretion to tailor discovery narrowly'').

Subdivision (b)(2). Rules 30, 31, and 33 establish presumptive national limits on the numbers of depositions and interrogatories. New Rule 30(d)(2) establishes a presumptive limit on the length of depositions. Subdivision (b)(2) is amended to remove the previous permission for local rules that establish different presumptive limits on these discovery activities. There is no reason to believe that unique circumstances justify varying these nationally-applicable presumptive limits in certain districts. The limits can be modified by court order or agreement in an individual action, but ''standing'' orders imposing different presumptive limits are not authorized. Because there is no national rule limiting the number of Rule 36 requests for admissions, the rule continues to authorize local rules that impose numerical limits on them. This change is not intended to interfere with differentiated case management in districts that use this technique by case-specific order as part of their Rule 16 process.

Subdivision (d). The amendments remove the prior authority to exempt cases by local rule from the moratorium on discovery before the subdivision (f) conference, but the categories of proceedings exempted from initial disclosure under subdivision (a)(1)(E) are excluded from subdivision (d). The parties may agree to disregard the moratorium where it applies, and the court may so order in a case, but ''standing'' orders altering the moratorium are not authorized.

Subdivision (f). As in subdivision (d), the amendments remove the prior authority to exempt cases by local rule from the conference requirement. The Committee has been informed that the addition of the conference was one of the most successful changes made in the 1993

amendments, and it therefore has determined to apply the conference requirement nationwide. The categories of proceedings exempted from initial disclosure under subdivision (a)(1)(E) are exempted from the conference requirement for the reasons that warrant exclusion from initial disclosure. The court may order that the conference need not occur in a case where otherwise required, or that it occur in a case otherwise exempted by subdivision (a)(1)(E). ''Standing'' orders altering the conference requirement for categories of cases are not authorized.

The rule is amended to require only a ''conference'' of the parties, rather than a ''meeting.'' There are important benefits to face-to-face discussion of the topics to be covered in the conference, and those benefits may be lost if other means of conferring were routinely used when face-to-face meetings would not impose burdens. Nevertheless, geographic conditions in some districts may exact costs far out of proportion to these benefits. The amendment allows the court by case-specific order to require a face-to-face meeting, but ''standing'' orders so requiring are not authorized.

As noted concerning the amendments to subdivision (a)(1), the time for the conference has been changed to at least 21 days before the Rule 16 scheduling conference, and the time for the report is changed to no more than 14 days after the Rule 26(f) conference. This should ensure that the court will have the report well in advance of the scheduling conference or the entry of the scheduling order.

Since Rule 16 was amended in 1983 to mandate some case management activities in all courts, it has included deadlines for completing these tasks to ensure that all courts do so within a reasonable time. Rule 26(f) was fit into this scheme when it was adopted in 1993. It was never intended, however, that the national requirements that certain activities be completed by a certain time should delay case management in districts that move much faster than the national rules direct, and the rule is therefore amended to permit such a court to adopt a local rule that shortens the period specified for the completion of these tasks.

''Shall'' is replaced by ''must,'' ''does,'' or an active verb under the program to conform amended rules to current style conventions when there is no ambiguity.

GAP Report. The Advisory Committee recommends that the amendments to Rules 26(a)(1)(A) and (B) be changed so that initial disclosure applies to information the disclosing party ''may use to support'' its claims or defenses. It also recommends changes in the Committee Note to explain that disclosure requirement. In addition, it recommends inclusion in the Note of further explanatory matter regarding the exclusion from initial disclosure provided in new Rule 26(a)(1)(E) for actions for review on an administrative record and the impact of these exclusions on bankruptcy proceedings. Minor wording improvements in the Note are also proposed.

The Advisory Committee recommends changing the rule to authorize the court to expand discovery to any ''matter''—not ''information''—relevant to the subject matter involved in the action. In addition, it recommends additional clarifying material in the Committee Note about the impact of the change on some commonly disputed discovery topics, the relationship between cost-bearing under Rule 26(b)(2) and expansion of the scope of discovery on a showing of good cause, and the meaning of ''relevant'' in the revision to the last sentence of current subdivision (b)(1). In addition, some minor clarifications of language changes have been proposed for the Committee Note.

The Advisory Committee recommends adding a sentence to the published amendments to Rule 26(f) authorizing local rules shortening the time between the attorney conference and the court's action under Rule 16(b), and addition to the Committee Note of explanatory material about this change to the rule. This addition can be made without republication in response to public comments.

COMMITTEE NOTES ON RULES—2006 AMENDMENT

Subdivision (a). Rule 26(a)(1)(B) is amended to parallel Rule 34(a) by recognizing that a party must disclose electronically stored information as well as documents that it may use to support its claims or defenses. The term ''electronically stored information'' has the same broad meaning in Rule 26(a)(1) as in Rule 34(a). This amendment is consistent with the 1993 addition of Rule 26(a)(1)(B). The term ''data compilations'' is deleted as unnecessary because it is a subset of both documents and electronically stored information.

Changes Made After Publication and Comment. As noted in the introduction [omitted], this provision was not included in the published rule. It is included as a conforming amendment, to make Rule 26(a)(1) consistent with the changes that were included in the published proposals.

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

Subdivision (b)(2). The amendment to Rule 26(b)(2) is designed to address issues raised by difficulties in locating, retrieving, and providing discovery of some electronically stored information. Electronic storage systems often make it easier to locate and retrieve information. These advantages are properly taken into account in determining the reasonable scope of discovery in a particular case. But some sources of electronically stored information can be accessed only with substantial burden and cost. In a particular case, these burdens and costs may make the information on such sources not reasonably accessible.

It is not possible to define in a rule the different types of technological features that may affect the burdens and costs of accessing electronically stored information. Information systems are designed to provide ready access to information used in regular ongoing activities. They also may be designed so as to provide ready access to information that is not regularly used. But a system may retain information on sources that are accessible only by incurring substantial burdens or costs. Subparagraph (B) is added to regulate discovery from such sources.

Under this rule, a responding party should produce electronically stored information that is relevant, not privileged, and reasonably accessible, subject to the (b)(2)(C) limitations that apply to all discovery. The responding party must also identify, by category or type, the sources containing potentially responsive information that it is neither searching nor producing. The identification should, to the extent possible, provide enough detail to enable the requesting party to evaluate the burdens and costs of providing the discovery and the likelihood of finding responsive information on the identified sources.

A party's identification of sources of electronically stored information as not reasonably accessible does not relieve the party of its common-law or statutory duties to preserve evidence. Whether a responding party is required to preserve unsearched sources of potentially responsive information that it believes are not reasonably accessible depends on the circumstances of each case. It is often useful for the parties to discuss this issue early in discovery.

The volume of—and the ability to search—much electronically stored information means that in many cases the responding party will be able to produce information from reasonably accessible sources that will fully satisfy the parties' discovery needs. In many circumstances the requesting party should obtain and evaluate the information from such sources before insisting that the responding party search and produce information contained on sources that are not reasonably accessible. If the requesting party continues to seek discovery of information from sources identified as not reasonably accessible, the parties should discuss the burdens and costs of accessing and retrieving the

information, the needs that may establish good cause for requiring all or part of the requested discovery even if the information sought is not reasonably accessible, and conditions on obtaining and producing the information that may be appropriate.

If the parties cannot agree whether, or on what terms, sources identified as not reasonably accessible should be searched and discoverable information produced, the issue may be raised either by a motion to compel discovery or by a motion for a protective order. The parties must confer before bringing either motion. If the parties do not resolve the issue and the court must decide, the responding party must show that the identified sources of information are not reasonably accessible because of undue burden or cost. The requesting party may need discovery to test this assertion. Such discovery might take the form of requiring the responding party to conduct a sampling of information contained on the sources identified as not reasonably accessible; allowing some form of inspection of such sources; or taking depositions of witnesses knowledgeable about the responding party's information systems.

Once it is shown that a source of electronically stored information is not reasonably accessible, the requesting party may still obtain discovery by showing good cause, considering the limitations of Rule 26(b)(2)(C) that balance the costs and potential benefits of discovery. The decision whether to require a responding party to search for and produce information that is not reasonably accessible depends not only on the burdens and costs of doing so, but also on whether those burdens and costs can be justified in the circumstances of the case. Appropriate considerations may include: (1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties' resources.

The responding party has the burden as to one aspect of the inquiry—whether the identified sources are not reasonably accessible in light of the burdens and costs required to search for, retrieve, and produce whatever responsive information may be found. The requesting party has the burden of showing that its need for the discovery outweighs the burdens and costs of locating, retrieving, and producing the information. In some cases, the court will be able to determine whether the identified sources are not reasonably accessible and whether the requesting party has shown good cause for some or all of the discovery, consistent with the limitations of Rule 26(b)(2)(C), through a single proceeding or presentation. The good-cause determination, however, may be complicated because the court and parties may know little about what information the sources identified as not reasonably accessible might contain, whether it is relevant, or how valuable it may be to the litigation. In such cases, the parties may need some focused discovery, which may include sampling of the sources, to learn more about what burdens and costs are involved in accessing the information, what the information consists of, and how valuable it is for the litigation in light of information that can be obtained by exhausting other opportunities for discovery.

The good-cause inquiry and consideration of the Rule 26(b)(2)(C) limitations are coupled with the authority to set conditions for discovery. The conditions may take the form of limits on the amount, type, or sources of information required to be accessed and produced. The conditions may also include payment by the requesting party of part or all of the reasonable costs of obtaining information from sources that are not reasonably accessible. A requesting party's willingness to share or bear the access costs may be weighed by the court in determining whether there is good cause. But the producing party's burdens in reviewing the information for relevance and privilege may weigh against permitting the requested discovery.

The limitations of Rule 26(b)(2)(C) continue to apply to all discovery of electronically stored information, including that stored on reasonably accessible electronic sources.

Changes Made after Publication and Comment. This recommendation modifies the version of the proposed rule amendment as published. Responding to comments that the published proposal seemed to require identification of information that cannot be identified because it is not reasonably accessible, the rule text was clarified by requiring identification of sources that are not reasonably accessible. The test of reasonable accessibility was clarified by adding ''because of undue burden or cost.''

The published proposal referred only to a motion by the requesting party to compel discovery. The rule text has been changed to recognize that the responding party may wish to determine its search and potential preservation obligations by moving for a protective order.

The provision that the court may for good cause order discovery from sources that are not reasonably accessible is expanded in two ways. It now states specifically that the requesting party is the one who must show good cause, and it refers to consideration of the limitations on discovery set out in present Rule 26(b)(2)(i), (ii), and (iii).

The published proposal was added at the end of present Rule 26(b)(2). It has been relocated to become a new subparagraph (B), allocating present Rule 26(b)(2) to new subparagraphs (A) and (C). The Committee Note was changed to reflect the rule text revisions. It also was shortened. The shortening was accomplished in part by deleting references to problems that are likely to become antique as technology continues to evolve, and in part by deleting passages that were at a level of detail better suited for a practice manual than a Committee Note.

The changes from the published proposed amendment to Rule 26(b)(2) are set out below. [Omitted]

Subdivision (b)(5). The Committee has repeatedly been advised that the risk of privilege waiver, and the work necessary to avoid it, add to the costs and delay of discovery. When the review is of electronically stored information, the risk of waiver, and the time and effort required to avoid it, can increase substantially because of the volume of electronically stored information and the difficulty in ensuring that all information to be produced has in fact been reviewed. Rule 26(b)(5)(A) provides a procedure for a party that has withheld information on the basis of privilege or protection as trial-preparation material to make the claim so that the requesting party can decide whether to contest the claim and the court can resolve the dispute. Rule 26(b)(5)(B) is added to provide a procedure for a party to assert a claim of privilege or trial-preparation material protection after information is produced in discovery in the action and, if the claim is contested, permit any party that received the information to present the matter to the court for resolution.

Rule 26(b)(5)(B) does not address whether the privilege or protection that is asserted after production was waived by the production. The courts have developed principles to determine whether, and under what circumstances, waiver results from inadvertent production of privileged or protected information. Rule 26(b)(5)(B) provides a procedure for presenting and addressing these issues. Rule 26(b)(5)(B) works in tandem with Rule 26(f), which is amended to direct the parties to discuss privilege issues in preparing their discovery plan, and which, with amended Rule 16(b), allows the parties to ask the court to include in an order any agreements the parties reach regarding issues of privilege or trial-preparation material protection. Agreements reached under Rule 26(f)(4) and orders including such agreements entered under Rule 16(b)(6) may be considered when a court determines whether a waiver has occurred. Such agreements and orders ordinarily

control if they adopt procedures different from those in Rule 26(b)(5)(B).

A party asserting a claim of privilege or protection after production must give notice to the receiving party. That notice should be in writing unless the circumstances preclude it. Such circumstances could include the assertion of the claim during a deposition. The notice should be as specific as possible in identifying the information and stating the basis for the claim. Because the receiving party must decide whether to challenge the claim and may sequester the information and submit it to the court for a ruling on whether the claimed privilege or protection applies and whether it has been waived, the notice should be sufficiently detailed so as to enable the receiving party and the court to understand the basis for the claim and to determine whether waiver has occurred. Courts will continue to examine whether a claim of privilege or protection was made at a reasonable time when delay is part of the waiver determination under the governing law.

After receiving notice, each party that received the information must promptly return, sequester, or destroy the information and any copies it has. The option of sequestering or destroying the information is included in part because the receiving party may have incorporated the information in protected trial-preparation materials. No receiving party may use or disclose the information pending resolution of the privilege claim. The receiving party may present to the court the questions whether the information is privileged or protected as trial-preparation material, and whether the privilege or protection has been waived. If it does so, it must provide the court with the grounds for the privilege or protection specified in the producing party's notice, and serve all parties. In presenting the question, the party may use the content of the information only to the extent permitted by the applicable law of privilege, protection for trial-preparation material, and professional responsibility.

If a party disclosed the information to nonparties before receiving notice of a claim of privilege or protection as trial-preparation material, it must take reasonable steps to retrieve the information and to return it, sequester it until the claim is resolved, or destroy it.

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

Changes Made After Publication and Comment. The rule recommended for approval is modified from the published proposal. The rule is expanded to include trial-preparation protection claims in addition to privilege claims.

The published proposal referred to production ''without intending to waive a claim of privilege.'' This reference to intent was deleted because many courts include intent in the factors that determine whether production waives privilege.

The published proposal required that the producing party give notice ''within a reasonable time.'' The time requirement was deleted because it seemed to implicate the question whether production effected a waiver, a question not addressed by the rule, and also because a receiving party cannot practicably ignore a notice that it believes was unreasonably delayed. The notice procedure was further changed to require that the producing party state the basis for the claim.

Two statements in the published Note have been brought into the rule text. The first provides that the receiving party may not use or disclose the information until the claim is resolved. The second provides that if the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it.[1]

The rule text was expanded by adding a provision that the receiving party may promptly present the information to the court under seal for a determination of the claim.

The published proposal provided that the producing party must comply with Rule 26(b)(5)(A) after making the claim. This provision was deleted as unnecessary.

Changes are made in the Committee Note to reflect the changes in the rule text.

The changes from the published rule are shown below. [Omitted]

Subdivision (f). Rule 26(f) is amended to direct the parties to discuss discovery of electronically stored information during their discovery-planning conference. The rule focuses on ''issues relating to disclosure or discovery of electronically stored information''; the discussion is not required in cases not involving electronic discovery, and the amendment imposes no additional requirements in those cases. When the parties do anticipate disclosure or discovery of electronically stored information, discussion at the outset may avoid later difficulties or ease their resolution.

When a case involves discovery of electronically stored information, the issues to be addressed during the Rule 26(f) conference depend on the nature and extent of the contemplated discovery and of the parties' information systems. It may be important for the parties to discuss those systems, and accordingly important for counsel to become familiar with those systems before the conference. With that information, the parties can develop a discovery plan that takes into account the capabilities of their computer systems. In appropriate cases identification of, and early discovery from, individuals with special knowledge of a party's computer systems may be helpful.

The particular issues regarding electronically stored information that deserve attention during the discovery planning stage depend on the specifics of the given case. *See Manual for Complex Litigation* (4th) § 40.25(2) (listing topics for discussion in a proposed order regarding meet-and-confer sessions). For example, the parties may specify the topics for such discovery and the time period for which discovery will be sought. They may identify the various sources of such information within a party's control that should be searched for electronically stored information. They may discuss whether the information is reasonably accessible to the party that has it, including the burden or cost of retrieving and reviewing the information. *See* Rule 26(b)(2)(B). Rule 26(f)(3) explicitly directs the parties to discuss the form or forms in which electronically stored information might be produced. The parties may be able to reach agreement on the forms of production, making discovery more efficient. Rule 34(b) is amended to permit a requesting party to specify the form or forms in which it wants electronically stored information produced. If the requesting party does not specify a form, Rule 34(b) directs the responding party to state the forms it intends to use in the production. Early discussion of the forms of production may facilitate the application of Rule 34(b) by allowing the parties to determine what forms of production will meet both parties' needs. Early identification of disputes over the forms of production may help avoid the expense and delay of searches or productions using inappropriate forms.

Rule 26(f) is also amended to direct the parties to discuss any issues regarding preservation of discoverable information during their conference as they develop a discovery plan. This provision applies to all sorts of discoverable information, but can be particularly important with regard to electronically stored information. The volume and dynamic nature of electronically stored information may complicate preservation obligations. The ordinary operation of computers involves both the automatic creation and the automatic deletion or overwriting of certain information. Failure to

[1] In response to concerns about the proposal raised at the June 15–16, 2005, Standing Committee meeting, the Committee Note was revised to emphasize that the courts will continue to examine whether a privilege claim was made at a reasonable time, as part of substantive law.

address preservation issues early in the litigation increases uncertainty and raises a risk of disputes.

The parties' discussion should pay particular attention to the balance between the competing needs to preserve relevant evidence and to continue routine operations critical to ongoing activities. Complete or broad cessation of a party's routine computer operations could paralyze the party's activities. *Cf. Manual for Complex Litigation* (4th) §11.422 (''A blanket preservation order may be prohibitively expensive and unduly burdensome for parties dependent on computer systems for their day-to-day operations.'') The parties should take account of these considerations in their discussions, with the goal of agreeing on reasonable preservation steps.

The requirement that the parties discuss preservation does not imply that courts should routinely enter preservation orders. A preservation order entered over objections should be narrowly tailored. Ex parte preservation orders should issue only in exceptional circumstances.

Rule 26(f) is also amended to provide that the parties should discuss any issues relating to assertions of privilege or of protection as trial-preparation materials, including whether the parties can facilitate discovery by agreeing on procedures for asserting claims of privilege or protection after production and whether to ask the court to enter an order that includes any agreement the parties reach. The Committee has repeatedly been advised about the discovery difficulties that can result from efforts to guard against waiver of privilege and work-product protection. Frequently parties find it necessary to spend large amounts of time reviewing materials requested through discovery to avoid waiving privilege. These efforts are necessary because materials subject to a claim of privilege or protection are often difficult to identify. A failure to withhold even one such item may result in an argument that there has been a waiver of privilege as to all other privileged materials on that subject matter. Efforts to avoid the risk of waiver can impose substantial costs on the party producing the material and the time required for the privilege review can substantially delay access for the party seeking discovery.

These problems often become more acute when discovery of electronically stored information is sought. The volume of such data, and the informality that attends use of e-mail and some other types of electronically stored information, may make privilege determinations more difficult, and privilege review correspondingly more expensive and time consuming. Other aspects of electronically stored information pose particular difficulties for privilege review. For example, production may be sought of information automatically included in electronic files but not apparent to the creator or to readers. Computer programs may retain draft language, editorial comments, and other deleted matter (sometimes referred to as ''embedded data'' or ''embedded edits'') in an electronic file but not make them apparent to the reader. Information describing the history, tracking, or management of an electronic file (sometimes called ''metadata'') is usually not apparent to the reader viewing a hard copy or a screen image. Whether this information should be produced may be among the topics discussed in the Rule 26(f) conference. If it is, it may need to be reviewed to ensure that no privileged information is included, further complicating the task of privilege review.

Parties may attempt to minimize these costs and delays by agreeing to protocols that minimize the risk of waiver. They may agree that the responding party will provide certain requested materials for initial examination without waiving any privilege or protection—sometimes known as a ''quick peek.'' The requesting party then designates the documents it wishes to have actually produced. This designation is the Rule 34 request. The responding party then responds in the usual course, screening only those documents actually requested for formal production and asserting privilege claims as provided in Rule 26(b)(5)(A). On other occasions, parties enter agreements—sometimes called ''clawback agreements''—that production without intent to waive privilege or protection should not be a waiver so long as the responding party identifies the documents mistakenly produced, and that the documents should be returned under those circumstances. Other voluntary arrangements may be appropriate depending on the circumstances of each litigation. In most circumstances, a party who receives information under such an arrangement cannot assert that production of the information waived a claim of privilege or of protection as trial-preparation material.

Although these agreements may not be appropriate for all cases, in certain cases they can facilitate prompt and economical discovery by reducing delay before the discovering party obtains access to documents, and by reducing the cost and burden of review by the producing party. A case-management or other order including such agreements may further facilitate the discovery process. Form 35 is amended to include a report to the court about any agreement regarding protections against inadvertent forfeiture or waiver of privilege or protection that the parties have reached, and Rule 16(b) is amended to recognize that the court may include such an agreement in a case- management or other order. If the parties agree to entry of such an order, their proposal should be included in the report to the court.

Rule 26(b)(5)(B) is added to establish a parallel procedure to assert privilege or protection as trial-preparation material after production, leaving the question of waiver to later determination by the court.

Changes Made After Publication and Comment. The Committee recommends a modified version of what was published. Rule 26(f)(3) was expanded to refer to the form ''or forms'' of production, in parallel with the like change in Rule 34. Different forms may be suitable for different sources of electronically stored information.

The published Rule 26(f)(4) proposal described the parties' views and proposals concerning whether, on their agreement, the court should enter an order protecting the right to assert privilege after production. This has been revised to refer to the parties' views and proposals concerning any issues relating to claims of privilege, including—if the parties agree on a procedure to assert such claims after production—whether to ask the court to include their agreement in an order. As with Rule 16(b)(6), this change was made to avoid any implications as to the scope of the protection that may be afforded by court adoption of the parties' agreement.

Rule 26(f)(4) also was expanded to include trial-preparation materials.

The Committee Note was revised to reflect the changes in the rule text.

The changes from the published rule are shown below. [Omitted]

Rule 27. Depositions Before Action or Pending Appeal

(a) BEFORE ACTION.

(1) *Petition.* A person who desires to perpetuate testimony regarding any matter that may be cognizable in any court of the United States may file a verified petition in the United States district court in the district of the residence of any expected adverse party. The petition shall be entitled in the name of the petitioner and shall show: 1, that the petitioner expects to be a party to an action cognizable in a court of the United States but is presently unable to bring it or cause it to be brought, 2, the subject matter of the expected action and the petitioner's interest therein, 3, the facts which the petitioner desires to establish by the proposed testimony and the reasons for desiring to perpetuate it, 4, the names

or a description of the persons the petitioner expects will be adverse parties and their addresses so far as known, and 5, the names and addresses of the persons to be examined and the substance of the testimony which the petitioner expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

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

(3) *Order and Examination*. If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with these rules; and the court may make orders of the character provided for by Rules 34 and 35. For the purpose of applying these rules to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

(4) *Use of Deposition*. If a deposition to perpetuate testimony is taken under these rules or if, although not so taken, it would be admissible in evidence in the courts of the state in which it is taken, it may be used in any action involving the same subject matter subsequently brought in a United States district court, in accordance with the provisions of Rule 32(a).

(b) PENDING APPEAL. If an appeal has been taken from a judgment of a district court or before the taking of an appeal if the time therefor has not expired, the district court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the district court. In such case the party who desires to perpetuate the testimony may make a motion in the district court for leave to take the depositions, upon the same notice and service thereof as if the action was pending in the district court. The motion shall show (1) the names and addresses of persons to be examined and the substance of the testimony which the party expects to elicit from each; (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 taken in actions pending in the district court.

(c) PERPETUATION BY ACTION. This rule does not limit the power of a court to entertain an action to perpetuate testimony.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Mar. 1, 1971, eff. July 1, 1971; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 25, 2005, eff. Dec. 1, 2005.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

Note to Subdivision (a). This rule offers a simple method of perpetuating testimony in cases where it is usually allowed under equity practice or under modern statutes. See *Arizona v. California*, 292 U.S. 341 (1934); *Todd Engineering Dry Dock and Repair Co. v. United States*, 32 F.(2d) 734 (C.C.A.5th, 1929); *Hall v. Stout*, 4 Del. ch. 269 (1871). For comparable state statutes see Ark.Civ.Code (Crawford, 1934) §§666–670; Calif.Code Civ.Proc. (Deering, 1937) 2083–2089; Ill.Rev.Stat. (1937) ch. 51, §§39–46; Iowa Code (1935) §§11400–11407; 2 Mass.Gen.Laws (Ter.Ed., 1932) ch. 233, §46–63; N.Y.C.P.A. (1937) §295; Ohio Gen.Code Ann. ((Throckmorton, 1936) §12216–12222; Va.Code Ann. (Michie, 1936) §6235; Wisc.Stat. (1935) §§326.27–326.29. The appointment of an attorney to represent absent parties or parties not personally notified, or a guardian ad litem to represent minors and incompetents, is provided for in several of the above statutes.

Note to Subdivision (b). This follows the practice approved in *Richter v. Union Trust Co*., 115 U.S. 55 (1885), by extending the right to perpetuate testimony to cases pending an appeal.

Note to Subdivision (c). This preserves the right to employ a separate action to perpetuate testimony under U.S.C., Title 28, [former] §644 (Depositions under *dedimus potestatem* and *in perpetuam*) as an alternate method.

NOTES OF ADVISORY COMMITTEE ON RULES—1946 AMENDMENT

Since the second sentence in subdivision (a)(3) refers only to depositions, it is arguable that Rules 34 and 35 are inapplicable in proceedings to perpetuate testimony. The new matter [in subdivisions (a)(3) and (b)] clarifies. A conforming change is also made in subdivision (b).

NOTES OF ADVISORY COMMITTEE ON RULES—1948 AMENDMENT

The only changes are in nomenclature to conform to the official designation of a district court in Title 28, U.S.C., §132(a).

NOTES OF ADVISORY COMMITTEE ON RULES—1971 AMENDMENT

The reference intended in this subdivision is to the rule governing the use of depositions in court proceedings. Formerly Rule 26(d), that rule is now Rule 32(a). The subdivision is amended accordingly.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

COMMITTEE NOTES ON RULES—2005 AMENDMENT

The outdated cross-reference to former Rule 4(d) is corrected to incorporate all Rule 4 methods of service. Former Rule 4(d) has been allocated to many different

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

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

Changes Made After Publication and Comment. Only style changes are recommended in the published draft.

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 in which the action is pending. 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. Depositions may be taken in a foreign country (1) pursuant to any applicable treaty or convention, or (2) pursuant to a letter of request (whether or not captioned a letter rogatory), or (3) on notice before a person authorized to administer oaths in the place where the examination is held, either by the law thereof or by the law of the United States, or (4) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of the commission to administer any necessary oath and take testimony. A commission or a letter of request shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter of request that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter of request may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter of request may be addressed ''To the Appropriate Authority in [here name the country].'' When a letter of request or any other device is used pursuant to any applicable treaty or convention, it shall be captioned in the form prescribed by that treaty or convention. Evidence obtained in response to a letter of request need not be excluded merely because it is not a verbatim transcript, because the testimony was not taken under oath, or because of 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.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Apr. 29, 1980, eff. Aug. 1, 1980; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

In effect this rule is substantially the same as U.S.C., Title 28, [former] §639 (Depositions *de bene esse;* when and where taken; notice). U.S.C., Title 28, [former] §642 (Depositions, acknowledgements, and affidavits taken by notaries public) does not conflict with subdivision (a).

NOTES OF ADVISORY COMMITTEE ON RULES—1946 AMENDMENT

The added language [in subdivision (a)] provides for the situation, occasionally arising, when depositions must be taken in an isolated place where there is no one readily available who has the power to administer oaths and take testimony according to the terms of the rule as originally stated. In addition, the amendment affords a more convenient method of securing depositions in the case where state lines intervene between the location of various witnesses otherwise rather closely grouped. The amendment insures that the person appointed shall have adequate power to perform his duties. It has been held that a person authorized to act in the premises, as, for example, a master, may take testimony outside the district of his appointment. *Consolidated Fastener Co. v. Columbian Button & Fastener Co.* (C.C.N.D.N.Y. 1898) 85 Fed. 54; *Mathieson Alkali Works v. Arnold, Hoffman & Co.* (C.C.A.1st, 1929) 31 F.(2d) 1.

NOTES OF ADVISORY COMMITTEE ON RULES—1963 AMENDMENT

The amendment of clause (1) is designed to facilitate depositions in foreign countries by enlarging the class of persons before whom the depositions may be taken on notice. The class is no longer confined, as at present, to a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States. In a country that regards the taking of testimony by a foreign official in aid of litigation pending in a court of another country as an infringement upon its sovereignty, it will be expedient to notice depositions before officers of the country in which the examination is taken. See generally *Symposium, Letters Rogatory* (Grossman ed. 1956); Doyle, *Taking Evidence by Deposition and Letters Rogatory and Obtaining Documents in Foreign Territory*, Proc. A.B.A., Sec. Int'l & Comp. L. 37 (1959); Heilpern, *Procuring Evidence Abroad*, 14 Tul.L.Rev. 29 (1939); Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 Yale L.J. 515, 526–29 (1953); Smit, *International Aspects of Federal Civil Procedure*, 61 Colum.L.Rev. 1031, 1056–58 (1961).

Clause (2) of amended subdivision (b), like the corresponding provision of subdivision (a) dealing with depositions taken in the United States, makes it clear that the appointment of a person by commission in itself confers power upon him to administer any necessary oath.

It has been held that a letter rogatory will not be issued unless the use of a notice or commission is shown to be impossible or impractical. See, e.g., *United States v. Matles*, 154 F.Supp. 574 (E.D.N.Y. 1957); *The Edmund Fanning*, 89 F.Supp. 282 (E.D.N.Y. 1950); *Branyan v. Koninklijke Luchtvaart Maatschappij*, 13 F.R.D. 425 (S.D.N.Y. 1953). See also *Ali Akber Kiachif v. Philco International Corp.*, 10 F.R.D. 277 (S.D.N.Y. 1950). The intent of the fourth sentence of the amended subdivision is to overcome this judicial antipathy and to permit a sound choice between depositions under a letter rogatory and on notice or by commission in the light of all the circumstances. In a case in which the foreign country will compel a witness to attend or testify in aid of a letter rogatory but not in aid of a commission, a letter rogatory may be preferred on the ground that it is less expensive to execute, even if there is plainly no need for compulsive process. A letter rogatory may also be preferred when it cannot be demonstrated that a witness will be recalcitrant or when the witness states that he is willing to testify voluntarily, but the contingency exists that he will change his mind at the last moment. In the latter case, it may be advisable to issue both a

commission and a letter rogatory, the latter to be executed if the former fails. The choice between a letter rogatory and a commission may be conditioned by other factors, including the nature and extent of the assistance that the foreign country will give to the execution of either.

In executing a letter rogatory the courts of other countries may be expected to follow their customary procedure for taking testimony. See *United States v. Paraffin Wax, 2255 Bags*, 23 F.R.D. 289 (E.D.N.Y. 1959). In many non-common-law countries the judge questions the witness, sometimes without first administering an oath, the attorneys put any supplemental questions either to the witness or through the judge, and the judge dictates a summary of the testimony, which the witness acknowledges as correct. See Jones, *supra*, at 530–32; Doyle, *supra*, at 39–41. The last sentence of the amended subdivision provides, contrary to the implications of some authority, that evidence recorded in such a fashion need not be excluded on that account. See The Mandu, 11 F.Supp. 845 (E.D.N.Y. 1935). *But cf. Nelson v. United States*, 17 Fed.Cas. 1340 (No. 10,116) (C.C.D.Pa. 1816); *Winthrop v. Union Ins. Co.*, 30 Fed.Cas. 376 (No. 17901) (C.C.D.Pa. 1807). The specific reference to the lack of an oath or a verbatim transcript is intended to be illustrative. Whether or to what degree the value or weight of the evidence may be affected by the method of taking or recording the testimony is left for determination according to the circumstances of the particular case, *cf. Uebersee Finanz-Korporation, A.G. v. Brownell*, 121 F.Supp. 420 (D.D.C. 1954); *Danisch v. Guardian Life Ins. Co.*, 19 F.R.D. 235 (S.D.N.Y. 1956); the testimony may indeed be so devoid of substance or probative value as to warrant its exclusion altogether.

Some foreign countries are hostile to allowing a deposition to be taken in their country, especially by notice or commission, or to lending assistance in the taking of a deposition. Thus compliance with the terms of amended subdivision (b) may not in all cases ensure completion of a deposition abroad. Examination of the law and policy of the particular foreign country in advance of attempting a deposition is therefore advisable. See 4 *Moore's Federal Practice* ¶¶28.05–28.08 (2d ed. 1950).

NOTES OF ADVISORY COMMITTEE ON RULES—1980 AMENDMENT

The amendments are clarifying.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1993 AMENDMENT

This revision is intended to make effective use of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, and of any similar treaties that the United States may enter into in the future which provide procedures for taking depositions abroad. The party taking the deposition is ordinarily obliged to conform to an applicable treaty or convention if an effective deposition can be taken by such internationally approved means, even though a verbatim transcript is not available or testimony cannot be taken under oath. For a discussion of the impact of such treaties upon the discovery process, and of the application of principles of comity upon discovery in countries not signatories to a convention, see *Société Nationale Industrielle Aérospatiale v. United States District Court*, 482 U.S. 522 (1987).

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

Rule 29. Stipulations Regarding Discovery Procedure

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

(As amended Mar. 30, 1970, eff. July 1, 1970; Apr. 22, 1993, eff. Dec. 1, 1993.)

NOTES OF ADVISORY COMMITTEE ON RULES—1970 Amendment

There is no provision for stipulations varying the procedures by which methods of discovery other than depositions are governed. It is common practice for parties to agree on such variations, and the amendment recognizes such agreements and provides a formal mechanism in the rules for giving them effect. Any stipulation varying the procedures may be superseded by court order, and stipulations extending the time for response to discovery under Rules 33, 34, and 36 require court approval.

NOTES OF ADVISORY COMMITTEE ON RULES—1993 AMENDMENT

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

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

Rule 30. Depositions Upon Oral Examination

(a) WHEN DEPOSITIONS MAY BE TAKEN; WHEN LEAVE REQUIRED.

(1) A party may take the testimony of any person, including a party, by deposition upon oral examination without leave of court except as provided in paragraph (2). The attendance of witnesses may be compelled by subpoena as provided in Rule 45.

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

(A) a proposed deposition would result in more than ten depositions being taken under

this rule or Rule 31 by the plaintiffs, or by the defendants, or by third-party defendants;

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

(C) a party seeks to take a deposition before the time specified in Rule 26(d) unless the notice contains a certification, with supporting facts, that the person to be examined is expected to leave the United States and be unavailable for examination in this country unless deposed before that time.

(b) NOTICE OF EXAMINATION: GENERAL REQUIREMENTS; METHOD OF RECORDING; PRODUCTION OF DOCUMENTS AND THINGS; DEPOSITION OF ORGANIZATION; DEPOSITION BY TELEPHONE.

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to, or included in, the notice.

(2) The party taking the deposition shall state in the notice the method by which the testimony shall be recorded. Unless the court orders otherwise, it may be recorded by sound, sound-and-visual, or stenographic means, and the party taking the deposition shall bear the cost of the recording. Any party may arrange for a transcription to be made from the recording of a deposition taken by nonstenographic means.

(3) With prior notice to the deponent and other parties, any party may designate another method to record the deponent's testimony in addition to the method specified by the person taking the deposition. The additional record or transcript shall be made at that party's expense unless the court otherwise orders.

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

(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 the person will testify. A subpoena shall advise a nonparty 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. This subdivision (b)(6) 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 or other remote electronic means. For the purposes of this rule and Rules 28(a), 37(a)(1), and 37(b)(1), a deposition taken by such means is taken in the district and at the place where the deponent is to answer questions.

(c) EXAMINATION AND CROSS-EXAMINATION; RECORD OF EXAMINATION; OATH; OBJECTIONS. Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Federal Rules of Evidence except Rules 103 and 615. The officer before whom the deposition is to be taken shall put the witness on oath or affirmation and shall personally, or by someone acting under the officer's direction and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other method authorized by subdivision (b)(2) of this rule. All objections made at the time of the examination to the qualifications of the officer taking the deposition, to the manner of taking it, to the evidence presented, to the conduct of any party, or to any other aspect of the proceedings shall be noted by the officer upon the record of the deposition; but the examination shall proceed, with the testimony being taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and the party taking the deposition shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

(d) SCHEDULE AND DURATION; MOTION TO TERMINATE OR LIMIT EXAMINATION.

(1) Any objection during a deposition must be stated concisely and in a non-argumentative and non-suggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion under Rule 30(d)(4).

(2) Unless otherwise authorized by the court or stipulated by the parties, a deposition is

limited to one day of seven hours. The court must allow additional time consistent with Rule 26(b)(2) if needed for a fair examination of the deponent or if the deponent or another person, or other circumstance, impedes or delays the examination.

(3) If the court finds that any impediment, delay, or other conduct has frustrated the fair examination of the deponent, it may impose upon the persons responsible an appropriate sanction, including the reasonable costs and attorney's fees incurred by any parties as a result thereof.

(4) At any time during a deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it may be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition must 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) REVIEW BY WITNESS; CHANGES; SIGNING. If requested by the deponent or a party before completion of the deposition, the deponent shall have 30 days after being notified by the officer that the transcript or recording is available in which to review the transcript or recording and, if there are changes in form or substance, to sign a statement reciting such changes and the reasons given by the deponent for making them. The officer shall indicate in the certificate prescribed by subdivision (f)(1) whether any review was requested and, if so, shall append any changes made by the deponent during the period allowed.

(f) CERTIFICATION AND DELIVERY BY OFFICER; EXHIBITS; COPIES.

(1) The officer must certify that the witness was duly sworn by the officer and that the deposition is a true record of the testimony given by the witness. This certificate must be in writing and accompany the record of the deposition. Unless otherwise ordered by the court, the officer must securely seal the deposition in an envelope or package indorsed with the title of the action and marked ''Deposition of [here insert name of witness]'' and must promptly send it to the attorney who arranged for the transcript or recording, who must store it under conditions that will protect it against loss, destruction, tampering, or deterioration. Documents and things produced for inspection during the examination of the witness must, upon the request of a party, be marked for identification and annexed to the deposition and may be inspected and copied by any party, except that if the person producing the materials desires to retain them the person may (A) offer copies to be marked for identification and annexed to the deposition and to serve thereafter as originals if the person affords to all parties fair opportunity to verify the copies by comparison with the originals, or (B) offer the originals to be marked for identification, after giving to each party an opportunity to inspect and copy them, in which event the materials may then be used in the same manner as if annexed to the deposition. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

(2) Unless otherwise ordered by the court or agreed by the parties, the officer shall retain stenographic notes of any deposition taken stenographically or a copy of the recording of any deposition taken by another method. Upon payment of reasonable charges therefor, the officer shall furnish a copy of the transcript or other recording of the deposition to any party or to the deponent.

(3) The party taking the deposition shall give prompt notice of its filing 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 that party and that party's attorney in attending, including reasonable attorney's 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 that party expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by that party and that party's attorney in attending, including reasonable attorney's fees.

(As amended Jan. 21, 1963, eff. July 1, 1963; Mar. 30, 1970, eff. July 1, 1970; Mar. 1, 1971, eff. July 1, 1971; Nov. 20, 1972, eff. July 1, 1975; Apr. 29, 1980, eff. Aug. 1, 1980; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 17, 2000, eff. Dec. 1, 2000.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

Note to Subdivision (a). This is in accordance with common practice. See U.S.C., Title 28, [former] § 639 (Depositions *de bene esse;* when and where taken; notice), the relevant provisions of which are incorporated in this rule; Calif.Code Civ.Proc. (Deering, 1937) § 2031; and statutes cited in respect to notice in the *Note* to Rule 26(a). The provision for enlarging or shortening the time of notice has been added to give flexibility to the rule.

Note to Subdivisions (b) and (d). These are introduced as a safeguard for the protection of parties and deponents on account of the unlimited right of discovery given by Rule 26.

Note to Subdivisions (c) and (e). These follow the general plan of [former] Equity Rule 51 (Evidence Taken Before Examiners, Etc.) and U. S. C., Title 28, [former]

§§640 (Depositions *de bene esse;* mode of taking), and [former] 641 (Same; transmission to court), but are more specific. They also permit the deponent to require the officer to make changes in the deposition if the deponent is not satisfied with it. See also [former] Equity Rule 50 (Stenographer–Appointment–Fees).

Note to Subdivision (f). Compare [former] Equity Rule 55 (Depositions Deemed Published When Filed).

Note to Subdivision (g). This is similar to 2 Minn. Stat. (Mason, 1927) §9833, but is more extensive.

NOTES OF ADVISORY COMMITTEE ON RULES—1963 AMENDMENT

This amendment corresponds to the change in Rule 4(d)(4). See the Advisory Committee's Note to that amendment.

NOTES OF ADVISORY COMMITTEE ON RULES—1970 AMENDMENT

Subdivision (a). This subdivision contains the provisions of existing Rule 26(a), transferred here as part of the rearrangement relating to Rule 26. Existing Rule 30(a) is transferred to 30(b). Changes in language have been made to conform to the new arrangement.

This subdivision is further revised in regard to the requirement of leave of court for taking a deposition. The present procedure, requiring a plaintiff to obtain leave of court if he serves notice of taking a deposition within 20 days after commencement of the action, is changed in several respects. First, leave is required by reference to the time the deposition is to be taken rather than the date of serving notice of taking. Second, the 20-day period is extended to 30 days and runs from the service of summons and complaint on any defendant, rather than the commencement of the action. *Cf.* Ill. S.Ct.R. 19–1, S–H Ill.Ann.Stat. §101.19–1. Third, leave is not required beyond the time that defendant initiates discovery, thus showing that he has retained counsel. As under the present practice, a party not afforded a reasonable opportunity to appear at a deposition, because he has not yet been served with process, is protected against use of the deposition at trial against him. See Rule 32(a), transferred from 26(d). Moreover, he can later redepose the witness if he so desires.

The purpose of requiring the plaintiff to obtain leave of court is, as stated by the Advisory Committee that proposed the present language of Rule 26(a), to protect "a defendant who has not had an opportunity to retain counsel and inform himself as to the nature of the suit." Note to 1948 amendment of Rule 26(a), quoted in 3A Barron & Holtzoff, *Federal Practice and Procedure* 455–456 (Wright ed. 1958). In order to assure defendant of this opportunity, the period is lengthened to 30 days. This protection, however, is relevant to the time of taking the deposition, not to the time that notice is served. Similarly, the protective period should run from the service of process rather than the filing of the complaint with the court. As stated in the note to Rule 26(d), the courts have used the service of notice as a convenient reference point for assigning priority in taking depositions, but with the elimination of priority in new Rule 26(d) the reference point is no longer needed. The new procedure is consistent in principle with the provisions of Rules 33, 34, and 36 as revised.

Plaintiff is excused from obtaining leave even during the initial 30-day period if he gives the special notice provided in subdivision (b)(2). The required notice must state that the person to be examined is about to go out of the district where the action is pending and more than 100 miles from the place of trial, or out of the United States, or on a voyage to sea, and will be unavailable for examination unless deposed within the 30-day period. These events occur most often in maritime litigation, when seamen are transferred from one port to another or are about to go to sea. Yet, there are analogous situations in nonmaritime litigation, and although the maritime problems are more common, a rule limited to claims in the admiralty and maritime jurisdiction is not justified.

In the recent unification of the civil and admiralty rules, this problem was temporarily met through addition in Rule 26(a) of a provision that depositions de bene esse may continue to be taken as to admiralty and maritime claims within the meaning of Rule 9(h). It was recognized at the time that "a uniform rule applicable alike to what are now civil actions and suits in admiralty" was clearly preferable, but the de bene esse procedure was adopted "for the time being at least." See Advisory Committee's note in Report of the Judicial Conference: Proposed Amendments to Rules of Civil Procedure 43–44 (1966).

The changes in Rule 30(a) and the new Rule 30(b)(2) provide a formula applicable to ordinary civil as well as maritime claims. They replace the provision for depositions de bene esse. They authorize an early deposition without leave of court where the witness is about to depart and, unless his deposition is promptly taken, (1) it will be impossible or very difficult to depose him before trial or (2) his deposition can later be taken but only with substantially increased effort and expense. *Cf. S.S. Hai Chang*, 1966 A.M.C. 2239 (S.D.N.Y. 1966), in which the deposing party is required to prepay expenses and counsel fees of the other party's lawyer when the action is pending in New York and depositions are to be taken on the West Coast. Defendant is protected by a provision that the deposition cannot be used against him if he was unable through exercise of diligence to obtain counsel to represent him.

The distance of 100 miles from place of trial is derived from the *de bene esse* provision and also conforms to the reach of a subpoena of the trial court, as provided in Rule 45(e). See also S.D.N.Y. Civ.R. 5(a). Some parts of the de bene esse provision are omitted from Rule 30(b)(2). Modern deposition practice adequately covers the witness who lives more than 100 miles away from place of trial. If a witness is aged or infirm, leave of court can be obtained.

Subdivision (b). Existing Rule 30(b) on protective orders has been transferred to Rule 26(c), and existing Rule 30(a) relating to the notice of taking deposition has been transferred to this subdivision. Because new material has been added, subsection numbers have been inserted.

Subdivision (b)(1). If a subpoena duces tecum is to be served, a copy thereof or a designation of the materials to be produced must accompany the notice. Each party is thereby enabled to prepare for the deposition more effectively.

Subdivision (b)(2). This subdivision is discussed in the note to subdivision (a), to which it relates.

Subdivision (b)(3). This provision is derived from existing Rule 30(a), with a minor change of language.

Subdivision (b)(4). In order to facilitate less expensive procedures, provision is made for the recording of testimony by other than stenographic means—*e.g.*, by mechanical, electronic, or photographic means. Because these methods give rise to problems of accuracy and trustworthiness, the party taking the deposition is required to apply for a court order. The order is to specify how the testimony is to be recorded, preserved, and filed, and it may contain whatever additional safeguards the court deems necessary.

Subdivision (b)(5). A provision is added to enable a party, through service of notice, to require another party to produce documents or things at the taking of his deposition. This may now be done as to a nonparty deponent through use of a subpoena duces tecum as authorized by Rule 45, but some courts have held that documents may be secured from a party only under Rule 34. See 2A Barron & Holtzoff, Federal Practice and Procedure §644.1 n. 83.2, §792 n. 16 (Wright ed. 1961). With the elimination of "good cause" from Rule 34, the reason for this restrictive doctrine has disappeared. *Cf.* N.Y.C.P.L.R. §3111.

Whether production of documents or things should be obtained directly under Rule 34 or at the deposition under this rule will depend on the nature and volume of the documents or things. Both methods are made available. When the documents are few and simple, and

closely related to the oral examination, ability to proceed via this rule will facilitate discovery. If the discovering party insists on examining many and complex documents at the taking of the deposition, thereby causing undue burdens on others, the latter may, under Rules 26(c) or 30(d), apply for a court order that the examining party proceed via Rule 34 alone.

Subdivision (b)(6). A new provision is added, whereby a party may name a corporation, partnership, association, or governmental agency as the deponent and designate the matters on which he requests examination, and the organization shall then name one or more of its officers, directors, or managing agents, or other persons consenting to appear and testify on its behalf with respect to matters known or reasonably available to the organization. *Cf.* Alberta Sup.Ct.R. 255. The organization may designate persons other than officers, directors, and managing agents, but only with their consent. Thus, an employee or agent who has an independent or conflicting interest in the litigation—for example, in a personal injury case—can refuse to testify on behalf of the organization.

This procedure supplements the existing practice whereby the examining party designates the corporate official to be deposed. Thus, if the examining party believes that certain officials who have not testified pursuant to this subdivision have added information, he may depose them. On the other hand, a court's decision whether to issue a protective order may take account of the availability and use made of the procedures provided in this subdivision.

The new procedure should be viewed as an added facility for discovery, one which may be advantageous to both sides as well as an improvement in the deposition process. It will reduce the difficulties now encountered in determining, prior to the taking of a deposition, whether a particular employee or agent is a ''managing agent.'' See Note, *Discovery Against Corporations Under the Federal Rules*, 47 Iowa L.Rev. 1006–1016 (1962). It will curb the ''bandying'' by which officers or managing agents of a corporation are deposed in turn but each disclaims knowledge of facts that are clearly known to persons in the organization and thereby to it. *Cf. Haney v. Woodward & Lothrop, Inc.*, 330 F.2d 940, 944 (4th Cir. 1964). The provisions should also assist organizations which find that an unnecessarily large number of their officers and agents are being deposed by a party uncertain of who in the organization has knowledge. Some courts have held that under the existing rules a corporation should not be burdened with choosing which person is to appear for it. *E.g., United States v. Gahagan Dredging Corp.*, 24 F.R.D. 328, 329 (S.D.N.Y. 1958). This burden is not essentially different from that of answering interrogatories under Rule 33, and is in any case lighter than that of an examining party ignorant of who in the corporation has knowledge.

Subdivision (c). A new sentence is inserted at the beginning, representing the transfer of existing Rule 26(c) to this subdivision. Another addition conforms to the new provision in subdivision (b)(4).

The present rule provides that transcription shall be carried out unless all parties waive it. In view of the many depositions taken from which nothing useful is discovered, the revised language provides that transcription is to be performed if any party requests it. The fact of the request is relevant to the exercise of the court's discretion in determining who shall pay for transcription.

Parties choosing to serve written questions rather than participate personally in an oral deposition are directed to serve their questions on the party taking the deposition, since the officer is often not identified in advance. Confidentiality is preserved, since the questions may be served in a sealed envelope.

Subdivision (d). The assessment of expenses incurred in relation to motions made under this subdivision (d) is made subject to the provisions of Rule 37(a). The standards for assessment of expenses are more fully set out in Rule 37(a), and these standards should apply to the essentially similar motions of this subdivision.

Subdivision (e). The provision relating to the refusal of a witness to sign his deposition is tightened through insertion of a 30-day time period.

Subdivision (f)(1). A provision is added which codifies in a flexible way the procedure for handling exhibits related to the deposition and at the same time assures each party that he may inspect and copy documents and things produced by a nonparty witness in response to subpoena duces tecum. As a general rule and in the absence of agreement to the contrary or order of the court, exhibits produced without objection are to be annexed to and returned with the deposition, but a witness may substitute copies for purposes of marking and he may obtain return of the exhibits. The right of the parties to inspect exhibits for identification and to make copies is assured. *Cf.* N.Y.C.P.L.R. § 3116(c).

NOTES OF ADVISORY COMMITTEE ON RULES—1971 AMENDMENT

The subdivision permits a party to name a corporation or other form of organization as a deponent in the notice of examination and to describe in the notice the matters about which discovery is desired. The organization is then obliged to designate natural persons to testify on its behalf. The amendment clarifies the procedure to be followed if a party desires to examine a nonparty organization through persons designated by the organization. Under the rules, a subpoena rather than a notice of examination is served on a non-party to compel attendance at the taking of a deposition. The amendment provides that a subpoena may name a nonparty organization as the deponent and may indicate the matters about which discovery is desired. In that event, the non-party organization must respond by designating natural persons, who are then obliged to testify as to matters known or reasonably available to the organization. To insure that a non-party organization that is not represented by counsel has knowledge of its duty to designate, the amendment directs the party seeking discovery to advise of the duty in the body of the subpoena.

NOTES OF ADVISORY COMMITTEE ON RULES—1972 AMENDMENT

Subdivision (c). Existing. Rule 43(b), which is to be abrogated, deals with the use of leading questions, the calling, interrogation, impeachment, and scope of cross-examination of adverse parties, officers, etc. These topics are dealt with in many places in the Rules of Evidence. Moreover, many pertinent topics included in the Rules of Evidence are not mentioned in Rule 43(b), e.g. privilege. A reference to the Rules of Evidence generally is therefore made in subdivision (c) of Rule 30.

NOTES OF ADVISORY COMMITTEE ON RULES—1980 AMENDMENT

Subdivision (b)(4). It has been proposed that electronic recording of depositions be authorized as a matter of course, subject to the right of a party to seek an order that a deposition be recorded by stenographic means. The Committee is not satisfied that a case has been made for a reversal of present practice. The amendment is made to encourage parties to agree to the use of electronic recording of depositions so that conflicting claims with respect to the potential of electronic recording for reducing costs of depositions can be appraised in the light of greater experience. The provision that the parties may stipulate that depositions may be recorded by other than stenographic means seems implicit in Rule 29. The amendment makes it explicit. The provision that the stipulation or order shall designate the person before whom the deposition is to be taken is added to encourage the naming of the recording technician as that person, eliminating the necessity of the presence of one whose only function is to administer the oath. See Rules 28(a) and 29.

Subdivision (b)(7). Depositions by telephone are now authorized by Rule 29 upon stipulation of the parties.

The amendment authorizes that method by order of the court. The final sentence is added to make it clear that when a deposition is taken by telephone it is taken in the district and at the place where the witness is to answer the questions rather than that where the questions are propounded.

Subdivision (f)(1). For the reasons set out in the Note following the amendment of Rule 5(d), the court may wish to permit the parties to retain depositions unless they are to be used in the action. The amendment of the first paragraph permits the court to so order.

The amendment of the second paragraph is clarifying. The purpose of the paragraph is to permit a person who produces materials at a deposition to offer copies for marking and annexation to the deposition. Such copies are a ''substitute'' for the originals, which are not to be marked and which can thereafter be used or even disposed of by the person who produces them. In the light of that purpose, the former language of the paragraph had been justly termed ''opaque.'' Wright & Miller, *Federal Practice and Procedure: Civil* § 2114.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

EFFECTIVE DATE OF AMENDMENT PROPOSED NOVEMBER 20, 1972

Amendment of this rule embraced by the order entered by the Supreme Court of the United States on November 20, 1972, effective on the 180th day beginning after January 2, 1975, see section 3 of Pub. L. 93–595, Jan. 2, 1975, 88 Stat. 1959, set out as a note under section 2074 of this title.

NOTES OF ADVISORY COMMITTEE ON RULES—1993 AMENDMENT

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

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

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

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

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

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

Paragraph (2)(C) revises the second sentence of the former subdivision (a) as to when depositions may be taken. Consistent with the changes made in Rule 26(d), providing that formal discovery ordinarily not commence until after the litigants have met and conferred as directed in revised Rule 26(f), the rule requires leave of court or agreement of the parties if a deposition is to be taken before that time (except when a witness is about to leave the country).

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

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

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

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

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

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

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

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

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

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

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

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

Paragraph (3) authorizes appropriate sanctions not only when a deposition is unreasonably prolonged, but also when an attorney engages in other practices that improperly frustrate the fair examination of the deponent, such as making improper objections or giving directions not to answer prohibited by paragraph (1). In general, counsel should not engage in any conduct during a deposition that would not be allowed in the presence of a judicial officer. The making of an excessive number of unnecessary objections may itself constitute sanctionable conduct, as may the refusal of an attorney to agree with other counsel on a fair apportionment of the time allowed for examination of a deponent or a refusal to agree to a reasonable request for some additional time to complete a deposition, when that is permitted by the local rule or order.

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

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

COMMITTEE NOTES ON RULES—2000 AMENDMENT

Subdivision (d). Paragraph (1) has been amended to clarify the terms regarding behavior during depositions. The references to objections ''to evidence'' and limitations ''on evidence'' have been removed to avoid disputes about what is ''evidence'' and whether an objection is to, or a limitation is on, discovery instead. It is intended that the rule apply to any objection to a question or other issue arising during a deposition, and to any limitation imposed by the court in connection with a deposition, which might relate to duration or other matters.

The current rule places limitations on instructions that a witness not answer only when the instruction is made by a ''party.'' Similar limitations should apply with regard to anyone who might purport to instruct a witness not to answer a question. Accordingly, the rule is amended to apply the limitation to instructions by any person. The amendment is not intended to confer new authority on nonparties to instruct witnesses to refuse to answer deposition questions. The amendment makes it clear that, whatever the legitimacy of giving such instructions, the nonparty is subject to the same limitations as parties.

Paragraph (2) imposes a presumptive durational limitation of one day of seven hours for any deposition. The Committee has been informed that overlong depositions can result in undue costs and delays in some circumstances. This limitation contemplates that there will be reasonable breaks during the day for lunch and other reasons, and that the only time to be counted is the time occupied by the actual deposition. For purposes of this durational limit, the deposition of each person designated under Rule 30(b)(6) should be considered a separate deposition. The presumptive duration may be extended, or otherwise altered, by agreement. Absent agreement, a court order is needed. The party seeking a court order to extend the examination, or otherwise alter the limitations, is expected to show good cause to justify such an order.

Parties considering extending the time for a deposition—and courts asked to order an extension—might consider a variety of factors. For example, if the witness needs an interpreter, that may prolong the examination. If the examination will cover events occurring over a long period of time, that may justify allowing additional time. In cases in which the witness will be questioned about numerous or lengthy documents, it is often desirable for the interrogating party to send copies of the documents to the witness sufficiently in advance of the deposition so that the witness can become familiar with them. Should the witness nevertheless not read the documents in advance, thereby prolonging the deposition, a court could consider that a reason for extending the time limit. If the examination reveals that documents have been requested but not produced, that may justify further examination once production has occurred. In multi-party cases, the need for each party to examine the witness may warrant additional time, although duplicative questioning should be avoided and parties with similar interests should strive to designate one lawyer to question about areas of common interest. Similarly, should the lawyer for the witness want to examine the witness, that may require additional time. Finally, with regard to expert witnesses, there may more often be a need for additional time—even after the submission of the report required by Rule 26(a)(2)—for full exploration of the theories upon which the witness relies.

It is expected that in most instances the parties and the witness will make reasonable accommodations to avoid the need for resort to the court. The limitation is phrased in terms of a single day on the assumption that ordinarily a single day would be preferable to a deposition extending over multiple days; if alternative arrangements would better suit the parties, they may agree to them. It is also assumed that there will be reasonable breaks during the day. Preoccupation with timing is to be avoided.

The rule directs the court to allow additional time where consistent with Rule 26(b)(2) if needed for a fair examination of the deponent. In addition, if the deponent or another person impedes or delays the examination, the court must authorize extra time. The amendment makes clear that additional time should also be allowed where the examination is impeded by an ''other circumstance,'' which might include a power outage, a health emergency, or other event.

In keeping with the amendment to Rule 26(b)(2), the provision added in 1993 granting authority to adopt a local rule limiting the time permitted for depositions has been removed. The court may enter a case-specific order directing shorter depositions for all depositions in a case or with regard to a specific witness. The court may also order that a deposition be taken for limited periods on several days.

Paragraph (3) includes sanctions provisions formerly included in paragraph (2). It authorizes the court to impose an appropriate sanction on any person responsible for an impediment that frustrated the fair examination of the deponent. This could include the deponent, any party, or any other person involved in the deposition. If the impediment or delay results from an ''other circumstance'' under paragraph (2), ordinarily no sanction would be appropriate.

Former paragraph (3) has been renumbered (4) but is otherwise unchanged.

Subdivision (f)(1). This subdivision is amended because Rule 5(d) has been amended to direct that discovery materials, including depositions, ordinarily should not be filed. The rule already has provisions directing that the lawyer who arranged for the transcript or recording preserve the deposition. Rule 5(d) provides that, once the deposition is used in the proceeding, the attorney must file it with the court.

''Shall'' is replaced by ''must'' or ''may'' under the program to conform amended rules to current style conventions when there is no ambiguity.

GAP Report. The Advisory Committee recommends deleting the requirement in the published proposed amendments that the deponent consent to extending a deposition beyond one day, and adding an amendment to Rule 30(f)(1) to conform to the published amendment to Rule 5(d) regarding filing of depositions. It also recommends conforming the Committee Note with regard to the deponent veto, and adding material to the Note to provide direction on computation of the durational limitation on depositions, to provide examples of situations in which the parties might agree—or the court order—that a deposition be extended, and to make clear that no new authority to instruct a witness is conferred by the amendment. One minor wording improvement in the Note is also suggested.

Rule 31. Depositions Upon Written Questions

(a) SERVING QUESTIONS; NOTICE.

(1) A party may take the testimony of any person, including a party, by deposition upon written questions without leave of court except as provided in paragraph (2). The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45.

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

(A) a proposed deposition would result in more than ten depositions being taken under this rule or Rule 30 by the plaintiffs, or by the defendants, or by third-party defendants;

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

(C) a party seeks to take a deposition before the time specified in Rule 26(d).

(3) A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating (1) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs, and (2) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with the provisions of Rule 30(b)(6).

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

(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 file or mail the deposition, attaching thereto the copy of the notice and the questions received by the officer.

(c) NOTICE OF FILING. When the deposition is filed the party taking it shall promptly give notice thereof to all other parties.

(As amended Mar. 30, 1970, eff. July 1, 1970; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

This rule is in accordance with common practice. In most of the states listed in the *Note* to Rule 26(a), provisions similar to this rule will be found in the statutes which in their respective statutory compilations follow those cited in the *Note* to Rule 26(a).

NOTES OF ADVISORY COMMITTEE ON RULES—1970 AMENDMENT

Confusion is created by the use of the same terminology to describe both the taking of a deposition upon ''written interrogatories'' pursuant to this rule and the serving of ''written interrogatories'' upon parties pursuant to Rule 33. The distinction between these two modes of discovery will be more readily and clearly grasped through substitution of the word ''questions'' for ''interrogatories'' throughout this rule.

Subdivision (a). A new paragraph is inserted at the beginning of this subdivision to conform to the rearrangement of provisions in Rules 26(a), 30(a), and 30(b).

The revised subdivision permits designation of the deponent by general description or by class or group.

This conforms to the practice for depositions on oral examination.

The new procedure provided in Rule 30(b)(6) for taking the deposition of a corporation or other organization through persons designated by the organization is incorporated by reference.

The service of all questions, including cross, redirect, and recross, is to be made on all parties. This will inform the parties and enable them to participate fully in the procedure.

The time allowed for service of cross, redirect, and recross questions has been extended. Experience with the existing time limits shows them to be unrealistically short. No special restriction is placed on the time for serving the notice of taking the deposition and the first set of questions. Since no party is required to serve cross questions less than 30 days after the notice and questions are served, the defendant has sufficient time to obtain counsel. The court may for cause shown enlarge or shorten the time.

Subdivision (d). Since new Rule 26(c) provides for protective orders with respect to all discovery, and expressly provides that the court may order that one discovery device be used in place of another, subdivision (d) is eliminated as unnecessary.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1993 AMENDMENT

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

Rule 32. Use of Depositions in Court Proceedings

(a) USE OF DEPOSITIONS. 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 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:

(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, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or

(C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or

(D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or

(E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

A deposition taken without leave of court pursuant to a notice under Rule 30(a)(2)(C) shall not be used against a party who demonstrates that, when served with the notice, it was unable through the exercise of diligence to obtain counsel to represent it at the taking of the deposition; nor shall a deposition be used against a party who, having received less than 11 days notice of a deposition, has promptly upon receiving such notice filed a motion for a protective order under Rule 26(c)(2) requesting that the deposition not be held or be held at a different time or place and such motion is pending at the time the deposition is held.

(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 Rule 28(b) and subdivision (d)(3) of this rule, 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) FORM OF PRESENTATION. Except as otherwise directed by the court, a party offering deposition testimony pursuant to this rule may offer it in stenographic or nonstenographic form, but, if in nonstenographic form, the party shall also provide the court with a transcript of the portions so offered. On request of any party in a case tried before a jury, deposition testimony offered other than for impeachment purposes shall be presented in nonstenographic form, if available, unless the court for good cause orders otherwise.

(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 disqualifica-

tion 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, filed, 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.

(As amended Mar. 30, 1970, eff. July 1, 1970; Nov. 20, 1972, eff. July 1, 1975; Apr. 29, 1980, eff. Aug. 1, 1980; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

This rule is in accordance with common practice. In most of the states listed in the *Note* to Rule 26, provisions similar to this rule will be found in the statutes which in their respective statutory compilations follow those cited in the *Note* to Rule 26.

NOTES OF ADVISORY COMMITTEE ON RULES—1970 AMENDMENT

As part of the rearrangement of the discovery rules, existing subdivisions (d), (e), and (f) of Rule 26 are transferred to Rule 32 as new subdivisions (a), (b), and (c). The provisions of Rule 32 are retained as subdivision (d) of Rule 32 with appropriate changes in the lettering and numbering of subheadings. The new rule is given a suitable new title. A beneficial byproduct of the rearrangement is that provisions which are naturally related to one another are placed in one rule.

A change is made in new Rule 32(a), whereby it is made clear that the rules of evidence are to be applied to depositions offered at trial as though the deponent were then present and testifying at trial. This eliminates the possibility of certain technical hearsay objections which are based, not on the contents of deponent's testimony, but on his absence from court. The language of present Rule 26(d) does not appear to authorize these technical objections, but it is not entirely clear. Note present Rule 26(e), transferred to Rule 32(b); see 2A Barron & Holtzoff, *Federal Practice and Procedure* 164–166 (Wright ed. 1961).

An addition in Rule 32(a)(2) provides for use of a deposition of a person designated by a corporation or other organization, which is a party, to testify on its behalf. This complements the new procedure for taking the deposition of a corporation or other organization provided in Rules 30(b)(6) and 31(a). The addition is appropriate, since the deposition is in substance and effect that of the corporation or other organization which is a party.

A change is made in the standard under which a party offering part of a deposition in evidence may be required to introduce additional parts of the deposition. The new standard is contained in a proposal made by the Advisory Committee on Rules of Evidence. See Rule 1–07 and accompanying Note, *Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates* 21–22 (March, 1969).

References to other rules are changed to conform to the rearrangement, and minor verbal changes have been made for clarification. The time for objecting to written questions served under Rule 31 is slightly extended.

NOTES OF ADVISORY COMMITTEE ON RULES—1972 AMENDMENT

Subdivision (e). The concept of ''making a person one's own witness'' appears to have had significance principally in two respects: impeachment and waiver of incompetency. Neither retains any vitality under the Rules of Evidence. The old prohibition against impeaching one's own witness is eliminated by Evidence Rule 607. The lack of recognition in the Rules of Evidence of state rules of incompetency in the Dead Man's area renders it unnecessary to consider aspects of waiver arising from calling the incompetent party witness. Subdivision (c) is deleted because it appears to be no longer necessary in the light of the Rules of Evidence.

NOTES OF ADVISORY COMMITTEE ON RULES—1980 AMENDMENT

Subdivision (a)(1). Rule 801(d) of the Federal Rules of Evidence permits a prior inconsistent statement of a witness in a deposition to be used as substantive evidence. And Rule 801(d)(2) makes the statement of an agent or servant admissible against the principal under the circumstances described in the Rule. The language of the present subdivision is, therefore, too narrow.

Subdivision (a)(4). The requirement that a prior action must have been dismissed before depositions taken for use in it can be used in a subsequent action was doubtless an oversight, and the courts have ignored it. See Wright & Miller, *Federal Practice and Procedure: Civil* § 2150. The final sentence is added to reflect the fact that the Federal Rules of Evidence permit a broader use of depositions previously taken under certain circumstances. For example, Rule 804(b)(1) of the Federal Rules of Evidence provides that if a witness is unavailable, as that term is defined by the rule, his deposition in any earlier proceeding can be used against a party to the prior proceeding who had an opportunity and similar motive to develop the testimony of the witness.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendment is technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1993 AMENDMENT

Subdivision (a). The last sentence of revised subdivision (a) not only includes the substance of the provisions formerly contained in the second paragraph of Rule 30(b)(2), but adds a provision to deal with the situation when a party, receiving minimal notice of a proposed deposition, is unable to obtain a court ruling on its motion for a protective order seeking to delay or change the place of the deposition. Ordinarily a party

does not obtain protection merely by the filing of a motion for a protective order under Rule 26(c); any protection is dependent upon the court's ruling. Under the revision, a party receiving less than 11 days notice of a deposition can, provided its motion for a protective order is filed promptly, be spared the risks resulting from nonattendance at the deposition held before its motion is ruled upon. Although the revision of Rule 32(a) covers only the risk that the deposition could be used against the non-appearing movant, it should also follow that, when the proposed deponent is the movant, the deponent would have ''just cause'' for failing to appear for purposes of Rule 37(d)(1). Inclusion of this provision is not intended to signify that 11 days' notice is the minimum advance notice for all depositions or that greater than 10 days should necessarily be deemed sufficient in all situations.

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

REFERENCES IN TEXT

The Federal Rules of Evidence, referred to in subd. (a)(1), (4), are set out in this Appendix.

EFFECTIVE DATE OF AMENDMENT PROPOSED NOVEMBER 20, 1972

Amendment of this rule embraced by the order entered by the Supreme Court of the United States on November 20, 1972, effective on the 180th day beginning after January 2, 1975, see section 3 of Pub. L. 93–595, Jan. 2, 1975, 88 Stat. 1959, set out as a note under section 2074 of this title.

Rule 33. Interrogatories to Parties

(a) AVAILABILITY. Without leave of court or written stipulation, any party may serve upon any other party written interrogatories, not exceeding 25 in number including all discrete subparts, to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Leave to serve additional interrogatories shall be granted to the extent consistent with the principles of Rule 26(b)(2). Without leave of court or written stipulation, interrogatories may not be served before the time specified in Rule 26(d).

(b) ANSWERS AND OBJECTIONS.

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

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

(3) The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties subject to Rule 29.

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

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

(c) SCOPE; USE AT TRIAL. Interrogatories may relate to any matters which can be inquired into under Rule 26(b)(1), and the answers may be used to the extent permitted by the rules of evidence.

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

(d) OPTION TO PRODUCE BUSINESS RECORDS. Where the answer to an interrogatory may be derived or ascertained from the business records, including electronically stored information, 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.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Mar. 30, 1970, eff. July 1, 1970; Apr. 29, 1980, eff. Aug. 1, 1980; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 12, 2006, eff. Dec. 1, 2006.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

This rule restates the substance of [former] Equity Rule 58 (Discovery—Interrogatories—Inspection and Production of Documents—Admission of Execution or Genuineness), with modifications to conform to these rules.

NOTES OF ADVISORY COMMITTEE ON RULES—1946 AMENDMENT

The added second sentence in the first paragraph of Rule 33 conforms with a similar change in Rule 26(a) and will avoid litigation as to when the interrogatories may be served. Original Rule 33 does not state the times at which parties may serve written interrogatories upon each other. It has been the accepted view, however, that the times were the same in Rule 33 as those stated in Rule 26(a). *United States v. American Sol-*

vents & Chemical Corp. of California (D.Del. 1939) 30 F.Supp. 107; *Sheldon v. Great Lakes Transit Corp.* (W.D.N.Y. 1942) 5 Fed.Rules Serv. 33.11, Case 3; *Musher Foundation, Inc.* v. *Alba Trading Co.* (S.D.N.Y. 1941) 42 F.Supp. 281; 2 *Moore's Federal Practice*, (1938) 2621. The time within which leave of court must be secured by a plaintiff has been fixed at 10 days, in view of the fact that a defendant has 10 days within which to make objections in any case, which should give him ample time to engage counsel and prepare.

Further in the first paragraph of Rule 33, the word ''service'' is substituted for ''delivery'' in conformance with the use of the word ''serve'' elsewhere in the rule and generally throughout the rules. See also Note to Rule 13(a) herein. The portion of the rule dealing with practice on objections has been revised so as to afford a clearer statement of the procedure. The addition of the words ''to interrogatories to which objection is made'' insures that only the answers to the objectionable interrogatories may be deferred, and that the answers to interrogatories not objectionable shall be forthcoming within the time prescribed in the rule. Under the original wording, answers to all interrogatories may be withheld until objections, sometimes to but a few interrogatories, are determined. The amendment expedites the procedure of the rule and serves to eliminate the strike value of objections to minor interrogatories. The elimination of the last sentence of the original rule is in line with the policy stated subsequently in this note.

The added second paragraph in Rule 33 contributes clarity and specificity as to the use and scope of interrogatories to the parties. The field of inquiry will be as broad as the scope of examination under Rule 26(b). There is no reason why interrogatories should be more limited than depositions, particularly when the former represent an inexpensive means of securing useful information. See *Hoffman v. Wilson Line, Inc.* (E.D.Pa. 1946) 9 Fed.Rules Serv. 33.514, Case 2; *Brewster v. Technicolor, Inc.* (S.D.N.Y. 1941) 5 Fed.Rules Serv. 33.319, Case 3; *Kingsway Press, Inc. v. Farrell Publishing Corp.* (S.D.N.Y. 1939) 30 F.Supp. 775. Under present Rule 33 some courts have unnecessarily restricted the breadth of inquiry on various grounds. See *Auer v. Hershey Creamery Co.* (D.N.J. 1939) 2 Fed.Rules Serv. 33.31, Case 2, 1 F.R.D. 14; *Tudor v. Leslie* (D.Mass. 1940) 4 Fed.Rules Serv. 33.324, Case 1. Other courts have read into the rule the requirement that interrogation should be directed only towards ''important facts'', and have tended to fix a more or less arbitrary limit as to the number of interrogatories which could be asked in any case. See *Knox v. Alter* (W.D.Pa. 1942) 6 Fed.Rules Serv. 33.352, Case 1; *Byers Theaters, Inc. v. Murphy* (W.D.Va. 1940) 3 Fed.Rules Serv. 33.31, Case 3, 1 F.R.D. 286; *Coca-Cola Co. v. Dixi-Cola Laboratories, Inc.* (D.Md. 1939) 30 F.Supp. 275. See also comment on these restrictions in Holtzoff, *Instruments of Discovery Under Federal Rules of Civil Procedure* (1942) 41 Mich.L.Rev. 205, 216–217. Under amended Rule 33, the party interrogated is given the right to invoke such protective orders under Rule 30(b) as are appropriate to the situation. At the same time, it is provided that the number of or number of sets of interrogatories to be served may not be limited arbitrarily or as a general policy to any particular number, but that a limit may be fixed only as justice requires to avoid annoyance, expense, embarrassment or oppression in individual cases. The party interrogated, therefore, must show the necessity for limitation on that basis. It will be noted that in accord with this change the last sentence of the present rule, restricting the sets of interrogatories to be served, has been stricken. In *J. Schoeneman, Inc. v. Brauer* (W.D.Mo. 1940) 3 Fed.Rules Serv. 33.31, Case 2, the court said: ''Rule 33 . . . has been interpreted . . . as being just as broad in its implications as in the case of depositions . . . It makes no difference therefore, how many interrogatories are propounded. If the inquiries are pertinent the opposing party cannot complain.'' To the same effect, see *Canuso v. City of Niagara Falls* (W.D.N.Y. 1945) 8 Fed.Rules Serv. 33.352, Case 1; *Hoffman v. Wilson Line, Inc., supra*.

By virtue of express language in the added second paragraph of Rule 33, as amended, any uncertainty as to the use of the answers to interrogatories is removed. The omission of a provision on this score in the original rule has caused some difficulty. See, *e.g.*, *Bailey v. New England Mutual Life Ins. Co.* (S.D.Cal. 1940) 4 Fed.Rules Serv. 33.46, Case 1.

The second sentence of the second paragraph in Rule 33, as amended, concerns the situation where a party wishes to serve interrogatories on a party after having taken his deposition, or vice versa. It has been held that an oral examination of a party, after the submission to him and answer of interrogatories, would be permitted. *Howard v. State Marine Corp.* (S.D.N.Y. 1940) 4 Fed.Rules Serv. 33.62, Case 1, 1 F.R.D. 499; *Stevens v. Minder Construction Co.* (S.D.N.Y. 1943) 7 Fed.Rules Serv. 30b.31, Case 2. But objections have been sustained to interrogatories served after the oral deposition of a party had been taken. *McNally v. Simons* (S.D.N.Y. 1940) 3 Fed.Rules Serv. 33.61, Case 1, 1 F.R.D. 254; *Currier v. Currier* (S.D.N.Y. 1942) 6 Fed.Rules Serv. 33.61, Case 1. Rule 33, as amended, permits either interrogatories after a deposition or a deposition after interrogatories. It may be quite desirable or necessary to elicit additional information by the inexpensive method of interrogatories where a deposition has already been taken. The party to be interrogated, however, may seek a protective order from the court under Rule 30(b) where the additional deposition or interrogation works a hardship or injustice on the party from whom it is sought.

NOTES OF ADVISORY COMMITTEE ON RULES—1970 AMENDMENT

Subdivision (a). The mechanics of the operation of Rule 33 are substantially revised by the proposed amendment, with a view to reducing court intervention. There is general agreement that interrogatories spawn a greater percentage of objections and motions than any other discovery device. The Columbia Survey shows that, although half of the litigants resorted to depositions and about one-third used interrogatories, about 65 percent of the objections were made with respect to interrogatories and 26 percent related to depositions. See also Speck, *The Use of Discovery in United States District Courts*, 60 Yale L.J. 1132, 1144, 1151 (1951); Note, 36 Minn.L.Rev. 364, 379 (1952).

The procedures now provided in Rule 33 seem calculated to encourage objections and court motions. The time periods now allowed for responding to interrogatories—15 days for answers and 10 days for objections—are too short. The Columbia Survey shows that tardy response to interrogatories is common, virtually expected. The same was reported in Speck, *supra*, 60 Yale L.J. 1132, 1144. The time pressures tend to encourage objections as a means of gaining time to answer.

The time for objections is even shorter than for answers, and the party runs the risk that if he fails to object in time he may have waived his objections. *E.g.*, *Cleminshaw v. Beech Aircraft Corp.*, 21 F.R.D. 300 (D.Del. 1957); see 4 *Moore's Federal Practice*, ¶33.27 (2d ed. 1966); 2A Barron & Holtzoff, *Federal Practice and Procedure* 372–373 (Wright ed. 1961). It often seems easier to object than to seek an extension of time. Unlike Rules 30(d) and 37(a), Rule 33 imposes no sanction of expenses on a party whose objections are clearly unjustified.

Rule 33 assures that the objections will lead directly to court, through its requirement that they be served with a notice of hearing. Although this procedure does preclude an out-of-court resolution of the dispute, the procedure tends to discourage informal negotiations. If answers are served and they are thought inadequate, the interrogating party may move under Rule 37(a) for an order compelling adequate answers. There is no assurance that the hearing on objections and that on inadequate answers will be heard together.

The amendment improves the procedure of Rule 33 in the following respects:

(1) The time allowed for response is increased to 30 days and this time period applies to both answers and objections, but a defendant need not respond in less

than 45 days after service of the summons and complaint upon him. As is true under existing law, the responding party who believes that some parts or all of the interrogatories are objectionable may choose to seek a protective order under new Rule 26(c) or may serve objections under this rule. Unless he applies for a protective order, he is required to serve answers or objections in response to the interrogatories, subject to the sanctions provided in Rule 37(d). Answers and objections are served together, so that a response to each interrogatory is encouraged, and any failure to respond is easily noted.

(2) In view of the enlarged time permitted for response, it is no longer necessary to require leave of court for service of interrogatories. The purpose of this requirement—that defendant have time to obtain counsel before a response must be made—is adequately fulfilled by the requirement that interrogatories be served upon a party with or after service of the summons and complaint upon him.

Some would urge that the plaintiff nevertheless not be permitted to serve interrogatories with the complaint. They fear that a routine practice might be invited, whereby form interrogatories would accompany most complaints. More fundamentally, they feel that, since very general complaints are permitted in present-day pleading, it is fair that the defendant have a right to take the lead in serving interrogatories. (These views apply also to Rule 36.) The amendment of Rule 33 rejects these views, in favor of allowing both parties to go forward with discovery, each free to obtain the information he needs respecting the case.

(3) If objections are made, the burden is on the interrogating party to move under Rule 37(a) for a court order compelling answers, in the course of which the court will pass on the objections. The change in the burden of going forward does not alter the existing obligation of an objecting party to justify his objections. *E.g., Pressley v. Boehlke*, 33 F.R.D. 316 (W.D.N.C. 1963). If the discovering party asserts than an answer is incomplete or evasive, again he may look to Rule 37(a) for relief, and he should add this assertion to his motion to overrule objections. There is no requirement that the parties consult informally concerning their differences, but the new procedure should encourage consultation, and the court may by local rule require it.

The proposed changes are similar in approach to those adopted by California in 1961. See Calif.Code Civ.Proc. §2030(a). The experience of the Los Angeles Superior Court is informally reported as showing that the California amendment resulted in a significant reduction in court motions concerning interrogatories. Rhode Island takes a similar approach. See R. 33, *R.I.R.Civ.Proc. Official Draft*, p. 74 (Boston Law Book Co.).

A change is made in subdivision (a) which is not related to the sequence of procedures. The restriction to ''adverse'' parties is eliminated. The courts have generally construed this restriction as precluding interrogatories unless an issue between the parties is disclosed by the pleadings—even though the parties may have conflicting interests. *E.g., Mozeika v. Kaufman Construction Co.*, 25 F.R.D. 233 (E.D.Pa. 1960) (plaintiff and third-party defendant); *Biddle v. Hutchinson*, 24 F.R.D. 256 (M.D.Pa. 1959) (codefendants). The resulting distinctions have often been highly technical. In *Schlagenhauf v. Holder*, 379 U.S. 104 (1964), the Supreme Court rejected a contention that examination under Rule 35 could be had only against an ''opposing'' party, as not in keeping ''with the aims of a liberal, nontechnical application of the Federal Rules.'' 379 U.S. at 116. Eliminating the requirement of ''adverse'' parties from Rule 33 brings it into line with all other discovery rules.

A second change in subdivision (a) is the addition of the term ''governmental agency'' to the listing of organizations whose answers are to be made by any officer or agent of the organization. This does not involve any change in existing law. Compare the similar listing in Rule 30(b)(6).

The duty of a party to supplement his answers to interrogatories is governed by a new provision in Rule 26(e).

Subdivision (b). There are numerous and conflicting decisions on the question whether and to what extent interrogatories are limited to matters ''of fact,'' or may elicit opinions, contentions, and legal conclusions. Compare, *e.g., Payer, Hewitt & Co. v. Bellanca Corp.*, 26 F.R.D. 219 (D.Del. 1960) (opinions bad); *Zinsky v. New York Central R.R.*, 36 F.R.D. 680 (N.D.Ohio 1964) (factual opinion or contention good, but legal theory bad); *United States v. Carter Products, Inc.*, 28 F.R.D. 373 (S.D.N.Y.1961) (factual contentions and legal theories bad) with *Taylor v. Sound Steamship Lines, Inc.*, 100 F.Supp. 388 (D.Conn. 1951) (opinions good), *Bynum v. United States*, 36 F.R.D. 14 (E.D.La. 1964) (contentions as to facts constituting negligence good). For lists of the many conflicting authorities, see 4 *Moore's Federal Practice* ¶33.17 (2d ed. 1966); 2A Barron & Holtzoff, *Federal Practice and Procedure* §768 (Wright ed. 1961).

Rule 33 is amended to provide that an interrogatory is not objectionable merely because it calls for an opinion or contention that relates to fact or the application of law to fact. Efforts to draw sharp lines between facts and opinions have invariably been unsuccessful, and the clear trend of the cases is to permit ''factual'' opinions. As to requests for opinions or contentions that call for the application of law to fact, they can be most useful in narrowing and sharpening the issues, which is a major purpose of discovery. See *Diversified Products Corp. v. Sports Center Co.*, 42 F.R.D. 3 (D.Md. 1967); Moore, *supra;* Field & McKusick, *Maine Civil Practice* §26.18 (1959). On the other hand, under the new language interrogatories may not extend to issues of ''pure law,'' *i.e.*, legal issues unrelated to the facts of the case. *Cf. United States v. Maryland & Va. Milk Producers Assn., Inc.*, 22 F.R.D. 300 (D.D.C. 1958).

Since interrogatories involving mixed questions of law and fact may create disputes between the parties which are best resolved after much or all of the other discovery has been completed, the court is expressly authorized to defer an answer. Likewise, the court may delay determination until pretrial conference, if it believes that the dispute is best resolved in the presence of the judge.

The principal question raised with respect to the cases permitting such interrogatories is whether they reintroduce undesirable aspects of the prior pleading practice, whereby parties were chained to misconceived contentions or theories, and ultimate determination on the merits was frustrated. See James, *The Revival of Bills of Particulars under the Federal Rules*, 71 Harv.L.Rev. 1473 (1958). But there are few if any instances in the recorded cases demonstrating that such frustration has occurred. The general rule governing the use of answers to interrogatories is that under ordinary circumstances they do not limit proof. See *e.g., McElroy v. United Air Lines, Inc.*, 21 F.R.D. 100 (W.D.Mo. 1967); *Pressley v. Boehlke*, 33 F.R.D. 316, 317 (W.D.N.C. 1963). Although in exceptional circumstances reliance on an answer may cause such prejudice that the court will hold the answering party bound to his answer, *e.g., Zielinski v. Philadelphia Piers, Inc.*, 139 F.Supp. 408 (E.D.Pa. 1956), the interrogating party will ordinarily not be entitled to rely on the unchanging character of the answers he receives and cannot base prejudice on such reliance. The rule does not affect the power of a court to permit withdrawal or amendment of answers to interrogatories.

The use of answers to interrogatories at trial is made subject to the rules of evidence. The provisions governing use of depositions, to which Rule 33 presently refers, are not entirely apposite to answers to interrogatories, since deposition practice contemplates that all parties will ordinarily participate through cross-examination. See 4 *Moore's Federal Practice* ¶33.29[1] (2 ed. 1966).

Certain provisions are deleted from subdivision (b) because they are fully covered by new Rule 26(c) providing for protective orders and Rules 26(a) and 26(d). The

language of the subdivision is thus simplified without any change of substance.

Subdivision (c). This is a new subdivision, adopted from Calif.Code Civ.Proc. §2030(c), relating especially to interrogatories which require a party to engage in burdensome or expensive research into his own business records in order to give an answer. The subdivision gives the party an option to make the records available and place the burden of research on the party who seeks the information. ''This provision, without undermining the liberal scope of interrogatory discovery, places the burden of discovery upon its potential benefitee,'' Louisell, *Modern California Discovery*, 124–125 (1963), and alleviates a problem which in the past has troubled Federal courts. See Speck, *The Use of Discovery in United States District Courts*, 60 Yale L.J. 1132, 1142–1144 (1951). The interrogating party is protected against abusive use of this provision through the requirement that the burden of ascertaining the answer be substantially the same for both sides. A respondent may not impose on an interrogating party a mass of records as to which research is feasible only for one familiar with the records. At the same time, the respondent unable to invoke this subdivision does not on that account lose the protection available to him under new Rule 26(c) against oppressive or unduly burdensome or expensive interrogatories. And even when the respondent successfully invokes the subdivision, the court is not deprived of its usual power, in appropriate cases, to require that the interrogating party reimburse the respondent for the expense of assembling his records and making them intelligible.

NOTES OF ADVISORY COMMITTEE ON RULES—1980 AMENDMENT

Subdivision (c). The Committee is advised that parties upon whom interrogatories are served have occasionally responded by directing the interrogating party to a mass of business records or by offering to make all of their records available, justifying the response by the option provided by this subdivision. Such practices are an abuse of the option. A party who is permitted by the terms of this subdivision to offer records for inspection in lieu of answering an interrogatory should offer them in a manner that permits the same direct and economical access that is available to the party. If the information sought exists in the form of compilations, abstracts or summaries then available to the responding party, those should be made available to the interrogating party. The final sentence is added to make it clear that a responding party has the duty to specify, by category and location, the records from which answers to interrogatories can be derived.

NOTES OF ADVISORY COMMITTEE ON RULES—1993 AMENDMENT

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

Subdivision (a). Revision of this subdivision limits interrogatory practice. Because Rule 26(a)(1)–(3) requires disclosure of much of the information previously obtained by this form of discovery, there should be less occasion to use it. Experience in over half of the district courts has confirmed that limitations on the number of interrogatories are useful and manageable. Moreover, because the device can be costly and may be used as a means of harassment, it is desirable to subject its use to the control of the court consistent with the principles stated in Rule 26(b)(2), particularly in multiparty cases where it has not been unusual for the same interrogatory to be propounded to a party by more than one of its adversaries.

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

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

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

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

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

Paragraph (4) is added to make clear that objections must be specifically justified, and that unstated or untimely grounds for objection ordinarily are waived. Note also the provisions of revised Rule 26(b)(5), which require a responding party to indicate when it is withholding information under a claim of privilege or as trial preparation materials.

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

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

COMMITTEE NOTES ON RULES—2006 AMENDMENT

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

Special difficulties may arise in using electronically stored information, either due to its form or because it is dependent on a particular computer system. Rule 33(d) allows a responding party to substitute access to documents or electronically stored information for an answer only if the burden of deriving the answer will be substantially the same for either party. Rule 33(d) states that a party electing to respond to an interrogatory by providing electronically stored information must ensure that the interrogating party can locate and identify it ''as readily as can the party served,''

and that the responding party must give the interrogating party a ''reasonable opportunity to examine, audit, or inspect'' the information. Depending on the circumstances, satisfying these provisions with regard to electronically stored information may require the responding party to provide some combination of technical support, information on application software, or other assistance. The key question is whether such support enables the interrogating party to derive or ascertain the answer from the electronically stored information as readily as the responding party. A party that wishes to invoke Rule 33(d) by specifying electronically stored information may be required to provide direct access to its electronic information system, but only if that is necessary to afford the requesting party an adequate opportunity to derive or ascertain the answer to the interrogatory. In that situation, the responding party's need to protect sensitive interests of confidentiality or privacy may mean that it must derive or ascertain and provide the answer itself rather than invoke Rule 33(d).

Changes Made after Publication and Comment. No changes are made to the rule text. The Committee Note is changed to reflect the sensitivities that limit direct access by a requesting party to a responding party's information system. If direct access to the responding party's system is the only way to enable a requesting party to locate and identify the records from which the answer may be ascertained, the responding party may choose to derive or ascertain the answer itself.

Rule 34. Production of Documents, Electronically Stored Information, 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 the requestor's behalf, to inspect, copy, test, or sample any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained—translated, if necessary, by the respondent into reasonably usable form, or to inspect, copy, test, or sample any designated 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 shall set forth, either by individual item or by category, the items to be inspected, and describe each with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The request may specify the form or forms in which electronically stored information is to be produced. Without leave of court or written stipulation, a request may not be served before the time specified in Rule 26(d).

The party upon whom the request is served shall serve a written response within 30 days after the service of the request. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties, subject to Rule 29. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, including an objection to the requested form or forms for producing electronically stored information, stating the reasons for the objection. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. If objection is made to the requested form or forms for producing electronically stored information—or if no form was specified in the request—the responding party must state the form or forms it intends to use. 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.

Unless the parties otherwise agree, or the court otherwise orders:

(i) 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;

(ii) if a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable; and

(iii) a party need not produce the same electronically stored information in more than one form.

(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.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Mar. 30, 1970, eff. July 1, 1970; Apr. 29, 1980, eff. Aug. 1, 1980; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 12, 2006, eff. Dec. 1, 2006.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

In England orders are made for the inspection of documents, *English Rules Under the Judicature Act (The Annual Practice*, 1937) O. 31, r.r. 14, *et seq.*, or for the inspection of tangible property or for entry upon land, O. 50, r.3. Michigan provides for inspection of damaged property when such damage is the ground of the action. Mich.Court Rules Ann. (Searl, 1933) Rule 41, §2.

Practically all states have statutes authorizing the court to order parties in possession or control of documents to permit other parties to inspect and copy them before trial. See Ragland, *Discovery Before Trial* (1932), Appendix, p. 267, setting out the statutes.

Compare [former] Equity Rule 58 (Discovery—Interrogatories—Inspection and Production of Documents—Admission of Execution or Genuineness) (fifth paragraph).

NOTES OF ADVISORY COMMITTEE ON RULES—1946 AMENDMENT

The changes in clauses (1) and (2) correlate the scope of inquiry permitted under Rule 34 with that provided in Rule 26(b), and thus remove any ambiguity created by the former differences in language. As stated in *Olson Transportation Co. v. Socony-Vacuum Oil Co.* (E.D.Wis. 1944) 8 Fed.Rules Serv. 34.41, Case 2, ''. . .

Rule 34 is a direct and simple method of discovery.'' At the same time the addition of the words following the term ''parties'' makes certain that the person in whose custody, possession, or control the evidence reposes may have the benefit of the applicable protective orders stated in Rule 30(b). This change should be considered in the light of the proposed expansion of Rule 30(b).

An objection has been made that the word ''designated'' in Rule 34 has been construed with undue strictness in some district court cases so as to require great and impracticable specificity in the description of documents, papers, books, etc., sought to be inspected. The Committee, however, believes that no amendment is needed, and that the proper meaning of ''designated'' as requiring specificity has already been delineated by the Supreme Court. See *Brown v. United States* (1928) 276 U.S. 134, 143 (''The subpoena . . . specifies . . . with reasonable particularity the subjects to which the documents called for related.''); *Consolidated Rendering Co. v. Vermont* (1908) 207 U.S. 541, 543–544 (''We see no reason why all such books, papers and correspondence which related to the subject of inquiry, and were described with reasonable detail, should not be called for and the company directed to produce them. Otherwise, the State would be compelled to designate each particular paper which it desired, which presupposes an accurate knowledge of such papers, which the tribunal desiring the papers would probably rarely, if ever, have.'').

NOTES OF ADVISORY COMMITTEE ON RULES—1970 AMENDMENT

Rule 34 is revised to accomplish the following major changes in the existing rule: (1) to eliminate the requirement of good cause; (2) to have the rule operate extrajudicially; (3) to include testing and sampling as well as inspecting or photographing tangible things; and (4) to make clear that the rule does not preclude an independent action for analogous discovery against persons not parties.

Subdivision (a). Good cause is eliminated because it has furnished an uncertain and erratic protection to the parties from whom production is sought and is now rendered unnecessary by virtue of the more specific provisions added to Rule 26(b) relating to materials assembled in preparation for trial and to experts retained or consulted by parties.

The good cause requirement was originally inserted in Rule 34 as a general protective provision in the absence of experience with the specific problems that would arise thereunder. As the note to Rule 26(b)(3) on trial preparation materials makes clear, good cause has been applied differently to varying classes of documents, though not without confusion. It has often been said in court opinions that good cause requires a consideration of need for the materials and of alternative means of obtaining them, *i.e.*, something more than relevance and lack of privilege. But the overwhelming proportion of the cases in which the formula of good cause has been applied to require a special showing are those involving trial preparation. In practice, the courts have not treated documents as having a special immunity to discovery simply because of their being documents. Protection may be afforded to claims of privacy or secrecy or of undue burden or expense under what is now Rule 26(c) (previously Rule 30(b)). To be sure, an appraisal of ''undue'' burden inevitably entails consideration of the needs of the party seeking discovery. With special provisions added to govern trial preparation materials and experts, there is no longer any occasion to retain the requirement of good cause.

The revision of Rule 34 to have it operate extrajudicially, rather than by court order, is to a large extent a reflection of existing law office practice. The Columbia Survey shows that of the litigants seeking inspection of documents or things, only about 25 percent filed motions for court orders. This minor fraction nevertheless accounted for a significant number of motions. About half of these motions were uncontested and in almost all instances the party seeking production ultimately prevailed. Although an extrajudicial procedure will not drastically alter existing practice under Rule 34—it will conform to it in most cases—it has the potential of saving court time in a substantial though proportionately small number of cases tried annually.

The inclusion of testing and sampling of tangible things and objects or operations on land reflects a need frequently encountered by parties in preparation for trial. If the operation of a particular machine is the basis of a claim for negligent injury, it will often be necessary to test its operating parts or to sample and test the products it is producing. *Cf.* Mich.Gen.Ct.R. 310.1(1) (1963) (testing authorized).

The inclusive description of ''documents'' is revised to accord with changing technology. It makes clear that Rule 34 applies to electronic data compilations from which information can be obtained only with the use of detection devices, and that when the data can as a practical matter be made usable by the discovering party only through respondent's devices, respondent may be required to use his devices to translate the data into usable form. In many instances, this means that respondent will have to supply a print-out of computer data. The burden thus placed on respondent will vary from case to case, and the courts have ample power under Rule 26(c) to protect respondent against undue burden of expense, either by restricting discovery or requiring that the discovering party pay costs. Similarly, if the discovering party needs to check the electronic source itself, the court may protect respondent with respect to preservation of his records, confidentially of nondiscoverable matters, and costs.

Subdivision (b). The procedure provided in Rule 34 is essentially the same as that in Rule 33, as amended, and the discussion in the note appended to that rule is relevant to Rule 34 as well. Problems peculiar to Rule 34 relate to the specific arrangements that must be worked out for inspection and related acts of copying, photographing, testing, or sampling. The rule provides that a request for inspection shall set forth the items to be inspected either by item or category, describing each with reasonable particularity, and shall specify a reasonable time, place, and manner of making the inspection.

Subdivision (c). Rule 34 as revised continues to apply only to parties. Comments from the bar make clear that in the preparation of cases for trial it is occasionally necessary to enter land or inspect large tangible things in the possession of a person not a party, and that some courts have dismissed independent actions in the nature of bills in equity for such discovery on the ground that Rule 34 is preemptive. While an ideal solution to this problem is to provide for discovery against persons not parties in Rule 34, both the jurisdictional and procedural problems are very complex. For the present, this subdivision makes clear that Rule 34 does not preclude independent actions for discovery against persons not parties.

NOTES OF ADVISORY COMMITTEE ON RULES—1980 AMENDMENT

Subdivision (b). The Committee is advised that, ''It is apparently not rare for parties deliberately to mix critical documents with others in the hope of obscuring significance.'' *Report of the Special Committee for the Study of Discovery Abuse, Section of Litigation of the American Bar Association* (1977) 22. The sentence added by this subdivision follows the recommendation of the *Report*.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendment is technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1991 AMENDMENT

This amendment reflects the change effected by revision of Rule 45 to provide for subpoenas to compel non-

parties to produce documents and things and to submit to inspections of premises. The deletion of the text of the former paragraph is not intended to preclude an independent action for production of documents or things or for permission to enter upon land, but such actions may no longer be necessary in light of this revision.

NOTES OF ADVISORY COMMITTEE ON RULES—1993 AMENDMENT

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

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

COMMITTEE NOTES ON RULES—2006 AMENDMENT

Subdivision (a). As originally adopted, Rule 34 focused on discovery of ''documents'' and ''things.'' In 1970, Rule 34(a) was amended to include discovery of data compilations, anticipating that the use of computerized information would increase. Since then, the growth in electronically stored information and in the variety of systems for creating and storing such information has been dramatic. Lawyers and judges interpreted the term ''documents'' to include electronically stored information because it was obviously improper to allow a party to evade discovery obligations on the basis that the label had not kept pace with changes in information technology. But it has become increasingly difficult to say that all forms of electronically stored information, many dynamic in nature, fit within the traditional concept of a ''document.'' Electronically stored information may exist in dynamic databases and other forms far different from fixed expression on paper. Rule 34(a) is amended to confirm that discovery of electronically stored information stands on equal footing with discovery of paper documents. The change clarifies that Rule 34 applies to information that is fixed in a tangible form and to information that is stored in a medium from which it can be retrieved and examined. At the same time, a Rule 34 request for production of ''documents'' should be understood to encompass, and the response should include, electronically stored information unless discovery in the action has clearly distinguished between electronically stored information and ''documents.''

Discoverable information often exists in both paper and electronic form, and the same or similar information might exist in both. The items listed in Rule 34(a) show different ways in which information may be recorded or stored. Images, for example, might be hard-copy documents or electronically stored information. The wide variety of computer systems currently in use, and the rapidity of technological change, counsel against a limiting or precise definition of electronically stored information. Rule 34(a)(1) is expansive and includes any type of information that is stored electronically. A common example often sought in discovery is electronic communications, such as e-mail. The rule covers—either as documents or as electronically stored information—information ''stored in any medium,'' to encompass future developments in computer technology. Rule 34(a)(1) is intended to be broad enough to cover all current types of computer-based information, and flexible enough to encompass future changes and developments.

References elsewhere in the rules to ''electronically stored information'' should be understood to invoke this expansive approach. A companion change is made to Rule 33(d), making it explicit that parties choosing to respond to an interrogatory by permitting access to responsive records may do so by providing access to electronically stored information. More generally, the term used in Rule 34(a)(1) appears in a number of other amendments, such as those to Rules 26(a)(1), 26(b)(2), 26(b)(5)(B), 26(f), 34(b), 37(f), and 45. In each of these rules, electronically stored information has the same broad meaning it has under Rule 34(a)(1). References to ''documents'' appear in discovery rules that are not amended, including Rules 30(f), 36(a), and 37(c)(2). These references should be interpreted to include electronically stored information as circumstances warrant.

The term ''electronically stored information'' is broad, but whether material that falls within this term should be produced, and in what form, are separate questions that must be addressed under Rules 26(b), 26(c), and 34(b).

The Rule 34(a) requirement that, if necessary, a party producing electronically stored information translate it into reasonably usable form does not address the issue of translating from one human language to another. *See In re Puerto Rico Elect. Power Auth.*, 687 F.2d 501, 504–510 (1st Cir. 1989).

Rule 34(a)(1) is also amended to make clear that parties may request an opportunity to test or sample materials sought under the rule in addition to inspecting and copying them. That opportunity may be important for both electronically stored information and hard-copy materials. The current rule is not clear that such testing or sampling is authorized; the amendment expressly permits it. As with any other form of discovery, issues of burden and intrusiveness raised by requests to test or sample can be addressed under Rules 26(b)(2) and 26(c). Inspection or testing of certain types of electronically stored information or of a responding party's electronic information system may raise issues of confidentiality or privacy. The addition of testing and sampling to Rule 34(a) with regard to documents and electronically stored information is not meant to create a routine right of direct access to a party's electronic information system, although such access might be justified in some circumstances. Courts should guard against undue intrusiveness resulting from inspecting or testing such systems.

Rule 34(a)(1) is further amended to make clear that tangible things must—like documents and land sought to be examined—be designated in the request.

Subdivision (b). Rule 34(b) provides that a party must produce documents as they are kept in the usual course of business or must organize and label them to correspond with the categories in the discovery request. The production of electronically stored information should be subject to comparable requirements to protect against deliberate or inadvertent production in ways that raise unnecessary obstacles for the requesting party. Rule 34(b) is amended to ensure similar protection for electronically stored information.

The amendment to Rule 34(b) permits the requesting party to designate the form or forms in which it wants electronically stored information produced. The form of production is more important to the exchange of electronically stored information than of hard-copy materials, although a party might specify hard copy as the requested form. Specification of the desired form or forms may facilitate the orderly, efficient, and cost-effective discovery of electronically stored information. The rule recognizes that different forms of production may be appropriate for different types of electronically stored information. Using current technology, for example, a party might be called upon to produce word processing documents, e-mail messages, electronic spreadsheets, different image or sound files, and material from databases. Requiring that such diverse types of electronically stored information all be produced in the same form could prove impossible, and even if possible could increase the cost and burdens of producing and using the information. The rule therefore provides that the requesting party may ask for different forms of production for different types of electronically stored information.

The rule does not require that the requesting party choose a form or forms of production. The requesting

party may not have a preference. In some cases, the requesting party may not know what form the producing party uses to maintain its electronically stored information, although Rule 26(f)(3) is amended to call for discussion of the form of production in the parties' prediscovery conference.

The responding party also is involved in determining the form of production. In the written response to the production request that Rule 34 requires, the responding party must state the form it intends to use for producing electronically stored information if the requesting party does not specify a form or if the responding party objects to a form that the requesting party specifies. Stating the intended form before the production occurs may permit the parties to identify and seek to resolve disputes before the expense and work of the production occurs. A party that responds to a discovery request by simply producing electronically stored information in a form of its choice, without identifying that form in advance of the production in the response required by Rule 34(b), runs a risk that the requesting party can show that the produced form is not reasonably usable and that it is entitled to production of some or all of the information in an additional form. Additional time might be required to permit a responding party to assess the appropriate form or forms of production.

If the requesting party is not satisfied with the form stated by the responding party, or if the responding party has objected to the form specified by the requesting party, the parties must meet and confer under Rule 37(a)(2)(B) in an effort to resolve the matter before the requesting party can file a motion to compel. If they cannot agree and the court resolves the dispute, the court is not limited to the forms initially chosen by the requesting party, stated by the responding party, or specified in this rule for situations in which there is no court order or party agreement.

If the form of production is not specified by party agreement or court order, the responding party must produce electronically stored information either in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable. Rule 34(a) requires that, if necessary, a responding party ''translate'' information it produces into a ''reasonably usable'' form. Under some circumstances, the responding party may need to provide some reasonable amount of technical support, information on application software, or other reasonable assistance to enable the requesting party to use the information. The rule does not require a party to produce electronically stored information in the form it [sic] which it is ordinarily maintained, as long as it is produced in a reasonably usable form. But the option to produce in a reasonably usable form does not mean that a responding party is free to convert electronically stored information from the form in which it is ordinarily maintained to a different form that makes it more difficult or burdensome for the requesting party to use the information efficiently in the litigation. If the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature.

Some electronically stored information may be ordinarily maintained in a form that is not reasonably usable by any party. One example is ''legacy'' data that can be used only by superseded systems. The questions whether a producing party should be required to convert such information to a more usable form, or should be required to produce it at all, should be addressed under Rule 26(b)(2)(B).

Whether or not the requesting party specified the form of production, Rule 34(b) provides that the same electronically stored information ordinarily be produced in only one form.

Changes Made after Publication and Comment. The proposed amendment recommended for approval has been modified from the published version. The sequence of ''documents or electronically stored information'' is changed to emphasize that the parenthetical exemplifications apply equally to illustrate ''documents'' and ''electronically stored information.'' The reference to ''detection devices'' is deleted as redundant with ''translated'' and as archaic.

The references to the form of production are changed in the rule and Committee Note to refer also to ''forms.'' Different forms may be appropriate or necessary for different sources of information.

The published proposal allowed the requesting party to specify a form for production and recognized that the responding party could object to the requested form. This procedure is now amplified by directing that the responding party state the form or forms it intends to use for production if the request does not specify a form or if the responding party objects to the requested form.

The default forms of production to be used when the parties do not agree on a form and there is no court order are changed in part. As in the published proposal, one default form is ''a form or forms in which [electronically stored information] is ordinarily maintained.'' The alternative default form, however, is changed from ''an electronically searchable form'' to ''a form or forms that are reasonably usable.'' ''[A]n electronically searchable form'' proved to have several defects. Some electronically stored information cannot be searched electronically. In addition, there often are many different levels of electronic searchability—the published default would authorize production in a minimally searchable form even though more easily searched forms might be available at equal or less cost to the responding party.

The provision that absent court order a party need not produce the same electronically stored information in more than one form was moved to become a separate item for the sake of emphasis.

The Committee Note was changed to reflect these changes in rule text, and also to clarify many aspects of the published Note. In addition, the Note was expanded to add a caveat to the published amendment that establishes the rule that documents—and now electronically stored information—may be tested and sampled as well as inspected and copied. Fears were expressed that testing and sampling might imply routine direct access to a party's information system. The Note states that direct access is not a routine right, ''although such access might be justified in some circumstances.''

The changes in the rule text since publication are set out below. [Omitted]

Rule 35. Physical and Mental Examinations 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 in which the action is pending 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 Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to the requesting party a copy of the detailed written report of the examiner setting out the examiner's find-

ings, 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 deposition 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) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision 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.

(As amended Mar. 30, 1970, eff. July 1, 1970; Mar. 2, 1987, eff. Aug. 1, 1987; Pub. L. 100–690, title VII, §7047(b), Nov. 18, 1988, 102 Stat. 4401; Apr. 30, 1991, eff. Dec. 1, 1991.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

Physical examination of parties before trial is authorized by statute or rule in a number of states. See Ariz.Rev.Code Ann. (Struckmeyer, 1928) §4468; Mich.Court Rules Ann. (Searl, 1933) Rule 41, §2; 2 N.J.Comp.Stat. (1910), N.Y.C.P.A. (1937) §306; 1 S.D.Comp.Laws (1929) §2716A; 3 Wash.Rev.Stat.Ann. (Remington, 1932) §1230–1.

Mental examination of parties is authorized in Iowa. Iowa Code (1935) ch. 491–F1. See McCash, *The Evolution of the Doctrine of Discovery and Its Present Status in Iowa*, 20 Ia.L.Rev. 68 (1934).

The constitutionality of legislation providing for physical examination of parties was sustained in *Lyon v. Manhattan Railway Co.*, 142 N.Y. 298, 37 N.E. 113 (1894), and *McGovern v. Hope*, 63 N.J.L. 76, 42 Atl. 830 (1899). In *Union Pacific Ry. Co. v. Botsford*, 141 U.S. 250 (1891), it was held that the court could not order the physical examination of a party in the absence of statutory authority. But in *Camden and Suburban Ry. Co. v. Stetson*, 177 U.S. 172 (1900) where there was statutory authority for such examination, derived from a state statute made operative by the conformity act, the practice was sustained. Such authority is now found in the present rule made operative by the Act of June 19, 1934, ch. 651, U.S.C., Title 28, §§723b [see 2072] (Rules in actions at law; Supreme Court authorized to make) and 723c [see 2072] (Union of equity and action at law rules; power of Supreme Court).

NOTES OF ADVISORY COMMITTEE ON RULES—1970 AMENDMENT

Subdivision (a). Rule 35(a) has hitherto provided only for an order requiring a party to submit to an examination. It is desirable to extend the rule to provide for an order against the party for examination of a person in his custody or under his legal control. As appears from the provisions of amended Rule 37(b)(2) and the comment under that rule, an order to "produce" the third person imposes only an obligation to use good faith efforts to produce the person.

The amendment will settle beyond doubt that a parent or guardian suing to recover for injuries to a minor may be ordered to produce the minor for examination. Further, the amendment expressly includes blood examination within the kinds of examinations that can be ordered under the rule. See *Beach v. Beach*, 114 F.2d 479 (D.C. Cir. 1940). Provisions similar to the amendment have been adopted in at least 10 States: Calif.Code Civ.Proc. §2032; Ida.R.Civ.P. 35; Ill.S-H Ann. c. 110A, §215; Md.R.P. 420; Mich.Gen. Ct.R. 311; Minn.R.Civ.P. 35; Mo.Vern.Ann.R.Civ.P. 60.01; N.Dak.R.Civ.P. 35; N.Y.C.P.L. §3121; Wyo.R.Civ.P. 35.

The amendment makes no change in the requirements of Rule 35 that, before a court order may issue, the relevant physical or mental condition must be shown to be "in controversy" and "good cause" must be shown for the examination. Thus, the amendment has no effect on the recent decision of the Supreme Court in *Schlagenhauf v. Holder*, 379 U.S. 104 (1964), stressing the importance of these requirements and applying them to the facts of the case. The amendment makes no reference to employees of a party. Provisions relating to employees in the State statutes and rules cited above appear to have been virtually unused.

Subdivision (b)(1). This subdivision is amended to correct an imbalance in Rule 35(b)(1) as heretofore written. Under that text, a party causing a Rule 35(a) examination to be made is required to furnish to the party examined, on request, a copy of the examining physician's report. If he delivers this copy, he is in turn entitled to receive from the party examined reports of all examinations of the same condition previously or later made. But the rule has not in terms entitled the examined party to receive from the party causing the Rule 35(a) examination any reports of earlier examinations of the same condition to which the latter may have access. The amendment cures this defect. See La.Stat.Ann., Civ.Proc. art. 1495 (1960); Utah R.Civ.P.35(c).

The amendment specifies that the written report of the examining physician includes results of all tests made, such as results of X-rays and cardiograms. It also embodies changes required by the broadening of Rule 35(a) to take in persons who are not parties.

Subdivision (b)(3). This new subdivision removes any possible doubt that reports of examination may be obtained although no order for examination has been made under Rule 35(a). Examinations are very frequently made by agreement, and sometimes before the party examined has an attorney. The courts have uniformly ordered that reports be supplied, see 4 *Moore's Federal Practice* ¶35.06, n.1 (2d ed. 1966); 2A Barron & Holtzoff, *Federal Practice and Procedure* §823, n. 22 (Wright ed. 1961), and it appears best to fill the technical gap in the present rule.

The subdivision also makes clear that reports of examining physicians are discoverable not only under Rule 35(b) but under other rules as well. To be sure, if the report is privileged, then discovery is not permissible under any rule other than Rule 35(b) and it is permissible under Rule 35(b) only if the party requests a copy of the report of examination made by the other party's doctor. *Sher v. De Haven*, 199 F.2d 777 (D.C. Cir. 1952), *cert. denied* 345 U.S. 936 (1953). But if the report is unprivileged and is subject to discovery under the provisions of rules other than Rule 35(b)—such as Rules 34 or 26(b)(3) or (4)—discovery should not depend upon whether the person examined demands a copy of the report. Although a few cases have suggested the contrary, *e.g.*, *Galloway v. National Dairy Products Corp.*, 24 F.R.D. 362 (E.D.Pa. 1959), the better considered district court decisions hold that Rule 35(b) is not preemptive. *E.g.*, *Leszynski v. Russ*, 29 F.R.D. 10, 12 (D.Md. 1961) and cases cited. The question was recently given full consideration in *Buffington v. Wood*, 351 F.2d 292 (3d Cir. 1965), holding that Rule 35(b) is not preemptive.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1991 AMENDMENT

The revision authorizes the court to require physical or mental examinations conducted by any person who is suitably licensed or certified.

The rule was revised in 1988 by Congressional enactment to authorize mental examinations by licensed clinical psychologists. This revision extends that amendment to include other certified or licensed professionals, such as dentists or occupational therapists, who are not physicians or clinical psychologists, but who may be well-qualified to give valuable testimony about the physical or mental condition that is the subject of dispute.

The requirement that the examiner be *suitably* licensed or certified is a new requirement. The court is thus expressly authorized to assess the credentials of the examiner to assure that no person is subjected to a court-ordered examination by an examiner whose testimony would be of such limited value that it would be unjust to require the person to undergo the invasion of privacy associated with the examination. This authority is not wholly new, for under the former rule, the court retained discretion to refuse to order an examination, or to restrict an examination. 8 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE §2234 (1986 Supp.). The revision is intended to encourage the exercise of this discretion, especially with respect to examinations by persons having narrow qualifications.

The court's responsibility to determine the suitability of the examiner's qualifications applies even to a proposed examination by a physician. If the proposed examination and testimony calls for an expertise that the proposed examiner does not have, it should not be ordered, even if the proposed examiner is a physician. The rule does not, however, require that the license or certificate be conferred by the jurisdiction in which the examination is conducted.

AMENDMENT BY PUBLIC LAW

1988—Subd. (a). Pub. L. 100–690, §7047(b)(1), substituted ''physical examination by a physician, or mental examination by a physician or psychologist'' for ''physical or mental examination by a physician''.

Subd. (b). Pub. L. 100–690, §7047(b)(2), inserted ''or psychologist'' in heading, in two places in par. (1), and in two places in par. (3).

Subd. (c). Pub. L. 100–690, §7047(b)(3), added subd. (c).

Rule 36. Requests for Admission

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

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow or as the parties may agree to in writing, subject to Rule 29, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify an answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that the party has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why the party cannot admit or deny it.

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 pre-trial 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 provision of Rule 16 governing amendment of a pre-trial 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 that party in maintaining the 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 for any other purpose nor may it be used against the party in any other proceeding.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Mar. 30, 1970, eff. July 1, 1970; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

Compare similar rules: [Former] Equity Rule 58 (last paragraph, which provides for the admission of the execution and genuineness of documents); *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 32; Ill.Rev.Stat. (1937) ch. 110, §182 and Rule 18 (Ill.Rev.Stat. (1937) ch. 110, §259.18); 2 Mass.Gen.Laws (Ter.Ed., 1932) ch. 231, §69; Mich.Court Rules Ann.

(Searl, 1933) Rule 42; N.J.Comp.Stat. (2 Cum.Supp. 1911–1924) N.Y.C.P.A. (1937) §§322, 323; Wis.Stat. (1935) §327.22.

NOTES OF ADVISORY COMMITTEE ON RULES—1946 AMENDMENT

The first change in the first sentence of Rule 36(a) and the addition of the new second sentence, specifying when requests for admissions may be served, bring Rule 36 in line with amended Rules 26(a) and 33. There is no reason why these rules should not be treated alike. Other provisions of Rule 36(a) give the party whose admissions are requested adequate protection.

The second change in the first sentence of the rule [subdivision (a)] removes any uncertainty as to whether a party can be called upon to admit matters of fact other than those set forth in relevant documents described in and exhibited with the request. In *Smyth v. Kaufman* (C.C.A.2d, 1940) 114 F.(2d) 40, it was held that the word ''therein'', now stricken from the rule [said subdivision] referred to the request and that a matter of fact not related to any document could be presented to the other party for admission or denial. The rule of this case is now clearly stated.

The substitution of the word ''served'' for ''delivered'' in the third sentence of the amended rule [said subdivision] is in conformance with the use of the word ''serve'' elsewhere in the rule and generally throughout the rules. See also Notes to Rules 13(a) and 33 herein. The substitution [in said subdivision] of ''shorter or longer'' for ''further'' will enable a court to designate a lesser period than 10 days for answer. This conforms with a similar provision already contained in Rule 33.

The addition of clause (2) [in said subdivision] specifies the method by which a party may challenge the propriety of a request to admit. There has been considerable difference of judicial opinion as to the correct method, if any, available to secure relief from an allegedly improper request. See Commentary, *Methods of Objecting to Notice to Admit* (1942) 5 Fed.Rules Serv. 835; *International Carbonic Engineering Co. v. Natural Carbonic Products, Inc.* (S.D.Cal. 1944) 57 F.Supp. 248. The changes in clause (1) are merely of a clarifying and conforming nature.

The first of the added last two sentences [in said subdivision] prevents an objection to a part of a request from holding up the answer, if any, to the remainder. See similar proposed change in Rule 33. The last sentence strengthens the rule by making the denial accurately reflect the party's position. It is taken, with necessary changes, from Rule 8(b).

NOTES OF ADVISORY COMMITTEE ON RULES—1970 AMENDMENT

Rule 36 serves two vital purposes, both of which are designed to reduce trial time. Admissions are sought, first to facilitate proof with respect to issues that cannot be eliminated from the case, and secondly, to narrow the issues by eliminating those that can be. The changes made in the rule are designed to serve these purposes more effectively. Certain disagreements in the courts about the proper scope of the rule are resolved. In addition, the procedural operation of the rule is brought into line with other discovery procedures, and the binding effect of an admission is clarified. See generally Finman, *The Request for Admissions in Federal Civil Procedure*, 71 Yale L.J. 371 (1962).

Subdivision (a). As revised, the subdivision provides that a request may be made to admit any matter within the scope of Rule 26(b) that relate to statements or opinions of fact or of the application of law to fact. It thereby eliminates the requirement that the matters be ''of fact.'' This change resolves conflicts in the court decisions as to whether a request to admit matters of ''opinion'' and matters involving ''mixed law and fact'' is proper under the rule. As to ''opinion,'' compare, *e.g., Jackson Bluff Corp. v. Marcelle*, 20 F.R.D. 139 (E.D.N.Y. 1957); *California v. The S.S. Jules Fribourg*, 19 F.R.D. 432 (N.D.Calif. 1955), with *e.g., Photon, Inc. v. Harris Intertype, Inc.*, 28 F.R.D. 327 (D.Mass. 1961); *Hise v. Lockwood Grader Corp.*, 153 F.Supp 276 (D.Nebr. 1957). As to ''mixed law and fact'' the majority of courts sustain objections, *e.g., Minnesota Mining and Mfg. Co. v. Norton Co.*, 36 F.R.D. 1 (N.D.Ohio 1964), but *McSparran v. Hanigan*, 225 F.Supp. 628 (E.D.Pa. 1963) is to the contrary.

Not only is it difficult as a practical matter to separate ''fact'' from ''opinion,'' see 4 *Moore's Federal Practice* ¶36.04 (2d ed. 1966); *cf.* 2A Barron & Holtzoff, *Federal Practice and Procedure* 317 (Wright ed. 1961), but an admission on a matter of opinion may facilitate proof or narrow the issues or both. An admission of a matter involving the application of law to fact may, in a given case, even more clearly narrow the issues. For example, an admission that an employee acted in the scope of his employment may remove a major issue from the trial. In *McSparran v. Hanigan, supra*, plaintiff admitted that ''the premises on which said accident occurred, were occupied or under the control'' of one of the defendants, 225 F.Supp. at 636. This admission, involving law as well as fact, removed one of the issues from the lawsuit and thereby reduced the proof required at trial. The amended provision does not authorize requests for admissions of law unrelated to the facts of the case.

Requests for admission involving the application of law to fact may create disputes between the parties which are best resolved in the presence of the judge after much or all of the other discovery has been completed. Power is therefore expressly conferred upon the court to defer decision until a pretrial conference is held or until a designated time prior to trial. On the other hand, the court should not automatically defer decision; in many instances, the importance of the admission lies in enabling the requesting party to avoid the burdensome accumulation of proof prior to the pretrial conference.

Courts have also divided on whether an answering party may properly object to request for admission as to matters which that party regards as ''in dispute.'' Compare, *e.g., Syracuse Broadcasting Corp. v. Newhouse*, 271 F.2d 910, 917 (2d Cir. 1959); *Driver v. Gindy Mfg. Corp.*, 24 F.R.D. 473 (E.D.Pa. 1959); with *e.g., McGonigle v. Baxter*, 27 F.R.D. 504 (E.D.Pa. 1961); *United States v. Ehbauer*, 13 F.R.D. 462 (W.D.Mo. 1952). The proper response in such cases is an answer. The very purpose of the request is to ascertain whether the answering party is prepared to admit or regards the matter as presenting a genuine issue for trial. In his answer, the party may deny, or he may give his reason for inability to admit or deny the existence of a genuine issue. The party runs no risk of sanctions if the matter is genuinely in issue, since Rule 37(c) provides a sanction of costs only when there are no good reasons for a failure to admit.

On the other hand, requests to admit may be so voluminous and so framed that the answering party finds the task of identifying what is in dispute and what is not unduly burdensome. If so, the responding party may obtain a protective order under Rule 26(c). Some of the decisions sustaining objections on ''disputability'' grounds could have been justified by the burdensome character of the requests. See, *e.g., Syracuse Broadcasting Corp. v. Newhouse, supra.*

Another sharp split of authority exists on the question whether a party may base his answer on lack of information or knowledge without seeking out additional information. One line of cases has held that a party may answer on the basis of such knowledge as he has at the time he answers. *E.g., Jackson Buff Corp. v. Marcelle*, 20 F.R.D. 139 (E.D.N.Y. 1957); *Sladek v. General Motors Corp.*, 16 F.R.D. 104 (S.D.Iowa 1954). A larger group of cases, supported by commentators, has taken the view that if the responding party lacks knowledge, he must inform himself in reasonable fashion. *E.g., Hise v. Lockwood Grader Corp.*, 153 F.Supp. 276 (D.Nebr. 1957); *E. H. Tate Co. v. Jiffy Enterprises, Inc.*, 16 F.R.D. 571 (E.D.Pa. 1954); Finman, *supra*, 71 Yale L.J. 371, 404–409; 4 *Moore's Federal Practice* ¶36.04 (2d ed. 1966); 2A Barron & Holtzoff, *Federal Practice and Procedure* 509 (Wright ed. 1961).

The rule as revised adopts the majority view, as in keeping with a basic principle of the discovery rules that a reasonable burden may be imposed on the parties when its discharge will facilitate preparation for trial and ease the trial process. It has been argued against this view that one side should not have the burden of ''proving'' the other side's case. The revised rule requires only that the answering party make reasonable inquiry and secure such knowledge and information as are readily obtainable by him. In most instances, the investigation will be necessary either to his own case or to preparation for rebuttal. Even when it is not, the information may be close enough at hand to be ''readily obtainable.'' Rule 36 requires only that the party state that he has taken these steps. The sanction for failure of a party to inform himself before he answers lies in the award of costs after trial, as provided in Rule 37(c).

The requirement that the answer to a request for admission be sworn is deleted, in favor of a provision that the answer be signed by the party or by his attorney. The provisions of Rule 36 make it clear that admissions function very much as pleadings do. Thus, when a party admits in part and denies in part, his admission is for purposes of the pending action only and may not be used against him in any other proceeding. The broadening of the rule to encompass mixed questions of law and fact reinforces this feature. Rule 36 does not lack a sanction for false answers; Rule 37(c) furnishes an appropriate deterrent.

The existing language describing the available grounds for objection to a request for admission is eliminated as neither necessary nor helpful. The statement that objection may be made to any request, which is ''improper'' adds nothing to the provisions that the party serve an answer or objection addressed to each matter and that he state his reasons for any objection. None of the other discovery rules set forth grounds for objection, except so far as all are subject to the general provisions of Rule 26.

Changes are made in the sequence of procedures in Rule 36 so that they conform to the new procedures in Rules 33 and 34. The major changes are as follows:

(1) The normal time for response to a request for admissions is lengthened from 10 to 30 days, conforming more closely to prevailing practice. A defendant need not respond, however, in less than 45 days after service of the summons and complaint upon him. The court may lengthen or shorten the time when special situations require it.

(2) The present requirement that the plaintiff wait 10 days to serve requests without leave of court is eliminated. The revised provision accords with those in Rules 33 and 34.

(3) The requirement that the objecting party move automatically for a hearing on his objection is eliminated, and the burden is on the requesting party to move for an order. The change in the burden of going forward does not modify present law on burden of persuasion. The award of expenses incurred in relation to the motion is made subject to the comprehensive provisions of Rule 37(a)(4).

(4) A problem peculiar to Rule 36 arises if the responding party serves answers that are not in conformity with the requirements of the rule—for example, a denial is not ''specific,'' or the explanation of inability to admit or deny is not ''in detail.'' Rule 36 now makes no provision for court scrutiny of such answers before trial, and it seems to contemplate that defective answers bring about admissions just as effectively as if no answer had been served. Some cases have so held. *E.g.*, *Southern Ry. Co. v. Crosby*, 201 F.2d 878 (4th Cir. 1953); *United States v. Laney*, 96 F.Supp. 482 (E.D.S.C. 1951).

Giving a defective answer the automatic effect of an admission may cause unfair surprise. A responding party who purported to deny or to be unable to admit or deny will for the first time at trial confront the contention that he has made a binding admission. Since it is not always easy to know whether a denial is ''specific'' or an explanation is ''in detail,'' neither party can know how the court will rule at trial and whether proof must be prepared. Some courts, therefore, have entertained motions to rule on defective answers. They have at times ordered that amended answers be served, when the defects were technical, and at other times have declared that the matter was admitted. *E.g.*, *Woods v. Stewart*, 171 F.2d 544 (5th Cir. 1948); *SEC v. Kaye, Real & Co.*, 122 F.Supp. 639 (S.D.N.Y. 1954); *Seib's Hatcheries, Inc. v. Lindley*, 13 F.R.D. 113 (W.D.Ark. 1952). The rule as revised conforms to the latter practice.

Subdivision (b). The rule does not now indicate the extent to which a party is bound by his admission. Some courts view admissions as the equivalent of sworn testimony *E.g.*, *Ark.-Tenn Distributing Corp. v. Breidt*, 209 F.2d 359 (3d Cir. 1954); *United States v. Lemons*, 125 F.Supp. 686 (W.D.Ark. 1954); 4 *Moore's Federal Practice* ¶36.08 (2d ed. 1966 Supp.). At least in some jurisdictions a party may rebut his own testimony, *e.g.*, *Alamo v. Del Rosario*, 98 F.2d 328 (D.C.Cir. 1938), and by analogy an admission made pursuant to Rule 36 may likewise be thought rebuttable. The courts in *Ark-Tenn* and *Lemons*, *supra*, reasoned in this way, although the results reached may be supported on different grounds. In *McSparran v. Hanigan*, 225 F.Supp. 628, 636–637 (E.D.Pa. 1963), the court held that an admission is conclusively binding, though noting the confusion created by prior decisions.

The new provisions give an admission a conclusively binding effect, for purposes only of the pending action, unless the admission is withdrawn or amended. In form and substance a Rule 36 admission is comparable to an admission in pleadings or a stipulation drafted by counsel for use at trial, rather than to an evidentiary admission of a party. Louisell, *Modern California Discovery* §8.07 (1963); 2A Barron & Holtzoff, *Federal Practice and Procedure* §838 (Wright ed. 1961). Unless the party securing an admission can depend on its binding effect, he cannot safely avoid the expense of preparing to prove the very matters on which he has secured the admission, and the purpose of the rule is defeated. Field & McKusick, *Maine Civil Practice* §36.4 (1959); Finman, *supra*, 71 Yale L.J. 371, 418–426; Comment, 56 Nw.U.L.Rev. 679, 682–683 (1961).

Provision is made for withdrawal or amendment of an admission. This provision emphasizes the importance of having the action resolved on the merits, while at the same time assuring each party that justified reliance on an admission in preparation for trial will not operate to his prejudice. *Cf. Moosman v. Joseph P. Blitz, Inc.*, 358 F.2d 686 (2d Cir. 1966).

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1993 AMENDMENT

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

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

(a) MOTION FOR ORDER COMPELLING DISCLOSURE OR DISCOVERY. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling disclosure or discovery as follows:

(1) *Appropriate Court.* An application for an order to a party shall be made to the court in which the action is pending. An application for an order to a person who is not a party shall be made to the court in the district where the discovery is being, or is to be, taken.

(2) *Motion.*

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

(B) If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

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

(4) *Expenses and Sanctions.*

(A) If the motion is granted or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust.

(B) If the motion is denied, the court may enter any protective order authorized under Rule 26(c) and shall, after affording an opportunity to be heard, require the moving party or the attorney filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(C) If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26(c) and may, after affording an opportunity to be heard, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) FAILURE TO COMPLY WITH ORDER.

(1) *Sanctions by Court in District Where Deposition Is Taken.* If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) *Sanctions by Court in Which Action Is Pending.* 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 in which the action is pending 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 that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until 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 that party to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that that 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 that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) FAILURE TO DISCLOSE; FALSE OR MISLEADING DISCLOSURE; REFUSAL TO ADMIT.

(1) A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless,

permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under Rule 37(b)(2)(A), (B), and (C) and may include informing the jury of the failure to make the disclosure.

(2) If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (A) the request was held objectionable pursuant to Rule 36(a), or (B) the admission sought was of no substantial importance, or (C) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or (D) there was other good reason for the failure to admit.

(d) FAILURE OF PARTY TO ATTEND AT OWN DEPOSITION OR SERVE ANSWERS TO INTERROGATORIES OR RESPOND TO REQUEST FOR INSPECTION. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule. Any motion specifying a failure under clause (2) or (3) of this subdivision shall include a certification that the movant has in good faith conferred or attempted to confer with the party failing to answer or respond in an effort to obtain such answer or response without court action. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has a pending motion for a protective order as provided by Rule 26(c).

[(e) SUBPOENA OF PERSON IN FOREIGN COUNTRY.] (Abrogated Apr. 29, 1980, eff. Aug. 1, 1980)

(f) ELECTRONICALLY STORED INFORMATION. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

(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 development and submission of a proposed discovery plan as required by Rule 26(f), the court may, after opportunity for hearing, require such party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

(As amended Dec. 29, 1948, eff. Oct. 20, 1949; Mar. 30, 1970, eff. July 1, 1970; Apr. 29, 1980, eff. Aug. 1, 1980; Pub. L. 96–481, title II, §205(a), Oct. 21, 1980, 94 Stat. 2330; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 12, 2006, eff. Dec. 1, 2006.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

The provisions of this rule authorizing orders establishing facts or excluding evidence or striking pleadings, or authorizing judgments of dismissal or default, for refusal to answer questions or permit inspection or otherwise make discovery, are in accord with *Hammond Packing Co. v. Arkansas*, 212 U.S. 322 (1909), which distinguishes between the justifiable use of such measures as a means of compelling the production of evidence, and their unjustifiable use, as in *Hovey v. Elliott*, 167 U.S. 409 (1897), for the mere purpose of punishing for contempt.

NOTES OF ADVISORY COMMITTEE ON RULES—1948 AMENDMENT

The amendment substitutes the present statutory reference.

NOTES OF ADVISORY COMMITTEE ON RULES—1970 AMENDMENT

Rule 37 provides generally for sanctions against parties or persons unjustifiably resisting discovery. Experience has brought to light a number of defects in the language of the rule as well as instances in which it is not serving the purposes for which it was designed. See Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 Col.L.Rev. 480 (1958). In addition, changes being made in other discovery rules requiring conforming amendments to Rule 37.

Rule 37 sometimes refers to a ''failure'' to afford discovery and at other times to a ''refusal'' to do so. Taking note of this dual terminology, courts have imported into ''refusal'' a requirement of ''wilfullness.'' See *Roth v. Paramount Pictures Corp.*, 8 F.R.D. 31 (W.D.Pa. 1948); *Campbell v. Johnson*, 101 F.Supp. 705, 707 (S.D.N.Y. 1951). In *Societe Internationale v. Rogers*, 357 U.S. 197 (1958), the Supreme Court concluded that the rather random use of these two terms in Rule 37 showed no design to use them with consistently distinctive meanings, that ''refused'' in Rule 37(b)(2) meant simply a failure to comply, and that wilfullness was relevant only to the selection of sanctions, if any, to be imposed. Nevertheless, after the decision in *Societe*, the court in *Hinson v. Michigan Mutual Liability Co.*, 275 F.2d 537 (5th Cir. 1960) once again ruled that ''refusal'' required wilfullness. Substitution of ''failure'' for ''refusal'' throughout Rule 37 should eliminate this confusion and bring the rule into harmony with the *Societe Internationale* decision. See Rosenberg, *supra*, 58 Col.L.Rev. 480, 489–490 (1958).

Subdivision (a). Rule 37(a) provides relief to a party seeking discovery against one who, with or without stated objections, fails to afford the discovery sought. It has always fully served this function in relation to depositions, but the amendments being made to Rules 33 and 34 give Rule 37(a) added scope and importance. Under existing Rule 33, a party objecting to interrogatories must make a motion for court hearing on his

objections. The changes now made in Rules 33 and 37(a) make it clear that the interrogating party must move to compel answers, and the motion is provided for in Rule 37(a). Existing Rule 34, since it requires a court order prior to production of documents or things or permission to enter on land, has no relation to Rule 37(a). Amendments of Rules 34 and 37(a) create a procedure similar to that provided for Rule 33.

Subdivision (a)(1). This is a new provision making clear to which court a party may apply for an order compelling discovery. Existing Rule 37(a) refers only to the court in which the deposition is being taken; nevertheless, it has been held that the court where the action is pending has ''inherent power'' to compel a party deponent to answer. *Lincoln Laboratories, Inc. v. Savage Laboratories, Inc.*, 27 F.R.D. 476 (D.Del. 1961). In relation to Rule 33 interrogatories and Rule 34 requests for inspection, the court where the action is pending is the appropriate enforcing tribunal. The new provision eliminates the need to resort to inherent power by spelling out the respective roles of the court where the action is pending and the court where the deposition is taken. In some instances, two courts are available to a party seeking to compel answers from a party deponent. The party seeking discovery may choose the court to which he will apply, but the court has power to remit the party to the other court as a more appropriate forum.

Subdivision (a)(2). This subdivision contains the substance of existing provisions of Rule 37(a) authorizing motions to compel answers to questions put at depositions and to interrogatories. New provisions authorize motions for orders compelling designation under Rules 30(b)(6) and 31(a) and compelling inspection in accordance with a request made under Rule 34. If the court denies a motion, in whole or part, it may accompany the denial with issuance of a protective order. Compare the converse provision in Rule 26(c).

Subdivision (a)(3). This new provision makes clear that an evasive or incomplete answer is to be considered, for purposes of subdivision (a), a failure to answer. The courts have consistently held that they have the power to compel adequate answers. *E.g., Cone Mills Corp. v. Joseph Bancroft & Sons Co.*, 33 F.R.D. 318 (D.Del. 1963). This power is recognized and incorporated into the rule.

Subdivision (a)(4). This subdivision amends the provisions for award of expenses, including reasonable attorney's fees, to the prevailing party or person when a motion is made for an order compelling discovery. At present, an award of expenses is made only if the losing party or person is found to have acted without substantial justification. The change requires that expenses be awarded unless the conduct of the losing party or person is found to have been substantially justified. The test of ''substantial justification'' remains, but the change in language is intended to encourage judges to be more alert to abuses occurring in the discovery process.

On many occasions, to be sure, the dispute over discovery between the parties is genuine, though ultimately resolved one way or the other by the court. In such cases, the losing party is substantially justified in carrying the matter to court. But the rules should deter the abuse implicit in carrying or forcing a discovery dispute to court when no genuine dispute exists. And the potential or actual imposition of expenses is virtually the sole formal sanction in the rules to deter a party from pressing to a court hearing frivolous requests for or objections to discovery.

The present provision of Rule 37(a) that the court shall require payment if it finds that the defeated party acted without ''substantial justification'' may appear adequate, but in fact it has been little used. Only a handful of reported cases include an award of expenses, and the Columbia Survey found that in only one instance out of about 50 motions decided under Rule 37(a) did the court award expenses. It appears that the courts do not utilize the most important available sanction to deter abusive resort to the judiciary.

The proposed change provides in effect that expenses should ordinarily be awarded unless a court finds that the losing party acted justifiably in carrying his point to court. At the same time, a necessary flexibility is maintained, since the court retains the power to find that other circumstances make an award of expenses unjust—as where the prevailing party also acted unjustifiably. The amendment does not significantly narrow the discretion of the court, but rather presses the court to address itself to abusive practices. The present provision that expenses may be imposed upon either the party or his attorney or both is unchanged. But it is not contemplated that expenses will be imposed upon the attorney merely because the party is indigent.

Subdivision (b). This subdivision deals with sanctions for failure to comply with a court order. The present captions for subsections (1) and (2) entitled, ''Contempt'' and ''Other Consequences,'' respectively, are confusing. One of the consequences listed in (2) is the arrest of the party, representing the exercise of the contempt power. The contents of the subsections show that the first authorizes the sanction of contempt (and no other) by the court in which the deposition is taken, whereas the second subsection authorizes a variety of sanctions, including contempt, which may be imposed by the court in which the action is pending. The captions of the subsections are changed to deflect their contents.

The scope of Rule 37(b)(2) is broadened by extending it to include any order ''to provide or permit discovery,'' including orders issued under Rules 37(a) and 35. Various rules authorize orders for discovery—*e.g.*, Rule 35 (b)(1), Rule 26(c) as revised. Rule 37(d). See Rosenberg, *supra*, 58 Col.L.Rev. 480, 484–486. Rule 37(b)(2) should provide comprehensively for enforcement of all these orders. *Cf. Societe Internationale v. Rogers*, 357 U.S. 197, 207 (1958). On the other hand, the reference to Rule 34 is deleted to conform to the changed procedure in that rule.

A new subsection (E) provides that sanctions which have been available against a party for failure to comply with an order under Rule 35(a) to submit to examination will now be available against him for his failure to comply with a Rule 35(a) order to produce a third person for examination, unless he shows that he is unable to produce the person. In this context, ''unable'' means in effect ''unable in good faith.'' See *Societe Internationale v. Rogers*, 357 U.S. 197 (1958).

Subdivision (b)(2) is amplified to provide for payment of reasonable expenses caused by the failure to obey the order. Although Rules 37(b)(2) and 37(d) have been silent as to award of expenses, courts have nevertheless ordered them on occasion. *E.g., United Sheeplined Clothing Co. v. Arctic Fur Cap Corp.*, 165 F.Supp. 193 (S.D.N.Y.1958); *Austin Theatre, Inc. v. Warner Bros. Picture, Inc.*, 22 F.R.D. 302 (S.D.N.Y. 1958). The provision places the burden on the disobedient party to avoid expenses by showing that his failure is justified or that special circumstances make an award of expenses unjust. Allocating the burden in this way conforms to the changed provisions as to expenses in Rule 37(a), and is particularly appropriate when a court order is disobeyed.

An added reference to directors of a party is similar to a change made in subdivision (d) and is explained in the note to that subdivision. The added reference to persons designated by a party under Rules 30(b)(6) or 31(a) to testify on behalf of the party carries out the new procedure in those rules for taking a deposition of a corporation or other organization.

Subdivision (c). Rule 37(c) provides a sanction for the enforcement of Rule 36 dealing with requests for admission. Rule 36 provides the mechanism whereby a party may obtain from another party in appropriate instances either (1) and admission, or (2) a sworn and specific denial, or (3) a sworn statement ''setting forth in detail the reasons why he cannot truthfully admit or deny.'' If the party obtains the second or third of these responses, in proper form, Rule 36 does not provide for a pretrial hearing on whether the response is warranted

by the evidence thus far accumulated. Instead, Rule 37(c) is intended to provide posttrial relief in the form of a requirement that the party improperly refusing the admission pay the expenses of the other side in making the necessary proof at trial.

Rule 37(c), as now written, addresses itself in terms only to the sworn denial and is silent with respect to the statement of reasons for an inability to admit or deny. There is no apparent basis for this distinction, since the sanction provided in Rule 37(c) should deter all unjustified failures to admit. This omission in the rule has caused confused and diverse treatment in the courts. One court has held that if a party gives inadequate reasons, he should be treated before trial as having denied the request, so that Rule 37(c) may apply. *Bertha Bldg. Corp. v. National Theatres Corp.*, 15 F.R.D. 339 (E.D.N.Y. 1954). Another has held that the party should be treated as having admitted the request. *Heng Hsin Co. v. Stern, Morgenthau & Co.*, 20 Fed.Rules Serv. 36a.52, Case 1 (S.D.N.Y. Dec. 10, 1954). Still another has ordered a new response, without indicating what the outcome should be if the new response were inadequate. *United States Plywood Corp. v. Hudson Lumber Co.*, 127 F.Supp. 489, 497–498 (S.D.N.Y. 1954). See generally Finman, *The Request for Admissions in Federal Civil Procedure*, 71 Yale L.J. 371, 426–430 (1962). The amendment eliminates this defect in Rule 37(c) by bringing within its scope all failures to admit.

Additional provisions in Rule 37(c) protect a party from having to pay expenses if the request for admission was held objectionable under Rule 36(a) or if the party failing to admit had reasonable ground to believe that he might prevail on the matter. The latter provision emphasizes that the true test under Rule 37(c) is not whether a party prevailed at trial but whether he acted reasonably in believing that he might prevail.

Subdivision (d). The scope of subdivision (d) is broadened to include responses to requests for inspection under Rule 34, thereby conforming to the new procedures of Rule 34.

Two related changes are made in subdivision (d): the permissible sanctions are broadened to include such orders ''as are just''; and the requirement that the failure to appear or respond be ''wilful'' is eliminated. Although Rule 37(d) in terms provides for only three sanctions, all rather severe, the courts have interpreted it as permitting softer sanctions than those which it sets forth. *E.g., Gill v. Stolow*, 240 F.2d 669 (2d Cir. 1957); *Saltzman v. Birrell*, 156 F.Supp. 538 (S.D.N.Y. 1957); 2A Barron & Holtzoff, *Federal Practice and Procedure* 554–557 (Wright ed. 1961). The rule is changed to provide the greater flexibility as to sanctions which the cases show is needed.

The resulting flexibility as to sanctions eliminates any need to retain the requirement that the failure to appear or respond be ''wilful.'' The concept of ''wilful failure'' is at best subtle and difficult, and the cases do not supply a bright line. Many courts have imposed sanctions without referring to wilfullness. *E.g., Milewski v. Schneider Transportation Co.*, 238 F.2d 397 (6th Cir. 1956); *Dictograph Products, Inc. v. Kentworth Corp.*, 7 F.R.D. 543 (W.D.Ky. 1947). In addition, in view of the possibility of light sanctions, even a negligent failure should come within Rule 37(d). If default is caused by counsel's ignorance of Federal practice, cf. *Dunn. v. Pa. R.R.*, 96 F. Supp. 597 (N.D.Ohio 1951), or by his preoccupation with another aspect of the case, *cf. Maurer-Neuer, Inc. v. United Packinghouse Workers*, 26 F.R.D. 139 (D.Kans. 1960), dismissal of the action and default judgment are not justified, but the imposition of expenses and fees may well be. ''Wilfullness'' continues to play a role, along with various other factors, in the choice of sanctions. Thus, the scheme conforms to Rule 37(b) as construed by the Supreme Court in *Societe Internationale v. Rogers*, 357 U.S. 197, 208 (1958).

A provision is added to make clear that a party may not properly remain completely silent even when he regards a notice to take his deposition or a set of interrogatories or requests to inspect as improper and objectionable. If he desires not to appear or not to respond, he must apply for a protective order. The cases are divided on whether a protective order must be sought. Compare *Collins v. Wayland*, 139 F.2d 677 (9th Cir. 1944), *cert. den.* 322 U.S. 744; *Bourgeois v. El Paso Natural Gas Co.*, 20 F.R.D. 358 (S.D.N.Y. 1957); *Loosley v. Stone*, 15 F.R.D. 373 (S.D.Ill. 1954), with *Scarlatos v. Kulukundis*, 21 F.R.D. 185 (S.D.N.Y. 1957); *Ross v. True Temper Corp.*, 11 F.R.D 307 (N.D.Ohio 1951). Compare also Rosenberg, *supra*, 58 Col.L.Rev. 480, 496 (1958) with 2A Barron & Holtzoff, *Federal Practice and Procedure* 530–531 (Wright ed. 1961). The party from whom discovery is sought is afforded, through Rule 26(c), a fair and effective procedure whereby he can challenge the request made. At the same time, the total non-compliance with which Rule 37(d) is concerned may impose severe inconvenience or hardship on the discovering party and substantially delay the discovery process. *Cf.* 2B Barron & Holtzoff, *Federal Practice and Procedure* 306–307 (Wright ed. 1961) (response to a subpoena).

The failure of an officer or managing agent of a party to make discovery as required by present Rule 37(d) is treated as the failure of the party. The rule as revised provides similar treatment for a director of a party. There is slight warrant for the present distinction between officers and managing agents on the one hand and directors on the other. Although the legal power over a director to compel his making discovery may not be as great as over officers or managing agents, *Campbell v. General Motors Corp.*, 13 F.R.D. 331 (S.D.N.Y. 1952), the practical differences are negligible. That a director's interests are normally aligned with those of his corporation is shown by the provisions of old Rule 26(d)(2), transferred to 32(a)(2) (deposition of director of party may be used at trial by an adverse party for any purpose) and of Rule 43(b) (director of party may be treated at trial as a hostile witness on direct examination by any adverse party). Moreover, in those rare instances when a corporation is unable through good faith efforts to compel a director to make discovery, it is unlikely that the court will impose sanctions. *Cf. Societe Internationale v. Rogers*, 357 U.S. 197 (1958).

Subdivision (e). The change in the caption conforms to the language of 28 U.S.C. §1783, as amended in 1964.

Subdivision (f). Until recently, costs of a civil action could be awarded against the United States only when expressly provided by Act of Congress, and such provision was rarely made. See H.R.Rept.No. 1535, 89th Cong., 2d Sess., 2–3 (1966). To avoid any conflict with this doctrine, Rule 37(f) has provided that expenses and attorney's fees may not be imposed upon the United States under Rule 37. See 2A Barron & Holtzoff, *Federal Practice and Procedure* 857 (Wright ed. 1961).

A major change in the law was made in 1966, 80 Stat. 308, 28 U.S.C. §2412 (1966), whereby a judgment for costs may ordinarily be awarded to the prevailing party in any civil action brought by or against the United States. Costs are not to include the fees and expenses of attorneys. In light of this legislative development, Rule 37(f) is amended to permit the award of expenses and fees against the United States under Rule 37, but only to the extent permitted by statute. The amendment brings Rule 37(f) into line with present and future statutory provisions.

NOTES OF ADVISORY COMMITTEE ON RULES—1980 AMENDMENT

Subdivision (b)(2). New Rule 26(f) provides that if a discovery conference is held, at its close the court shall enter an order respecting the subsequent conduct of discovery. The amendment provides that the sanctions available for violation of other court orders respecting discovery are available for violation of the discovery conference order.

Subdivision (e). Subdivision (e) is stricken. Title 28, U.S.C. §1783 no longer refers to sanctions. The subdivision otherwise duplicates Rule 45(e)(2).

Subdivision (g). New Rule 26(f) imposes a duty on parties to participate in good faith in the framing of a discovery plan by agreement upon the request of any party. This subdivision authorizes the court to award

to parties who participate in good faith in an attempt to frame a discovery plan the expenses incurred in the attempt if any party or his attorney fails to participate in good faith and thereby causes additional expense.

Failure of United States to Participate in Good Faith in Discovery. Rule 37 authorizes the court to direct that parties or attorneys who fail to participate in good faith in the discovery process pay the expenses, including attorney's fees, incurred by other parties as a result of that failure. Since attorneys' fees cannot ordinarily be awarded against the United States (28 U.S.C. § 2412), there is often no practical remedy for the misconduct of its officers and attorneys. However, in the case of a government attorney who fails to participate in good faith in discovery, nothing prevents a court in an appropriate case from giving written notification of that fact to the Attorney General of the United States and other appropriate heads of offices or agencies thereof.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1993 AMENDMENT

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

Pursuant to new subdivision (a)(2)(A), a party dissatisfied with the disclosure made by an opposing party may under this rule move for an order to compel disclosure. In providing for such a motion, the revised rule parallels the provisions of the former rule dealing with failures to answer particular interrogatories. Such a motion may be needed when the information to be disclosed might be helpful to the party seeking the disclosure but not to the party required to make the disclosure. If the party required to make the disclosure would need the material to support its own contentions, the more effective enforcement of the disclosure requirement will be to exclude the evidence not disclosed, as provided in subdivision (c)(1) of this revised rule.

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

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

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

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

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

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

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

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

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

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

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

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

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

COMMITTEE NOTES ON RULES—2000 AMENDMENT

Subdivision (c)(1). When this subdivision was added in 1993 to direct exclusion of materials not disclosed as required, the duty to supplement discovery responses pursuant to Rule 26(e)(2) was omitted. In the face of this omission, courts may rely on inherent power to sanction for failure to supplement as required by Rule 26(e)(2), *see* 8 *Federal Practice & Procedure* § 2050 at 607–09, but that is an uncertain and unregulated ground for imposing sanctions. There is no obvious occasion for a Rule 37(a) motion in connection with failure to supplement, and ordinarily only Rule 37(c)(1) exists as rule-based authority for sanctions if this supplementation obligation is violated.

The amendment explicitly adds failure to comply with Rule 26(e)(2) as a ground for sanctions under Rule 37(c)(1), including exclusion of withheld materials. The rule provides that this sanction power only applies when the failure to supplement was ''without substan-

tial justification.'' Even if the failure was not substantially justified, a party should be allowed to use the material that was not disclosed if the lack of earlier notice was harmless.

''Shall'' is replaced by ''is'' under the program to conform amended rules to current style conventions when there is no ambiguity.

GAP Report. The Advisory Committee recommends that the published amendment proposal be modified to state that the exclusion sanction can apply to failure ''to amend a prior response to discovery as required by Rule 26(e)(2).'' In addition, one minor phrasing change is recommended for the Committee Note.

COMMITTEE NOTES ON RULES—2006 AMENDMENT

Subdivision (f). Subdivision (f) is new. It focuses on a distinctive feature of computer operations, the routine alteration and deletion of information that attends ordinary use. Many steps essential to computer operation may alter or destroy information, for reasons that have nothing to do with how that information might relate to litigation. As a result, the ordinary operation of computer systems creates a risk that a party may lose potentially discoverable information without culpable conduct on its part. Under Rule 37(f), absent exceptional circumstances, sanctions cannot be imposed for loss of electronically stored information resulting from the routine, good-faith operation of an electronic information system.

Rule 37(f) applies only to information lost due to the ''routine operation of an electronic information system''—the ways in which such systems are generally designed, programmed, and implemented to meet the party's technical and business needs. The ''routine operation'' of computer systems includes the alteration and overwriting of information, often without the operator's specific direction or awareness, a feature with no direct counterpart in hard-copy documents. Such features are essential to the operation of electronic information systems.

Rule 37(f) applies to information lost due to the routine operation of an information system only if the operation was in good faith. Good faith in the routine operation of an information system may involve a party's intervention to modify or suspend certain features of that routine operation to prevent the loss of information, if that information is subject to a preservation obligation. A preservation obligation may arise from many sources, including common law, statutes, regulations, or a court order in the case. The good faith requirement of Rule 37(f) means that a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve. When a party is under a duty to preserve information because of pending or reasonably anticipated litigation, intervention in the routine operation of an information system is one aspect of what is often called a ''litigation hold.'' Among the factors that bear on a party's good faith in the routine operation of an information system are the steps the party took to comply with a court order in the case or party agreement requiring preservation of specific electronically stored information.

Whether good faith would call for steps to prevent the loss of information on sources that the party believes are not reasonably accessible under Rule 26(b)(2) depends on the circumstances of each case. One factor is whether the party reasonably believes that the information on such sources is likely to be discoverable and not available from reasonably accessible sources.

The protection provided by Rule 37(f) applies only to sanctions ''under these rules.'' It does not affect other sources of authority to impose sanctions or rules of professional responsibility.

This rule restricts the imposition of ''sanctions.'' It does not prevent a court from making the kinds of adjustments frequently used in managing discovery if a party is unable to provide relevant responsive information. For example, a court could order the responding party to produce an additional witness for deposition, respond to additional interrogatories, or make similar attempts to provide substitutes or alternatives for some or all of the lost information.

Changes Made after Publication and Comment. The published rule barred sanctions only if the party who lost electronically stored information took reasonable steps to preserve the information after it knew or should have known the information was discoverable in the action. A footnote invited comment on an alternative standard that barred sanctions unless the party recklessly or intentionally failed to preserve the information. The present proposal establishes an intermediate standard, protecting against sanctions if the information was lost in the ''good faith'' operation of an electronic information system. The present proposal carries forward a related element that was a central part of the published proposal—the information must have been lost in the system's ''routine operation.'' The change to a good-faith test made it possible to eliminate the reference to information ''discoverable in the action,'' removing a potential source of confusion as to the duty to preserve information on sources that are identified as not reasonably accessible under Rule 26(b)(2)(B).

The change to a good-faith standard is accompanied by addition of a provision that permits sanctions for loss of information in good- faith routine operation in ''exceptional circumstances.'' This provision recognizes that in some circumstances a court should provide remedies to protect an entirely innocent party requesting discovery against serious prejudice arising from the loss of potentially important information.

As published, the rule included an express exception that denied protection if a party ''violated an order in the action requiring it to preserve electronically stored information.'' This exception was deleted for fear that it would invite routine applications for preservation orders, and often for overbroad orders. The revised Committee Note observes that violation of an order is an element in determining whether a party acted in good faith.

The revised proposal broadens the rule's protection by applying to operation of ''an'' electronic information system, rather than ''the party's'' system. The change protects a party who has contracted with an outside firm to provide electronic information storage, avoiding potential arguments whether the system can be characterized as ''the party's.'' The party remains obliged to act in good faith to avoid loss of information in routine operations conducted by the outside firm.

The Committee Note is changed to reflect the changes in the rule text.

The changes from the published version of the proposed rule text are set out below. [Omitted]

AMENDMENT BY PUBLIC LAW

1980—Subd. (f). Pub. L. 96–481 repealed subd. (f) which provided that except to the extent permitted by statute, expenses and fees may not be awarded against the United States under this rule.

EFFECTIVE DATE OF 1980 AMENDMENT

Amendment by Pub. L. 96–481 effective Oct. 1, 1981, and applicable to adversary adjudication defined in section 504(b)(1)(C) of Title 5, and to civil actions and adversary adjudications described in section 2412 of Title 28, Judiciary and Judicial Procedure, which are pending on, or commenced on or after Oct. 1, 1981, see section 208 of Pub. L. 96–481, set out as an Effective Date note under section 504 of Title 5, Government Organization and Employees.

VI. TRIALS

Rule 38. Jury Trial of Right

(a) RIGHT PRESERVED. The right of trial by jury as declared by the Seventh Amendment to

the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

(b) DEMAND. Any party may demand a trial by jury of any issue triable of right by a jury by (1) serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue, and (2) filing the demand as required by Rule 5(d). Such demand may be indorsed upon a pleading of the party.

(c) SAME: SPECIFICATION OF ISSUES. In the demand a party may specify the issues which the party wishes so tried; otherwise the party shall be deemed to have demanded trial by jury for all the issues so triable. If the party has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

(d) WAIVER. The failure of a party to serve and file a demand as required by this rule constitutes a waiver by the party of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

(e) ADMIRALTY AND MARITIME CLAIMS. These rules shall not be construed to create a right to trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9(h).

(As amended Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

This rule provides for the preservation of the constitutional right of trial by jury as directed in the enabling act (act of June 19, 1934, 48 Stat. 1064, U.S.C., Title 28, §723c [see 2072]), and it and the next rule make definite provision for claim and waiver of jury trial, following the method used in many American states and in England and the British Dominions. Thus the claim must be made at once on initial pleading or appearance under Ill.Rev.Stat. (1937) ch. 110, §188; 6 Tenn.Code Ann. (Williams, 1934) §8734; compare Wyo.Rev.Stat.Ann. (1931) §89–1320 (with answer or reply); within 10 days after the pleadings are completed or the case is at issue under 2 Conn.Gen.Stat. (1930) §5624; Hawaii Rev.Laws (1935) §4101; 2 Mass.Gen.Laws (Ter.Ed. 1932) ch. 231, §60; 3 Mich.Comp.Laws (1929) §14263; Mich.Court Rules Ann. (Searl, 1933) Rule 33 (15 days); England (until 1933) O. 36, r.r. 2 and 6; and Ontario Jud.Act (1927) §57(1) (4 days, or, where prior notice of trial, 2 days from such notice); or at a definite time varying under different codes, from 10 days before notice of trial to 10 days after notice, or, as in many, when the case is called for assignment, Ariz.Rev.Code Ann. (Struckmeyer, 1928) §3802; Calif.Code Civ.Proc. (Deering, 1937) §631, par. 4; Iowa Code (1935) §10724; 4 Nev.Comp.Laws (Hillyer, 1929) §8782; N.M.Stat.Ann. (Courtright, 1929) §105–814; N.Y.C.P.A. (1937) §426, subdivision 5 (applying to New York, Bronx, Richmond, Kings, and Queens Counties); R.I.Pub.Laws (1929), ch. 1327, amending R.I.Gen.Laws (1923) ch. 337, §6; Utah Rev.Stat.Ann. (1933) §104–23–6; 2 Wash.Rev.Stat.Ann. (Remington, 1932) §316; England (4 days after notice of trial), Administration of Justice Act (1933) §6 and amended rule under the Judicature Act (The Annual Practice, 1937), O. 36, r. 1; Australia High Court Procedure Act (1921) §12, Rules, O. 33, r. 2; Alberta Rules of Ct. (1914) 172, 183, 184; British Columbia Sup.Ct.Rules (1925) O. 36, r.r. 2, 6, 11, and 16; New Brunswick Jud. Act (1927) O. 36, r.r. 2 and 5. See James, *Trial by Jury and the New Federal Rules of Procedure* (1936), 45 Yale L.J. 1022.

Rule 81(c) provides for claim for jury trial in removed actions.

The right to trial by jury as declared in U.S.C., Title 28, §770 [now 1873] (Trial of issues of fact; by jury; exceptions), and similar statutes, is unaffected by this rule. This rule modifies U.S.C., Title 28, [former] §773 (Trial of issues of fact; by court).

NOTES OF ADVISORY COMMITTEE ON RULES—1966 AMENDMENT

See Note to Rule 9(h), supra.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1993 AMENDMENT

Language requiring the filing of a jury demand as provided in subdivision (d) is added to subdivision (b) to eliminate an apparent ambiguity between the two subdivisions. For proper scheduling of cases, it is important that jury demands not only be served on other parties, but also be filed with the court.

Rule 39. Trial by Jury or by the Court

(a) BY JURY. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.

(b) BY THE COURT. Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

(c) ADVISORY JURY AND TRIAL BY CONSENT. In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, except in actions against the United States when a statute of the United States provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

NOTES OF ADVISORY COMMITTEE ON RULES—1937

The provisions for express waiver of jury trial found in U.S.C., Title 28, [former] §773 (Trial of issues of fact; by court) are incorporated in this rule. See rule 38, however, which extends the provisions for waiver of jury. U.S.C., Title 28, [former] §772 (Trial of issues of fact; in equity in patent causes) is unaffected by this rule. When certain of the issues are to be tried by jury and others by the court, the court may determine the sequence in which such issues shall be tried. See *Liberty Oil Co. v. Condon Nat. Bank*, 260 U.S. 235 (1922).

A discretionary power in the courts to send issues of fact to the jury is common in state procedure. Compare Calif.Code Civ.Proc. (Deering, 1937) §592; 1

Colo.Stat.Ann. (1935) Code Civ.Proc., ch. 12, §191; Conn.Gen.Stat. (1930) §5625; 2 Minn.Stat. (Mason, 1927) §9288; 4 Mont.Rev.Codes Ann. (1935) §9327; N.Y.C.P.A. (1937) §430; 2 Ohio Gen.Code Ann. (Page, 1926) §11380; 1 Okla.Stat.Ann. (Harlow, 1931) §351; Utah Rev.Stat.Ann. (1933) §104–23–5; 2 Wash.Rev.Stat.Ann. (Remington, 1932) §315; Wis.Stat. (1935) §270.07. See [former] Equity Rule 23 (Matters Ordinarily Determinable at Law When Arising in Suit in Equity to be Disposed of Therein) and U.S.C., Title 28, [former] §772 (Trial of issues of fact; in equity in patent causes); *Colleton Merc. Mfg. Co. v. Savannah River Lumber Co.*, 280 Fed. 358 (C.C.A.4th, 1922); *Fed. Res. Bk. of San Francisco v. Idaho Grimm Alfalfa Seed Growers' Ass'n*, 8 F.(2d) 922 (C.C.A.9th, 1925), cert. den. 270 U.S. 646 (1926); *Watt v. Starke*, 101 U.S. 247, 25 L.Ed. 826 (1879).

Rule 40. Assignment of Cases for Trial

The district courts shall provide by rule for the placing of actions upon the trial calendar (1) without request of the parties or (2) upon request of a party and notice to the other parties or (3) in such other manner as the courts deem expedient. Precedence shall be given to actions entitled thereto by any statute of the United States.

NOTES OF ADVISORY COMMITTEE ON RULES—1937

U.S.C., Title 28, [former] §769 (Notice of case for trial) is modified. See [former] Equity Rule 56 (On Expiration of Time for Depositions, Case Goes on Trial Calendar). See also [former] Equity Rule 57 (Continuances).

For examples of statutes giving precedence, see U.S.C., Title 28, §47 [now 1253, 2101, 2325] (Injunctions as to orders of Interstate Commerce Commission); §380 [now 1253, 2101, 2284] (Injunctions alleged unconstitutionality of state statutes); §380a [now 1253, 2101, 2284] (Same; Constitutionality of federal statute); [former] §768 (Priority of cases where a state is party); Title 15, §28 (Antitrust laws; suits against monopolies expedited); Title 22, §240 (Petition for restoration of property seized as munitions of war, etc.); and Title 49, [former] §44 (Proceedings in equity under interstate commerce laws; expedition of suits).

Rule 41. Dismissal of Actions

(a) VOLUNTARY DISMISSAL: EFFECT THEREOF.

(1) *By Plaintiff; by Stipulation*. Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

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

(b) INVOLUNTARY DISMISSAL: EFFECT THEREOF. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

(c) DISMISSAL OF COUNTERCLAIM, CROSS-CLAIM, OR THIRD-PARTY CLAIM. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (1) of subdivision (a) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

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

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Dec. 4, 1967, eff. July 1, 1968; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

Note to Subdivision (a). Compare Ill.Rev.Stat. (1937) ch. 110, §176, and *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 26.

Provisions regarding dismissal in such statutes as U.S.C., Title 8, §164 [see 1329] (Jurisdiction of district courts in immigration cases) and U.S.C., Title 31, §232 [now 3730] (Liability of persons making false claims against United States; suits) are preserved by paragraph (1).

Note to Subdivision (b). This provides for the equivalent of a nonsuit on motion by the defendant after the completion of the presentation of evidence by the plaintiff. Also, for actions tried without a jury, it provides the equivalent of the directed verdict practice for jury actions which is regulated by Rule 50.

NOTES OF ADVISORY COMMITTEE ON RULES—1946 AMENDMENT

Subdivision (a). The insertion of the reference to Rule 66 correlates Rule 41(a)(1) with the express provisions concerning dismissal set forth in amended Rule 66 on receivers.

The change in Rule 41(a)(1)(i) gives the service of a motion for summary judgment by the adverse party the same effect in preventing unlimited dismissal as was originally given only to the service of an answer. The omission of reference to a motion for summary judgment in the original rule was subject to criticism. 3 *Moore's Federal Practice* (1938) 3037–3038, n. 12. A motion for summary judgment may be forthcoming prior to answer, and if well taken will eliminate the necessity for an answer. Since such a motion may require even more research and preparation than the answer itself, there is good reason why the service of the motion, like that

of the answer, should prevent a voluntary dismissal by the adversary without court approval.

The word ''generally'' has been stricken from Rule 41(a)(1)(ii) in order to avoid confusion and to conform with the elimination of the necessity for special appearances by original Rule 12(b).

Subdivision (b). In some cases tried without a jury, where at the close of plaintiff's evidence the defendant moves for dismissal under Rule 41(b) on the ground that plaintiff's evidence is insufficient for recovery, the plaintiff's own evidence may be conflicting or present questions of credibility. In ruling on the defendant's motion, questions arise as to the function of the judge in evaluating the testimony and whether findings should be made if the motion is sustained. Three circuits hold that as the judge is the trier of the facts in such a situation his function is not the same as on a motion to direct a verdict, where the jury is the trier of the facts, and that the judge in deciding such a motion in a non-jury case may pass on conflicts of evidence and credibility, and if he performs that function of evaluating the testimony and grants the motion on the merits, findings are required. *Young v. United States* (C.C.A.9th, 1940) 111 F.(2d) 823; *Gary Theatre Co. v. Columbia Pictures Corporation* (C.C.A.7th, 1941) 120 F.(2d) 891; *Bach v. Friden Calculating Machine Co., Inc.* (C.C.A.6th, 1945) 148 F.(2d) 407. *Cf. Mateas v. Fred Harvey, a Corporation* (C.C.A.9th, 1945) 146 F.(2d) 989. The Third Circuit has held that on such a motion the function of the court is the same as on a motion to direct in a jury case, and that the court should only decide whether there is evidence which would support a judgment for the plaintiff, and, therefore, findings are not required by Rule 52. *Federal Deposit Insurance Corp. v. Mason* (C.C.A.3d, 1940) 115 F.(2d) 548; *Schad v. Twentieth Century-Fox Film Corp.* (C.C.A.3d, 1943) 136 F.(2d) 991. The added sentence in Rule 41(b) incorporates the view of the Sixth, Seventh and Ninth Circuits. See also 3 *Moore's Federal Practice* (1938) Cum. Supplement §41.03, under ''Page 3045''; Commentary, *The Motion to Dismiss in Non-Jury Cases* (1946) 9 Fed.Rules Serv., Comm.Pg. 41b.14.

NOTES OF ADVISORY COMMITTEE ON RULES—1963 AMENDMENT

Under the present text of the second sentence of this subdivision, the motion for dismissal at the close of the plaintiff's evidence may be made in a case tried to a jury as well as in a case tried without a jury. But, when made in a jury-tried case, this motion overlaps the motion for a directed verdict under Rule 50(a), which is also available in the same situation. It has been held that the standard to be applied in deciding the Rule 41(b) motion at the close of the plaintiff's evidence in a jury-tried case is the same as that used upon a motion for a directed verdict made at the same stage; and, just as the court need not make findings pursuant to Rule 52(a) when it directs a verdict, so in a jury-tried case it may omit these findings in granting the Rule 41(b) motion. See generally *O'Brien v. Westinghouse Electric Corp.*, 293 F.2d 1, 5–10 (3d Cir. 1961).

As indicated by the discussion in the *O'Brien* case, the overlap has caused confusion. Accordingly, the second and third sentences of Rule 41(b) are amended to provide that the motion for dismissal at the close of the plaintiff's evidence shall apply only to nonjury cases (including cases tried with an advisory jury). Hereafter the correct motion in jury-tried cases will be the motion for a directed verdict. This involves no change of substance. It should be noted that the court upon a motion for a directed verdict may in appropriate circumstances deny that motion and grant instead a new trial, or a voluntary dismissal without prejudice under Rule 41(a)(2). See 6 *Moore's Federal Practice* §59.08[5] (2d ed. 1954); *cf. Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 217, 67 S.Ct. 752, 91 L.Ed. 849 (1947).

The first sentence of Rule 41(b), providing for dismissal for failure to prosecute or to comply with the Rules or any order of court, and the general provisions of the last sentence remain applicable in jury as well as nonjury cases.

The amendment of the last sentence of Rule 41(b) indicates that a dismissal for lack of an indispensable party does not operate as an adjudication on the merits. Such a dismissal does not bar a new action, for it is based merely ''on a plaintiff's failure to comply with a precondition requisite to the Court's going forward to determine the merits of his substantive claim.'' See *Costello v. United States*, 365 U.S. 265, 284–288, 81 S.Ct. 534, 5 L.Ed.2d 551 & n. 5 (1961); *Mallow v. Hinde*, 12 Wheat. (25 U.S.) 193, 6 L.Ed. 599 (1827); Clark, *Code Pleading* 602 (2d ed. 1947); *Restatement of Judgments* §49, comm. a, b (1942). This amendment corrects an omission from the rule and is consistent with an earlier amendment, effective in 1948, adding ''the defense of failure to join an indispensable party'' to clause (1) of Rule 12(h).

NOTES OF ADVISORY COMMITTEE ON RULES—1966 AMENDMENT

The terminology is changed to accord with the amendment of Rule 19. See that amended rule and the Advisory Committee's Note thereto.

NOTES OF ADVISORY COMMITTEE ON RULES—1968 AMENDMENT

The amendment corrects an inadvertent error in the reference to amended Rule 23.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendment is technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1991 AMENDMENT

Language is deleted that authorized the use of this rule as a means of terminating a non-jury action on the merits when the plaintiff has failed to carry a burden of proof in presenting the plaintiff's case. The device is replaced by the new provisions of Rule 52(c), which authorize entry of judgment against the defendant as well as the plaintiff, and earlier than the close of the case of the party against whom judgment is rendered. A motion to dismiss under Rule 41 on the ground that a plaintiff's evidence is legally insufficient should now be treated as a motion for judgment on partial findings as provided in Rule 52(c).

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, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

(As amended Feb. 28, 1966, eff. July 1, 1966.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

Subdivision (a) is based upon U.S.C., Title 28, [former] §734 (Orders to save costs; consolidation of causes of like nature) but insofar as the statute differs from this rule, it is modified.

For comparable statutes dealing with consolidation see Ark.Dig.Stat. (Crawford & Moses, 1921) §1081; Calif.Code Civ.Proc. (Deering, 1937) §1048; N.M.Stat.Ann. (Courtright, 1929) §105–828; N.Y.C.P.A. (1937) §§96, 96a, and 97; American Judicature Society, Bulletin XIV (1919) Art.26.

For severance or separate trials see Calif.Code Civ.Proc. (Deering, 1937) §1048; N.Y.C.P.A. (1937) §96; American Judicature Society, Bulletin XIV (1919) Art. 3, §2 and Art. 10, §10. See also the third sentence of Equity Rule 29 (Defenses—How Presented) providing for discretionary separate hearing and disposition before trial of pleas in bar or abatement, and see also Rule 12(d) of these rules for preliminary hearings of defenses and objections.

For the entry of separate judgments, see Rule 54(b) (Judgment at Various Stages).

NOTES OF ADVISORY COMMITTEE ON RULES—1966 AMENDMENT

In certain suits in admiralty separation for trial of the issues of liability and damages (or of the extent of liability other than damages, such as salvage and general average) has been conducive to expedition and economy, especially because of the statutory right to interlocutory appeal in admiralty cases (which is of course preserved by these Rules). While separation of issues for trial is not to be routinely ordered, it is important that it be encouraged where experience has demonstrated its worth. Cf. Weinstein, *Routine Bifurcation of Negligence Trials*, 14 Vand.L.Rev. 831 (1961).

In cases (including some cases within the admiralty and maritime jurisdiction) in which the parties have a constitutional or statutory right of trial by jury, separation of issues may give rise to problems. See *e.g.*, *United Air Lines, Inc. v. Wiener*, 286 F.2d 302 (9th Cir. 1961). Accordingly, the proposed change in Rule 42 reiterates the mandate of Rule 38 respecting preservation of the right to jury trial.

Rule 43. Taking of Testimony

(a) FORM. In every trial, the testimony of witnesses shall be taken in open court, unless a federal law, these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court provide otherwise. The court may, for good cause shown in compelling circumstances and upon appropriate safeguards, permit presentation of testimony in open court by contemporaneous transmission from a different location.

[(b) SCOPE OF EXAMINATION AND CROSS-EXAMINATION.] (Abrogated Nov. 20, 1972, and Dec. 18, 1972, eff. July 1, 1975)

[(c) RECORD OF EXCLUDED EVIDENCE.] (Abrogated Nov. 20, 1972, and Dec. 18, 1972, eff. July 1, 1975)

(d) AFFIRMATION IN LIEU OF OATH. Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.

(e) EVIDENCE ON MOTIONS. When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.

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

(As amended Feb. 28, 1966, eff. July 1, 1966; Nov. 20, 1972, and Dec. 18, 1972, eff. July 1, 1975; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 23, 1996, eff. Dec. 1, 1996.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

Note to Subdivision (a). The first sentence is a restatement of the substance of U.S.C., Title 28, [former] §635 (Proof in common-law actions), §637 [see 2072, 2073] (Proof in equity and admiralty), and [former] Equity Rule 46 (Trial—Testimony Usually Taken in Open Court—Rulings on Objections to Evidence). This rule abolishes in patent and trade-mark actions, the practice under [former] Equity Rule 48 of setting forth in affidavits the testimony in chief of expert witnesses whose testimony is directed to matters of opinion. The second and third sentences on admissibility of evidence and *Subdivision (b)* on contradiction and cross-examination modify U.S.C., Title 28, §725 [now 1652] (Laws of states as rules of decision) insofar as that statute has been construed to prescribe conformity to state rules of evidence. Compare Callihan and Ferguson, *Evidence and the New Federal Rules of Civil Procedure*, 45 Yale L.J. 622 (1936), and *Same: 2*, 47 Yale L.J. 195 (1937). The last sentence modifies to the extent indicated U.S.C., Title 28, [former] §631 (Competency of witnesses governed by State laws).

Note to Subdivision (b). See 4 *Wigmore on Evidence* (2d ed., 1923) §1885 *et seq*.

Note to Subdivision (c). See [former] Equity Rule 46 (Trial—Testimony Usually Taken in Open Court—Rulings on Objections to Evidence). With the last sentence compare *Dowagiac v. Lochren*, 143 Fed. 211 (C.C.A.8th, 1906). See also *Blease v. Garlington*, 92 U.S. 1 (1876); *Nelson v. United States*, 201 U.S. 92. 114 (1906); *Unkle v. Wills*, 281 Fed. 29 (C.C.A.8th 1922).

See Rule 61 for harmless error in either the admission or exclusion of evidence.

Note to Subdivision (d). See [former] Equity Rule 78 (Affirmation in Lieu of Oath) and U.S.C., Title 1, §1 (Words importing singular number, masculine gender, etc.; extended application), providing for affirmation in lieu of oath.

NOTES OF ADVISORY COMMITTEE ON RULES—1946
SUPPLEMENTARY NOTE REGARDING RULES 43 AND 44

These rules have been criticized and suggested improvements offered by commentators. 1 *Wigmore on Evidence* (3d ed. 1940) 200–204; Green, *The Admissibility of Evidence Under the Federal Rules* (1941) 55 Harv.L.Rev. 197. Cases indicate, however, that the rule is working better than these commentators had expected. *Boerner v. United States* (C.C.A.2d, 1941) 117 F.(2d) 387, cert. den. (1941) 313 U.S. 587; *Mosson v. Liberty Fast Freight Co.* (C.C.A.2d, 1942) 124 F.(2d) 448; *Hartford Accident & Indemnity Co. v. Olivier* (C.C.A.5th, 1941) 123 F.(2d) 709; *Anzano v. Metropolitan Life Ins. Co. of New York* (C.C.A.3d, 1941) 118 F.(2d) 430; *Franzen v. E. I. DuPont De Nemours & Co.* (C.C.A.3d, 1944) 146 F.(2d) 837; *Fakouri v. Cadais* (C.C.A.5th, 1945) 147 F.(2d) 667; *In re C. & P. Co.* (S.D.Cal. 1945) 63 F.Supp. 400, 408. But *cf. United States v. Aluminum Co. of America* (S.D.N.Y. 1938) 1 Fed.Rules Serv. 43a.3, Case 1; Note (1946) 46 Col.L.Rev. 267. While consideration of a comprehensive and detailed set of rules of evidence seems very desirable, it has not been feasible for the Committee so far to undertake this important task. Such consideration should include the adaptability to federal practice of all or parts of the proposed Code of Evidence of the American Law Institute. See Armstrong, *Proposed Amendments to Federal Rules of Civil Procedure*, 4 F.R.D. 124, 137–138.

NOTES OF ADVISORY COMMITTEE ON RULES—1966 AMENDMENT

This new subdivision authorizes the court to appoint interpreters (including interpreters for the deaf), to provide for their compensation, and to tax the compensation as costs. Compare proposed subdivision (b) of Rule 28 of the Federal Rules of Criminal Procedure.

NOTES OF ADVISORY COMMITTEE ON RULES—1972 AMENDMENT

Rule 43, entitled Evidence, has heretofore served as the basic rule of evidence for civil cases in federal courts. Its very general provisions are superseded by the detailed provisions of the new Rules of Evidence. The original title and many of the provisions of the rule are, therefore, no longer appropriate.

Subdivision (a). The provision for taking testimony in open court is not duplicated in the Rules of Evidence and is retained. Those dealing with admissibility of evidence and competency of witnesses, however, are no longer needed or appropriate since those topics are covered at large in the Rules of Evidence. They are accordingly deleted. The language is broadened, however, to take account of acts of Congress dealing with the taking of testimony, as well as of the Rules of Evidence and any other rules adopted by the Supreme Court.

Subdivision (b). The subdivision is no longer needed or appropriate since the matters with which it deals are treated in the Rules of Evidence. The use of leading questions, both generally and in the interrogation of an adverse party or witness identified with him, is the subject of Evidence Rule 611(c). Who may impeach is treated in Evidence Rule 601 and scope of cross-examination is covered in Evidence Rule 611(b). The subdivision is accordingly deleted.

Subdivision (c). Offers of proof and making a record of excluded evidence are treated in Evidence Rule 103. The subdivision is no longer needed or appropriate and is deleted.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendment is technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1996 AMENDMENT

Rule 43(a) is revised to conform to the style conventions adopted for simplifying the present Civil Rules. The only intended changes of meaning are described below.

The requirement that testimony be taken ''orally'' is deleted. The deletion makes it clear that testimony of a witness may be given in open court by other means if the witness is not able to communicate orally. Writing or sign language are common examples. The development of advanced technology may enable testimony to be given by other means. A witness unable to sign or write by hand may be able to communicate through a computer or similar device.

Contemporaneous transmission of testimony from a different location is permitted only on showing good cause in compelling circumstances. The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truthtelling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition. Transmission cannot be justified merely by showing that it is inconvenient for the witness to attend the trial.

The most persuasive showings of good cause and compelling circumstances are likely to arise when a witness is unable to attend trial for unexpected reasons, such as accident or illness, but remains able to testify from a different place. Contemporaneous transmission may be better than an attempt to reschedule the trial, particularly if there is a risk that other—and perhaps more important—witnesses might not be available at a later time.

Other possible justifications for remote transmission must be approached cautiously. Ordinarily depositions, including video depositions, provide a superior means of securing the testimony of a witness who is beyond the reach of a trial subpoena, or of resolving difficulties in scheduling a trial that can be attended by all witnesses. Deposition procedures ensure the opportunity of all parties to be represented while the witness is testifying. An unforeseen need for the testimony of a remote witness that arises during trial, however, may establish good cause and compelling circumstances. Justification is particularly likely if the need arises from the interjection of new issues during trial or from the unexpected inability to present testimony as planned from a different witness.

Good cause and compelling circumstances may be established with relative ease if all parties agree that testimony should be presented by transmission. The court is not bound by a stipulation, however, and can insist on live testimony. Rejection of the parties' agreement will be influenced, among other factors, by the apparent importance of the testimony in the full context of the trial.

A party who could reasonably foresee the circumstances offered to justify transmission of testimony will have special difficulty in showing good cause and the compelling nature of the circumstances. Notice of a desire to transmit testimony from a different location should be given as soon as the reasons are known, to enable other parties to arrange a deposition, or to secure an advance ruling on transmission so as to know whether to prepare to be present with the witness while testifying.

No attempt is made to specify the means of transmission that may be used. Audio transmission without video images may be sufficient in some circumstances, particularly as to less important testimony. Video transmission ordinarily should be preferred when the cost is reasonable in relation to the matters in dispute, the means of the parties, and the circumstances that justify transmission. Transmission that merely produces the equivalent of a written statement ordinarily should not be used.

Safeguards must be adopted that ensure accurate identification of the witness and that protect against influence by persons present with the witness. Accurate transmission likewise must be assured.

Other safeguards should be employed to ensure that advance notice is given to all parties of foreseeable circumstances that may lead the proponent to offer testimony by transmission. Advance notice is important to protect the opportunity to argue for attendance of the witness at trial. Advance notice also ensures an opportunity to depose the witness, perhaps by video record, as a means of supplementing transmitted testimony.

REFERENCES IN TEXT

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

EFFECTIVE DATE OF AMENDMENTS PROPOSED NOVEMBER 20, 1972, AND DECEMBER 18, 1972

Amendments of this rule embraced by orders entered by the Supreme Court of the United States on November 20, 1972, and December 18, 1972, effective on the 180th day beginning after January 2, 1975, see section 3 of Pub. L. 93–595, Jan. 2, 1975, 88 Stat. 1959, set out as a note under section 2074 of this title.

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 the officer's deputy, and accompanied by a certificate that such officer has the custody. The certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal

of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of the officer's office.

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

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

(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.

(As amended Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

This rule provides a simple and uniform method of proving public records, and entry or lack of entry therein, in all cases including those specifically provided for by statutes of the United States. Such statutes are not superseded, however, and proof may also be made according to their provisions whenever they differ from this rule. Some of those statutes are:

U.S.C., Title 28:

§ 661 [now 1733] (Copies of department or corporation records and papers; admissibility; seal)
§ 662 [now 1733] (Same; in office of General Counsel of the Treasury)
§ 663 [now 1733] (Instruments and papers of Comptroller of Currency; admissibility)
§ 664 [now 1733] (Organization certificates of national banks; admissibility)
§ 665 [now 1733] (Transcripts from books of Treasury in suits against delinquents; admissibility)
§ 666 [now 1733] (Same; certificate by Secretary or Assistant Secretary)
§ 670 [now 1743] (Admissibility of copies of statements of demands by Post Office Department)
§ 671 [now 1733] (Admissibility of copies of post office records and statement of accounts)
§ 672 [former] (Admissibility of copies of records in General Land Office)
§ 673 [now 1744] (Admissibility of copies of records, and so forth, of Patent Office)
§ 674 [now 1745] (Copies of foreign letters patent as prima facie evidence)
§ 675 [former] (Copies of specifications and drawings of patents admissible)
§ 676 [now 1736] (Extracts from Journals of Congress admissible when injunction of secrecy removed)
§ 677 [now 1740] (Copies of records in offices of United States consuls admissible)
§ 678 [former] (Books and papers in certain district courts)
§ 679 [former] (Records in clerks' offices, western district of North Carolina)
§ 680 [former] (Records in clerks' offices of former district of California)
§ 681 [now 1734] (Original records lost or destroyed; certified copy admissible)
§ 682 [now 1734] (Same; when certified copy not obtainable)
§ 685 [now 1735] (Same; certified copy of official papers)
§ 687 [now 1738] (Authentication of legislative acts; proof of judicial proceedings of State)
§ 688 [now 1739] (Proofs of records in offices not pertaining to courts)
§ 689 [now 1742] (Copies of foreign records relating to land titles)
§ 695 [now 1732] (Writings and records made in regular course of business; admissibility)
§ 695e [now 1741] (Foreign documents on record in public offices; certification)

U.S.C., Title 1:

§ 30 [now 112] (Statutes at large; contents; admissibility in evidence)
§ 30a [now 113] (''Little and Brown's'' edition of laws and treaties competent evidence of Acts of Congress)
§ 54 [now 204] (Codes and supplements as establishing prima facie the laws of United States and District of Columbia, etc.)
§ 55 [now 208] (Copies of supplements to Code of Laws of United States and of District of Columbia Code and supplements; conclusive evidence of original)

U.S.C., Title 5:

§ 490 [former] (Records of Department of Interior; authenticated copies as evidence)

U.S.C., Title 6:

§ 7 [now Title 31, § 9306] (Surety Companies as sureties; appointment of agents; service of process)

U.S.C., Title 8:

§ 9a [see 1435(c)] (Citizenship of children of persons naturalized under certain laws; repatriation of native-born women married to aliens prior to September 22, 1922; copies of proceedings)
§ 356 [see 1443] (Regulations for execution of naturalization laws; certified copies of papers as evidence)
§ 399b(d) [see 1443] (Certifications of naturalization records; authorization; admissibility as evidence)

U.S.C., Title 11:

§ 44(d), (e), (f), (g) [former] (Bankruptcy court proceedings and orders as evidence)
§ 204 [former] (Extensions extended, etc.; evidence of confirmation)

§ 207(j) [former] (Corporate reorganizations; certified copy of decree as evidence)

U.S.C., Title 15:

§ 127 (Trade-mark records in Patent Office; copies as evidence)

U.S.C., Title 20:

§ 52 (Smithsonian Institution; evidence of title to site and buildings)

U.S.C., Title 25:

§ 6 (Bureau of Indian Affairs; seal; authenticated and certified documents; evidence)

U.S.C., Title 31:

§ 46 [now 704] (Laws governing General Accounting Office; copies of books, records, etc., thereof as evidence)

U.S.C., Title 38:

§ 11g [see 302] (Seal of Veterans' Administration; authentication of copies of records)

U.S.C., Title 40:

§ 238 [former] (National Archives; seal; reproduction of archives; fee; admissibility in evidence of reproductions)

§ 270c [now 3133(a)] (Bonds of contractors for public works; right of person furnishing labor or material to copy of bond)

U.S.C., Title 43:

§§ 57–59 (Copies of land surveys, etc., in certain states and districts admissible as evidence)

§ 83 (General Land Office registers and receivers; transcripts of records as evidence)

U.S.C., Title 46:

§ 823 [former] (Records of Maritime Commission; copies; publication of reports; evidence)

U.S.C., Title 47:

§ 154(m) (Federal Communications Commission; copies of reports and decisions as evidence)

§ 412 (Documents filed with Federal Communications Commission as public records; prima facie evidence; confidential records)

U.S.C., Title 49:

§ 14(3) [see 706] (Interstate Commerce Commission reports and decisions; printing and distribution of copies)

§ 16(13) [former] (Copies of schedules, tariffs, etc., filed with Interstate Commerce Commission as evidence)

§ 19a(i) [former] (Valuation of property of carriers by Interstate Commerce Commission; final published valuations as evidence)

NOTES OF ADVISORY COMMITTEE ON RULES—1946
SUPPLEMENTARY NOTE REGARDING RULES 43 AND 44

For supplementary note of Advisory Committee on this rule, see note under rule 43.

NOTES OF ADVISORY COMMITTEE ON RULES—1966
AMENDMENT

Subdivision (a)(1). These provisions on proof of official records kept within the United States are similar in substance to those heretofore appearing in Rule 44. There is a more exact description of the geographical areas covered. An official record kept in one of the areas enumerated qualifies for proof under subdivision (a)(1) even though it is not a United States official record. For example, an official record kept in one of these areas by a government in exile falls within subdivision (a)(1). It also falls within subdivision (a)(2) which may be availed of alternatively. *Cf. Banco de Espana v. Federal Reserve Bank*, 114 F.2d 438 (2d Cir. 1940).

Subdivision (a)(2). Foreign official records may be proved, as heretofore, by means of official publications thereof. See *United States v. Aluminum Co. of America*, 1 F.R.D. 71 (S.D.N.Y. 1939). Under this rule, a document that, on its face, appears to be an official publication, is admissible, unless a party opposing its admission into evidence shows that it lacks that character.

The rest of subdivision (a)(2) aims to provide greater clarity, efficiency, and flexibility in the procedure for authenticating copies of foreign official records.

The reference to attestation by "the officer having the legal custody of the record," hitherto appearing in Rule 44, has been found inappropriate for official records kept in foreign countries where the assumed relation between custody and the authority to attest does not obtain. See 2B Barron & Holtzoff, *Federal Practice & Procedure* § 992 (Wright ed. 1961). Accordingly it is provided that an attested copy may be obtained from any person authorized by the law of the foreign country to make the attestation without regard to whether he is charged with responsibility for maintaining the record or keeping it in his custody.

Under Rule 44 a United States foreign service officer has been called on to certify to the authority of the foreign official attesting the copy as well as the genuineness of his signature and his official position. See Schlesinger, *Comparative Law* 57 (2d ed. 1959); Smit, *International Aspects of Federal Civil Procedure*, 61 Colum.L.Rev. 1031, 1063 (1961); 22 C.F.R. § 92.41(a), (e) (1958). This has created practical difficulties. For example, the question of the authority of the foreign officer might raise issues of foreign law which were beyond the knowledge of the United States officer. The difficulties are met under the amended rule by eliminating the element of the authority of the attesting foreign official from the scope of the certifying process, and by specifically permitting use of the chain-certificate method. Under this method, it is sufficient if the original attestation purports to have been issued by an authorized person and is accompanied by a certificate of another foreign official whose certificate may in turn be followed by that of a foreign official of higher rank. The process continues until a foreign official is reached as to whom the United States foreign service official (or a diplomatic or consular officer of the foreign country assigned or accredited to the United States) has adequate information upon which to base a "final certification." See *New York Life Ins. Co. v. Aronson*, 38 F.Supp. 687 (W.D.Pa. 1941); 22 C.F.R. § 92.37 (1958).

The final certification (a term used in contradistinction to the certificates prepared by the foreign officials in a chain) relates to the incumbency and genuineness of signature of the foreign official who attested the copy of the record or, where the chain-certificate method is used, of a foreign official whose certificate appears in the chain, whether that certificate is the last in the chain or not. A final certification may be prepared on the basis of material on file in the consulate or any other satisfactory information.

Although the amended rule will generally facilitate proof of foreign official records, it is recognized that in some situations it may be difficult or even impossible to satisfy the basic requirements of the rule. There may be no United States consul in a particular foreign country; the foreign officials may not cooperate, peculiarities may exist or arise hereafter in the law or practice of a foreign country. See *United States v. Grabina*, 119 F.2d 863 (2d Cir. 1941); and, generally, Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 Yale L.J. 515, 548–49 (1953). Therefore the final sentence of subdivision (a)(2) provides the court with discretion to admit an attested copy of a record without a final certification, or an attested summary of a record with or without a final certification. See Rep. of Comm. on Comparative Civ. Proc. & Prac., Proc. A.B.A., Sec. Int'l & Comp. L. 123, 130–131 (1952); Model Code of Evidence §§ 517, 519 (1942). This relaxation should be permitted only when it is shown that the party has been unable to satisfy the basic requirements of the amended rule despite his reasonable efforts. Moreover, it is specially provided that the parties must be given a reasonable opportunity in these cases to ex-

amine into the authenticity and accuracy of the copy or summary.

Subdivision (b). This provision relating to proof of lack of record is accommodated to the changes made in subdivision (a).

Subdivision (c). The amendment insures that international agreements of the United States are unaffected by the rule. Several consular conventions contain provisions for reception of copies or summaries of foreign official records. See, e.g., Consular Conv. with Italy, May 8, 1878, art. X, 20 Stat. 725, T.S. No. 178 (Dept. State 1878). See also 28 U.S.C. §§1740–42, 1745; *Fakouri v. Cadais*, 149 F.2d 321 (5th Cir. 1945), cert. denied, 326 U.S. 742 (1945); 5 *Moore's Federal Practice*, par. 44.05 (2d ed. 1951).

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1991 AMENDMENT

The amendment to paragraph (a)(1) strikes the references to specific territories, two of which are no longer subject to the jurisdiction of the United States, and adds a generic term to describe governments having a relationship with the United States such that their official records should be treated as domestic records.

The amendment to paragraph (a)(2) adds a sentence to dispense with the final certification by diplomatic officers when the United States and the foreign country where the record is located are parties to a treaty or convention that abolishes or displaces the requirement. In that event the treaty or convention is to be followed. This changes the former procedure for authenticating foreign official records only with respect to records from countries that are parties to the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents. Moreover, it does not affect the former practice of attesting the records, but only changes the method of certifying the attestation.

The Hague Public Documents Convention provides that the requirement of a final certification is abolished and replaced with a model *apostille*, which is to be issued by officials of the country where the records are located. See Hague Public Documents Convention, Arts. 2–4. The *apostille* certifies the signature, official position, and seal of the attesting officer. The authority who issues the *apostille* must maintain a register or card index showing the serial number of the *apostille* and other relevant information recorded on it. A foreign court can then check the serial number and information on the *apostille* with the issuing authority in order to guard against the use of fraudulent *apostilles*. This system provides a reliable method for maintaining the integrity of the authentication process, and the *apostille* can be accorded greater weight than the normal authentication procedure because foreign officials are more likely to know the precise capacity under their law of the attesting officer than would an American official. See generally Comment, *The United States and the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents*, 11 HARV. INT'L L.J. 476, 482, 488 (1970).

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

(As added Feb. 28, 1966, eff. July 1, 1966; amended Nov. 20, 1972, eff. July 1, 1975; Mar. 2, 1987, eff. Aug. 1, 1987.)

NOTES OF ADVISORY COMMITTEE ON RULES—1966

Rule 44.1 is added by amendment to furnish Federal courts with a uniform and effective procedure for raising and determining an issue concerning the law of a foreign country.

To avoid unfair surprise, the *first sentence* of the new rule requires that a party who intends to raise an issue of foreign law shall give notice thereof. The uncertainty under Rule 8(a) about whether foreign law must be pleaded—*compare Siegelman v. Cunard White Star, Ltd.*, 221 F.2d 189 (2d Cir. 1955), and *Pedersen v. United States*, 191 F.Supp. 95 (D.Guam 1961), *with Harrison v. United Fruit Co.*, 143 F.Supp. 598 (S.D.N.Y. 1956)—is eliminated by the provision that the notice shall be "written" and "reasonable." It may, but need not be, incorporated in the pleadings. In some situations the pertinence of foreign law is apparent from the outset; accordingly the necessary investigation of that law will have been accomplished by the party at the pleading stage, and the notice can be given conveniently in the pleadings. In other situations the pertinence of foreign law may remain doubtful until the case is further developed. A requirement that notice of foreign law be given only through the medium of the pleadings would tend in the latter instances to force the party to engage in a peculiarly burdensome type of investigation which might turn out to be unnecessary; and correspondingly the adversary would be forced into a possible wasteful investigation. The liberal provisions for amendment of the pleadings afford help if the pleadings are used as the medium of giving notice of the foreign law; but it seems best to permit a written notice to be given outside of and later than the pleadings, provided the notice is reasonable.

The new rule does not attempt to set any definite limit on the party's time for giving the notice of an issue of foreign law; in some cases the issue may not become apparent until the trial and notice then given may still be reasonable. The stage which the case has reached at the time of the notice, the reason proffered by the party for his failure to give earlier notice, and the importance to the case as a whole of the issue of foreign law sought to be raised, are among the factors which the court should consider in deciding a question of the reasonableness of a notice. If notice is given by one party it need not be repeated by any other and serves as a basis for presentation of material on the foreign law by all parties.

The *second sentence* of the new rule describes the materials to which the court may resort in determining an issue of foreign law. Heretofore the district courts, applying Rule 43(a), have looked in certain cases to State law to find the rules of evidence by which the content of foreign-country law is to be established. The State laws vary; some embody procedures which are inefficient, time consuming and expensive. See, generally, Nussbaum, *Proving the Law of Foreign Countries*, 3 Am.J.Comp.L. 60 (1954). In all events the ordinary rules of evidence are often inapposite to the problem of determining foreign law and have in the past prevented examination of material which could have provided a proper basis for the determination. The new rule permits consideration by the court of any relevant material, including testimony, without regard to its admissibility under Rule 43. Cf. N.Y.Civ.Prac.Law & Rules, R. 4511 (effective Sept. 1, 1963); 2 Va.Code Ann. tit. 8, §8–273; 2 W.Va.Code Ann. §5711.

In further recognition of the peculiar nature of the issue of foreign law, the new rule provides that in determining this law the court is not limited by material presented by the parties; it may engage in its own research and consider any relevant material thus found. The court may have at its disposal better foreign law materials than counsel have presented, or may wish to reexamine and amplify material that has been pre-

sented by counsel in partisan fashion or in insufficient detail. On the other hand, the court is free to insist on a complete presentation by counsel.

There is no requirement that the court give formal notice to the parties of its intention to engage in its own research on an issue of foreign law which has been raised by them, or of its intention to raise and determine independently an issue not raised by them. Ordinarily the court should inform the parties of material it has found diverging substantially from the material which they have presented; and in general the court should give the parties an opportunity to analyze and counter new points upon which it proposes to rely. See Schlesinger, *Comparative Law* 142 (2d ed. 1959); Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 Harv.L.Rev. 1281, 1296 (1952); cf. *Siegelman v. Cunard White Star, Ltd., supra*, 221 F.2d at 197. To require, however, that the court give formal notice from time to time as it proceeds with its study of the foreign law would add an element of undesirable rigidity to the procedure for determining issues of foreign law.

The new rule refrains from imposing an obligation on the court to take ''judicial notice'' of foreign law because this would put an extreme burden on the court in many cases; and it avoids use of the concept of ''judicial notice'' in any form because of the uncertain meaning of that concept as applied to foreign law. See, e.g., *Stern, Foreign Law in the Courts: Judicial Notice and Proof*, 45 Calif.L.Rev. 23, 43 (1957). Rather the rule provides flexible procedures for presenting and utilizing material on issues of foreign law by which a sound result can be achieved with fairness to the parties.

Under the *third sentence*, the court's determination of an issue of foreign law is to be treated as a ruling on a question of ''law,'' not ''fact,'' so that appellate review will not be narrowly confined by the ''clearly erroneous'' standard of Rule 52(a). *Cf. Uniform Judicial Notice of Foreign Law Act* §3; Note, 72 Harv.L.Rev. 318 (1958).

The new rule parallels Article IV of the Uniform Interstate and International Procedure Act, approved by the Commissioners on Uniform State Laws in 1962, except that section 4.03 of Article IV states that ''[t]he court, not the jury'' shall determine foreign law. The new rule does not address itself to this problem, since the Rules refrain from allocating functions as between the court and the jury. See Rule 38(a). It has long been thought, however, that the jury is not the appropriate body to determine issues of foreign law. See, e.g., Story, *Conflict of Laws*, §638 (1st ed. 1834, 8th ed. 1883); 1 Greenleaf, *Evidence*, §486 (1st ed. 1842, 16th ed. 1899); 4 Wigmore, *Evidence* §2558 (1st ed. 1905); 9 id. §2558 (3d ed. 1940). The majority of the States have committed such issues to determination by the court. See Article 5 of the Uniform Judicial Notice of Foreign Law Act, adopted by twenty-six states, 9A U.L.A. 318 (1957) (Suppl. 1961, at 134); N.Y.Civ.Prac.Law & Rules, R. 4511 (effective Sept. 1, 1963); Wigmore, *loc. cit.* And Federal courts that have considered the problem in recent years have reached the same conclusion without reliance on statute. See *Janson v. Swedish American Line*, 185 F.2d 212, 216 (1st Cir. 1950); *Bank of Nova Scotia v. San Miguel*, 196 F.2d 950, 957, n. 6 (1st Cir. 1952); *Liechti v. Roche*, 198 F.2d 174 (5th Cir. 1952); *Daniel Lumber Co. v. Empresas Hondurenas, S.A.*, 215 F.2d 465 (5th Cir. 1954).

NOTES OF ADVISORY COMMITTEE ON RULES—1972 AMENDMENT

Since the purpose of the provision is to free the judge, in determining foreign law, from any restrictions imposed by evidence rules, a general reference to the Rules of Evidence is appropriate and is made.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendment is technical. No substantive change is intended.

REFERENCES IN TEXT

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

EFFECTIVE DATE OF AMENDMENT PROPOSED NOVEMBER 20, 1972

Amendment of this rule embraced by the order entered by the Supreme Court of the United States on November 20, 1972, effective on the 180th day beginning after January 2, 1973, see section 3 of Pub. L. 93–595, Jan. 2, 1975, 88 Stat. 1959, set out as a note under section 2074 of this title.

Rule 45. Subpoena

(a) FORM; ISSUANCE.

(1) Every subpoena shall

(A) state the name of the court from which it is issued; and

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

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

(D) set forth the text of subdivisions (c) and (d) of this rule.

A command to produce evidence or to permit inspection, copying, testing, or sampling may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(2) A subpoena must issue as follows:

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

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

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

(3) 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

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

(B) a court for a district in which a deposition or production is compelled by the subpoena, if the deposition or production pertains to an action pending in a court in which the attorney is authorized to practice.

(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. 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 within the district of the court by which it is issued, or at any place without the district that is within 100 miles of the place of the deposition, hearing, trial, production, inspection, copying, testing, or sampling specified in the subpoena or at any place within the state where a state statute or rule of court permits service of a subpoena issued by a state court of general jurisdiction sitting in the place of the deposition, hearing, trial, production, inspection, copying, testing, or sampling specified in the subpoena. When a statute of the United States provides therefor, the court upon proper application and 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 of the court by which the subpoena is issued 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 on behalf of which the subpoena was issued 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, copying, testing, or sampling of designated electronically stored information, 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, copying, testing, or sampling 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 producing any or all of the designated materials or inspection of the premises—or to producing electronically stored information in the form or forms requested. If objection is made, the party serving the subpoena shall not be entitled to inspect, copy, test, or sample the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. 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, inspection, copying, testing, or sampling. Such an order to compel shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection, copying, testing, or sampling commanded.

(3)(A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held;

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

(iv) 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 and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in 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) 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.

(B) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in a form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable.

(C) A person responding to a subpoena need not produce the same electronically stored information in more than one form.

(D) A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person

identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2)(A) 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.

(B) If information is produced in response to a subpoena that is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The person who produced the information must preserve the information until the claim is resolved.

(e) CONTEMPT. Failure of 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. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Mar. 30, 1970, eff. July 1, 1970; Apr. 29, 1980, eff. Aug. 1, 1980; Apr. 29, 1985, eff. Aug. 1, 1985; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 25, 2005, eff. Dec. 1, 2005; Apr. 12, 2006, eff. Dec. 1, 2006.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

This rule applies to subpoenas *ad testificandum* and *duces tecum* issued by the district courts for attendance at a hearing or a trial, or to take depositions. It does not apply to the enforcement of subpoenas issued by administrative officers and commissions pursuant to statutory authority. The enforcement of such subpoenas by the district courts is regulated by appropriate statutes. Many of these statutes do not place any territorial limits on the validity of subpoenas so issued, but provide that they may be served anywhere within the United States. Among such statutes are the following:

U.S.C., Title 7, §§222 and 511n (Secretary of Agriculture)
U.S.C., Title 15, §49 (Federal Trade Commission)
U.S.C., Title 15, §§77v(b), 78u(c), 79r(d) (Securities and Exchange Commission)
U.S.C., Title 16, §§797(g) and 825f (Federal Power Commission)
U.S.C., Title 19, §1333(b) (Tariff Commission)
U.S.C., Title 22, §§268, 270d and 270e (International Commissions, etc.)
U.S.C., Title 26, §§614, 619(b) [see 7456] (Board of Tax Appeals)
U.S.C., Title 26, §1523(a) [see 7608] (Internal Revenue Officers)
U.S.C., Title 29, §161 (Labor Relations Board)
U.S.C., Title 33, §506 (Secretary of Army)
U.S.C., Title 35, §§54–56 [now 24] (Patent Office proceedings)
U.S.C., Title 38, [former] §133 (Veterans' Administration)
U.S.C., Title 41, §39 (Secretary of Labor)
U.S.C., Title 45, §157 Third. (h) (Board of Arbitration under Railway Labor Act)
U.S.C., Title 45, §222(b) (Investigation Commission under Railroad Retirement Act of 1935)
U.S.C., Title 46 [App.], §1124(b) (Maritime Commission)
U.S.C., Title 47, §409(c) and (d) (Federal Communications Commission)
U.S.C., Title 49, §12(2) and (3) [see 721(c) and 13301(c)] (Interstate Commerce Commission)
U.S.C., Title 49, §173a [see 46104] (Secretary of Commerce)

Note to Subdivisions (a) and (b). These simplify the form of subpoena as provided in U.S.C., Title 28, [former] §655 (Witnesses; subpoena; form; attendance under); and broaden U.S.C., Title 28, [former] §636 (Production of books and writings) to include all actions, and to extend to any person. With the provision for relief from an oppressive or unreasonable subpoena *duces tecum*, compare N.Y.C.P.A. (1937) §411.

Note to Subdivision (c). This provides for the simple and convenient method of service permitted under many state codes; e.g., N.Y.C.P.A. (1937) §§220, 404, J.Ct.Act, §191; 3 Wash.Rev.Stat.Ann. (Remington, 1932) §1218. Compare Equity Rule 15 (Process, by Whom Served).

For statutes governing fees and mileage of witnesses see:

U.S.C., Title 28:

§600a [now 1871] (Per diem; mileage)
§600c [now 1821, 1825] (Amount per diem and mileage for witnesses; subsistence)
§600d [former] (Fees and mileage in certain states)
§601 [former] (Witnesses; fees; enumeration)
§602 [now 1824] (Fees and mileage of jurors and witnesses)
§603 [see Title 5, §§5515, 5537] (No officer of court to have witness fees)

Note to Subdivision (d). The method provided in paragraph (1) for the authorization of the issuance of subpoenas has been employed in some districts. See *Henning v. Boyle*, 112 Fed. 397 (S.D.N.Y., 1901). The requirement of an order for the issuance of a subpoena *duces tecum* is in accordance with U.S.C., Title 28, [former] §647 (Deposition under *dedimus potestatem;* subpoena *duces tecum*). The provisions of paragraph (2) are in accordance with common practice. See U.S.C., Title 28, [former] §648 (Deposition under *dedimus potestatem;* witnesses, when required to attend); N.Y.C.P.A. (1937) §300; 1 N.J.Rev.Stat. (1937) 2:27–174.

Note to Subdivision (e). The first paragraph continues the substance of U.S.C., Title 28, [former] §654 (Witnesses; subpoenas; may run into another district). Compare U.S.C., Title 11, [former] §69 (Referees in bankruptcy; contempts before) (production of books and writings) which is not affected by this rule. For examples of statutes which allow the court, upon proper application and cause shown, to authorize the clerk of the court to issue a subpoena for a witness who lives in another district and at a greater distance than 100 miles from the place of the hearing or trial, see:

U.S.C., Title 15:

§23 (Suits by United States; subpoenas for witnesses) (under antitrust laws).

U.S.C., Title 38:

§ 445 [now 1984] (Actions on claims; jurisdiction; parties; procedure; limitation; witnesses; definitions) (Veterans; insurance contracts).

The second paragraph continues the present procedure applicable to certain witnesses who are in foreign countries. See U.S.C., Title 28, §§ 711 [now 1783] (Letters rogatory to take testimony of witness, addressed to court of foreign country; failure of witness to appear; subpoena) and 713 [now 1783] (Service of subpoena on witness in foreign country).

Note to Subdivision (f). Compare [former] Equity Rule 52 (Attendance of Witnesses Before Commissioner, Master, or Examiner).

NOTES OF ADVISORY COMMITTEE ON RULES—1946 AMENDMENT

Subdivision (b). The added words, ''or tangible things'' in subdivision (b) merely make the rule for the subpoena duces tecum at the trial conform to that of subdivision (d) for the subpoena at the taking of depositions.

The insertion of the words ''or modify'' in clause (1) affords desirable flexibility.

Subdivision (d). The added last sentence of amended subdivision (d)(1) properly gives the subpoena for documents or tangible things the same scope as provided in Rule 26(b), thus promoting uniformity. The requirement in the last sentence of original Rule 45(d)(1)—to the effect that leave of court should be obtained for the issuance of such a subpoena—has been omitted. This requirement is unnecessary and oppressive on both counsel and court, and it has been criticized by district judges. There is no satisfactory reason for a differentiation between a subpoena for the production of documentary evidence by a witness at a trial (Rule 45(a)) and for the production of the same evidence at the taking of a deposition. Under this amendment, the person subpoenaed may obtain the protection afforded by any of the orders permitted under Rule 30(b) or Rule 45(b). See *Application of Zenith Radio Corp.* (E.D.Pa. 1941) 4 Fed.Rules Serv. 30b.21, Case 1, 1 F.R.D. 627; *Fox v. House* (E.D.Okla. 1939) 29 F.Supp. 673; *United States of America for the Use of Tilo Roofing Co., Inc. v. J. Slotnik Co.* (D.Conn. 1944) 3 F.R.D. 408.

The changes in subdivision (d)(2) give the court the same power in the case of residents of the district as is conferred in the case of non-residents, and permit the court to fix a place for attendance which may be more convenient and accessible for the parties than that specified in the rule.

NOTES OF ADVISORY COMMITTEE ON RULES—1948 AMENDMENT

The amendment substitutes the present statutory reference.

NOTES OF ADVISORY COMMITTEE ON RULES—1970 AMENDMENT

At present, when a subpoena duces tecum is issued to a deponent, he is required to produce the listed materials at the deposition, but is under no clear compulsion to permit their inspection and copying. This results in confusion and uncertainty before the time the deposition is taken, with no mechanism provided whereby the court can resolve the matter. Rule 45(d)(1), as revised, makes clear that the subpoena authorizes inspection and copying of the materials produced. The deponent is afforded full protection since he can object, thereby forcing the party serving the subpoena to obtain a court order if he wishes to inspect and copy. The procedure is thus analogous to that provided in Rule 34.

The changed references to other rules conform to changes made in those rules. The deletion of words in the clause describing the proper scope of the subpoena conforms to a change made in the language of Rule 34. The reference to Rule 26(b) is unchanged but encompasses new matter in that subdivision. The changes make it clear that the scope of discovery through a subpoena is the same as that applicable to Rule 34 and the other discovery rules.

NOTES OF ADVISORY COMMITTEE ON RULES—1980 AMENDMENT

Subdivision (d)(1). The amendment defines the term ''proof of service'' as used in the first sentence of the present subdivision. For want of a definition, the district court clerks have been obliged to fashion their own, with results that vary from district to district. All that seems required is a simple certification on a copy of the notice to take a deposition that the notice has been served on every other party to the action. That is the proof of service required by Rule 25(d) of both the Federal Rules of Appellate Procedure and the Supreme Court Rules.

Subdivision (e)(1). The amendment makes the reach of a subpoena of a district court at least as extensive as that of the state courts of general jurisdiction in the state in which the district court is held. Under the present rule the reach of a district court subpoena is often greater, since it extends throughout the district. No reason appears why it should be less, as it sometimes is because of the accident of district lines. Restrictions upon the reach of subpoenas are imposed to prevent undue inconvenience to witnesses. State statutes and rules of court are quite likely to reflect the varying degrees of difficulty and expense attendant upon local travel.

NOTES OF ADVISORY COMMITTEE ON RULES—1985 AMENDMENT

Present Rule 45(d)(2) has two sentences setting forth the territorial scope of deposition subpoenas. The first sentence is directed to depositions taken in the judicial district in which the deponent resides; the second sentence addresses situations in which the deponent is not a resident of the district in which the deposition is to take place. The Rule, as currently constituted, creates anomalous situations that often cause logistical problems in conducting litigation.

The first sentence of the present Rule states that a deponent may be required to attend only in the *county* wherein that person resides or is employed or transacts business in person, that is, where the person lives or works. Under this provision a deponent can be compelled, without court order, to travel from one end of that person's home county to the other, no matter how far that may be. The second sentence of the Rule is somewhat more flexible, stating that someone who does not reside in the district in which the deposition is to be taken can be required to attend in the county where the person is served with the subpoena, *or* within 40 miles from the place of service.

Under today's conditions there is no sound reason for distinguishing between residents of the district or county in which a deposition is to be taken and non-residents, and the Rule is amended to provide that any person may be subpoenaed to attend a deposition within a specified radius from that person's residence, place of business, or where the person was served. The 40-mile radius has been increased to 100 miles.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1991 AMENDMENT

Purposes of Revision. The purposes of this revision are (1) to clarify and enlarge the protections afforded persons who are required to assist the court by giving information or evidence; (2) to facilitate access outside the deposition procedure provided by Rule 30 to documents and other information in the possession of persons who are not parties; (3) to facilitate service of subpoenas for depositions or productions of evidence at

places distant from the district in which an action is proceeding; (4) to enable the court to compel a witness found within the state in which the court sits to attend trial; (5) to clarify the organization of the text of the rule.

Subdivision (a). This subdivision is amended in seven significant respects.

First, Paragraph (a)(3) modifies the requirement that a subpoena be issued by the clerk of court. Provision is made for the issuance of subpoenas by attorneys as officers of the court. This revision perhaps culminates an evolution. Subpoenas were long issued by specific order of the court. As this became a burden to the court, general orders were made authorizing clerks to issue subpoenas on request. Since 1948, they have been issued in blank by the clerk of any federal court to any lawyer, the clerk serving as stationer to the bar. In allowing counsel to issue the subpoena, the rule is merely a recognition of present reality.

Although the subpoena is in a sense the command of the attorney who completes the form, defiance of a subpoena is nevertheless an act in defiance of a court order and exposes the defiant witness to contempt sanctions. In *ICC v. Brimson*, 154 U.S. 447 (1894), the Court upheld a statute directing federal courts to issue subpoenas to compel testimony before the ICC. In *CAB v. Hermann*, 353 U.S. 322 (1957), the Court approved as established practice the issuance of administrative subpoenas as a matter of absolute agency right. And in *NLRB v. Warren Co.*, 350 U.S. 107 (1955), the Court held that the lower court had no discretion to withhold sanctions against a contemnor who violated such subpoenas. The 1948 revision of Rule 45 put the attorney in a position similar to that of the administrative agency, as a public officer entitled to use the court's contempt power to investigate facts in dispute. Two courts of appeals have touched on the issue and have described lawyer-issued subpoenas as mandates of the court. *Waste Conversion, Inc. v. Rollins Environmental Services (NJ), Inc.*, 893 F.2d 605 (3d cir., 1990); *Fisher v. Marubent Cotton Corp.*, 526 F.2d 1338, 1340 (8th cir., 1975). Cf. *Young v. United States ex rel Vuitton et Fils S.A.*, 481 U.S. 787, 821 (1987) (Scalia, J., concurring). This revision makes the rule explicit that the attorney acts as an officer of the court in issuing and signing subpoenas.

Necessarily accompanying the evolution of this power of the lawyer as officer of the court is the development of increased responsibility and liability for the misuse of this power. The latter development is reflected in the provisions of subdivision (c) of this rule, and also in the requirement imposed by paragraph (3) of this subdivision that the attorney issuing a subpoena must sign it.

Second, Paragraph (a)(3) authorizes attorneys in distant districts to serve as officers authorized to issue commands in the name of the court. Any attorney permitted to represent a client in a federal court, even one admitted pro hac vice, has the same authority as a clerk to issue a subpoena from any federal court for the district in which the subpoena is served and enforced. In authorizing attorneys to issue subpoenas from distant courts, the amended rule effectively authorizes service of a subpoena anywhere in the United States by an attorney representing any party. This change is intended to ease the administrative burdens of inter-district law practice. The former rule resulted in delay and expense caused by the need to secure forms from clerks' offices some distance from the place at which the action proceeds. This change does not enlarge the burden on the witness.

Pursuant to Paragraph (a)(2), a subpoena for a deposition must still issue from the court in which the deposition or production would be compelled. Accordingly, a motion to quash such a subpoena if it overbears the limits of the subpoena power must, as under the previous rule, be presented to the court for the district in which the deposition would occur. Likewise, the court in whose name the subpoena is issued is responsible for its enforcement.

Third, in order to relieve attorneys of the need to secure an appropriate seal to affix to a subpoena issued as an officer of a distant court, the requirement that a subpoena be under seal is abolished by the provisions of Paragraph (a)(1).

Fourth, Paragraph (a)(1) authorizes the issuance of a subpoena to compel a non-party to produce evidence independent of any deposition. This revision spares the necessity of a deposition of the custodian of evidentiary material required to be produced. A party seeking additional production from a person subject to such a subpoena may serve an additional subpoena requiring additional production at the same time and place.

Fifth, Paragraph (a)(2) makes clear that the person subject to the subpoena is required to produce materials in that person's control whether or not the materials are located within the district or within the territory within which the subpoena can be served. The non-party witness is subject to the same scope of discovery under this rule as that person would be as a party to whom a request is addressed pursuant to Rule 34.

Sixth, Paragraph (a)(1) requires that the subpoena include a statement of the rights and duties of witnesses by setting forth in full the text of the new subdivisions (c) and (d).

Seventh, the revised rule authorizes the issuance of a subpoena to compel the inspection of premises in the possession of a non-party. Rule 34 has authorized such inspections of premises in the possession of a party as discovery compelled under Rule 37, but prior practice required an independent proceeding to secure such relief ancillary to the federal proceeding when the premises were not in the possession of a party. Practice in some states has long authorized such use of a subpoena for this purpose without apparent adverse consequence.

Subdivision (b). Paragraph (b)(1) retains the text of the former subdivision (c) with minor changes.

The reference to the United States marshal and deputy marshal is deleted because of the infrequency of the use of these officers for this purpose. Inasmuch as these officers meet the age requirement, they may still be used if available.

A provision requiring service of prior notice pursuant to Rule 5 of compulsory pretrial production or inspection has been added to paragraph (b)(1). The purpose of such notice is to afford other parties an opportunity to object to the production or inspection, or to serve a demand for additional documents or things. Such additional notice is not needed with respect to a deposition because of the requirement of notice imposed by Rule 30 or 31. But when production or inspection is sought independently of a deposition, other parties may need notice in order to monitor the discovery and in order to pursue access to any information that may or should be produced.

Paragraph (b)(2) retains language formerly set forth in subdivision (e) and extends its application to subpoenas for depositions or production.

Paragraph (b)(3) retains language formerly set forth in paragraph (d)(1) and extends its applications to subpoenas for trial or hearing or production.

Subdivision (c). This provision is new and states the rights of witnesses. It is not intended to diminish rights conferred by Rules 26–37 or any other authority.

Paragraph (c)(1) gives specific application to the principle stated in Rule 26(g) and specifies liability for earnings lost by a non-party witness as a result of a misuse of the subpoena. No change in existing law is thereby effected. Abuse of a subpoena is an actionable tort, *Board of Ed. v. Farmingdale Classroom Teach. Ass'n*, 38 N.Y.2d 397, 380 N.Y.S.2d 635, 343 N.E.2d 278 (1975), and the duty of the attorney to the non-party is also embodied in Model Rule of Professional Conduct 4.4. The liability of the attorney is correlative to the expanded power of the attorney to issue subpoenas. The liability may include the cost of fees to collect attorneys' fees owed as a result of a breach of this duty.

Paragraph (c)(2) retains language from the former subdivision (b) and paragraph (d)(1). The 10-day period for response to a subpoena is extended to 14 days to avoid the complex calculations associated with short

time periods under Rule 6 and to allow a bit more time for such objections to be made.

A non-party required to produce documents or materials is protected against significant expense resulting from involuntary assistance to the court. This provision applies, for example, to a non-party required to provide a list of class members. The court is not required to fix the costs in advance of production, although this will often be the most satisfactory accommodation to protect the party seeking discovery from excessive costs. In some instances, it may be preferable to leave uncertain costs to be determined after the materials have been produced, provided that the risk of uncertainty is fully disclosed to the discovering party. See, *e.g., United States v. Columbia Broadcasting Systems, Inc.*, 666 F.2d 364 (9th Cir. 1982).

Paragraph (c)(3) explicitly authorizes the quashing of a subpoena as a means of protecting a witness from misuse of the subpoena power. It replaces and enlarges on the former subdivision (b) of this rule and tracks the provisions of Rule 26(c). While largely repetitious, this rule is addressed to the witness who may read it on the subpoena, where it is required to be printed by the revised paragraph (a)(1) of this rule.

Subparagraph (c)(3)(A) identifies those circumstances in which a subpoena must be quashed or modified. It restates the former provisions with respect to the limits of mandatory travel that are set forth in the former paragraphs (d)(2) and (e)(1), with one important change. Under the revised rule, a federal court can compel a witness to come from any place in the state to attend trial, whether or not the local state law so provides. This extension is subject to the qualification provided in the next paragraph, which authorizes the court to condition enforcement of a subpoena compelling a non-party witness to bear substantial expense to attend trial. The traveling non-party witness may be entitled to reasonable compensation for the time and effort entailed.

Clause (c)(3)(A)(iv) requires the court to protect all persons from undue burden imposed by the use of the subpoena power. Illustratively, it might be unduly burdensome to compel an adversary to attend trial as a witness if the adversary is known to have no personal knowledge of matters in dispute, especially so if the adversary would be required to incur substantial travel burdens.

Subparagraph (c)(3)(B) identifies circumstances in which a subpoena should be quashed unless the party serving the subpoena shows a substantial need and the court can devise an appropriate accommodation to protect the interests of the witness. An additional circumstance in which such action is required is a request for costly production of documents; that situation is expressly governed by subparagraph (b)(2)(B).

Clause (c)(3)(B)(i) authorizes the court to quash, modify, or condition a subpoena to protect the person subject to or affected by the subpoena from unnecessary or unduly harmful disclosures of confidential information. It corresponds to Rule 26(c)(7).

Clause (c)(3)(B)(ii) provides appropriate protection for the intellectual property of the non-party witness; it does not apply to the expert retained by a party, whose information is subject to the provisions of Rule 26(b)(4). A growing problem has been the use of subpoenas to compel the giving of evidence and information by unretained experts. Experts are not exempt from the duty to give evidence, even if they cannot be compelled to prepare themselves to give effective testimony, *e.g., Carter-Wallace, Inc. v. Otte*, 474 F.2d 529 (2d Cir. 1972), but compulsion to give evidence may threaten the intellectual property of experts denied the opportunity to bargain for the value of their services. See generally Maurer, *Compelling the Expert Witness: Fairness and Utility Under the Federal Rules of Civil Procedure*, 19 GA.L.REV. 71 (1984); Note, *Discovery and Testimony of Unretained Experts*, 1987 DUKE L.J. 140. Arguably the compulsion to testify can be regarded as a ''taking'' of intellectual property. The rule establishes the right of such persons to withhold their expertise, at least unless the party seeking it makes the kind of showing required for a conditional denial of a motion to quash as provided in the final sentence of subparagraph (c)(3)(B); that requirement is the same as that necessary to secure work product under Rule 26(b)(3) and gives assurance of reasonable compensation. The Rule thus approves the accommodation of competing interests exemplified in *United States v. Columbia Broadcasting Systems Inc.*, 666 F.2d 364 (9th Cir. 1982). See also *Wright v. Jeep Corporation*, 547 F. Supp. 871 (E.D. Mich. 1982).

As stated in *Kaufman v. Edelstein*, 539 F.2d 811, 822 (2d Cir. 1976), the district court's discretion in these matters should be informed by ''the degree to which the expert is being called because of his knowledge of facts relevant to the case rather than in order to give opinion testimony; the difference between testifying to a previously formed or expressed opinion and forming a new one; the possibility that, for other reasons, the witness is a unique expert; the extent to which the calling party is able to show the unlikelihood that any comparable witness will willingly testify; and the degree to which the witness is able to show that he has been oppressed by having continually to testify. . . .''

Clause (c)(3)(B)(iii) protects non-party witnesses who may be burdened to perform the duty to travel in order to provide testimony at trial. The provision requires the court to condition a subpoena requiring travel of more than 100 miles on reasonable compensation.

Subdivision (d). This provision is new. Paragraph (d)(1) extends to non-parties the duty imposed on parties by the last paragraph of Rule 34(b), which was added in 1980.

Paragraph (d)(2) is new and corresponds to the new Rule 26(b)(5). Its purpose is to provide a party whose discovery is constrained by a claim of privilege or work product protection with information sufficient to evaluate such a claim and to resist if it seems unjustified. The person claiming a privilege or protection cannot decide the limits of that party's own entitlement.

A party receiving a discovery request who asserts a privilege or protection but fails to disclose that claim is at risk of waiving the privilege or protection. A person claiming a privilege or protection who fails to provide adequate information about the privilege or protection claim to the party seeking the information is subject to an order to show cause why the person should not be held in contempt under subdivision (e). Motions for such orders and responses to motions are subject to the sanctions provisions of Rules 7 and 11.

A person served a subpoena that is too broad may be faced with a burdensome task to provide full information regarding all that person's claims to privilege or work product protection. Such a person is entitled to protection that may be secured through an objection made pursuant to paragraph (c)(2).

Subdivision (e). This provision retains most of the language of the former subdivision (f).

''Adequate cause'' for a failure to obey a subpoena remains undefined. In at least some circumstances, a non-party might be guilty of contempt for refusing to obey a subpoena even though the subpoena manifestly overreaches the appropriate limits of the subpoena power. *E.g., Walker v. City of Birmingham*, 388 U.S. 307 (1967). But, because the command of the subpoena is not in fact one uttered by a judicial officer, contempt should be very sparingly applied when the non-party witness has been overborne by a party or attorney. The language added to subdivision (f) is intended to assure that result where a non-party has been commanded, on the signature of an attorney, to travel greater distances than can be compelled pursuant to this rule.

COMMITTEE NOTES ON RULES—2005 AMENDMENT

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

Rule 30(b)(2) directs that the party noticing a deposition state in the notice the manner for recording the testimony, but the notice need not be served on the de-

ponent. The deponent learns of the recording method only if the deponent is a party or is informed by a party. Rule 30(b)(3) permits another party to designate an additional method of recording with prior notice to the deponent and the other parties. The deponent thus has notice of the recording method when an additional method is designated. This amendment completes the notice provisions to ensure that a nonparty deponent has notice of the recording method when the recording method is described only in the deposition notice.

A subpoenaed witness does not have a right to refuse to proceed with a deposition due to objections to the manner of recording. But under rare circumstances, a nonparty witness might have a ground for seeking a protective order under Rule 26(c) with regard to the manner of recording or the use of the deposition if recorded in a certain manner. Should such a witness not learn of the manner of recording until the deposition begins, undesirable delay or complication might result. Advance notice of the recording method affords an opportunity to raise such protective issues.

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

Changes Made After Publication and Comment. Only a small style change has been made in the proposal as published.

COMMITTEE NOTES ON RULES—2006 AMENDMENT

Rule 45 is amended to conform the provisions for subpoenas to changes in other discovery rules, largely related to discovery of electronically stored information. Rule 34 is amended to provide in greater detail for the production of electronically stored information. Rule 45(a)(1)(C) is amended to recognize that electronically stored information, as defined in Rule 34(a), can also be sought by subpoena. Like Rule 34(b), Rule 45(a)(1) is amended to provide that the subpoena can designate a form or forms for production of electronic data. Rule 45(c)(2) is amended, like Rule 34(b), to authorize the person served with a subpoena to object to the requested form or forms. In addition, as under Rule 34(b), Rule 45(d)(1)(B) is amended to provide that if the subpoena does not specify the form or forms for electronically stored information, the person served with the subpoena must produce electronically stored information in a form or forms in which it is usually maintained or in a form or forms that are reasonably usable. Rule 45(d)(1)(C) is added to provide that the person producing electronically stored information should not have to produce the same information in more than one form unless so ordered by the court for good cause.

As with discovery of electronically stored information from parties, complying with a subpoena for such information may impose burdens on the responding person. Rule 45(c) provides protection against undue impositions on nonparties. For example, Rule 45(c)(1) directs that a party serving a subpoena ''shall take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena,'' and Rule 45(c)(2)(B) permits the person served with the subpoena to object to it and directs that an order requiring compliance ''shall protect a person who is neither a party nor a party's officer from significant expense resulting from'' compliance. Rule 45(d)(1)(D) is added to provide that the responding person need not provide discovery of electronically stored information from sources the party identifies as not reasonably accessible, unless the court orders such discovery for good cause, considering the limitations of Rule 26(b)(2)(C), on terms that protect a nonparty against significant expense. A parallel provision is added to Rule 26(b)(2).

Rule 45(a)(1)(B) is also amended, as is Rule 34(a), to provide that a subpoena is available to permit testing and sampling as well as inspection and copying. As in Rule 34, this change recognizes that on occasion the opportunity to perform testing or sampling may be important, both for documents and for electronically stored information. Because testing or sampling may present particular issues of burden or intrusion for the person served with the subpoena, however, the protective provisions of Rule 45(c) should be enforced with vigilance when such demands are made. Inspection or testing of certain types of electronically stored information or of a person's electronic information system may raise issues of confidentiality or privacy. The addition of sampling and testing to Rule 45(a) with regard to documents and electronically stored information is not meant to create a routine right of direct access to a person's electronic information system, although such access might be justified in some circumstances. Courts should guard against undue intrusiveness resulting from inspecting or testing such systems.

Rule 45(d)(2) is amended, as is Rule 26(b)(5), to add a procedure for assertion of privilege or of protection as trial-preparation materials after production. The receiving party may submit the information to the court for resolution of the privilege claim, as under Rule 26(b)(5)(B).

Other minor amendments are made to conform the rule to the changes described above.

Changes Made After Publication and Comment. The Committee recommends a modified version of the proposal as published. The changes were made to maintain the parallels between Rule 45 and the other rules that address discovery of electronically stored information. These changes are fully described in the introduction to Rule 45 and in the discussions of the other rules. [Omitted]

The changes from the published proposed amendment are shown below. [Omitted]

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 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.

(As amended Mar. 2, 1987, eff. Aug. 1, 1987.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

Abolition of formal exceptions is often provided by statute. See Ill.Rev.Stat. (1937), ch. 110, §204; Neb.Comp.Stat. (1929) §20–1139; N.M.Stat.Ann. (Courtright, 1929) §105–830; 2 N.D.Comp.Laws Ann. (1913) §7653; Ohio Code Ann. (Throckmorton, 1936) §11560; 1 S.D.Comp.Laws (1929) §2542; Utah Rev.Stat.Ann. (1933) §§104–39–2, 104–24–18; Va.Rules of Court, Rule 22, 163 Va. v, xii (1935); Wis.Stat. (1935) §270.39. Compare N.Y.C.P.A. (1937) §§583, 445, and 446, all as amended by L. 1936, ch. 915. Rule 51 deals with objections to the court's instructions to the jury.

U.S.C., Title 28, [former] §§776 (Bill of exceptions; authentication; signing of by judge) and [former] 875 (Review of findings in cases tried without a jury) are superseded insofar as they provide for formal exceptions, and a bill of exceptions.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

Rule 47. Selection of Jurors

(a) EXAMINATION OF JURORS. The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their

attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper.

(b) PEREMPTORY CHALLENGES. The court shall allow the number of peremptory challenges provided by 28 U.S.C. §1870.

(c) EXCUSE. The court may for good cause excuse a juror from service during trial or deliberation.

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 30, 1991, eff. Dec. 1, 1991.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

Note to Subdivision (a). This permits a practice found very useful by Federal trial judges. For an example of a state practice in which the examination by the court is supplemented by further inquiry by counsel, see Rule 27 of the Code of Rules for the District Courts of Minnesota, 186 Minn. xxxiii (1932), 3 Minn.Stat. (Mason, supp. 1936) Appendix, 4, p. 1062.

Note to Subdivision (b). The provision for an alternate juror is one often found in modern state codes. See N.C.Code (1935) §2330(a); Ohio Gen.Code Ann. (Page, Supp. 1926–1935) §11419–47; Pa.Stat.Ann. (Purdon, Supp. 1936) Title 17, §1153; compare U.S.C., Title 28, [former] §417a (Alternate jurors in criminal trials); 1 N.J.Rev.Stat. (1937) 2:91A–1, 2:91A–2, 2:91A–3.

Provisions for qualifying, drawing, and challenging of jurors are found in U.S.C., Title 28:

§411 [now 1861] (Qualifications and exemptions)
§412 [now 1864] (Manner of drawing)
§413 [now 1865] (Apportioned in district)
§415 [see 1862] (Not disqualified because of race or color)
§416 [now 1867] (Venire; service and return)
§417 [now 1866] (Talesmen for petit jurors)
§418 [now 1866] (Special juries)
§423 [now 1869] (Jurors not to serve more than once a year)
§424 [now 1870] (Challenges)

and D.C. Code (1930) Title 18, §§341–360 (Juries and Jury Commission) and Title 6, §366 (Peremptory challenges.

NOTES OF ADVISORY COMMITTEE ON RULES—1966 AMENDMENT

The revision of this subdivision brings it into line with the amendment of Rule 24(c) of the Federal Rules of Criminal Procedure. That rule previously allowed four alternate jurors, as contrasted with the two allowed in civil cases, and the amendments increase the number of a maximum of six in all cases. The Advisory Committee's Note to amended Criminal Rule 24(c) points to experience demonstrating that four alternates may not be enough in some lengthy criminal trials; and the same may be said of civil trials. The Note adds:

''The words 'or are found to be' are added to the second sentence to make clear that an alternate juror may be called in the situation where it is first discovered during the trial that a juror was unable or disqualified to perform his duties at the time he was sworn.''

NOTES OF ADVISORY COMMITTEE ON RULES—1991 AMENDMENT

Subdivision (b). The former provision for alternate jurors is stricken and the institution of the alternate juror abolished.

The former rule reflected the long-standing assumption that a jury would consist of exactly twelve members. It provided for additional jurors to be used as substitutes for jurors who are for any reason excused or disqualified from service after the commencement of the trial. Additional jurors were traditionally designated at the outset of the trial, and excused at the close of the evidence if they had not been promoted to full service on account of the elimination of one of the original jurors.

The use of alternate jurors has been a source of dissatisfaction with the jury system because of the burden it places on alternates who are required to listen to the evidence but denied the satisfaction of participating in its evaluation.

Subdivision (c). This provision makes it clear that the court may in appropriate circumstances excuse a juror during the jury deliberations without causing a mistrial. Sickness, family emergency or juror misconduct that might occasion a mistrial are examples of appropriate grounds for excusing a juror. It is not grounds for the dismissal of a juror that the juror refuses to join with fellow jurors in reaching a unanimous verdict.

Rule 48. Number of Jurors—Participation in Verdict

The court shall seat a jury of not fewer than six and not more than twelve members and all jurors shall participate in the verdict unless excused from service by the court pursuant to Rule 47(c). Unless the parties otherwise stipulate, (1) the verdict shall be unanimous and (2) no verdict shall be taken from a jury reduced in size to fewer than six members.

(As amended Apr. 30, 1991, eff. Dec. 1, 1991.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

For provisions in state codes, compare Utah Rev.Stat.Ann. (1933) §48–O–5 (In civil cases parties may agree in open court on lesser number of jurors); 2 Wash.Rev.Stat.Ann. (Remington, 1932) §323 (Parties may consent to any number of jurors not less than three).

NOTES OF ADVISORY COMMITTEE ON RULES—1991 AMENDMENT

The former rule was rendered obsolete by the adoption in many districts of local rules establishing six as the standard size for a civil jury.

It appears that the minimum size of a jury consistent with the Seventh Amendment is six. *Cf. Ballew v. Georgia*, 435 U.S. 223 (1978) (holding that a conviction based on a jury of less than six is a denial of due process of law). If the parties agree to trial before a smaller jury, a verdict can be taken, but the parties should not other than in exceptional circumstances be encouraged to waive the right to a jury of six, not only because of the constitutional stature of the right, but also because smaller juries are more erratic and less effective in serving to distribute responsibility for the exercise of judicial power.

Because the institution of the alternate juror has been abolished by the proposed revision of Rule 47, it will ordinarily be prudent and necessary, in order to provide for sickness or disability among jurors, to seat more than six jurors. The use of jurors in excess of six increases the representativeness of the jury and harms no interest of a party. *Ray v. Parkside Surgery Center*, 13 F.R. Serv. 585 (6th cir. 1989).

If the court takes the precaution of seating a jury larger than six, an illness occurring during the deliberation period will not result in a mistrial, as it did formerly, because all seated jurors will participate in the verdict and a sufficient number will remain to render a unanimous verdict of six or more.

In exceptional circumstances, as where a jury suffers depletions during trial and deliberation that are greater than can reasonably be expected, the parties may agree to be bound by a verdict rendered by fewer than six jurors. The court should not, however, rely upon the availability of such an agreement, for the use of juries smaller than six is problematic for reasons fully explained in *Ballew v. Georgia*, supra.

Rule 49. Special Verdicts and Interrogatories

(a) SPECIAL VERDICTS. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

(b) GENERAL VERDICT ACCOMPANIED BY ANSWER TO INTERROGATORIES. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

(As amended Jan. 21, 1963, eff. July 1, 1963; Mar. 2, 1987, eff. Aug. 1, 1987.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

The Federal courts are not bound to follow state statutes authorizing or requiring the court to ask a jury to find a special verdict or to answer interrogatories. *Victor American Fuel Co. v. Peccarich*, 209 Fed. 568 (C.C.A.8th, 1913) cert. den. 232 U.S. 727 (1914); *Spokane and I. E. R. Co. v. Campbell*, 217 Fed. 518 (C.C.A.9th, 1914), affd. 241 U.S. 497 (1916); Simkins, *Federal Practice* (1934) §186. The power of a territory to adopt by statute the practice under *Subdivision (b)* has been sustained. *Walker v. New Mexico and Southern Pacific R. R.*, 165 U.S. 593 (1897); *Southwestern Brewery and Ice Co. v. Schmidt*, 226 U.S. 162 (1912).

Compare Wis.Stat. (1935) §§270.27, 270.28 and 270.30 Green, *A New Development in Jury Trial* (1927), 13 A.B.A.J. 715; Morgan, *A Brief History of Special Verdicts and Special Interrogatories* (1923), 32 Yale L.J. 575.

The provisions of U.S.C., Title 28, [former] §400(3) (Declaratory judgments authorized; procedure) permitting the submission of issues of fact to a jury are covered by this rule.

NOTES OF ADVISORY COMMITTEE ON RULES—1963 AMENDMENT

This amendment conforms to the amendment of Rule 58. See the Advisory Committee's Note to Rule 58, as amended.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

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

(a) JUDGMENT AS A MATTER OF LAW.

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

(A) resolve the issue against the party; and

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

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

(b) RENEWING THE MOTION AFTER TRIAL; ALTERNATIVE MOTION FOR A NEW TRIAL. If the court does not grant a motion for judgment as a matter of law made under subdivision (a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after the entry of judgment or—if the motion addresses a jury issue not decided by a verdict—no later than 10 days after the jury was discharged. The movant may alternatively request a new trial or join a motion for a new trial under Rule 59.

In ruling on a renewed motion, the court may:

(1) if a verdict was returned:

(A) allow the judgment to stand,

(B) order a new trial, or

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

(2) if no verdict was returned:

(A) order a new trial, or

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

(c) GRANTING RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW; CONDITIONAL RULINGS; NEW TRIAL MOTION.

(1) If the renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or re-

versed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered shall be filed no later than 10 days after entry of the judgment.

(d) SAME: DENIAL OF MOTION FOR JUDGMENT AS A MATTER OF LAW. If the motion for judgment as a matter of law is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

(As amended Jan. 21, 1963, eff. July 1, 1963; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 27, 1995, eff. Dec. 1, 1995; Apr. 12, 2006, eff. Dec. 1, 2006.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

Note to Subdivision (a). The present federal rule is changed to the extent that the formality of an express reservation of rights against waiver is no longer necessary. See *Sampliner v. Motion Picture Patents Co.*, 254 U.S. 233 (1920); *Union Indemnity Co. v. United States*, 74 F.(2d) 645 (C.C.A.6th, 1935). The requirement that specific grounds for the motion for a directed verdict must be stated settles a conflict in the federal cases. See Simkins, *Federal Practice* (1934) §189.

Note to Subdivision (b). For comparable state practice upheld under the conformity act, see *Baltimore and Carolina Line v. Redman*, 295 U.S. 654 (1935); compare *Slocum v. New York Life Ins. Co.*, 228 U.S. 364 (1913).

See *Northern Ry. Co. v. Page*, 274 U.S. 65 (1927), following the Massachusetts practice of alternative verdicts, explained in Thorndike, *Trial by Jury in United States Courts*, 26 Harv.L.Rev. 732 (1913). See also Thayer, *Judicial Administration*, 63 U. of Pa.L.Rev. 585, 600–601, and note 32 (1915); Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 Harv.L.Rev. 669, 685 (1918); Comment, 34 Mich.L.Rev. 93, 98 (1935).

NOTES OF ADVISORY COMMITTEE ON RULES—1963 AMENDMENT

Subdivision (a). The practice, after the court has granted a motion for a directed verdict, of requiring the jury to express assent to a verdict they did not reach by their own deliberations serves no useful purpose and may give offense to the members of the jury. See 2B Barron & Holtzoff, *Federal Practice and Procedure* §1072, at 367 (Wright ed. 1961); Blume, *Origin and Development of the Directed Verdict*, 48 Mich.L.Rev. 555, 582–85, 589–90 (1950). The final sentence of the subdivision, added by amendment, provides that the court's order granting a motion for a directed verdict is effective in itself, and that no action need be taken by the foreman or other members of the jury. See Ariz.R.Civ.P. 50(c); cf. Fed.R.Crim.P. 29 (a). No change is intended in the standard to be applied in deciding the motion. To assure this interpretation, and in the interest of simplicity, the traditional term, ''directed verdict,'' is retained.

Subdivision (b). A motion for judgment notwithstanding the verdict will not lie unless it was preceded by a motion for a directed verdict made at the close of all the evidence.

The amendment of the second sentence of this subdivision sets the time limit for making the motion for judgment n.o.v. at 10 days after the entry of judgment, rather than 10 days after the reception of the verdict. Thus the time provision is made consistent with that contained in Rule 59(b) (time for motion for new trial) and Rule 52(b) (time for motion to amend findings by the court).

Subdivision (c) deals with the situation where a party joins a motion for a new trial with his motion for judgment n.o.v. or prays for a new trial in the alternative, and the motion for judgment n.o.v. is granted. The procedure to be followed in making rulings on the motion for the new trial, and the consequences of the rulings thereon, were partly set out in *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 253, 61 S.Ct. 189, 85 L.Ed. 147 (1940), and have been further elaborated in later cases. See *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 67 S.Ct. 752, 91 L.Ed. 849 (1947); *Globe Liquor Co., Inc. v. San Roman*, 332 U.S. 571, 68 S.Ct. 246, 92 L.Ed. 177 (1948); *Fountain v. Filson*, 336 U.S. 681, 69 S.Ct. 754, 93 L.Ed. 971 (1949); *Johnson v. New York, N.H. & H.R.R. Co.*, 344 U.S. 48, 73 S.Ct. 125, 97 L.Ed. 77 (1952). However, courts as well as counsel have often misunderstood the procedure, and it will be helpful to summarize the proper practice in the text of the rule. The amendments do not alter the effects of a jury verdict or the scope of appellate review.

In the situation mentioned, *subdivision (c)(1)* requires that the court make a ''conditional'' ruling on the new-trial motion, i.e., a ruling which goes on the assumption that the motion for judgment n.o.v. was erroneously granted and will be reversed or vacated; and the court is required to state its grounds for the conditional ruling. Subdivision (c)(1) then spells out the consequences of a reversal of the judgment in the light of the conditional ruling on the new-trial motion.

If the motion for new trial has been conditionally granted, and the judgment is reversed, ''the new trial shall proceed unless the appellate court has otherwise ordered.'' The party against whom the judgment n.o.v. was entered below may, as appellant, besides seeking to overthrow that judgment, also attack the conditional grant of the new trial. And the appellate court, if it reverses the judgment n.o.v., may in an appropriate case also reverse the conditional grant of the new trial and direct that judgment be entered on the verdict. See *Bailey v. Slentz*, 189 F.2d 406 (10th Cir. 1951); *Moist Cold Refrigerator Co. v. Lou Johnson Co.*, 249 F.2d 246 (9th Cir. 1957), cert. denied, 356 U.S. 968, 78 S.Ct. 1008, 2 L.Ed.2d 1074 (1958); *Peters v. Smith*, 221 F.2d 721 (3d Cir.1955); *Dailey v. Timmer*, 292 F.2d 824 (3d Cir. 1961), explaining *Lind v. Schenley Industries, Inc.*, 278 F.2d 79 (3d Cir.), cert. denied, 364 U.S. 835, 81 S.Ct. 58, 5 L.Ed.2d 60 (1960); *Cox v. Pennsylvania R.R.*, 120 A.2d 214 (D.C.Mun.Ct.App. 1956); 3 Barron & Holtzoff, *Federal Practice and Procedure* §1302.1 at 346–47 (Wright ed. 1958); 6 *Moore's Federal Practice* ¶59.16 at 3915 n. 8a (2d ed. 1954).

If the motion for a new trial has been conditionally denied, and the judgment is reversed, ''subsequent proceedings shall be in accordance with the order of the appellate court.'' The party in whose favor judgment n.o.v. was entered below may, as appellee, besides seeking to uphold that judgment, also urge on the appellate court that the trial court committed error in conditionally denying the new trial. The appellee may assert this error in his brief, without taking a cross-appeal. *Cf. Patterson v. Pennsylvania R.R.*, 238 F.2d 645, 650 (6th Cir. 1956); *Hughes v. St. Louis Nat. L. Baseball Club, Inc.*, 359 Mo. 993, 997, 224 S.W.2d 989, 992 (1949). If the appellate court concludes that the judgment cannot stand,

but accepts the appellee's contention that there was error in the conditional denial of the new trial, it may order a new trial in lieu of directing the entry of judgment upon the verdict.

Subdivision (c)(2), which also deals with the situation where the trial court has granted the motion for judgment n.o.v., states that the verdict-winner may apply to the trial court for a new trial pursuant to Rule 59 after the judgment n.o.v. has been entered against him. In arguing to the trial court in opposition to the motion for judgment n.o.v., the verdict-winner may, and often will, contend that he is entitled, at the least, to a new trial, and the court has a range of discretion to grant a new trial or (where plaintiff won the verdict) to order a dismissal of the action without prejudice instead of granting judgment n.o.v. See *Cone v. West Virginia Pulp & Paper Co., supra*, 330 U.S. at 217, 218 67 S.Ct. at 755, 756, 91 L.Ed. 849. Subdivision (c)(2) is a reminder that the verdict-winner is entitled, even after entry of judgment n.o.v. against him, to move for a new trial in the usual course. If in these circumstances the motion is granted, the judgment is superseded.

In some unusual circumstances, however, the grant of the new-trial motion may be only conditional, and the judgment will not be superseded. See the situation in *Tribble v. Bruin*, 279 F.2d 424 (4th Cir. 1960) (upon a verdict for plaintiff, defendant moves for and obtains judgment n.o.v.; plaintiff moves for a new trial on the ground of inadequate damages; trial court might properly have granted plaintiff's motion, conditional upon reversal of the judgment n.o.v.).

Even if the verdict-winner makes no motion for a new trial, he is entitled upon his appeal from the judgment n.o.v. not only to urge that that judgment should be reversed and judgment entered upon the verdict, but that errors were committed during the trial which at the least entitle him to a new trial.

Subdivision (d) deals with the situation where judgment has been entered on the jury verdict, the motion for judgment n.o.v. and any motion for a new trial having been denied by the trial court. The verdict-winner, as appellee, besides seeking to uphold the judgment, may urge upon the appellate court that in case the trial court is found to have erred in entering judgment on the verdict, there are grounds for granting him a new trial instead of directing the entry of judgment for his opponent. In appropriate cases the appellate court is not precluded from itself directing that a new trial be had. See *Weade v. Dichmann, Wright & Pugh, Inc.*, 337 U.S. 801, 69 S.Ct. 1326, 93 L.Ed. 1704 (1949). Nor is it precluded in proper cases from remanding the case for a determination by the trial court as to whether a new trial should be granted. The latter course is advisable where the grounds urged are suitable for the exercise of trial court discretion.

Subdivision (d) does not attempt a regulation of all aspects of the procedure where the motion for judgment n.o.v. and any accompanying motion for a new trial are denied, since the problems have not been fully canvassed in the decisions and the procedure is in some respects still in a formative stage. It is, however, designed to give guidance on certain important features of the practice.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1991 AMENDMENT

Subdivision (a). The revision of this subdivision aims to facilitate the exercise by the court of its responsibility to assure the fidelity of its judgment to the controlling law, a responsibility imposed by the Due Process Clause of the Fifth Amendment. *Cf. Galloway v. United States*, 319 U.S. 372 (1943).

The revision abandons the familiar terminology of *direction of verdict* for several reasons. The term is misleading as a description of the relationship between judge and jury. It is also freighted with anachronisms some of which are the subject of the text of former subdivision (a) of this rule that is deleted in this revision. Thus, it should not be necessary to state in the text of this rule that a motion made pursuant to it is not a waiver of the right to jury trial, and only the antiquities of directed verdict practice suggest that it might have been. The term "judgment as a matter of law" is an almost equally familiar term and appears in the text of Rule 56; its use in Rule 50 calls attention to the relationship between the two rules. Finally, the change enables the rule to refer to preverdict and post-verdict motions with a terminology that does not conceal the common identity of two motions made at different times in the proceeding.

If a motion is denominated a motion for directed verdict or for judgment notwithstanding the verdict, the party's error is merely formal. Such a motion should be treated as a motion for judgment as a matter of law in accordance with this rule.

Paragraph (a)(1) articulates the standard for the granting of a motion for judgment as a matter of law. It effects no change in the existing standard. That existing standard was not expressed in the former rule, but was articulated in long-standing case law. *See generally* Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts*, 55 MINN. L. REV. 903 (1971). The expressed standard makes clear that action taken under the rule is a performance of the court's duty to assure enforcement of the controlling law and is not an intrusion on any responsibility for factual determinations conferred on the jury by the Seventh Amendment or any other provision of federal law. Because this standard is also used as a reference point for entry of summary judgment under 56(a), it serves to link the two related provisions.

The revision authorizes the court to perform its duty to enter judgment as a matter of law at any time during the trial, as soon as it is apparent that either party is unable to carry a burden of proof that is essential to that party's case. Thus, the second sentence of paragraph (a)(1) authorizes the court to consider a motion for judgment as a matter of law as soon as a party has completed a presentation on a fact essential to that party's case. Such early action is appropriate when economy and expedition will be served. In no event, however, should the court enter judgment against a party who has not been apprised of the materiality of the dispositive fact and been afforded an opportunity to present any available evidence bearing on that fact. In order further to facilitate the exercise of the authority provided by this rule, Rule 16 is also revised to encourage the court to schedule an order of trial that proceeds first with a presentation on an issue that is likely to be dispositive, if such an issue is identified in the course of pretrial. Such scheduling can be appropriate where the court is uncertain whether favorable action should be taken under Rule 56. Thus, the revision affords the court the alternative of denying a motion for summary judgment while scheduling a separate trial of the issue under Rule 42(b) or scheduling the trial to begin with a presentation on that essential fact which the opposing party seems unlikely to be able to maintain.

Paragraph (a)(2) retains the requirement that a motion for judgment be made prior to the close of the trial, subject to renewal after a jury verdict has been rendered. The purpose of this requirement is to assure the responding party an opportunity to cure any deficiency in that party's proof that may have been overlooked until called to the party's attention by a late motion for judgment. Cf. *Farley Transp. Co. v. Santa Fe Trail Transp. Co.*, 786 F.2d 1342 (9th Cir. 1986) ("If the moving party is then permitted to make a later attack on the evidence through a motion for judgment notwithstanding the verdict or an appeal, the opposing party may be prejudiced by having lost the opportunity to present additional evidence before the case was submitted to the jury"); *Benson v. Allphin*, 786 F.2d 268 (7th

Cir. 1986) (''the motion for directed verdict at the close of all the evidence provides the nonmovant an opportunity to do what he can to remedy the deficiencies in his case . . .); *McLaughlin v. The Fellows Gear Shaper Co.*, 4 F.R.Serv. 3d 607 (3d Cir. 1986) (per Adams, J., dissenting: ''This Rule serves important practical purposes in ensuring that neither party is precluded from presenting the most persuasive case possible and in preventing unfair surprise after a matter has been submitted to the jury''). At one time, this requirement was held to be of constitutional stature, being compelled by the Seventh Amendment. Cf. *Slocum v. New York Insurance Co.*, 228 U.S. 364 (1913). But cf. *Baltimore & Carolina Line v. Redman*, 295 U.S. 654 (1935).

The second sentence of paragraph (a)(2) does impose a requirement that the moving party articulate the basis on which a judgment as a matter of law might be rendered. The articulation is necessary to achieve the purpose of the requirement that the motion be made before the case is submitted to the jury, so that the responding party may seek to correct any overlooked deficiencies in the proof. The revision thus alters the result in cases in which courts have used various techniques to avoid the requirement that a motion for a directed verdict be made as a predicate to a motion for judgment notwithstanding the verdict. E.g., *Benson v. Allphin*, 788 F.2d 268 (7th cir. 1986) (''this circuit has allowed something less than a formal motion for directed verdict to preserve a party's right to move for judgment notwithstanding the verdict''). *See generally* 9 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE §2537 (1971 and Supp.). The information required with the motion may be supplied by explicit reference to materials and argument previously supplied to the court.

This subdivision deals only with the entry of judgment and not with the resolution of particular factual issues as a matter of law. The court may, as before, properly refuse to instruct a jury to decide an issue if a reasonable jury could on the evidence presented decide that issue in only one way.

Subdivision (b). This provision retains the concept of the former rule that the post-verdict motion is a renewal of an earlier motion made at the close of the evidence. One purpose of this concept was to avoid any question arising under the Seventh Amendment. *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243 (1940). It remains useful as a means of defining the appropriate issue posed by the post-verdict motion. A post-trial motion for judgment can be granted only on grounds advanced in the pre-verdict motion. *E.g., Kutner Buick, Inc. v. American Motors Corp.*, 848 F.2d 614 (3d cir. 1989).

Often it appears to the court or to the moving party that a motion for judgment as a matter of law made at the close of the evidence should be reserved for a post-verdict decision. This is so because a jury verdict for the moving party moots the issue and because a preverdict ruling gambles that a reversal may result in a new trial that might have been avoided. For these reasons, the court may often wisely decline to rule on a motion for judgment as a matter of law made at the close of the evidence, and it is not inappropriate for the moving party to suggest such a postponement of the ruling until after the verdict has been rendered.

In ruling on such a motion, the court should disregard any jury determination for which there is no legally sufficient evidentiary basis enabling a reasonable jury to make it. The court may then decide such issues as a matter of law and enter judgment if all other material issues have been decided by the jury on the basis of legally sufficient evidence, or by the court as a matter of law.

The revised rule is intended for use in this manner with Rule 49. Thus, the court may combine facts established as a matter of law either before trial under Rule 56 or at trial on the basis of the evidence presented with other facts determined by the jury under instructions provided under Rule 49 to support a proper judgment under this rule.

This provision also retains the former requirement that a post-trial motion under the rule must be made within 10 days after entry of a contrary judgment. The renewed motion must be served and filed as provided by Rule 5. A purpose of this requirement is to meet the requirements of F.R.App.P. 4(a)(4).

Subdivision (c). Revision of this subdivision conforms the language to the change in diction set forth in subdivision (a) of this revised rule.

Subdivision (d). Revision of this subdivision conforms the language to that of the previous subdivisions.

NOTES OF ADVISORY COMMITTEE ON RULES—1993 AMENDMENT

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

NOTES OF ADVISORY COMMITTEE ON RULES—1995 AMENDMENT

The only change, other than stylistic, intended by this revision is to prescribe a uniform explicit time for filing of post-judgment motions under this rule—no later than 10 days after entry of the judgment. Previously, there was an inconsistency in the wording of Rules 50, 52, and 59 with respect to whether certain post-judgment motions had to be filed, or merely served, during that period. This inconsistency caused special problems when motions for a new trial were joined with other post-judgment motions. These motions affect the finality of the judgment, a matter often of importance to third persons as well as the parties and the court. The Committee believes that each of these rules should be revised to require filing before end of the 10-day period. Filing is an event that can be determined with certainty from court records. The phrase ''no later than'' is used—rather than ''within''—to include post-judgment motions that sometimes are filed before actual entry of the judgment by the clerk. It should be noted that under Rule 6(a) Saturdays, Sundays, and legal holidays are excluded in measuring the 10-day period, and that under Rule 5 the motions when filed are to contain a certificate of service on other parties.

COMMITTEE NOTES ON RULES—2006 AMENDMENT

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

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

This change responds to many decisions that have begun to move away from requiring a motion for judgment as a matter of law at the literal close of all the evidence. Although the requirement has been clearly established for several decades, lawyers continue to overlook it. The courts are slowly working away from

the formal requirement. The amendment establishes the functional approach that courts have been unable to reach under the present rule and makes practice more consistent and predictable.

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

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

Changes Made After Publication and Comment. This recommendation modifies the version of the proposal as published. The only changes made in the rule text after publication are matters of style. One sentence in the Committee Note was changed by adopting the wording of the 1991 Committee Note describing the grounds that may be used to support a renewed motion for judgment as a matter of law. A paragraph also was added to the Committee Note to explain the style revisions in subdivision (a). The changes from the published rule text are set out below. [Omitted]

Rule 51. Instructions to Jury; Objections; Preserving a Claim of Error

(a) REQUESTS.

(1) A party may, at the close of the evidence or at an earlier reasonable time that the court directs, file and furnish to every other party written requests that the court instruct the jury on the law as set forth in the requests.

(2) After the close of the evidence, a party may:

(A) file requests for instructions on issues that could not reasonably have been anticipated at an earlier time for requests set under Rule 51(a)(1), and

(B) with the court's permission file untimely requests for instructions on any issue.

(b) INSTRUCTIONS. The court:

(1) must inform the parties of its proposed instructions and proposed action on the requests before instructing the jury and before final jury arguments;

(2) must give the parties an opportunity to object on the record and out of the jury's hearing to the proposed instructions and actions on requests before the instructions and arguments are delivered; and

(3) may instruct the jury at any time after trial begins and before the jury is discharged.

(c) OBJECTIONS.

(1) A party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds of the objection.

(2) An objection is timely if:

(A) a party that has been informed of an instruction or action on a request before the jury is instructed and before final jury arguments, as provided by Rule 51(b)(1), objects at the opportunity for objection required by Rule 51(b)(2); or

(B) a party that has not been informed of an instruction or action on a request before the time for objection provided under Rule 51(b)(2) objects promptly after learning that the instruction or request will be, or has been, given or refused.

(d) ASSIGNING ERROR; PLAIN ERROR.

(1) A party may assign as error:

(A) an error in an instruction actually given if that party made a proper objection under Rule 51(c), or

(B) a failure to give an instruction if that party made a proper request under Rule 51(a), and—unless the court made a definitive ruling on the record rejecting the request—also made a proper objection under Rule 51(c).

(2) A court may consider a plain error in the instructions affecting substantial rights that has not been preserved as required by Rule 51(d)(1)(A) or (B).

(As amended Mar. 2, 1987, eff. Aug. 1, 1987; Mar. 27, 2003, eff. Dec. 1, 2003.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

Supreme Court Rule 8 requires exceptions to the charge of the court to the jury which shall distinctly state the several matters of law in the charge to which exception is taken. Similar provisions appear in the rules of the various Circuit Courts of Appeals.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

Although Rule 51 in its present form specifies that the court shall instruct the jury only after the arguments of the parties are completed, in some districts (typically those in states where the practice is otherwise) it is common for the parties to stipulate to instruction before the arguments. The purpose of the amendment is to give the court discretion to instruct the jury either before or after argument. Thus, the rule as revised will permit resort to the long-standing federal practice or to an alternative procedure, which has been praised because it gives counsel the opportunity to explain the instructions, argue their application to the facts and thereby give the jury the maximum assistance in determining the issues and arriving at a good verdict on the law and the evidence. As an ancillary benefit, this approach aids counsel by supplying a natural outline so that arguments may be directed to the essential fact issues which the jury must decide. See generally Raymond, *Merits and Demerits of the Missouri System of Instructing Juries*, 5 St. Louis U.L.J. 317 (1959). Moreover, if the court instructs before an argument, counsel then know the precise words the court has chosen and need not speculate as to the words the court will later use in its instructions. Finally, by instructing ahead of argument the court has the attention of the jurors when they are fresh and can given their full attention to the court's instructions. It is more difficult to hold the attention of jurors after lengthy arguments.

COMMITTEE NOTES ON RULES—2003 AMENDMENT

Rule 51 is revised to capture many of the interpretations that have emerged in practice. The revisions in text will make uniform the conclusions reached by a majority of decisions on each point. Additions also are made to cover some practices that cannot now be anchored in the text of Rule 51.

Scope. Rule 51 governs instructions to the trial jury on the law that governs the verdict. A variety of other instructions cannot practicably be brought within Rule 51. Among these instructions are preliminary instructions to a venire, and cautionary or limiting instructions delivered in immediate response to events at trial.

Requests. Subdivision (a) governs requests. Apart from the plain error doctrine recognized in subdivision (d)(2), a court is not obliged to instruct the jury on issues raised by the evidence unless a party requests an instruction. The revised rule recognizes the court's au-

thority to direct that requests be submitted before trial.

The close-of-the-evidence deadline may come before trial is completed on all potential issues. Trial may be formally bifurcated or may be sequenced in some less formal manner. The close of the evidence is measured by the occurrence of two events: completion of all intended evidence on an identified phase of the trial and impending submission to the jury with instructions.

The risk in directing a pretrial request deadline is that trial evidence may raise new issues or reshape issues the parties thought they had understood. Courts need not insist on pretrial requests in all cases. Even if the request time is set before trial or early in the trial, subdivision (a)(2)(A) permits requests after the close of the evidence to address issues that could not reasonably have been anticipated at the earlier time for requests set by the court.

Subdivision (a)(2)(B) expressly recognizes the court's discretion to act on an untimely request. The most important consideration in exercising the discretion confirmed by subdivision (a)(2)(B) is the importance of the issue to the case—the closer the issue lies to the ''plain error'' that would be recognized under subdivision (d)(2), the better the reason to give an instruction. The cogency of the reason for failing to make a timely request also should be considered. To be considered under subdivision (a)(2)(B) a request should be made before final instructions and before final jury arguments. What is a ''final'' instruction and argument depends on the sequence of submitting the case to the jury. If separate portions of the case are submitted to the jury in sequence, the final arguments and final instructions are those made on submitting to the jury the portion of the case addressed by the arguments and instructions.

Instructions. Subdivision (b)(1) requires the court to inform the parties, before instructing the jury and before final jury arguments related to the instruction, of the proposed instructions as well as the proposed action on instruction requests. The time limit is addressed to final jury arguments to reflect the practice that allows interim arguments during trial in complex cases; it may not be feasible to develop final instructions before such interim arguments. It is enough that counsel know of the intended instructions before making final arguments addressed to the issue. If the trial is sequenced or bifurcated, the final arguments addressed to an issue may occur before the close of the entire trial.

Subdivision (b)(2) complements subdivision (b)(1) by carrying forward the opportunity to object established by present Rule 51. It makes explicit the opportunity to object on the record, ensuring a clear memorial of the objection.

Subdivision (b)(3) reflects common practice by authorizing instructions at any time after trial begins and before the jury is discharged.

Objections. Subdivision (c) states the right to object to an instruction or the failure to give an instruction. It carries forward the formula of present Rule 51 requiring that the objection state distinctly the matter objected to and the grounds of the objection, and makes explicit the requirement that the objection be made on the record. The provisions on the time to object make clear that it is timely to object promptly after learning of an instruction or action on a request when the court has not provided advance information as required by subdivision (b)(1). The need to repeat a request by way of objection is continued by new subdivision (d)(1)(B) except where the court made a definitive ruling on the record.

Preserving a claim of error and plain error. Many cases hold that a proper request for a jury instruction is not alone enough to preserve the right to appeal failure to give the instruction. The request must be renewed by objection. This doctrine is appropriate when the court may not have sufficiently focused on the request, or may believe that the request has been granted in substance although in different words. But this doctrine may also prove a trap for the unwary who fail to add an objection after the court has made it clear that the request has been considered and rejected on the merits. Subdivision (d)(1)(B) establishes authority to review the failure to grant a timely request, despite a failure to add an objection, when the court has made a definitive ruling on the record rejecting the request.

Many circuits have recognized that an error not preserved under Rule 51 may be reviewed in exceptional circumstances. The language adopted to capture these decisions in subdivision (d)(2) is borrowed from Criminal Rule 52. Although the language is the same, the context of civil litigation often differs from the context of criminal prosecution; actual application of the plain-error standard takes account of the differences. The Supreme Court has summarized application of Criminal Rule 52 as involving four elements: (1) there must be an error; (2) the error must be plain; (3) the error must affect substantial rights; and (4) the error must seriously affect the fairness, integrity, or public reputation of judicial proceedings. *Johnson v. U.S.*, 520 U.S. 461, 466–467, 469–470 (1997). (The Johnson case quoted the fourth element from its decision in a civil action, *U.S. v. Atkinson*, 297 U.S. 157, 160 (1936): ''In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise substantially affect the fairness, integrity, or public reputation of judicial proceedings.'')

The court's duty to give correct jury instructions in a civil action is shaped by at least four factors.

The factor most directly implied by a ''plain'' error rule is the obviousness of the mistake. The importance of the error is a second major factor. The costs of correcting an error reflect a third factor that is affected by a variety of circumstances. In a case that seems close to the fundamental error line, account also may be taken of the impact a verdict may have on nonparties.

Changes Made After Publication and Comment. The changes made after publication and comment are indicated by double-underlining and overstriking on the texts that were published in August 2001.

Rule 51(d) was revised to conform the plain-error provision to the approach taken in Criminal Rule 52(b). The Note was revised as described in the Recommendation.

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

(a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in subdivision (c) of this rule.

(b) AMENDMENT. On a party's motion filed no later than 10 days after entry of judgment, the court may amend its findings—or make additional findings—and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59. When findings of fact are made in actions tried without a jury, the sufficiency of the evidence supporting the findings may be later questioned whether or not in the district court the party raising the question objected to the findings, moved to amend them, or moved for partial findings.

(c) JUDGMENT ON PARTIAL FINDINGS. If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence. Such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Apr. 28, 1983, eff. Aug. 1, 1983; Apr. 29, 1985, eff. Aug. 1, 1985; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 27, 1995, eff. Dec. 1, 1995.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

See [former] Equity Rule 70½, as amended Nov. 25, 1935 (Findings of Fact and Conclusions of Law), and U.S.C., Title 28, [former] §764 (Opinion, findings, and conclusions in action against United States) which are substantially continued in this rule. The provisions of U.S.C., Title 28, [former] §§773 (Trial of issues of fact; by court) and [former] 875 (Review in cases tried without a jury) are superseded insofar as they provide a different method of finding facts and a different method of appellate review. The rule stated in the third sentence of *Subdivision (a)* accords with the decisions on the scope of the review in modern federal equity practice. It is applicable to all classes of findings in cases tried without a jury whether the finding is of a fact concerning which there was conflict of testimony, or of a fact deduced or inferred from uncontradicted testimony. See *Silver King Coalition Mines, Co. v. Silver King Consolidated Mining Co.*, 204 Fed. 166 (C.C.A.8th, 1913), cert. den. 229 U.S. 624 (1913); *Warren v. Keep*, 155 U.S. 265 (1894); *Furrer v. Ferris*, 145 U.S. 132 (1892); *Tilghman v. Proctor*, 125 U.S. 136, 149 (1888); *Kimberly v. Arms*, 129 U.S. 512, 524 (1889). Compare *Kaeser & Blair, Inc., v. Merchants' Ass'n*, 64 F.(2d) 575, 576 (C.C.A.6th, 1933); *Dunn v. Trefry*, 260 Fed. 147, 148 (C.C.A.1st, 1919).

In the following states findings of fact are required in all cases tried without a jury (waiver by the parties being permitted as indicated at the end of the listing): Arkansas, Civ.Code (Crawford, 1934) §364; California, Code Civ.Proc. (Deering, 1937) §§632, 634; Colorado, 1 Stat.Ann. (1935) Code Civ.Proc. §§232, 291 (in actions before referees or for possession of and damages to land); Connecticut, Gen.Stats. §§5660, 5664; Idaho, 1 Code Ann. (1932) §§7–302 through 7–305; Massachusetts (equity cases), 2 Gen.Laws (Ter.Ed., 1932) ch. 214, §23; Minnesota, 2 Stat. (Mason, 1927) §9311; Nevada, 4 Comp.Laws (Hillyer, 1929) §8783–8784; New Jersey, Sup.Ct. Rule 113, 2 N.J.Misc. 1197, 1239 (1924); New Mexico, Stat.Ann. (Courtright, 1929) §105–813; North Carolina, Code (1935) §569; North Dakota, 2 Comp.Laws Ann. (1913) §7641; Oregon, 2 Code Ann. (1930) §2–502; South Carolina, Code (Michie, 1932) §649; South Dakota, 1 Comp.Laws (1929) §§2525–2526; Utah, Rev.Stat.Ann. (1933) §104–26–2, 104–26–3; Vermont (where jury trial waived), Pub. Laws (1933) §2069; Washington, 2 Rev.Stat.Ann. (Remington, 1932) §367; Wisconsin, Stat. (1935) §270.33. The parties may waive this requirement for findings in California, Idaho, North Dakota, Nevada, New Mexico, Utah, and South Dakota.

In the following states the review of findings of fact in all non-jury cases, including jury waived cases, is assimilated to the equity review: Alabama, Code Ann. (Michie, 1928) §§9498, 8599; California, Code Civ.Proc. (Deering, 1937) §956a; but see 20 Calif.Law Rev. 171 (1932); Colorado, *Johnson v. Kountze*, 21 Colo. 486, 43 Pac. 445 (1895), *semble*; Illinois, *Baker v. Hinricks*, 359 Ill. 138, 194 N.E. 284 (1934), *Weininger v. Metropolitan Fire Ins. Co.*, 359 Ill. 584, 195 N.E. 420, 98 A.L.R. 169 (1935); Minnesota, *State Bank of Gibbon v. Walter*, 167 Minn. 37, 38, 208 N.W. 423 (1926), *Waldron v. Page*, 191 Minn. 302, 253 N.W. 894 (1934); New Jersey, N.J.Comp.Stat. (2 Cum.Supp. 1911–1924) Title 163, §303, as interpreted in *Bussy v. Hatch*, 95 N.J.L. 56, 111 A. 546 (1920); New York, *York Mortgage Corporation v. Clotar Const. Corp.*, 254 N.Y. 128, 133, 172 N.E. 265 (1930); North Dakota, Comp.Laws Ann. (1913) §7846, as amended by N.D.Laws 1933, ch. 208, *Milnor Holding Co. v. Holt*, 63 N.D. 362, 370, 248 N.W. 315 (1933); Oklahoma, *Wichita Mining and Improvement Co. v. Hale*, 20 Okla. 159, 167, 94 Pac. 530 (1908); South Dakota, *Randall v. Burk Township*, 4 S.D. 337, 57 N.W. 4 (1893); Texas, *Custard v. Flowers*, 14 S.W.2d 109 (1929); Utah, Rev.Stat.Ann. (1933) §104–41–5; Vermont, *Roberge v. Troy*, 105 Vt. 134, 163 Atl. 770 (1933); Washington, 2 Rev.Stat.Ann. (Remington, 1932) §§309–316; *McCullough v. Puget Sound Realty Associates*, 76 Wash. 700, 136 Pac. 1146 (1913), but see *Cornwall v. Anderson*, 85 Wash. 369, 148 Pac. 1 (1915); West Virginia, *Kinsey v. Carr*, 60 W.Va. 449, 55 S.E. 1004 (1906), semble; Wisconsin, Stat. (1935) §251.09; *Campbell v. Sutliff*, 193 Wis. 370, 214 N.W. 374 (1927), *Gessler v. Erwin Co.*, 182 Wis. 315, 193 N.W. 363 (1924).

For examples of an assimilation of the review of findings of fact in cases tried without a jury to the review at law as made in several states, see Clark and Stone, *Review of Findings of Fact*, 4 U. of Chi.L.Rev. 190, 215 (1937).

NOTES OF ADVISORY COMMITTEE ON RULES—1946 AMENDMENT

Subdivision (a). The amended rule makes clear that the requirement for findings of fact and conclusions of law thereon applies in a case with an advisory jury. This removes an ambiguity in the rule as originally stated, but carries into effect what has been considered its intent. 3 *Moore's Federal Practice* (1938) 3119; *Hurwitz v. Hurwitz* (App.D.C. 1943) 136 F.(2d) 796.

The two sentences added at the end of Rule 52(a) eliminate certain difficulties which have arisen concerning findings and conclusions. The first of the two sentences permits findings of fact and conclusions of law to appear in an opinion or memorandum of decision. See, *e.g.*, *United States v. One 1941 Ford Sedan* (S.D.Tex. 1946) 65 F.Supp. 84. Under original Rule 52(a) some courts have expressed the view that findings and conclusions could not be incorporated in an opinion. *Detective Comics, Inc. v. Bruns Publications* (S.D.N.Y. 1939) 28 F.Supp. 399; *Pennsylvania Co. for Insurance on Lives & Granting Annuities v. Cincinnati & L. E. R. Co.* (S.D.Ohio 1941) 43 F.Supp. 5; *United States v. Aluminum Co. of America* (S.D.N.Y. 1941) 5 Fed.Rules Serv. 52a.11, Case 3; see also s.c., 44 F.Supp. 97. But, to the contrary, see *Wellman v. United States* (D.Mass. 1938) 25 F.Supp. 868; *Cook v. United States* (D.Mass. 1939) 26 F.Supp. 253; *Proctor v. White* (D.Mass. 1939) 28 F.Supp. 161; *Green Valley Creamery, Inc. v. United States* (C.C.A.1st, 1939) 108 F.(2d) 342. See also *Matton Oil Transfer Corp. v. The Dynamic* (C.C.A.2d, 1941) 123 F.(2d) 999; *Carter Coal Co. v. Litz* (C.C.A.4th, 1944) 140 F.(2d) 934; *Woodruff v. Heiser* (C.C.A.10th, 1945) 150 F.(2d) 869; *Coca-Cola Co. v. Busch* (E.D.Pa. 1943) 7 Fed.Rules Serv. 59b.2, Case 4; Oglebay, *Some Developments in Bankruptcy Law* (1944) 18 J. of Nat'l Ass'n of Ref. 68, 69. Findings of fact aid in the process of judgment and in defining for future cases the precise limitations of the issues and the determination thereon. Thus they not only aid the appellate court on

review (*Hurwitz v. Hurwitz* (App.D.C. 1943) 136 F.(2d) 796) but they are an important factor in the proper application of the doctrines of res judicata and estoppel by judgment. Nordbye, *Improvements in Statement of Findings of Fact and Conclusions of Law*, 1 F.R.D. 25, 26–27; *United States v. Forness* (C.C.A.2d, 1942) 125 F.(2d) 928, cert. den. (1942) 316 U.S. 694. These findings should represent the judge's own determination and not the long, often argumentative statements of successful counsel. *United States v. Forness, supra; United States v. Crescent Amusement Co.* (1944) 323 U.S. 173. Consequently, they should be a part of the judge's opinion and decision, either stated therein or stated separately. *Matton Oil Transfer Corp. v. The Dynamic, supra*. But the judge need only make brief, definite, pertinent findings and conclusions upon the contested matters; there is no necessity for over-elaboration of detail or particularization of facts. *United States v. Forness, supra; United States v. Crescent Amusement Co., supra*. See also *Petterson Lighterage & Towing Corp. v. New York Central R. Co.* (C.C.A.2d, 1942) 126 F.(2d) 992; *Brown Paper Mill Co., Inc. v. Irwin* (C.C.A.8th, 1943) 134 F.(2d) 337; *Allen Bradley Co. v. Local Union No. 3*, I.B.E.W. (C.C.A.2d, 1944) 145 F.(2d) 215, rev'd on other grounds (1945) 325 U.S. 797; *Young v. Murphy* (N.D.Ohio 1946) 9 Fed.Rules Serv. 52a.11, Case 2.

The last sentence of Rule 52(a) as amended will remove any doubt that findings and conclusions are unnecessary upon decision of a motion, particularly one under Rule 12 or Rule 56, except as provided in amended Rule 41(b). As so holding, see *Thomas v. Peyser* (App.D.C. 1941) 118 F.(2d) 369; *Schad v. Twentieth Century-Fox Corp.* (C.C.A.3d, 1943) 136 F.(2d) 991; *Prudential Ins. Co. of America v. Goldstein* (E.D.N.Y. 1942) 43 F.Supp. 767; *Somers Coal Co. v. United States* (N.D.Ohio 1942) 6 Fed.Rules Serv. 52a.1, Case 1; *Pen-Ken Oil & Gas Corp. v. Warfield Natural Gas Co.* (E.D.Ky. 1942) 5 Fed.Rules Serv. 52a.1, Case 3; also Commentary, *Necessity of Findings of Fact* (1941) 4 Fed.Rules Serv. 936.

NOTES OF ADVISORY COMMITTEE ON RULES—1963 AMENDMENT

This amendment conforms to the amendment of Rule 58. See the Advisory Committee's Note to Rule 58, as amended.

NOTES OF ADVISORY COMMITTEE ON RULES—1983 AMENDMENT

Rule 52(a) has been amended to revise its penultimate sentence to provide explicitly that the district judge may make the findings of fact and conclusions of law required in nonjury cases orally. Nothing in the prior text of the rule forbids this practice, which is widely utilized by district judges. See Christensen, *A Modest Proposal for Immeasurable Improvement*, 64 A.B.A.J. 693 (1978). The objective is to lighten the burden on the trial court in preparing findings in nonjury cases. In addition, the amendment should reduce the number of published district court opinions that embrace written findings.

NOTES OF ADVISORY COMMITTEE ON RULES—1985 AMENDMENT

Rule 52(a) has been amended (1) to avoid continued confusion and conflicts among the circuits as to the standard of appellate review of findings of fact by the court, (2) to eliminate the disparity between the standard of review as literally stated in Rule 52(a) and the practice of some courts of appeals, and (3) to promote nationwide uniformity. See Note, *Rule 52(a): Appellate Review of Findings of Fact Based on Documentary or Undisputed Evidence*, 49 Va. L. Rev. 506, 536 (1963).

Some courts of appeal have stated that when a trial court's findings do not rest on demeanor evidence and evaluation of a witness' credibility, there is no reason to defer to the trial court's findings and the appellate court more readily can find them to be clearly erroneous. See, e.g., *Marcum v. United States*, 621 F.2d 142, 144–45 (5th Cir. 1980). Others go further, holding that appellate review may be had without application of the ''clearly erroneous'' test since the appellate court is in as good a position as the trial court to review a purely documentary record. See, *e.g., Atari, Inc. v. North American Philips Consumer Electronics Corp.*, 672 F.2d 607, 614 (7th Cir.), *cert. denied*, 459 U.S. 880 (1982); *Lydle v. United States*, 635 F.2d 763, 765 n. 1 (6th Cir. 1981); *Swanson v. Baker Indus., Inc.*, 615 F.2d 479, 483 (8th Cir. 1980); *Taylor v. Lombard*, 606 F.2d 371, 372 (2d Cir. 1979), *cert. denied*, 445 U.S. 946 (1980); *Jack Kahn Music Co. v. Baldwin Piano & Organ Co.*, 604 F.2d 755, 758 (2d Cir. 1979); *John R. Thompson Co. v. United States*, 477 F.2d 164, 167 (7th Cir. 1973).

A third group has adopted the view that the ''clearly erroneous'' rule applies in all nonjury cases even when findings are based solely on documentary evidence or on inferences from undisputed facts. See, *e.g., Maxwell v. Sumner*, 673 F.2d 1031, 1036 (9th Cir.), *cert. denied*, 459 U.S. 976 (1982); *United States v. Texas Education Agency*, 647 F.2d 504, 506–07 (5th Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982); *Constructora Maza, Inc. v. Banco de Ponce*, 616 F.2d 573, 576 (1st Cir. 1980); *In re Sierra Trading Corp.*, 482 F.2d 333, 337 (10th Cir. 1973); *Case v. Morrisette*, 475 F.2d 1300, 1306–07 (D.C. Cir. 1973).

The commentators also disagree as to the proper interpretation of the Rule. *Compare* Wright, *The Doubtful Omniscience of Appellate Courts*, 41 Minn. L. Rev. 751, 769–70 (1957) (language and intent of Rule support view that ''clearly erroneous'' test should apply to all forms of evidence), *and* 9 C. Wright & A. Miller, *Federal Practice and Procedure: Civil § 2587*, at 740 (1971) (language of the Rule is clear), *with* 5A J. Moore, *Federal Practice ¶52.04, 2687–88 (2d ed. 1982) (Rule as written supports broader review of findings based on non-demeanor testimony)*.

The Supreme Court has not clearly resolved the issue. See, *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 104 S. Ct. 1949, 1958 (1984); *Pullman Standard v. Swint*, 456 U.S. 273, 293 (1982); *United States v. General Motors Corp.*, 384 U.S. 127, 141 n. 16 (1966); *United States v. United States Gypsum Co.*, 333 U.S. 364, 394–96 (1948).

The principal argument advanced in favor of a more searching appellate review of findings by the district court based solely on documentary evidence is that the rationale of Rule 52(a) does not apply when the findings do not rest on the trial court's assessment of credibility of the witnesses but on an evaluation of documentary proof and the drawing of inferences from it, thus eliminating the need for any special deference to the trial court's findings. These considerations are outweighed by the public interest in the stability and judicial economy that would be promoted by recognizing that the trial court, not the appellate tribunal, should be the finder of the facts. To permit courts of appeals to share more actively in the fact-finding function would tend to undermine the legitimacy of the district courts in the eyes of litigants, multiply appeals by encouraging appellate retrial of some factual issues, and needlessly reallocate judicial authority.

NOTES OF ADVISORY COMMITTEE ON RULES—1991 AMENDMENT

Subdivision (c) is added. It parallels the revised Rule 50(a), but is applicable to non-jury trials. It authorizes the court to enter judgment at any time that it can appropriately make a dispositive finding of fact on the evidence.

The new subdivision replaces part of Rule 41(b), which formerly authorized a dismissal at the close of the plaintiff's case if the plaintiff had failed to carry an essential burden of proof. Accordingly, the reference to Rule 41 formerly made in subdivision (a) of this rule is deleted.

As under the former Rule 41(b), the court retains discretion to enter no judgment prior to the close of the evidence.

Judgment entered under this rule differs from a summary judgment under Rule 56 in the nature of the evaluation made by the court. A judgment on partial findings is made after the court has heard all the evidence

bearing on the crucial issue of fact, and the finding is reversible only if the appellate court finds it to be ''clearly erroneous.'' A summary judgment, in contrast, is made on the basis of facts established on account of the absence of contrary evidence or presumptions; such establishments of fact are rulings on questions of law as provided in Rule 56(a) and are not shielded by the ''clear error'' standard of review.

NOTES OF ADVISORY COMMITTEE ON RULES—1993 AMENDMENT

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

NOTES OF ADVISORY COMMITTEE ON RULES—1995 AMENDMENT

The only change, other than stylistic, intended by this revision is to require that any motion to amend or add findings after a nonjury trial must be filed no later than 10 days after entry of the judgment. Previously, there was an inconsistency in the wording of Rules 50, 52, and 59 with respect to whether certain post-judgment motions had to be filed, or merely served, during that period. This inconsistency caused special problems when motions for a new trial were joined with other post-judgment motions. These motions affect the finality of the judgment, a matter often of importance to third persons as well as the parties and the court. The Committee believes that each of these rules should be revised to require filing before end of the 10-day period. Filing is an event that can be determined with certainty from court records. The phrase ''no later than'' is used—rather than ''within''—to include post-judgment motions that sometimes are filed before actual entry of the judgment by the clerk. It should be noted that under Rule 6(a) Saturdays, Sundays, and legal holidays are excluded in measuring the 10-day period, and that under Rule 5 the motions when filed are to contain a certificate of service on other parties.

Rule 53. Masters

(a) APPOINTMENT.

(1) Unless a statute provides otherwise, a court may appoint a master only to:

(A) perform duties consented to by the parties;

(B) hold trial proceedings and make or recommend findings of fact on issues to be decided by the court without a jury if appointment is warranted by

(i) some exceptional condition, or

(ii) the need to perform an accounting or resolve a difficult computation of damages; or

(C) address pretrial and post-trial matters that cannot be addressed effectively and timely by an available district judge or magistrate judge of the district.

(2) A master must not have a relationship to the parties, counsel, action, or court that would require disqualification of a judge under 28 U.S.C. §455 unless the parties consent with the court's approval to appointment of a particular person after disclosure of any potential grounds for disqualification.

(3) In appointing a master, the court must consider the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense or delay.

(b) ORDER APPOINTING MASTER.

(1) *Notice*. The court must give the parties notice and an opportunity to be heard before appointing a master. A party may suggest candidates for appointment.

(2) *Contents*. The order appointing a master must direct the master to proceed with all reasonable diligence and must state:

(A) the master's duties, including any investigation or enforcement duties, and any limits on the master's authority under Rule 53(c);

(B) the circumstances—if any—in which the master may communicate ex parte with the court or a party;

(C) the nature of the materials to be preserved and filed as the record of the master's activities;

(D) the time limits, method of filing the record, other procedures, and standards for reviewing the master's orders, findings, and recommendations; and

(E) the basis, terms, and procedure for fixing the master's compensation under Rule 53(h).

(3) *Entry of Order*. The court may enter the order appointing a master only after the master has filed an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. §455 and, if a ground for disqualification is disclosed, after the parties have consented with the court's approval to waive the disqualification.

(4) *Amendment*. The order appointing a master may be amended at any time after notice to the parties, and an opportunity to be heard.

(c) MASTER'S AUTHORITY. Unless the appointing order expressly directs otherwise, a master has authority to regulate all proceedings and take all appropriate measures to perform fairly and efficiently the assigned duties. The master may by order impose upon a party any noncontempt sanction provided by Rule 37 or 45, and may recommend a contempt sanction against a party and sanctions against a nonparty.

(d) EVIDENTIARY HEARINGS. Unless the appointing order expressly directs otherwise, a master conducting an evidentiary hearing may exercise the power of the appointing court to compel, take, and record evidence.

(e) MASTER'S ORDERS. A master who makes an order must file the order and promptly serve a copy on each party. The clerk must enter the order on the docket.

(f) MASTER'S REPORTS. A master must report to the court as required by the order of appointment. The master must file the report and promptly serve a copy of the report on each party unless the court directs otherwise.

(g) ACTION ON MASTER'S ORDER, REPORT, OR RECOMMENDATIONS.

(1) *Action*. In acting on a master's order, report, or recommendations, the court must afford an opportunity to be heard and may receive evidence, and may: adopt or affirm; modify; wholly or partly reject or reverse; or resubmit to the master with instructions.

(2) *Time To Object or Move*. A party may file objections to—or a motion to adopt or modify—the master's order, report, or recom-

mendations no later than 20 days from the time the master's order, report, or recommendations are served, unless the court sets a different time.

(3) *Fact Findings*. The court must decide de novo all objections to findings of fact made or recommended by a master unless the parties stipulate with the court's consent that:

(A) the master's findings will be reviewed for clear error, or

(B) the findings of a master appointed under Rule 53(a)(1)(A) or (C) will be final.

(4) *Legal Conclusions*. The court must decide de novo all objections to conclusions of law made or recommended by a master.

(5) *Procedural Matters*. Unless the order of appointment establishes a different standard of review, the court may set aside a master's ruling on a procedural matter only for an abuse of discretion.

(h) COMPENSATION.

(1) *Fixing Compensation*. The court must fix the master's compensation before or after judgment on the basis and terms stated in the order of appointment, but the court may set a new basis and terms after notice and an opportunity to be heard.

(2) *Payment*. The compensation fixed under Rule 53(h)(1) must be paid either:

(A) by a party or parties; or

(B) from a fund or subject matter of the action within the court's control.

(3) *Allocation*. The court must allocate payment of the master's compensation among the parties after considering the nature and amount of the controversy, the means of the parties, and the extent to which any party is more responsible than other parties for the reference to a master. An interim allocation may be amended to reflect a decision on the merits.

(i) APPOINTMENT OF MAGISTRATE JUDGE. A magistrate judge is subject to this rule only when the order referring a matter to the magistrate judge expressly provides that the reference is made under this rule.

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 28, 1983, eff. Aug. 1, 1983; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Mar. 27, 2003, eff. Dec. 1, 2003.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

Note to Subdivision (a). This is a modification of [former] Equity Rule 68 (Appointment and Compensation of Masters).

Note to Subdivision (b). This is substantially the first sentence of [former] Equity Rule 59 (Reference to Master—Exceptional, Not Usual) extended to actions formerly legal. See *Ex parte Peterson* 253 U.S. 300, 40 S.Ct. 543, 64 L.Ed. 919 (1920).

Note to Subdivision (c). This is [former] Equity Rules 62 (Powers of Master) and 65 (Claimants Before Master Examinable by Him) with slight modifications. Compare [former] Equity Rules 49 (Evidence Taken Before Examiners, Etc.) and 51 (Evidence Taken Before Examiners, Etc.).

Note to Subdivision (d). (1) This is substantially a combination of the second sentence of [former] Equity Rule 59 (Reference to Master—Exceptional, Not Usual) and [former] Equity Rule 60 (Proceedings Before Master). Compare [former] Equity Rule 53 (Notice of Taking Testimony Before Examiner, Etc.).

(2) This is substantially [former] Equity Rule 52 (Attendance of Witnesses Before Commissioner, Master, or Examiner).

(3) This is substantially [former] Equity Rule 63 (Form of Accounts Before Master).

Note to Subdivision (e). This contains the substance of [former] Equity Rules 61 (Master's Report—Documents Identified but not Set Forth), 61½ (Master's Report—Presumption as to Correctness—Review), and 66 (Return of Master's Report—Exceptions—Hearing), with modifications as to the form and effect of the report and for inclusion of reports by auditors, referees, and examiners, and references in actions formerly legal. Compare [former] Equity Rules 49 (Evidence Taken Before Examiners, Etc.) and 67 (Costs on Exceptions to Master's Report). See *Camden v. Stuart*, 144 U.S. 104, 12 S.Ct. 585, 36 L.Ed. 363 (1892); *Ex parte Peterson*, 253 U.S. 300, 40 S.Ct. 543, 64 L.Ed. 919 (1920).

NOTES OF ADVISORY COMMITTEE ON RULES—1966 AMENDMENT

These changes are designed to preserve the admiralty practice whereby difficult computations are referred to a commissioner or assessor, especially after an interlocutory judgment determining liability. As to separation of issues for trial see Rule 42(b).

NOTES OF ADVISORY COMMITTEE ON RULES—1983 AMENDMENT

Subdivision (a). The creation of full-time magistrates, who serve at government expense and have no nonjudicial duties competing for their time, eliminates the need to appoint standing masters. Thus the prior provision in Rule 53(a) authorizing the appointment of standing masters is deleted. Additionally, the definition of "master" in subdivision (a) now eliminates the superseded office of commissioner.

The term "special master" is retained in Rule 53 in order to maintain conformity with 28 U.S.C. §636(b)(2), authorizing a judge to designate a magistrate "to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States District Courts." Obviously, when a magistrate serves as a special master, the provisions for compensation of masters are inapplicable, and the amendment to subdivision (a) so provides.

Although the existence of magistrates may make the appointment of outside masters unnecessary in many instances, see, *e.g.*, *Gautreaux v. Chicago Housing Authority*, 384 F.Supp. 37 (N.D.Ill. 1974), mandamus denied *sub nom.*, *Chicago Housing Authority v. Austin*, 511 F.2d 82 (7th Cir. 1975); *Avco Corp. v. American Tel. & Tel. Co.*, 68 F.R.D. 532 (S.D. Ohio 1975), such masters may prove useful when some special expertise is desired or when a magistrate is unavailable for lengthy and detailed supervision of a case.

Subdivision (b). The provisions of 28 U.S.C. §636(b)(2) not only permit magistrates to serve as masters under Rule 53(b) but also eliminate the exceptional condition requirement of Rule 53(b) when the reference is made with the consent of the parties. The amendment to subdivision (b) brings Rule 53 into harmony with the statute by exempting magistrates, appointed with the consent of the parties, from the general requirement that some exceptional condition requires the reference. It should be noted that subdivision (b) does not address the question, raised in recent decisional law and commentary, as to whether the exceptional condition requirement is applicable when *private masters* who are not magistrates are appointed with the consent of the parties. See Silberman, *Masters and Magistrates Part II: The American Analogue*, 50 N.Y.U. L.Rev. 1297, 1354 (1975).

Subdivision (c). The amendment recognizes the abrogation of Federal Rule 43(c) by the Federal Rules of Evidence.

Subdivision (f). The new subdivision responds to confusion flowing from the dual authority for references of pretrial matters to magistrates. Such references can be

made, with or without the consent of the parties, pursuant to Rule 53 or under 28 U.S.C. §636(b)(1)(A) and (b)(1)(B). There are a number of distinctions between references made under the statute and under the rule. For example, under the statute nondispositive pretrial matters may be referred to a magistrate, without consent, for final determination with reconsideration by the district judge if the magistrate's order is clearly erroneous or contrary to law. Under the rule, however, the appointment of a master, without consent of the parties, to supervise discovery would require some exceptional condition (Rule 53(b)) and would subject the proceedings to the report procedures of Rule 53(e). If an order of reference does not clearly articulate the source of the court's authority the resulting proceedings could be subject to attack on grounds of the magistrate's noncompliance with the provisions of Rule 53. This subdivision therefore establishes a presumption that the limitations of Rule 53 are not applicable unless the reference is specifically made subject to Rule 53.

A magistrate serving as a special master under 28 U.S.C. §636(b)(2) is governed by the provisions of Rule 53, with the exceptional condition requirement lifted in the case of a consensual reference.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1991 AMENDMENT

The purpose of the revision is to expedite proceedings before a master. The former rule required only a filing of the master's report, with the clerk then notifying the parties of the filing. To receive a copy, a party would then be required to secure it from the clerk. By transmitting directly to the parties, the master can save some efforts of counsel. Some local rules have previously required such action by the master.

NOTES OF ADVISORY COMMITTEE ON RULES—1993 AMENDMENT

This revision is made to conform the rule to changes made by the Judicial Improvements Act of 1990.

COMMITTEE NOTES ON RULES—2003 AMENDMENT

Rule 53 is revised extensively to reflect changing practices in using masters. From the beginning in 1938, Rule 53 focused primarily on special masters who perform trial functions. Since then, however, courts have gained experience with masters appointed to perform a variety of pretrial and post-trial functions. See Willging, Hooper, Leary, Miletich, Reagan, & Shapard, *Special Masters' Incidence and Activity* (Federal Judicial Center 2000). This revised Rule 53 recognizes that in appropriate circumstances masters may properly be appointed to perform these functions and regulates such appointments. Rule 53 continues to address trial masters as well, but permits appointment of a trial master in an action to be tried to a jury only if the parties consent. The new rule clarifies the provisions that govern the appointment and function of masters for all purposes. Rule 53(g) also changes the standard of review for findings of fact made or recommended by a master. The core of the original Rule 53 remains, including its prescription that appointment of a master must be the exception and not the rule.

Special masters are appointed in many circumstances outside the Civil Rules. Rule 53 applies only to proceedings that Rule 1 brings within its reach.

Subdivision (a)(1). District judges bear primary responsibility for the work of their courts. A master should be appointed only in limited circumstances. Subdivision (a)(1) describes three different standards, relating to appointments by consent of the parties, appointments for trial duties, and appointments for pretrial or post-trial duties.

Consent Masters. Subparagraph (a)(1)(A) authorizes appointment of a master with the parties' consent. Party consent does not require that the court make the appointment; the court retains unfettered discretion to refuse appointment.

Trial Masters. Use of masters for the core functions of trial has been progressively limited. These limits are reflected in the provisions of subparagraph (a)(1)(B) that restrict appointments to exercise trial functions. The Supreme Court gave clear direction to this trend in *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957); earlier roots are sketched in *Los Angeles Brush Mfg. Corp. v. James*, 272 U.S. 701 (1927). As to nonjury trials, this trend has developed through elaboration of the ''exceptional condition'' requirement in present Rule 53(b). This phrase is retained, and will continue to have the same force as it has developed. Although the provision that a reference ''shall be the exception and not the rule'' is deleted, its meaning is embraced for this setting by the exceptional condition requirement.

Subparagraph (a)(1)(B)(ii) carries forward the approach of present Rule 53(b), which exempts from the ''exceptional condition'' requirement ''matters of account and of difficult computation of damages.'' This approach is justified only as to essentially ministerial determinations that require mastery of much detailed information but that do not require extensive determinations of credibility. Evaluations of witness credibility should only be assigned to a trial master when justified by an exceptional condition.

The use of a trial master without party consent is abolished as to matters to be decided by a jury unless a statute provides for this practice.

Abolition of the direct power to appoint a trial master as to issues to be decided by a jury leaves the way free to appoint a trial master with the consent of all parties. A trial master should be appointed in a jury case, with consent of the parties and concurrence of the court, only if the parties waive jury trial with respect to the issues submitted to the master or if the master's findings are to be submitted to the jury as evidence in the manner provided by former Rule 53(e)(3). In no circumstance may a master be appointed to preside at a jury trial.

The central function of a trial master is to preside over an evidentiary hearing on the merits of the claims or defenses in the action. This function distinguishes the trial master from most functions of pretrial and post-trial masters. If any master is to be used for such matters as a preliminary injunction hearing or a determination of complex damages issues, for example, the master should be a trial master. The line, however, is not distinct. A pretrial master might well conduct an evidentiary hearing on a discovery dispute, and a post-trial master might conduct evidentiary hearings on questions of compliance.

Rule 53 has long provided authority to report the evidence without recommendations in nonjury trials. This authority is omitted from Rule 53(a)(1)(B). In some circumstances a master may be appointed under Rule 53(a)(1)(A) or (C) to take evidence and report without recommendations.

For nonjury cases, a master also may be appointed to assist the court in discharging trial duties other than conducting an evidentiary hearing.

Pretrial and Post-Trial Masters. Subparagraph (a)(1)(C) authorizes appointment of a master to address pretrial or post-trial matters. Appointment is limited to matters that cannot be addressed effectively and in a timely fashion by an available district judge or magistrate judge of the district. A master's pretrial or post-trial duties may include matters that could be addressed by a judge, such as reviewing discovery documents for privilege, or duties that might not be suitable for a judge. Some forms of settlement negotiations, investigations, or administration of an organization are familiar examples of duties that a judge might not feel free to undertake.

Magistrate Judges. Particular attention should be paid to the prospect that a magistrate judge may be available for special assignments. United States magistrate judges are authorized by statute to perform many pre-

trial functions in civil actions. 28 U.S.C. §636(b)(1). Ordinarily a district judge who delegates these functions should refer them to a magistrate judge acting as magistrate judge.

There is statutory authority to appoint a magistrate judge as special master. 28 U.S.C. §636(b)(2). In special circumstances, or when expressly authorized by a statute other than §636(b)(2), it may be appropriate to appoint a magistrate judge as a master when needed to perform functions outside those listed in §636(b)(1). There is no apparent reason to appoint a magistrate judge to perform as master duties that could be performed in the role of magistrate judge. Party consent is required for trial before a magistrate judge, moreover, and this requirement should not be undercut by resort to Rule 53 unless specifically authorized by statute; see 42 U.S.C. §2000e–5(f)(5).

Pretrial Masters. The appointment of masters to participate in pretrial proceedings has developed extensively over the last two decades as some district courts have felt the need for additional help in managing complex litigation. This practice is not well regulated by present Rule 53, which focuses on masters as trial participants. Rule 53 is amended to confirm the authority to appoint—and to regulate the use of—pretrial masters.

A pretrial master should be appointed only when the need is clear. Direct judicial performance of judicial functions may be particularly important in cases that involve important public issues or many parties. At the extreme, a broad delegation of pretrial responsibility as well as a delegation of trial responsibilities can run afoul of Article III.

A master also may be appointed to address matters that blur the divide between pretrial and trial functions. The court's responsibility to interpret patent claims as a matter of law, for example, may be greatly assisted by appointing a master who has expert knowledge of the field in which the patent operates. Review of the master's findings will be de novo under Rule 53(g)(4), but the advantages of initial determination by a master may make the process more effective and timely than disposition by the judge acting alone. Determination of foreign law may present comparable difficulties. The decision whether to appoint a master to address such matters is governed by subdivision (a)(1)(C), not the trial-master provisions of subdivision (a)(1)(B).

Post-Trial Masters. Courts have come to rely on masters to assist in framing and enforcing complex decrees. Present Rule 53 does not directly address this practice. Amended Rule 53 authorizes appointment of post-trial masters for these and similar purposes. The constraint of subdivision (a)(1)(C) limits this practice to cases in which the master's duties cannot be performed effectively and in a timely fashion by an available district judge or magistrate judge of the district.

Reliance on a master is appropriate when a complex decree requires complex policing, particularly when a party has proved resistant or intransigent. This practice has been recognized by the Supreme Court, see *Local 28, Sheet Metal Workers' Internat. Assn. v. EEOC*, 478 U.S. 421, 481–482 (1986). The master's role in enforcement may extend to investigation in ways that are quite unlike the traditional role of judicial officers in an adversary system.

Expert Witness Overlap. This rule does not address the difficulties that arise when a single person is appointed to perform overlapping roles as master and as court-appointed expert witness under Evidence Rule 706. Whatever combination of functions is involved, the Rule 53(a)(1)(B) limit that confines trial masters to issues to be decided by the court does not apply to a person who also is appointed as an expert witness under Evidence Rule 706.

Subdivision (a)(2) and (3). Masters are subject to the Code of Conduct for United States Judges, with exceptions spelled out in the Code. Special care must be taken to ensure that there is no actual or apparent conflict of interest involving a master. The standard of disqualification is established by 28 U.S.C. §455. The affidavit required by Rule 53(b)(3) provides an important source of information about possible grounds for disqualification, but careful inquiry should be made at the time of making the initial appointment. The disqualification standards established by §455 are strict. Because a master is not a public judicial officer, it may be appropriate to permit the parties to consent to appointment of a particular person as master in circumstances that would require disqualification of a judge. The judge must be careful to ensure that no party feels any pressure to consent, but with such assurances—and with the judge's own determination that there is no troubling conflict of interests or disquieting appearance of impropriety—consent may justify an otherwise barred appointment.

One potential disqualification issue is peculiar to the master's role. It may happen that a master who is an attorney represents a client whose litigation is assigned to the judge who appointed the attorney as master. Other parties to the litigation may fear that the attorney-master will gain special respect from the judge. A flat prohibition on appearance before the appointing judge during the time of service as master, however, might in some circumstances unduly limit the opportunity to make a desirable appointment. These matters may be regulated to some extent by state rules of professional responsibility. The question of present conflicts, and the possibility of future conflicts, can be considered at the time of appointment. Depending on the circumstances, the judge may consider it appropriate to impose a non-appearance condition on the lawyer-master, and perhaps on the master's firm as well.

Subdivision (b). The order appointing a pretrial master is vitally important in informing the master and the parties about the nature and extent of the master's duties and authority. Care must be taken to make the order as precise as possible. The parties must be given notice and opportunity to be heard on the question whether a master should be appointed and on the terms of the appointment. To the extent possible, the notice should describe the master's proposed duties, time to complete the duties, standards of review, and compensation. Often it will be useful to engage the parties in the process of identifying the master, inviting nominations, and reviewing potential candidates. Party involvement may be particularly useful if a pretrial master is expected to promote settlement.

The hearing requirement of Rule 53(b)(1) can be satisfied by an opportunity to make written submissions unless the circumstances require live testimony.

Rule 53(b)(2) requires precise designation of the master's duties and authority. Clear identification of any investigating or enforcement duties is particularly important. Clear delineation of topics for any reports or recommendations is also an important part of this process. And it is important to protect against delay by establishing a time schedule for performing the assigned duties. Early designation of the procedure for fixing the master's compensation also may provide useful guidance to the parties.

Ex parte communications between a master and the court present troubling questions. Ordinarily the order should prohibit such communications, assuring that the parties know where authority is lodged at each step of the proceedings. Prohibiting ex parte communications between master and court also can enhance the role of a settlement master by assuring the parties that settlement can be fostered by confidential revelations that will not be shared with the court. Yet there may be circumstances in which the master's role is enhanced by the opportunity for ex parte communications with the court. A master assigned to help coordinate multiple proceedings, for example, may benefit from off-the-record exchanges with the court about logistical matters. The rule does not directly regulate these matters. It requires only that the court exercise its discretion and address the topic in the order of appointment.

Similarly difficult questions surround ex parte communications between a master and the parties. Ex parte communications may be essential in seeking to advance settlement. Ex parte communications also may prove useful in other settings, as with in camera review of documents to resolve privilege questions. In most settings, however, ex parte communications with the parties should be discouraged or prohibited. The rule requires that the court address the topic in the order of appointment.

Subdivision (b)(2)(C) provides that the appointment order must state the nature of the materials to be preserved and filed as the record of the master's activities, and (b)(2)(D) requires that the order state the method of filing the record. It is not feasible to prescribe the nature of the record without regard to the nature of the master's duties. The records appropriate to discovery duties may be different from those appropriate to encouraging settlement, investigating possible violations of a complex decree, or making recommendations for trial findings. A basic requirement, however, is that the master must make and file a complete record of the evidence considered in making or recommending findings of fact on the basis of evidence. The order of appointment should routinely include this requirement unless the nature of the appointment precludes any prospect that the master will make or recommend evidence-based findings of fact. In some circumstances it may be appropriate for a party to file materials directly with the court as provided by Rule 5(e), but in many circumstances filing with the court may be inappropriate. Confidentiality is important with respect to many materials that may properly be considered by a master. Materials in the record can be transmitted to the court, and filed, in connection with review of a master's order, report, or recommendations under subdivisions (f) and (g). Independently of review proceedings, the court may direct filing of any materials that it wishes to make part of the public record.

The provision in subdivision (b)(2)(D) that the order must state the standards for reviewing the master's orders, findings, or recommendations is a reminder of the provisions of subdivision (g)(3) that recognize stipulations for review less searching than the presumptive requirement of de novo decision by the court. Subdivision (b)(2)(D) does not authorize the court to supersede the limits of subdivision (g)(3).

In setting the procedure for fixing the master's compensation, it is useful at the outset to establish specific guidelines to control total expense. The court has power under subdivision (h) to change the basis and terms for determining compensation after notice to the parties.

Subdivision (b)(3) permits entry of the order appointing a master only after the master has filed an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. §455. If the affidavit discloses a possible ground for disqualification, the order can enter only if the court determines that there is no ground for disqualification or if the parties, knowing of the ground for disqualification, consent with the court's approval to waive the disqualification.

The provision in Rule 53(b)(4) for amending the order of appointment is as important as the provisions for the initial order. Anything that could be done in the initial order can be done by amendment. The hearing requirement can be satisfied by an opportunity to make written submissions unless the circumstances require live testimony.

Subdivision (c). Subdivision (c) is a simplification of the provisions scattered throughout present Rule 53. It is intended to provide the broad and flexible authority necessary to discharge the master's responsibilities. The most important delineation of a master's authority and duties is provided by the Rule 53(b) appointing order.

Subdivision (d). The subdivision (d) provisions for evidentiary hearings are reduced from the extensive provisions in current Rule 53. This simplification of the rule is not intended to diminish the authority that may be delegated to a master. Reliance is placed on the broad and general terms of subdivision (c).

Subdivision (e). Subdivision (e) provides that a master's order must be filed and entered on the docket. It must be promptly served on the parties, a task ordinarily accomplished by mailing or other means as permitted by Rule 5(b). In some circumstances it may be appropriate to have the clerk's office assist the master in mailing the order to the parties.

Subdivision (f). Subdivision (f) restates some of the provisions of present Rule 53(e)(1). The report is the master's primary means of communication with the court. The materials to be provided to support review of the report will depend on the nature of the report. The master should provide all portions of the record preserved under Rule 53(b)(2)(C) that the master deems relevant to the report. The parties may designate additional materials from the record, and may seek permission to supplement the record with evidence. The court may direct that additional materials from the record be provided and filed. Given the wide array of tasks that may be assigned to a pretrial master, there may be circumstances that justify sealing a report or review record against public access—a report on continuing or failed settlement efforts is the most likely example. A post-trial master may be assigned duties in formulating a decree that deserve similar protection. Such circumstances may even justify denying access to the report or review materials by the parties, although this step should be taken only for the most compelling reasons. Sealing is much less likely to be appropriate with respect to a trial master's report.

Before formally making an order, report, or recommendations, a master may find it helpful to circulate a draft to the parties for review and comment. The usefulness of this practice depends on the nature of the master's proposed action.

Subdivision (g). The provisions of subdivision (g)(1), describing the court's powers to afford a hearing, take evidence, and act on a master's order, report, or recommendations are drawn from present Rule 53(e)(2), but are not limited, as present Rule 53(e)(2) is limited, to the report of a trial master in a nonjury action. The requirement that the court must afford an opportunity to be heard can be satisfied by taking written submissions when the court acts on the report without taking live testimony.

The subdivision (g)(2) time limits for objecting to—or seeking adoption or modification of—a master's order, report, or recommendations, are important. They are not jurisdictional. Although a court may properly refuse to entertain untimely review proceedings, the court may excuse the failure to seek timely review. The basic time period is lengthened to 20 days because the present 10-day period may be too short to permit thorough study and response to a complex report dealing with complex litigation. If no party asks the court to act on a master's report, the court is free to adopt the master's action or to disregard it at any relevant point in the proceedings.

Subdivision (g)(3) establishes the standards of review for a master's findings of fact or recommended findings of fact. The court must decide de novo all objections to findings of fact made or recommended by the master unless the parties stipulate, with the court's consent, that the findings will be reviewed for clear error or—with respect to a master appointed on the parties' consent or appointed to address pretrial or post-trial matters—that the findings will be final. Clear-error review is more likely to be appropriate with respect to findings that do not go to the merits of the underlying claims or defenses, such as findings of fact bearing on a privilege objection to a discovery request. Even if no objection is made, the court is free to decide the facts de novo; to review for clear error if an earlier approved stipulation provided clear-error review; or to withdraw its consent to a stipulation for clear-error review or finality, and then to decide de novo. If the court withdraws its consent to a stipulation for finality or clear-error review, it may reopen the opportunity to object.

Under Rule 53(g)(4), the court must decide de novo all objections to conclusions of law made or recommended by a master. As with findings of fact, the court also may decide conclusions of law de novo when no objection is made.

Apart from factual and legal questions, masters often make determinations that, when made by a trial court, would be treated as matters of procedural discretion. The court may set a standard for review of such matters in the order of appointment, and may amend the order to establish the standard. If no standard is set by the original or amended order appointing the master, review of procedural matters is for abuse of discretion. The subordinate role of the master means that the trial court's review for abuse of discretion may be more searching than the review that an appellate court makes of a trial court.

If a master makes a recommendation on any matter that does not fall within Rule 53(g)(3), (4), or (5), the court may act on the recommendation under Rule 53(g)(1).

Subdivision (h). The need to pay compensation is a substantial reason for care in appointing private persons as masters.

Payment of the master's fees must be allocated among the parties and any property or subject-matter within the court's control. The amount in controversy and the means of the parties may provide some guidance in making the allocation. The nature of the dispute also may be important—parties pursuing matters of public interest, for example, may deserve special protection. A party whose unreasonable behavior has occasioned the need to appoint a master, on the other hand, may properly be charged all or a major portion of the master's fees. It may be proper to revise an interim allocation after decision on the merits. The revision need not await a decision that is final for purposes of appeal, but may be made to reflect disposition of a substantial portion of the case.

The basis and terms for fixing compensation should be stated in the order of appointment. The court retains power to alter the initial basis and terms, after notice and an opportunity to be heard, but should protect the parties against unfair surprise.

The provision of former Rule 53(a) that the ''provision for compensation shall not apply when a United States Magistrate Judge is designated to serve as a master'' is deleted as unnecessary. Other provisions of law preclude compensation.

Subdivision (i). Rule 53(i) carries forward unchanged former Rule 53(f).

Changes Made After Publication and Comment. Subdivision (a)(3), barring appearance by a master as attorney before the appointing judge during the period of the appointment, is deleted. Subdivision (a)(4) is renumbered as (a)(3).

Subdivision (b)(2) is amended by adding new material to the subparagraph (A), (B,) (C), and (D) specifications of issues that must be addressed in the order appointing a master. (A) now requires a statement of any investigation or enforcement duties. (B) now establishes a presumption that ex parte communications between master and court are limited to administrative matters; the court may, in its discretion, permit ex parte communications on other matters. (C) directs that the order address not only preservation but also filing of the record. (D) requires that the order state the method of filing the record.

Subdivision (b)(3) is changed by requiring an opportunity to be heard on an order amending an appointment order. It also is renumbered as (b)(4).

Subdivision (b)(4), renumbered as (b)(3), is redrafted to express the original meaning more clearly.

Subdivision (c) has a minor style change.

Subdivision (g)(1) is amended to state that in acting on a master's recommendations the court ''must'' afford an opportunity to be heard.

Subdivision (g)(3) is changed to narrow still further the opportunities to depart from de novo determination of objections to a master's findings or recommendations for findings of fact.

Subdivision (g)(4) is changed by deleting the opportunity of the parties to stipulate that a master's conclusions of law will be final.

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, the report of a master, 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, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(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; ATTORNEYS' FEES.

(1) *Costs Other than Attorneys' Fees.* Except when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Such costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

(2) *Attorneys' Fees.*

(A) Claims for attorneys' fees and related nontaxable expenses shall be made by motion unless the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial.

(B) Unless otherwise provided by statute or order of the court, the motion must be filed no later than 14 days after entry of judgment; must specify the judgment and the statute, rule, or other grounds entitling the moving party to the award; and must state the amount or provide a fair estimate of the amount sought. If directed by the court, the motion shall also disclose the terms of any agreement with respect to fees

to be paid for the services for which claim is made.

(C) On request of a party or class member, the court shall afford an opportunity for adversary submissions with respect to the motion in accordance with Rule 43(e) or Rule 78. The court may determine issues of liability for fees before receiving submissions bearing on issues of evaluation of services for which liability is imposed by the court. The court shall find the facts and state its conclusions of law as provided in Rule 52(a).

(D) By local rule the court may establish special procedures by which issues relating to such fees may be resolved without extensive evidentiary hearings. In addition, the court may refer issues relating to the value of services to a special master under Rule 53 without regard to the provisions of Rule 53(a)(1) and may refer a motion for attorneys' fees to a magistrate judge under Rule 72(b) as if it were a dispositive pretrial matter.

(E) The provisions of subparagraphs (A) through (D) do not apply to claims for fees and expenses as sanctions for violations of these rules or under 28 U.S.C. §1927.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Apr. 17, 1961, eff. July 19, 1961; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 29, 2002, eff. Dec. 1, 2002; Mar. 27, 2003, eff. Dec. 1, 2003.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

Note to Subdivision (a). The second sentence is derived substantially from [former] Equity Rule 71 (Form of Decree).

Note to Subdivision (b). This provides for the separate judgment of equity and code practice. See Wis.Stat. (1935) §270.54; Compare N.Y.C.P.A. (1937) §476.

Note to Subdivision (c). For the limitation on default contained in the first sentence, see 2 N.D.Comp.Laws Ann. (1913) §7680; N.Y.C.P.A. (1937) §479. Compare *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 13, r.r. 3–12. The remainder is a usual code provision. It makes clear that a judgment should give the relief to which a party is entitled, regardless of whether it is legal or equitable or both. This necessarily includes the deficiency judgment in foreclosure cases formerly provided for by Equity Rule 10 (Decree for Deficiency in Foreclosures, Etc.).

Note to Subdivision (d). For the present rule in common law actions, see *Ex parte Peterson*, 253 U.S. 300, 40 S.Ct. 543, 64 L.Ed. 919 (1920); Payne, *Costs in Common Law Actions in the Federal Courts* (1935), 21 Va.L.Rev. 397.

The provisions as to costs in actions in *forma pauperis* contained in U.S.C., Title 28, §§832–836 [now 1915] are unaffected by this rule. Other sections of U.S.C., Title 28, which are unaffected by this rule are: §§815 [former] (Costs; plaintiff not entitled to, when), 821 [now 1928] (Costs; infringement of patent; disclaimer), 825 (Costs; several actions), 829 [now 1927] (Costs; attorney liable for, when), and 830 [now 1920] (Costs; bill of; taxation).

The provisions of the following and similar statutes as to costs against the United States and its officers and agencies are specifically continued:

U.S.C., Title 15, §§77v(a), 78aa, 79y (Securities and Exchange Commission)
U.S.C., Title 16, §825p (Federal Power Commission)
U.S.C., Title 26, [former] §§1569(d) and 1645(d) (Internal revenue actions)
U.S.C., Title 26, [former] §1670(b)(2) (Reimbursement of costs of recovery against revenue officers)
U.S.C., Title 28, [former] §817 (Internal revenue actions)
U.S.C., Title 28, §836 [now 1915] (United States—actions in *forma pauperis)*
U.S.C., Title 28, §842 [now 2006] (Actions against revenue officers)
U.S.C., Title 28, §870 [now 2408] (United States—in certain cases)
U.S.C., Title 28, [former] §906 (United States—foreclosure actions)
U.S.C., Title 47, §401 (Communications Commission)

The provisions of the following and similar statutes as to costs are unaffected:

U.S.C., Title 7, §210(f) (Actions for damages based on an order of the Secretary of Agriculture under Stockyards Act)
U.S.C., Title 7, §499g(c) (Appeals from reparations orders of Secretary of Agriculture under Perishable Commodities Act)
U.S.C., Title 8, [former] §45 (Action against district attorneys in certain cases)
U.S.C., Title 15, §15 (Actions for injuries due to violation of antitrust laws)
U.S.C., Title 15, §72 (Actions for violation of law forbidding importation or sale of articles at less than market value or wholesale prices)
U.S.C., Title 15, §77k (Actions by persons acquiring securities registered with untrue statements under Securities Act of 1933)
U.S.C., Title 15, §78i(e) (Certain actions under the Securities Exchange Act of 1934)
U.S.C., Title 15, §78r (Similar to 78i(e))
U.S.C., Title 15, §96 (Infringement of trade-mark—damages)
U.S.C., Title 15, §99 (Infringement of trade-mark—injunctions)
U.S.C., Title 15, §124 (Infringement of trade-mark—damages)
U.S.C., Title 19, §274 (Certain actions under customs law)
U.S.C., Title 30, §32 (Action to determine right to possession of mineral lands in certain cases)
U.S.C., Title 31, §§232 [now 3730] and [former] 234 (Action for making false claims upon United States)
U.S.C., Title 33, §926 (Actions under Harbor Workers' Compensation Act)
U.S.C., Title 35, §67 [now 281, 284] (Infringement of patent—damages)
U.S.C., Title 35, §69 [now 282] (Infringement of patent—pleading and proof)
U.S.C., Title 35, §71 [now 288] (Infringement of patent—when specification too broad)
U.S.C., Title 45, §153p (Actions for non-compliance with an order of National R. R. Adjustment Board for payment of money)
U.S.C., Title 46, [former] §38 (Action for penalty for failure to register vessel)
U.S.C., Title 46, [former] §829 (Action based on non-compliance with an order of Maritime Commission for payment of money)
U.S.C., Title 46, §941 [now 31304] (Certain actions under Ship Mortgage Act)
U.S.C., Title 46 [App.], §1227 (Actions for damages for violation of certain provisions of the Merchant Marine Act, 1936)
U.S.C., Title 47, §206 (Actions for certain violations of Communications Act of 1934)
U.S.C., Title 49, §16(2) [see 11704, 15904] (Action based on non-compliance with an order of I. C. C. for payment of money)

NOTES OF ADVISORY COMMITTEE ON RULES—1946 AMENDMENT

The historic rule in the federal courts has always prohibited piecemeal disposal of litigation and permitted appeals only from final judgments except in those special instances covered by statute. *Hohorst v. Hamburg-American Packet Co.* (1893) 148 U.S. 262; *Rexford v. Brunswick-Balke-Collender Co.* (1913) 228 U.S. 339; *Collins v. Miller* (1920) 252 U.S. 364. Rule 54(b) was originally adopted in view of the wide scope and possible content of the newly created ''civil action'' in order to avoid the pos-

sible injustice of a delay in judgment of a distinctly separate claim to await adjudication of the entire case. It was not designed to overturn the settled federal rule stated above, which, indeed, has more recently been reiterated in *Catlin v. United States* (1945) 324 U.S. 229. See also *United States v. Florian* (1941) 312 U.S. 656, rev'g (and restoring the first opinion in) *Florian v. United States* (C.C.A.7th, 1940) 114 F.(2d) 990; *Reeves v. Beardall* (1942) 316 U.S. 283.

Unfortunately, this was not always understood, and some confusion ensued. Hence situations arose where district courts made a piecemeal disposition of an action and entered what the parties thought amounted to a judgment, although a trial remained to be had on other claims similar or identical with those disposed of. In the interim the parties did not know their ultimate rights, and accordingly took an appeal, thus putting the finality of the partial judgment in question. While most appellate courts have reached a result generally in accord with the intent of the rule, yet there have been divergent precedents and division of views which have served to render the issues more clouded to the parties appellant. It hardly seems a case where multiplicity of precedents will tend to remove the problem from debate. The problem is presented and discussed in the following cases: *Atwater v. North American Coal Corp.* (C.C.A.2d, 1940) 111 F.(2d) 125; *Rosenblum v. Dingfelder* (C.C.A.2d, 1940) 111 F.(2d) 406; *Audi-Vision, Inc. v. RCA Mfg. Co., Inc.* (C.C.A.2d, 1943) 136 F.(2d) 621; *Zalkind v. Scheinman* (C.C.A.2d, 1943) 139 F.(2d) 895; *Oppenheimer v. F. J. Young & Co., Inc.* (C.C.A.2d, 1944) 144 F.(2d) 387; *Libbey-Owens-Ford Glass Co. v. Sylvania Industrial Corp.* (C.C.A.2d, 1946) 154 F.(2d) 814, cert. den. (1946) 66 S.Ct. 1353; *Zarati Steamship Co. v. Park Bridge Corp.* (C.C.A.2d, 1946) 154 F.(2d) 377; *Baltimore and Ohio R. Co. v. United Fuel Gas Co.* (C.C.A.4th, 1946) 154 F.(2d) 545; *Jefferson Electric Co. v. Sola Electric Co.* (C.C.A.7th, 1941) 122 F.(2d) 124; *Leonard v. Socony-Vacuum Oil Co.* (C.C.A.7th, 1942) 130 F.(2d) 535; *Markham v. Kasper* (C.C.A.7th, 1945) 152 F.(2d) 270; *Hanney v. Franklin Fire Ins. Co. of Philadelphia* (C.C.A.9th, 1944) 142 F.(2d) 864; *Toomey v. Toomey* (App.D.C. 1945) 149 F.(2d) 19.

In view of the difficulty thus disclosed, the Advisory Committee in its two preliminary drafts of proposed amendments attempted to redefine the original rule with particular stress upon the interlocutory nature of partial judgments which did not adjudicate all claims arising out of a single transaction or occurrence. This attempt appeared to meet with almost universal approval from those of the profession commenting upon it, although there were, of course, helpful suggestions for additional changes in language or clarification of detail. But *cf.* Circuit Judge Frank's dissenting opinion in *Libbey-Owens-Ford Glass Co. v. Sylvania Industrial Corp., supra*, n. 21 of the dissenting opinion. The Committee, however, became convinced on careful study of its own proposals that the seeds of ambiguity still remained, and that it had not completely solved the problem of piecemeal appeals. After extended consideration, it concluded that a retention of the older federal rule was desirable, and that this rule needed only the exercise of a discretionary power to afford a remedy in the infrequent harsh case to provide a simple, definite, workable rule. This is afforded by amended Rule 54(b). It re-establishes an ancient policy with clarity and precision. For the possibility of staying execution where not all claims are disposed of under Rule 54(b), see amended Rule 62(h).

NOTES OF ADVISORY COMMITTEE ON RULES—1961 AMENDMENT

This rule permitting appeal, upon the trial court's determination of "no just reason for delay," from a judgment upon one or more but fewer than all the claims in an action, has generally been given a sympathetic construction by the courts and its validity is settled. *Reeves v. Beardall*, 316 U.S. 283 (1942); *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427 (1956); *Cold Metal Process Co. v. United Engineering & Foundry Co.*, 351 U.S. 445 (1956).

A serious difficulty has, however, arisen because the rule speaks of claims but nowhere mentions parties. A line of cases has developed in the circuits consistently holding the rule to be inapplicable to the dismissal, even with the requisite trial court determination, of one or more but fewer than all defendants jointly charged in an action, *i.e.* charged with various forms of concerted or related wrongdoing or related liability. See *Mull v. Ackerman*, 279 F.2d 25 (2d Cir. 1960); *Richards v. Smith*, 276 F.2d 652 (5th Cir. 1960); *Hardy v. Bankers Life & Cas. Co.*, 222 F.2d 827 (7th Cir. 1955); *Steiner v. 20th Century-Fox Film Corp.*, 220 F.2d 105 (9th Cir. 1955). For purposes of Rule 54(b) it was arguable that there were as many "claims" as there were parties defendant and that the rule in its present text applied where less than all of the parties were dismissed, *cf. United Artists Corp. v. Masterpiece Productions, Inc.*, 221 F.2d 213, 215 (2d Cir. 1955); *Bowling Machines, Inc. v. First Nat. Bank*, 283 F.2d 39 (1st Cir. 1960); but the Courts of Appeals are now committed to an opposite view.

The danger of hardship through delay of appeal until the whole action is concluded may be at least as serious in the multiple-parties situations as in multiple-claims cases, see *Pabellon v. Grace Line, Inc.*, 191 F.2d 169, 179 (2d Cir. 1951), *cert. denied*, 342 U.S. 893 (1951), and courts and commentators have urged that Rule 54(b) be changed to take in the former. See *Reagan v. Traders & General Ins. Co.*, 255 F.2d 845 (5th Cir. 1958); *Meadows v. Greyhound Corp.*, 235 F.2d 233 (5th Cir. 1956); *Steiner v. 20th Century-Fox Film Corp., supra*; 6 *Moore's Federal Practice* ¶54.34[2] (2d ed. 1953); 3 Barron & Holtzoff, *Federal Practice & Procedure* §1193.2 (Wright ed. 1958); *Developments in the Law—Multiparty Litigation*, 71 Harv.L.Rev. 874, 981 (1958); Note, 62 Yale L.J. 263, 271 (1953); Ill.Ann.Stat. ch. 110, §50(2) (Smith-Hurd 1956). The amendment accomplishes this purpose by referring explicitly to parties.

There has been some recent indication that interlocutory appeal under the provisions of 28 U.S.C. §1292(b), added in 1958, may now be available for the multiple-parties cases here considered. See *Jaftex Corp. v. Randolph Mills, Inc.*, 282 F.2d 508 (2d Cir. 1960). The Rule 54(b) procedure seems preferable for those cases, and §1292(b) should be held inapplicable to them when the rule is enlarged as here proposed. See *Luckenbach Steamship Co., Inc., v. H. Muehlstein & Co., Inc.*, 280 F.2d 755, 757 (2d Cir. 1960); 1 Barron & Holtzoff, *supra*, §58.1, p. 321 (Wright ed. 1960).

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendment is technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1993 AMENDMENT

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

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

Paragraph (2). This new paragraph establishes a procedure for presenting claims for attorneys' fees, whether or not denominated as "costs." It applies also to requests for reimbursement of expenses, not taxable as costs, when recoverable under governing law incident to the award of fees. *Cf. West Virginia Univ. Hosp. v. Casey*, ____ U.S. ____ (1991), holding, prior to the Civil Rights Act of 1991, that expert witness fees were not recoverable under 42 U.S.C. §1988. As noted in subparagraph (A), it does not, however, apply to fees recoverable as an element of damages, as when sought under

the terms of a contract; such damages typically are to be claimed in a pleading and may involve issues to be resolved by a jury. Nor, as provided in subparagraph (E), does it apply to awards of fees as sanctions authorized or mandated under these rules or under 28 U.S.C. § 1927.

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

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

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

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

If directed by the court, the moving party is also required to disclose any fee agreement, including those between attorney and client, between attorneys sharing a fee to be awarded, and between adversaries made in partial settlement of a dispute where the settlement must be implemented by court action as may be required by Rules 23(e) and 23.1 or other like provisions. With respect to the fee arrangements requiring court approval, the court may also by local rule require disclosure immediately after such arrangements are agreed to. *E.g.*, Rule 5 of United States District Court for the Eastern District of New York; *cf. In re ''Agent Orange'' Product Liability Litigation (MDL 381)*, 611 F. Supp. 1452, 1464 (E.D.N.Y. 1985).

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

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

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

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

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

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

Subparagraph (D) explicitly authorizes the court to establish procedures facilitating the efficient and fair resolution of fee claims. A local rule, for example, might call for matters to be presented through affidavits, or might provide for issuance of proposed findings by the court, which would be treated as accepted by the parties unless objected to within a specified time. A court might also consider establishing a schedule reflecting customary fees or factors affecting fees within the community, as implicitly suggested by Justice O'Connor in *Pennsylvania v. Delaware Valley Citizens' Council*, 483 U.S. 711, 733 (1987) (O'Connor, J., concurring) (how particular markets compensate for contingency). *Cf. Thompson v. Kennickell*, 710 F. Supp. 1 (D.D.C. 1989) (use of findings in other cases to promote consistency). The parties, of course, should be permitted to show that in the circumstances of the case such a schedule should not be applied or that different hourly rates would be appropriate.

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

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

COMMITTEE NOTES ON RULES—2002 AMENDMENT

Subdivision (d)(2)(C) is amended to delete the requirement that judgment on a motion for attorney fees be set forth in a separate document. This change complements the amendment of Rule 58(a)(1), which deletes the separate document requirement for an order disposing of a motion for attorney fees under Rule 54. These changes are made to support amendment of Rule 4 of the Federal Rules of Appellate Procedure. It continues to be important that a district court make clear its meaning when it intends an order to be the final disposition of a motion for attorney fees.

The requirement in subdivision (d)(2)(B) that a motion for attorney fees be not only filed but also served no later than 14 days after entry of judgment is

changed to require filing only, to establish a parallel with Rules 50, 52, and 59. Service continues to be required under Rule 5(a).

COMMITTEE NOTES ON RULES—2003 AMENDMENT

Rule 54(d)(2)(D) is revised to reflect amendments to Rule 53.

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 the party's default.

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

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

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

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

(e) JUDGMENT AGAINST THE UNITED STATES. No judgment by default shall be entered against the United States or an officer or agency thereof unless the claimant establishes a claim or right to relief by evidence satisfactory to the court.

(As amended Mar. 2, 1987, eff. Aug. 1, 1987.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

This represents the joining of the equity decree *pro confesso* ([former] Equity Rules 12 (Issue of Subpoena—Time for Answer), 16 (Defendant to Answer—Default—Decree *Pro Confesso*), 17 (Decree *Pro Confesso* to be Followed by Final Decree—Setting Aside Default), 29 (Defenses—How Presented), 31 (Reply—When Required—When Cause at Issue)) and the judgment by default now governed by U.S.C., Title 28, [former] §724 (Conformity act). For dismissal of an action for failure to comply with these rules or any order of the court, see rule 41(b).

Note to Subdivision (a). The provision for the entry of default comes from the Massachusetts practice, 2 Mass.Gen.Laws (Ter.Ed., 1932) ch. 231, §57. For affidavit of default, see 2 Minn.Stat. (Mason, 1927) §9256.

Note to Subdivision (b). The provision in paragraph (1) for the entry of judgment by the clerk when plaintiff claims a sum certain is found in the N.Y.C.P.A. (1937) §485, in Calif.Code Civ.Proc. (Deering, 1937) §585(1), and in Conn.Practice Book (1934) §47. For provisions similar to paragraph (2), compare Calif.Code, *supra*, §585(2); N.Y.C.P.A. (1937) §490; 2 Minn.Stat. (Mason, 1927) §9256(3); 2 Wash.Rev.Stat.Ann. (Remington, 1932) §411(2). U.S.C., Title 28, §785 (Action to recover forfeiture in bond) and similar statutes are preserved by the last clause of paragraph (2).

Note to Subdivision (e). This restates substantially the last clause of U.S.C., Title 28, [former] §763 (Action against the United States under the Tucker Act). As this rule governs in all actions against the United States, U.S.C., Title 28, [former] §45 (Practice and procedure in certain cases under the interstate commerce laws) and similar statutes are modified insofar as they contain anything inconsistent therewith.

NOTES OF ADVISORY COMMITTEE ON RULES—1946 SUPPLEMENTARY NOTE

Note. The operation of Rule 55(b) (Judgment) is directly affected by the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U.S.C. [App.] §501 *et seq.*). Section 200 of the Act [50 U.S.C. Appendix, §520] imposes specific requirements which must be fulfilled before a default judgment can be entered (*e.g.*, *Ledwith v. Storkan* (D.Neb. 1942) 6 Fed.Rules Serv. 60b.24, Case 2, 2 F.R.D. 539, and also provides for the vacation of a judgment in certain circumstances. See discussion in Commentary, *Effect of Conscription Legislation on the Federal Rules* (1940) 3 Fed.Rules Serv. 725; 3 *Moore's Federal Practice* (1938) Cum.Supplement §55.02.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

Rule 56. Summary Judgment

(a) FOR CLAIMANT. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

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

(c) MOTION AND PROCEEDINGS THEREON. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on

file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

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

(e) FORM OF AFFIDAVITS; FURTHER TESTIMONY; DEFENSE REQUIRED. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

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

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

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Mar. 2, 1987, eff. Aug. 1, 1987.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

This rule is applicable to all actions, including those against the United States or an officer or agency thereof.

Summary judgment procedure is a method for promptly disposing of actions in which there is no genuine issue as to any material fact. It has been extensively used in England for more than 50 years and has been adopted in a number of American states. New York, for example, has made great use of it. During the first nine years after its adoption there, the records of New York county alone show 5,600 applications for summary judgments. *Report of the Commission on the Administration of Justice in New York State* (1934), p. 383. See also *Third Annual Report of the Judicial Council of the State of New York* (1937), p. 30.

In England it was first employed only in cases of liquidated claims, but there has been a steady enlargement of the scope of the remedy until it is now used in actions to recover land or chattels and in all other actions at law, for liquidated or unliquidated claims, except for a few designated torts and breach of promise of marriage. *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 3, r. 6; Orders 14, 14A, and 15; see also O. 32, r. 6, authorizing an application for judgment at any time upon admissions. In Michigan (3 Comp.Laws (1929) §14260) and Illinois (Ill.Rev.Stat. (1937) ch. 110, §§181, 259.15, 259.16), it is not limited to liquidated demands. New York (N.Y.R.C.P. (1937) Rule 113; see also Rule 107) has brought so many classes of actions under the operation of the rule that the Commission on Administration of Justice in New York State (1934) recommend that all restrictions be removed and that the remedy be available "in any action" (p. 287). For the history and nature of the summary judgment procedure and citations of state statutes, see Clark and Samenow, *The Summary Judgment* (1929), 38 Yale L.J. 423.

Note to Subdivision (d). See Rule 16 (Pre-Trial Procedure; Formulating Issues) and the *Note* thereto.

Note to Subdivisions (e) and (f). These are similar to rules in Michigan. Mich.Court Rules Ann. (Searl, 1933) Rule 30.

NOTES OF ADVISORY COMMITTEE ON RULES—1946 AMENDMENT

Subdivision (a). The amendment allows a claimant to move for a summary judgment at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party. This will normally operate to permit an earlier motion by the claimant than under the original rule, where the phrase "at any time after the pleading in answer thereto has been served" operates to prevent a claimant from moving for summary judgment, even in a case clearly proper for its exercise, until a formal answer has been filed. Thus in *Peoples Bank v. Federal Reserve Bank of San Francisco* (N.D.Cal. 1944) 58 F.Supp. 25, the plaintiff's counter-motion for a summary judgment was stricken as premature, because the defendant had not filed an answer. Since Rule 12(a) allows at least 20 days for an answer, that time plus the 10 days required in Rule 56(c) means that under original Rule 56(a) a minimum period of 30 days necessarily has to elapse in every case before the claimant can be heard on his right to a summary judgment. An extension of time by the court or the service of preliminary motions of any kind will prolong that period even further. In many cases this merely represents unnecessary delay. See *United States v. Adler's Creamery, Inc.* (C.C.A.2d, 1939) 107 F.(2d) 987. The changes are in the interest of more expeditious litigation. The 20-day period, as provided, gives the defendant an opportunity to secure counsel and determine a course of action. But in a case where the defendant himself serves a motion for summary judgment within that time, there is no reason to restrict the plaintiff and the amended rule so provides.

Subdivision (c). The amendment of Rule 56(c), by the addition of the final sentence, resolves a doubt ex-

pressed in *Sartor v. Arkansas Natural Gas Corp.* (1944) 321 U.S. 620. See also Commentary, *Summary Judgment as to Damages* (1944) 7 Fed.Rules Serv. 974; *Madeirense Do Brasil S/A v. Stulman-Emrick Lumber Co.* (C.C.A.2d, 1945) 147 F.(2d) 399, cert. den. (1945) 325 U.S. 861. It makes clear that although the question of recovery depends on the amount of damages, the summary judgment rule is applicable and summary judgment may be granted in a proper case. If the case is not fully adjudicated it may be dealt with as provided in subdivision (d) of Rule 56, and the right to summary recovery determined by a preliminary order, interlocutory in character, and the precise amount of recovery left for trial.

Subdivision (d). Rule 54(a) defines ''judgment'' as including a decree and ''any order from which an appeal lies.'' Subdivision (d) of Rule 56 indicates clearly, however, that a partial summary ''judgment'' is not a final judgment, and, therefore, that it is not appealable, unless in the particular case some statute allows an appeal from the interlocutory order involved. The partial summary judgment is merely a pretrial adjudication that certain issues shall be deemed established for the trial of the case. This adjudication is more nearly akin to the preliminary order under Rule 16, and likewise serves the purpose of speeding up litigation by eliminating before trial matters wherein there is no genuine issue of fact. See *Leonard v. Socony-Vacuum Oil Co.* (C.C.A.7th, 1942) 130 F.(2d) 535; *Biggins v. Oltmer Iron Works* (C.C.A.7th, 1946) 154 F.(2d) 214; 3 *Moore's Federal Practice* (1938). 3190–3192. Since interlocutory appeals are not allowed, except where specifically provided by statute (see 3 *Moore, op. cit. supra*, 3155–3156) this interpretation is in line with that policy, *Leonard v. Socony-Vacuum Oil Co., supra*. See also *Audi Vision Inc., v. RCA Mfg. Co.* (C.C.A.2d, 1943) 136 F.(2d) 621; *Toomey v. Toomey* (App.D.C. 1945) 149 F.(2d) 19; *Biggins v. Oltmer Iron Works, supra; Catlin v. United States* (1945) 324 U.S. 229.

NOTES OF ADVISORY COMMITTEE ON RULES—1963 AMENDMENT

Subdivision (c). By the amendment ''answers to interrogatories'' are included among the materials which may be considered on motion for summary judgment. The phrase was inadvertently omitted from the rule, see 3 Barron & Holtzoff, *Federal Practice and Procedure* 159–60 (Wright ed. 1958), and the courts have generally reached by interpretation the result which will hereafter be required by the text of the amended rule. See Annot., 74 A.L.R.2d 984 (1960).

Subdivision (e). The words ''answers to interrogatories'' are added in the third sentence of this subdivision to conform to the amendment of subdivision (c).

The last two sentences are added to overcome a line of cases, chiefly in the Third Circuit, which has impaired the utility of the summary judgment device. A typical case is as follows: A party supports his motion for summary judgment by affidavits or other evidentiary matters sufficient to show that there is no genuine issue as to a material fact. The adverse party, in opposing the motion, does not produce any evidentiary matter, or produces some but not enough to establish that there is a genuine issue for trial. Instead, the adverse party rests on averments of his pleadings which on their face present an issue. In this situation Third Circuit cases have taken the view that summary judgment must be denied, at least if the averments are ''well-pleaded,'' and not suppositious, conclusory, or ultimate. See *Frederick Hart & Co., Inc. v. Recordgraph Corp.*, 169 F.2d 580 (3d Cir. 1948); *United States ex rel. Kolton v. Halpern*, 260 F.2d 590 (3d Cir. 1958); *United States ex rel. Nobles v. Ivey Bros. Constr. Co., Inc.*, 191 F.Supp. 383 (D.Del. 1961); *Jamison v. Pennsylvania Salt Mfg. Co.*, 22 F.R.D. 238 (W.D.Pa. 1958); *Bunny Bear, Inc. v. Dennis Mitchell Industries*, 139 F.Supp. 542 (E.D.Pa. 1956); *Levy v. Equitable Life Assur. Society*, 18 F.R.D. 164 (E.D.Pa. 1955).

The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial. The Third Circuit doctrine, which permits the pleadings themselves to stand in the way of granting an otherwise justified summary judgment, is incompatible with the basic purpose of the rule. See 6 *Moore's Federal Practice* 2069 (2d ed. 1953); 3 Barron & Holtzoff, supra, §1235.1.

It is hoped that the amendment will contribute to the more effective utilization of the salutary device of summary judgment.

The amendment is not intended to derogate from the solemnity of the pleadings. Rather it recognizes that, despite the best efforts of counsel to make his pleadings accurate, they may be overwhelmingly contradicted by the proof available to his adversary.

Nor is the amendment designed to affect the ordinary standards applicable to the summary judgment motion. So, for example: Where an issue as to a material fact cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility, summary judgment is not appropriate. Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented. And summary judgment may be inappropriate where the party opposing it shows under subdivision (f) that he cannot at the time present facts essential to justify his opposition.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

Rule 57. Declaratory Judgments

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

(As amended Dec. 29, 1948, eff. Oct. 20, 1949.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

The fact that a declaratory judgment may be granted ''whether or not further relief is or could be prayed'' indicates that declaratory relief is alternative or cumulative and not exclusive or extraordinary. A declaratory judgment is appropriate when it will ''terminate the controversy'' giving rise to the proceeding. Inasmuch as it often involves only an issue of law on undisputed or relatively undisputed facts, it operates frequently as a summary proceeding, justifying docketing the case for early hearing as on a motion, as provided for in California (Code Civ.Proc. (Deering, 1937) §1062a), Michigan (3 Comp.Laws (1929) §13904), and Kentucky (Codes (Carroll, 1932) Civ.Pract. §639a–3).

The ''controversy'' must necessarily be ''of a justiciable nature, thus excluding an advisory decree upon a hypothetical state of facts.'' *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 325, 56 S.Ct. 466, 473, 80 L.Ed. 688, 699 (1936). The existence or nonexistence of any right, duty, power, liability, privilege, disability, or immunity or of any fact upon which such legal relations depend, or of a status, may be declared. The petitioner must have a practical interest in the declaration sought and all parties having an interest therein or adversely affected must be made parties or be cited. A declaration may not be rendered if a special statutory proceeding has been provided for the adjudication of some special type of case, but general ordinary or extraordinary legal remedies, whether regulated by statute or not, are not deemed special statutory proceedings.

When declaratory relief will not be effective in settling the controversy, the court may decline to grant it. But the fact that another remedy would be equally effective affords no ground for declining declaratory relief. The demand for relief shall state with precision the declaratory judgment desired, to which may be joined a demand for coercive relief, cumulatively or in the alternative; but when coercive relief only is sought but is deemed ungrantable or inappropriate, the court may *sua sponte*, if it serves a useful purpose, grant instead a declaration of rights. *Hasselbring v. Koepke*, 263 Mich. 466, 248 N.W. 869, 93 A.L.R. 1170 (1933). Written instruments, including ordinances and statutes, may be construed before or after breach at the petition of a properly interested party, process being served on the private parties or public officials interested. In other respects the Uniform Declaratory Judgment Act affords a guide to the scope and function of the Federal act. Compare *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 57 S.Ct. 461 (1937); *Nashville, Chattanooga & St. Louis Ry. v. Wallace*, 288 U.S. 249 (1933); *Gully, Tax Collector v. Interstate Natural Gas Co.*, 82 F.(2d) 145 (C.C.A.5th, 1936); *Ohio Casualty Ins. Co. v. Plummer*, 13 F.Supp. 169 (S.D.Tex., 1935); Borchard, Declaratory Judgments (1934), *passim*.

NOTES OF ADVISORY COMMITTEE ON RULES—1948 AMENDMENT

The amendment substitutes the present statutory reference.

Rule 58. Entry of Judgment

(a) SEPARATE DOCUMENT.

(1) Every judgment and amended judgment must be set forth on a separate document, but a separate document is not required for an order disposing of a motion:

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

(B) to amend or make additional findings of fact under Rule 52(b);

(C) for attorney fees under Rule 54;

(D) for a new trial, or to alter or amend the judgment, under Rule 59; or

(E) for relief under Rule 60.

(2) Subject to Rule 54(b):

(A) unless the court orders otherwise, the clerk must, without awaiting the court's direction, promptly prepare, sign, and enter the judgment when:

(i) the jury returns a general verdict,

(ii) the court awards only costs or a sum certain, or

(iii) the court denies all relief;

(B) the court must promptly approve the form of the judgment, which the clerk must promptly enter, when:

(i) the jury returns a special verdict or a general verdict accompanied by interrogatories, or

(ii) the court grants other relief not described in Rule 58(a)(2).

(b) TIME OF ENTRY. Judgment is entered for purposes of these rules:

(1) if Rule 58(a)(1) does not require a separate document, when it is entered in the civil docket under Rule 79(a), and

(2) if Rule 58(a)(1) requires a separate document, when it is entered in the civil docket under Rule 79(a) and when the earlier of these events occurs:

(A) when it is set forth on a separate document, or

(B) when 150 days have run from entry in the civil docket under Rule 79(a).

(c) COST OR FEE AWARDS.

(1) Entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees, except as provided in Rule 58(c)(2).

(2) When a timely motion for attorney fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and has become effective to order that the motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59.

(d) REQUEST FOR ENTRY. A party may request that judgment be set forth on a separate document as required by Rule 58(a)(1).

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 29, 2002, eff. Dec. 1, 2002.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

See Wis.Stat. (1935) §270.31 (judgment entered forthwith on verdict of jury unless otherwise ordered), §270.65 (where trial is by the court, entered by direction of the court), §270.63 (entered by clerk on judgment on admitted claim for money). Compare 1 Idaho Code Ann. (1932) §7–1101, and 4 Mont.Rev.Codes Ann. (1935) §9403, which provides that judgment in jury cases be entered by clerk within 24 hours after verdict unless court otherwise directs. Conn. Practice Book (1934) §200, provides that all judgments shall be entered within one week after rendition. In some States such as Washington, 2 Rev.Stat.Ann. (Remington, 1932) §431, in jury cases the judgment is entered two days after the return of verdict to give time for making motion for new trial; §435 (*ibid.*), provides that all judgments shall be entered by the clerk, subject to the court's direction.

NOTES OF ADVISORY COMMITTEE ON RULES—1946 AMENDMENT

The reference to Rule 54(b) is made necessary by the amendment of that rule.

Two changes have been made in Rule 58 in order to clarify the practice. The substitution of the more inclusive phrase ''all relief be denied'' for the words ''there be no recovery'', makes it clear that the clerk shall enter the judgment forthwith in the situations specified without awaiting the filing of a formal judgment approved by the court. The phrase ''all relief be denied'' covers cases such as the denial of a bankrupt's discharge and similar situations where the relief sought is refused but there is literally no denial of a ''recovery''.

The addition of the last sentence in the rule emphasizes that judgments are to be entered promptly by the clerk without waiting for the taxing of costs. Certain district court rules, for example, Civil Rule 22 of the Southern District of New York—until its annulment Oct. 1, 1945, for conflict with this rule—and the like rule of the Eastern District of New York, are expressly in conflict with this provision, although the federal law is of long standing and well settled. *Fowler v. Hamill* (1891) 139 U.S. 549; *Craig v. The Hartford* (C.C.Cal. 1856) Fed.Case No. 3,333; *Tuttle v. Claflin* (C.C.A.2d, 1895) 60 Fed. 7, cert. den. (1897) 166 U.S. 721; *Prescott & A. C. Ry. Co. v. Atchison, T. & S. F. R. Co.* (C.C.A.2d, 1897) 84 Fed. 213; *Stallo v. Wagner* (C.C.A.2d, 1917) 245 Fed. 636, 639–40; *Brown v. Parker* (C.C.A.8th, 1899) 97 Fed. 446; *Allis-Chalmers v. United States* (C.C.A.7th, 1908) 162 Fed. 679. And this applies even though state law is to the contrary. *United States v. Nordbye* (C.C.A.8th, 1935) 75 F.(2d) 744, 746, cert. den. (1935) 296 U.S. 572. Inasmuch as it has been held that failure of the clerk thus enter judgment is a ''misprision'' ''not to be excused'' *(The Washington*

(C.C.A.2d, 1926) 16 F.(2d) 206), such a district court rule may have serious consequences for a district court clerk. Rules of this sort also provide for delay in entry of the judgment contrary to Rule 58. See *Commissioner of Internal Revenue v. Bedford's Estate* (1945) 325 U.S. 283.

NOTES OF ADVISORY COMMITTEE ON RULES—1963 AMENDMENT

Under the present rule a distinction has sometimes been made between judgments on general jury verdicts, on the one hand, and, on the other, judgments upon decisions of the court that a party shall recover only money or costs or that all relief shall be denied. In the first situation, it is clear that the clerk should enter the judgment without awaiting a direction by the court unless the court otherwise orders. In the second situation it was intended that the clerk should similarly enter the judgment forthwith upon the court's decision; but because of the separate listing in the rule, and the use of the phrase "upon receipt . . . of the direction," the rule has sometimes been interpreted as requiring the clerk to await a separate direction of the court. All these judgments are usually uncomplicated, and should be handled in the same way. The amended rule accordingly deals with them as a single group in clause (1) (substituting the expression "only a sum certain" for the present expression "only money"), and requires the clerk to prepare, sign, and enter them forthwith, without awaiting court direction, unless the court makes a contrary order. (The clerk's duty is ministerial and may be performed by a deputy clerk in the name of the clerk. See 28 U.S.C. § 956; *cf. Gilbertson v. United States*, 168 Fed. 672 (7th Cir. 1909).) The more complicated judgments described in clause (2) must be approved by the court before they are entered.

Rule 58 is designed to encourage all reasonable speed in formulating and entering the judgment when the case has been decided. Participation by the attorneys through the submission of forms of judgment involves needless expenditure of time and effort and promotes delay, except in special cases where counsel's assistance can be of real value. See *Matteson v. United States*, 240 F.2d 517, 518–19 (2d Cir. 1956). Accordingly, the amended rule provides that attorneys shall not submit forms of judgment unless directed to do so by the court. This applies to the judgments mentioned in clause (2) as well as clause (1).

Hitherto some difficulty has arisen, chiefly where the court has written an opinion or memorandum containing some apparently directive or dispositive words, e.g., "the plaintiff's motion [for summary judgment] is granted," see *United States v. F. & M. Schaefer Brewing Co.*, 356 U.S. 227, 229, 78 S.Ct. 674, 2 L.Ed.2d 721 (1958). Clerks on occasion have viewed these opinions or memoranda as being in themselves a sufficient basis for entering judgment in the civil docket as provided by Rule 79(a). However, where the opinion or memorandum has not contained all the elements of a judgment, or where the judge has later signed a formal judgment, it has become a matter of doubt whether the purported entry of judgment was effective, starting the time running for postverdict motions and for the purpose of appeal. See *id.;* and *compare Blanchard v. Commonwealth Oil Co.*, 294 F.2d 834 (5th Cir. 1961); *United States v. Higginson*, 238 F.2d 439 (1st Cir. 1956); *Danzig v. Virgin Isle Hotel, Inc.*, 278 F.2d 580 (3d Cir. 1960); *Sears v. Austin*, 282 F.2d 340 (9th Cir. 1960), with *Matteson v. United States, supra; Erstling v. Southern Bell Tel. & Tel. Co.*, 255 F.2d 93 (5th Cir. 1958); *Barta v. Oglala Sioux Tribe*, 259 F.2d 553 (8th Cir. 1958), *cert. denied*, 358 U.S. 932, 79 S.Ct. 320, 3 L.Ed.2d 304 (1959); *Beacon Fed. S. & L. Assn. v. Federal Home L. Bank Bd.*, 266 F.2d 246 (7th Cir.), cert. denied, 361 U.S. 823, 80 S.Ct. 70, 4 L.Ed.2d 67 (1959); *Ram v. Paramount Film D. Corp.*, 278 F.2d 191 (4th Cir. 1960).

The amended rule eliminates these uncertainties by requiring that there be a judgment set out on a separate document—distinct from any opinion or memorandum—which provides the basis for the entry of judgment. That judgments shall be on separate documents is also indicated in Rule 79(b); and see General Rule 10 of the U.S. District Courts for the Eastern and Southern Districts of New York; *Ram v. Paramount Film D. Corp., supra*, at 194.

See the amendment of Rule 79(a) and the new specimen forms of judgment, Forms 31 and 32.

See also Rule 55(b)(1) and (2) covering the subject of judgments by default.

NOTES OF ADVISORY COMMITTEE ON RULES—1993 AMENDMENT

Ordinarily the pendency or post-judgment filing of a claim for attorney's fees will not affect the time for appeal from the underlying judgment. *See Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988). Particularly if the claim for fees involves substantial issues or is likely to be affected by the appellate decision, the district court may prefer to defer consideration of the claim for fees until after the appeal is resolved. However, in many cases it may be more efficient to decide fee questions before an appeal is taken so that appeals relating to the fee award can be heard at the same time as appeals relating to the merits of the case. This revision permits, but does not require, the court to delay the finality of the judgment for appellate purposes under revised Fed. R. App. P. 4(a) until the fee dispute is decided. To accomplish this result requires entry of an order by the district court before the time a notice of appeal becomes effective for appellate purposes. If the order is entered, the motion for attorney's fees is treated in the same manner as a timely motion under Rule 59.

COMMITTEE NOTES ON RULES—2002 AMENDMENT

Rule 58 has provided that a judgment is effective only when set forth on a separate document and entered as provided in Rule 79(a). This simple separate document requirement has been ignored in many cases. The result of failure to enter judgment on a separate document is that the time for making motions under Rules 50, 52, 54(d)(2)(B), 59, and some motions under Rule 60, never begins to run. The time to appeal under Appellate Rule 4(a) also does not begin to run. There have been few visible problems with respect to Rule 50, 52, 54(d)(2)(B), 59, or 60 motions, but there have been many and horridly confused problems under Appellate Rule 4(a). These amendments are designed to work in conjunction with Appellate Rule 4(a) to ensure that appeal time does not linger on indefinitely, and to maintain the integration of the time periods set for Rules 50, 52, 54(d)(2)(B), 59, and 60 with Appellate Rule 4(a).

Rule 58(a) preserves the core of the present separate document requirement, both for the initial judgment and for any amended judgment. No attempt is made to sort through the confusion that some courts have found in addressing the elements of a separate document. It is easy to prepare a separate document that recites the terms of the judgment without offering additional explanation or citation of authority. Forms 31 and 32 provide examples.

Rule 58 is amended, however, to address a problem that arises under Appellate Rule 4(a). Some courts treat such orders as those that deny a motion for new trial as a "judgment," so that appeal time does not start to run until the order is entered on a separate document. Without attempting to address the question whether such orders are appealable, and thus judgments as defined by Rule 54(a), the amendment provides that entry on a separate document is not required for an order disposing of the motions listed in Appellate Rule 4(a). The enumeration of motions drawn from the Appellate Rule 4(a) list is generalized by omitting details that are important for appeal time purposes but that would unnecessarily complicate the separate document requirement. As one example, it is not required that any of the enumerated motions be timely. Many of the enumerated motions are frequently made before judgment is entered. The exemption of the order disposing of the motion does not excuse the obligation to set forth the judgment itself on a separate document. And

if disposition of the motion results in an amended judgment, the amended judgment must be set forth on a separate document.

Rule 58(b) discards the attempt to define the time when a judgment becomes ''effective.'' Taken in conjunction with the Rule 54(a) definition of a judgment to include ''any order from which an appeal lies,'' the former Rule 58 definition of effectiveness could cause strange difficulties in implementing pretrial orders that are appealable under interlocutory appeal provisions or under expansive theories of finality. Rule 58(b) replaces the definition of effectiveness with a new provision that defines the time when judgment is entered. If judgment is promptly set forth on a separate document, as should be done when required by Rule 58(a)(1), the new provision will not change the effect of Rule 58. But in the cases in which court and clerk fail to comply with this simple requirement, the motion time periods set by Rules 50, 52, 54, 59, and 60 begin to run after expiration of 150 days from entry of the judgment in the civil docket as required by Rule 79(a).

A companion amendment of Appellate Rule 4(a)(7) integrates these changes with the time to appeal.

The new all-purpose definition of the entry of judgment must be applied with common sense to other questions that may turn on the time when judgment is entered. If the 150-day provision in Rule 58(b)(2)(B)—designed to integrate the time for post-judgment motions with appeal time—serves no purpose, or would defeat the purpose of another rule, it should be disregarded. In theory, for example, the separate document requirement continues to apply to an interlocutory order that is appealable as a final decision under collateral-order doctrine. Appealability under collateral-order doctrine should not be complicated by failure to enter the order as a judgment on a separate document—there is little reason to force trial judges to speculate about the potential appealability of every order, and there is no means to ensure that the trial judge will always reach the same conclusion as the court of appeals. Appeal time should start to run when the collateral order is entered without regard to creation of a separate document and without awaiting expiration of the 150 days provided by Rule 58(b)(2). Drastic surgery on Rules 54(a) and 58 would be required to address this and related issues, however, and it is better to leave this conundrum to the pragmatic disregard that seems its present fate. The present amendments do not seem to make matters worse, apart from one false appearance. If a pretrial order is set forth on a separate document that meets the requirements of Rule 58(b), the time to move for reconsideration seems to begin to run, perhaps years before final judgment. And even if there is no separate document, the time to move for reconsideration seems to begin 150 days after entry in the civil docket. This apparent problem is resolved by Rule 54(b), which expressly permits revision of all orders not made final under Rule 54(b) ''at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.''

New Rule 58(d) replaces the provision that attorneys shall not submit forms of judgment except on direction of the court. This provision was added to Rule 58 to avoid the delays that were frequently encountered by the former practice of directing the attorneys for the prevailing party to prepare a form of judgment, and also to avoid the occasionally inept drafting that resulted from attorney-prepared judgments. See *11 Wright, Miller & Kane, Federal Practice & Procedure: Civil 2d, § 2786*. The express direction in Rule 58(a)(2) for prompt action by the clerk, and by the court if court action is required, addresses this concern. The new provision allowing any party to move for entry of judgment on a separate document will protect all needs for prompt commencement of the periods for motions, appeals, and execution or other enforcement.

Changes Made After Publication and Comments. Minor style changes were made. The definition of the time of entering judgment in Rule 58(b) was extended to reach all Civil Rules, not only the Rules described in the published version—Rules 50, 52, 54(d)(2)(B), 59, 60, and 62. And the time of entry was extended from 60 days to 150 days after entry in the civil docket without a required separate document.

REFERENCES IN TEXT

The Federal Rules of Appellate Procedure, referred to in subd. (c)(2), are set out in this Appendix.

Rule 59. New Trials; Amendment of Judgments

(a) GROUNDS. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) TIME FOR MOTION. Any motion for a new trial shall be filed no later than 10 days after entry of the judgment.

(c) TIME FOR SERVING AFFIDAVITS. When a motion for new trial is based on affidavits, they shall be filed with the motion. The opposing party has 10 days after service to file opposing affidavits, but that period may be extended for up to 20 days, either by the court for good cause or by the parties' written stipulation. The court may permit reply affidavits.

(d) ON COURT'S INITIATIVE; NOTICE; SPECIFYING GROUNDS. No later than 10 days after entry of judgment the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. When granting a new trial on its own initiative or for a reason not stated in a motion, the court shall specify the grounds in its order.

(e) MOTION TO ALTER OR AMEND JUDGMENT. Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Feb. 28, 1966, eff. July 1, 1966; Apr. 27, 1995, eff. Dec. 1, 1995.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

This rule represents an amalgamation of the petition for rehearing of [former] Equity Rule 69 (Petition for Rehearing) and the motion for new trial of U.S.C., Title 28, § 391 [see 2111] (New trials; harmless error), made in the light of the experience and provision of the code States. Compare Calif.Code Civ.Proc. (Deering, 1937) §§ 656–663a, U.S.C., Title 28, § 391 [see 2111] (New trials; harmless error) is thus substantially continued in this rule. U.S.C., Title 28, [former] § 840 (Executions; stay on conditions) is modified insofar as it contains time provisions inconsistent with *Subdivision (b)*. For the effect of the motion for new trial upon the time for taking an appeal see *Morse v. United States*, 270 U.S. 151 (1926); *Aspen Mining and Smelting Co. v. Billings*, 150 U.S. 31 (1893).

For partial new trials which are permissible under *Subdivision (a)*, see *Gasoline Products Co., Inc., v.*

Champlin Refining Co., 283 U.S. 494 (1931); *Schuerholz v. Roach*, 58 F.(2d) 32 (C.C.A.4th, 1932); *Simmons v. Fish*, 210 Mass. 563, 97 N.E. 102, Ann.Cas.1912D, 588 (1912) (sustaining and recommending the practice and citing Federal cases and cases in accord from about sixteen States and *contra* from three States). The procedure in several States provides specifically for partial new trials. Ariz.Rev.Code Ann. (Struckmeyer, 1928) §3852; Calif.Code Civ.Proc. (Deering, 1937) §§657, 662; Ill.Rev.Stat. (1937) ch. 110, §216 (par. (f)); Md.Ann.Code (Bagby, 1924) Art. 5, §§25, 26; Mich.Court Rules Ann. (Searl, 1933) Rule 47, §2; Miss.Sup.Ct. Rule 12, 161 Miss. 903, 905 (1931); N.J.Sup.Ct. Rules 131, 132, 147, 2 N.J.Misc. 1197, 1246–1251, 1255 (1924); 2 N.D.Comp.Laws Ann. (1913), §7844, as amended by N.D.Laws 1927, ch. 214.

NOTES OF ADVISORY COMMITTEE ON RULES—1946 AMENDMENT

Subdivision (b). With the time for appeal to a circuit court of appeals reduced in general to 30 days by the proposed amendment of Rule 73(a), the utility of the original ''except'' clause, which permits a motion for a new trial on the ground of newly discovered evidence to be made before the expiration of the time for appeal, would have been seriously restricted. It was thought advisable, therefore, to take care of this matter in another way. By amendment of Rule 60(b), newly discovered evidence is made the basis for relief from a judgment, and the maximum time limit has been extended to one year. Accordingly the amendment of Rule 59(b) eliminates the ''except'' clause and its specific treatment of newly discovered evidence as a ground for a motion for new trial. This ground remains, however, as a basis for a motion for new trial served not later than 10 days after the entry of judgment. See also Rule 60(b).

As to the effect of a motion under subdivision (b) upon the running of appeal time, see amended Rule 73(a) and Note.

Subdivision (e). This subdivision has been added to care for a situation such as that arising in *Boaz v. Mutual Life Ins. Co. of New York* (C.C.A.8th, 1944) 146 F.(2d) 321, and makes clear that the district court possesses the power asserted in that case to alter or amend a judgment after its entry. The subdivision deals only with alteration or amendment of the original judgment in a case and does not relate to a judgment upon motion as provided in Rule 50(b). As to the effect of a motion under subdivision (e) upon the running of appeal time, see amended Rule 73(a) and Note.

The title of Rule 59 has been expanded to indicate the inclusion of this subdivision.

NOTES OF ADVISORY COMMITTEE ON RULES—1966 AMENDMENT

By narrow interpretation of Rule 59(b) and (d), it has been held that the trial court is without power to grant a motion for a new trial, timely served, by an order made more than 10 days after the entry of judgment, based upon a ground not stated in the motion but perceived and relied on by the trial court sua sponte. *Freid v. McGrath*, 133 F.2d 350 (D.C.Cir. 1942); *National Farmers Union Auto. & Cas. Co. v. Wood*, 207 F.2d 659 (10th Cir. 1953); *Bailey v. Slentz*, 189 F.2d 406 (10th Cir. 1951); *Marshall's U.S. Auto Supply, Inc. v. Cashman*, 111 F.2d 140 (10th Cir. 1940), cert. denied, 311 U.S. 667 (1940); but see *Steinberg v. Indemnity Ins. Co.*, 36 F.R.D. 253 (E.D.La. 1964).

The result is undesirable. Just as the court has power under Rule 59(d) to grant a new trial of its own initiative within the 10 days, so it should have power, when an effective new trial motion has been made and is pending, to decide it on grounds thought meritorious by the court although not advanced in the motion. The second sentence added by amendment to Rule 59(d) confirms the court's power in the latter situation, with provision that the parties be afforded a hearing before the power is exercised. See 6 *Moore's Federal Practice*, par. 59.09[2] (2d ed. 1953).

In considering whether a given ground has or has not been advanced in the motion made by the party, it should be borne in mind that the particularity called for in stating the grounds for a new trial motion is the same as that required for all motions by Rule 7(b)(1). The latter rule does not require ritualistic detail but rather a fair indication to court and counsel of the substance of the grounds relied on. See *Lebeck v. William A. Jarvis Co.*, 250 F.2d 285 (3d Cir. 1957); *Tsai v. Rosenthal*, 297 F.2d 614 (8th Cir. 1961); *General Motors Corp. v. Perry*, 303 F.2d 544 (7th Cir. 1962); *cf. Grimm v. California Spray-Chemical Corp.*, 264 F.2d 145 (9th Cir. 1959); *Cooper v. Midwest Feed Products Co.*, 271 F.2d 177 (8th Cir. 1959).

NOTES OF ADVISORY COMMITTEE ON RULES—1995 AMENDMENT

The only change, other than stylistic, intended by this revision is to add explicit time limits for filing motions for a new trial, motions to alter or amend a judgment, and affidavits opposing a new trial motion. Previously, there was an inconsistency in the wording of Rules 50, 52, and 59 with respect to whether certain post-judgment motions had to be filed, or merely served, during the prescribed period. This inconsistency caused special problems when motions for a new trial were joined with other post-judgment motions. These motions affect the finality of the judgment, a matter often of importance to third persons as well as the parties and the court. The Committee believes that each of these rules should be revised to require filing before end of the 10-day period. Filing is an event that can be determined with certainty from court records. The phrase ''no later than'' is used—rather than ''within''—to include post-judgment motions that sometimes are filed before actual entry of the judgment by the clerk. It should be noted that under Rule 5 the motions when filed are to contain a certificate of service on other parties. It also should be noted that under Rule 6(a) Saturdays, Sundays, and legal holidays are excluded in measuring the 10-day period, but that Bankruptcy Rule 9006(a) excludes intermediate Saturdays, Sundays, and legal holidays only in computing periods less than 8 days.

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 a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons

(1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., §1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Mar. 2, 1987, eff. Aug. 1, 1987.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

Note to Subdivision (a). See [former] Equity Rule 72 (Correction of Clerical Mistakes in Orders and Decrees); Mich.Court Rules Ann. (Searl, 1933) Rule 48, §3; 2 Wash.Rev.Stat.Ann. (Remington, 1932) §464(3); Wyo.Rev.Stat.Ann. (Courtright, 1931) §89–2301(3). For an example of a very liberal provision for the correction of clerical errors and for amendment after judgment, see Va.Code Ann. (Michie, 1936) §§6329, 6333.

Note to Subdivision (b). Application to the court under this subdivision does not extend the time for taking an appeal, as distinguished from the motion for new trial. This section is based upon Calif.Code Civ.Proc. (Deering, 1937) §473. See also N.Y.C.P.A. (1937) §108; 2 Minn.Stat. (Mason, 1927) §9283.

For the independent action to relieve against mistake, etc., see Dobie, *Federal Procedure*, pages 760–765, compare 639; and Simkins, *Federal Practice*, ch. CXXI (pp. 820–830) and ch. CXXII (pp. 831–834), compare §214.

NOTES OF ADVISORY COMMITTEE ON RULES—1946 AMENDMENT

Subdivision (a). The amendment incorporates the view expressed in *Perlman v. 322 West Seventy-Second Street Co., Inc.* (C.C.A.2d, 1942) 127 F.(2d) 716; 3 *Moore's Federal Practice* (1938) 3276, and further permits correction after docketing, with leave of the appellate court. Some courts have thought that upon the taking of an appeal the district court lost its power to act. See *Schram v. Safety Investment Co.* (E.D.Mich. 1942) 45 F.Supp. 636; also *Miller v. United States* (C.C.A.7th, 1940) 114 F.(2d) 267.

Subdivision (b). When promulgated, the rules contained a number of provisions, including those found in Rule 60(b), describing the practice by a motion to obtain relief from judgments, and these rules, coupled with the reservation in Rule 60(b) of the right to entertain a new action to relieve a party from a judgment, were generally supposed to cover the field. Since the rules have been in force, decisions have been rendered that the use of bills of review, *coram nobis*, or *audita querela*, to obtain relief from final judgments is still proper, and that various remedies of this kind still exist although they are not mentioned in the rules and the practice is not prescribed in the rules. It is obvious that the rules should be complete in this respect and define the practice with respect to any existing rights or remedies to obtain relief from final judgments. For extended discussion of the old common law writs and equitable remedies, the interpretation of Rule 60, and proposals for change, see Moore and Rogers, *Federal Relief from Civil Judgments* (1946) 55 Yale L.J. 623. See also 3 *Moore's Federal Practice* (1938) 3254 *et seq.*; Commentary, *Effect of Rule 60b on Other Methods of Relief From Judgment* (1941) 4 Fed.Rules Serv. 942, 945; *Wallace v. United States* (C.C.A.2d, 1944) 142 F.(2d) 240, cert. den. (1944) 323 U.S. 712.

The reconstruction of Rule 60(b) has for one of its purposes a clarification of this situation. Two types of procedure to obtain relief from judgments are specified in the rules as it is proposed to amend them. One procedure is by motion in the court and in the action in which the judgment was rendered. The other procedure is by a new or independent action to obtain relief from a judgment, which action may or may not be begun in the court which rendered the judgment. Various rules, such as the one dealing with a motion for new trial and for amendment of judgments, Rule 59, one for amended findings, Rule 52, and one for judgment notwithstanding the verdict, Rule 50(b), and including the provisions of Rule 60(b) as amended, prescribe the various types of cases in which the practice by motion is permitted. In each case there is a limit upon the time within which resort to a motion is permitted, and this time limit may not be enlarged under Rule 6(b). If the right to make a motion is lost by the expiration of the time limits fixed in these rules, the only other procedural remedy is by a new or independent action to set aside a judgment upon those principles which have heretofore been applied in such an action. Where the independent action is resorted to, the limitations of time are those of laches or statutes of limitations. The Committee has endeavored to ascertain all the remedies and types of relief heretofore available by *coram nobis*, *coram vobis*, *audita querela*, bill of review, or bill in the nature of a bill of review. See Moore and Rogers, *Federal Relief from Civil Judgments* (1946) 55 Yale L.J. 623, 659–682. It endeavored then to amend the rules to permit, either by motion or by independent action, the granting of various kinds of relief from judgments which were permitted in the federal courts prior to the adoption of these rules, and the amendment concludes with a provision abolishing the use of bills of review and the other common law writs referred to, and requiring the practice to be by motion or by independent action.

To illustrate the operation of the amendment, it will be noted that under Rule 59(b) as it now stands, without amendment, a motion for new trial on the ground of newly discovered evidence is permitted within ten days after the entry of the judgment, or after that time upon leave of the court. It is proposed to amend Rule 59(b) by providing that under that rule a motion for new trial shall be served not later than ten days after the entry of the judgment, whatever the ground be for the motion, whether error by the court or newly discovered evidence. On the other hand, one of the purposes of the bill of review in equity was to afford relief on the ground of newly discovered evidence long after the entry of the judgment. Therefore, to permit relief by a motion similar to that heretofore obtained on bill of review, Rule 60(b) as amended permits an application for relief to be made by motion, on the ground of newly discovered evidence, within one year after judgment. Such a motion under Rule 60(b) does not affect the finality of the judgment, but a motion under Rule 59, made within 10 days, does affect finality and the running of the time for appeal.

If these various amendments, including principally those to Rule 60(b), accomplish the purpose for which they are intended, the federal rules will deal with the practice in every sort of case in which relief from final judgments is asked, and prescribe the practice. With reference to the question whether, as the rules now exist, relief by *coram nobis*, bills of review, and so forth, is permissible, the generally accepted view is that the remedies are still available, although the precise relief obtained in a particular case by use of these ancillary remedies is shrouded in ancient lore and mystery. See *Wallace v. United States* (C.C.A.2d, 1944) 142 F.(2d) 240, cert. den. (1944) 323 U.S. 712; *Fraser v. Doing* (App.D.C. 1942) 130 F.(2d) 617; *Jones v. Watts* (C.C.A.5th, 1944) 142 F.(2d) 575; *Preveden v. Hahn* (S.D.N.Y. 1941) 36 F.Supp. 952; *Cavallo v. Agwilines, Inc.* (S.D.N.Y. 1942) 6 Fed.Rules Serv. 60b.31, Case 2, 2 F.R.D. 526; *McGinn v. United States*

(D.Mass. 1942) 6 Fed.Rules Serv. 60b.51, Case 3, 2 F.R.D. 562; *City of Shattuck, Oklahoma ex rel. Versluis v. Oliver* (W.D.Okla. 1945) 8 Fed.Rules Serv. 60b.31, Case 3; Moore and Rogers, *Federal Relief from Civil Judgments* (1946) 55 Yale L.J. 623, 631–653; 3 *Moore's Federal Practice* (1938) 3254 *et seq.*; Commentary, *Effect of Rule 60b on Other Methods of Relief From Judgment, op. cit. supra. Cf. Norris v. Camp* (C.C.A.10th, 1944) 144 F.(2d) 1; *Reed v. South Atlantic Steamship Co. of Delaware* (D.Del. 1942) 6 Fed.Rules Serv. 60b.31, Case 1; *Laughlin v. Berens* (D.D.C. 1945) 8 Fed.Rules Serv. 60b.51, Case 1, 73 W.L.R. 209.

The transposition of the words ''the court'' and the addition of the word ''and'' at the beginning of the first sentence are merely verbal changes. The addition of the qualifying word ''final'' emphasizes the character of the judgments, orders or proceedings from which Rule 60(b) affords relief; and hence interlocutory judgments are not brought within the restrictions of the rule, but rather they are left subject to the complete power of the court rendering them to afford such relief from them as justice requires.

The qualifying pronoun ''his'' has been eliminated on the basis that it is too restrictive, and that the subdivision should include the mistake or neglect of others which may be just as material and call just as much for supervisory jurisdiction as where the judgment is taken against the party through *his* mistake, inadvertence, etc.

Fraud, whether intrinsic or extrinsic, misrepresentation, or other misconduct of an adverse party are express grounds for relief by motion under amended subdivision (b). There is no sound reason for their exclusion. The incorporation of fraud and the like within the scope of the rule also removes confusion as to the proper procedure. It has been held that relief from a judgment obtained by extrinsic fraud could be secured by motion within a ''reasonable time,'' which might be after the time stated in the rule had run. *Fiske v. Buder* (C.C.A.8th, 1942) 125 F.(2d) 841; see also inferentially *Bucy v. Nevada Construction Co.* (C.C.A.9th, 1942) 125 F.(2d) 213. On the other hand, it has been suggested that in view of the fact that fraud was omitted from original Rule 60(b) as a ground for relief, an independent action was the only proper remedy. Commentary, *Effect of Rule 60b on Other Methods of Relief From Judgment* (1941) 4 Fed.Rules Serv. 942, 945. The amendment settles this problem by making fraud an express ground for relief by motion; and under the saving clause, fraud may be urged as a basis for relief by independent action insofar as established doctrine permits. See Moore and Rogers, *Federal Relief from Civil Judgments* (1946) 55 Yale L.J. 623, 653–659; 3 *Moore's Federal Practice* (1938) 3267 *et seq.* And the rule expressly does not limit the power of the court, when fraud has been perpetrated upon it, to give relief under the saving clause. As an illustration of this situation, see *Hazel-Atlas Glass Co. v. Hartford Empire Co.* (1944) 322 U.S. 238.

The time limit for relief by motion in the court and in the action in which the judgment was rendered has been enlarged from six months to one year.

It should be noted that Rule 60(b) does not assume to define the substantive law as to the grounds for vacating judgments, but merely prescribes the practice in proceedings to obtain relief.

It should also be noted that under § 200(4) of the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U.S.C. [App.] § 501 *et seq.* [§ 520(4)]), a judgment rendered in any action or proceeding governed by the section may be vacated under certain specified circumstances upon proper application to the court.

NOTES OF ADVISORY COMMITTEE ON RULES—1948 AMENDMENT

The amendment substitutes the present statutory reference.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendment is technical. No substantive change is intended.

Rule 61. Harmless Error

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

NOTES OF ADVISORY COMMITTEE ON RULES—1937

A combination of U.S.C., Title 28, §§ 391 [see 2111] (New trials; harmless error) and [former] 777 (Defects of form; amendments) with modifications. See *McCandless v. United States*, 298 U.S. 342 (1936). Compare [former] Equity Rule 72 (Correction of Clerical Mistakes in Orders and Decrees); and last sentence of [former] Equity Rule 46 (Trial—Testimony Usually Taken in Open Court—Rulings on Objections to Evidence). For the last sentence see the last sentence of [former] Equity Rule 19 (Amendments Generally).

Rule 62. Stay of Proceedings To Enforce a Judgment

(a) AUTOMATIC STAY; EXCEPTIONS—INJUNCTIONS, RECEIVERSHIPS, AND PATENT ACCOUNTINGS. Except as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action, or a judgment or order directing an accounting in an action for infringement of letters patent, shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal. The provisions of subdivision (c) of this rule govern the suspending, modifying, restoring, or granting of an injunction during the pendency of an appeal.

(b) STAY ON MOTION FOR NEW TRIAL OR FOR JUDGMENT. In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60, or of a motion for judgment in accordance with a motion for a directed verdict made pursuant to Rule 50, or of a motion for amendment to the findings or for additional findings made pursuant to Rule 52(b).

(c) INJUNCTION PENDING APPEAL. When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. If the judgment appealed from is rendered by a district court of three judges specially constituted pursuant to a statute of the United States, no such order shall be made except (1) by such court sitting in open court or (2)

by the assent of all the judges of such court evidenced by their signatures to the order.

(d) STAY UPON APPEAL. When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.

(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) STAY ACCORDING TO STATE LAW. In any state in which a judgment is a lien upon the property of the judgment debtor and in which the judgment debtor is entitled to a stay of execution, a judgment debtor is entitled, in the district court held therein, to such stay as would be accorded the judgment debtor had the action been maintained in the courts of that state.

(g) POWER OF APPELLATE COURT NOT LIMITED. The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.

(h) STAY OF JUDGMENT AS TO MULTIPLE CLAIMS OR MULTIPLE PARTIES. When a court has ordered a final judgment under the conditions stated in Rule 54(b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Apr. 17, 1961, eff. July 19, 1961; Mar. 2, 1987, eff. Aug. 1, 1987.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

Note to Subdivision (a). The first sentence states the substance of the last sentence of U.S.C., Title 28, [former] §874 (Supersedeas). The remainder of the subdivision states the substance of the last clause of U.S.C., Title 28, [former] §227 (Appeals in proceedings for injunctions; receivers; and admiralty), and of [former] §227a (Appeals in suits in equity for infringement of letters patent for inventions; stay of proceedings for accounting), but extended to include final as well as interlocutory judgments.

Note to Subdivision (b). This modifies U.S.C., Title 28, [former] §840 (Executions; stay on conditions).

Note to Subdivision (c). Compare [former] Equity Rule 74 (Injunction Pending Appeal); and *Cumberland Telephone and Telegraph Co. v. Louisiana Public Service Commission*, 260 U.S. 212 (1922). See Simkins, *Federal Practice* (1934) §916 in regard to the effect of appeal on injunctions and the giving of bonds. See U.S.C., [former] Title 6 (Official and Penal Bonds) for bonds by surety companies. For statutes providing for a specially constituted district court of three judges, see:

U.S.C., Title 7:

§217 (Proceedings for suspension of orders of Secretary of Agriculture under Stockyards Act)—by reference.

§499k (Injunctions; application of injunction laws governing orders of Interstate Commerce Commission to orders of Secretary of Agriculture under Perishable Commodities Act)—by reference.

U.S.C., Title 15:

§28 (Antitrust laws; suits against monopolies expedited)

U.S.C., Title 28:

§47 [now 2325] (Injunctions as to orders of Interstate Commerce Commission, etc.)

§380 [now 2284] (Injunctions; alleged unconstitutionality of State statutes.)

§380a [now 2284] (Same; constitutionality of federal statute)

U.S.C., Title 49:

§44 [former] (Suits in equity under interstate commerce laws; expedition of suits)

Note to Subdivision (d). This modifies U.S.C., Title 28, [former] §874 (Supersedeas). See Rule 36(2), Rules of the Supreme Court of the United States, which governs supersedeas bonds on direct appeals to the Supreme Court, and Rule 73(d), of these rules, which governs supersedeas bonds on appeals to a circuit court of appeals. The provisions governing supersedeas bonds in both kinds of appeals are substantially the same.

Note to Subdivision (e). This states the substance of U.S.C., Title 28, §870 [now 2408] (Bond; not required of the United States).

Note to Subdivision (f). This states the substance of U.S.C., Title 28, [former] §841 (Executions; stay of one term) with appropriate modification to conform to the provisions of Rule 6(c) as to terms of court.

NOTES OF ADVISORY COMMITTEE ON RULES—1946 AMENDMENT

Subdivision (a). [This subdivision not amended]. Sections 203 and 204 of the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U.S.C. [App.] §501 *et seq.* [§§523, 524]) provide under certain circumstances for the issuance and continuance of a stay of execution of any judgment or order entered against a person in military service. See *Bowsman v. Peterson* (D.Neb. 1942) 45 F.Supp. 741. Section 201 of the Act [50 U.S.C. App. §521] permits under certain circumstances the issuance of a stay of any action or proceeding at any stage thereof, where either the plaintiff or defendant is a person in military service. See also Note to Rule 64 herein.

Subdivision (b). This change was necessary because of the proposed addition to Rule 59 of subdivision (e).

Subdivision (h). In proposing to revise Rule 54(b), the Committee thought it advisable to include a separate provision in Rule 62 for stay of enforcement of a final judgment in cases involving multiple claims.

NOTES OF ADVISORY COMMITTEE ON RULES—1948 AMENDMENT

Section 210 of the Judicial Code, as amended, U.S.C., Title 28, §47a, is repealed by revised Title 28 and its provisions that stays pending appeals to the Supreme Court in Interstate Commerce Commission cases may be granted only by that court or a justice thereof are not included in revised Title 28. Prior to this repeal the additional general reference in subdivision (g) to ''other statutes of the United States'', was needed as a safety residual provision due to the specific reference to Section 210 of the Judicial Code. With the repeal of this latter section there is no need for the residual provision, which has no present applicability; and to the extent that any statute is enacted providing ''that stays pending appeals to the Supreme Court may be granted only by that court or a justice thereof'' it will govern and will not be inconsistent or repugnant to subdivision (g) as amended.

NOTES OF ADVISORY COMMITTEE ON RULES—1961 AMENDMENT

These changes conform to the amendment of Rule 54(b).

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendment is technical. No substantive change is intended.

Rule 63. Inability of a Judge to Proceed

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

(As amended Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

This rule adapts and extends the provisions of U.S.C., Title 28, [former] §776 (Bill of exceptions; authentication; signing of by judge) to include all duties to be performed by the judge after verdict or judgment. The statute is therefore superseded.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1991 AMENDMENT

The revision substantially displaces the former rule. The former rule was limited to the disability of the judge, and made no provision for disqualification or possible other reasons for the withdrawal of the judge during proceedings. In making provision for other circumstances, the revision is not intended to encourage judges to discontinue participation in a trial for any but compelling reasons. Cf. *United States v. Lane*, 708 F.2d 1394, 1395–1397 (9th cir. 1983). Manifestly, a substitution should not be made for the personal convenience of the court, and the reasons for a substitution should be stated on the record.

The former rule made no provision for the withdrawal of the judge during the trial, but was limited to disqualification after trial. Several courts concluded that the text of the former rule prohibited substitution of a new judge prior to the points described in the rule, thus requiring a new trial, whether or not a fair disposition was within reach of a substitute judge. *E.g.*, *Whalen v. Ford Motor Credit Co.*, 684 F.2d 272 (4th Cir. 1982, en banc) *cert. denied*, 459 U.S. 910 (1982) (jury trial); *Arrow-Hart, Inc. v. Philip Carey Co.*, 552 F.2d 711 (6th Cir. 1977) (non-jury trial). *See generally* Comment, *The Case of the Dead Judge: Fed.R.Civ.P. 63: Whalen v. Ford Motor Credit Co.*, 67 MINN. L. REV. 827 (1983).

The increasing length of federal trials has made it likely that the number of trials interrupted by the disability of the judge will increase. An efficient mechanism for completing these cases without unfairness is needed to prevent unnecessary expense and delay. To avoid the injustice that may result if the substitute judge proceeds despite unfamiliarity with the action, the new Rule provides, in language similar to Federal Rule of Criminal Procedure 25(a), that the successor judge must certify familiarity with the record and determine that the case may be completed before that judge without prejudice to the parties. This will necessarily require that there be available a transcript or a videotape of the proceedings prior to substitution. If there has been a long but incomplete jury trial, the prompt availability of the transcript or videotape is crucial to the effective use of this rule, for the jury cannot long be held while an extensive transcript is prepared without prejudice to one or all parties.

The revised text authorizes the substitute judge to make a finding of fact at a bench trial based on evidence heard by a different judge. This may be appropriate in limited circumstances. First, if a witness has become unavailable, the testimony recorded at trial can be considered by the successor judge pursuant to F.R.Ev. 804, being equivalent to a recorded deposition available for use at trial pursuant to Rule 32. For this purpose, a witness who is no longer subject to a subpoena to compel testimony at trial is unavailable. Secondly, the successor judge may determine that particular testimony is not material or is not disputed, and so need not be reheard. The propriety of proceeding in this manner may be marginally affected by the availability of a videotape record; a judge who has reviewed a trial on videotape may be entitled to greater confidence in his or her ability to proceed.

The court would, however, risk error to determine the credibility of a witness not seen or heard who is available to be recalled. Cf. *Anderson v. City of Bessemer City NC*, 470 U.S. 564, 575 (1985); *Marshall v. Jerrico Inc*, 446 U.S. 238, 242 (1980). See also *United States v. Radatz*, 447 U.S. 667 (1980).

VIII. PROVISIONAL AND FINAL REMEDIES

Rule 64. Seizure of Person or Property

At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, subject to the following qualifications: (1) any existing statute of the United States governs to the extent to which it is applicable; (2) the action in which any of the foregoing remedies is used shall be commenced and prosecuted or, if removed from a state court, shall be prosecuted after removal, pursuant to these rules. The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action.

NOTES OF ADVISORY COMMITTEE ON RULES—1937

This rule adopts the existing Federal law, except that it specifies the applicable State law to be that of the time when the remedy is sought. Under U.S.C., Title 28, [former] §726 (Attachments as provided by State laws) the plaintiff was entitled to remedies by attachment or other process which were on June 1, 1872, provided by the applicable State law, and the district courts might, from time to time, by general rules, adopt such State laws as might be in force. This statute is superseded as are district court rules which are rendered unnecessary by the rule.

Lis pendens. No rule concerning *lis pendens* is stated, for this would appear to be a matter of substantive law affecting State laws of property. It has been held that in the absence of a State statute expressly providing for the recordation of notice of the pendency of Federal

actions, the commencement of a Federal action is notice to all persons affected. *King v. Davis*, 137 Fed. 198 (W.D.Va., 1903). It has been held, however, that when a State statute does so provide expressly, its provisions are binding. *United States v. Calcasieu Timber Co.*, 236 Fed. 196 (C.C.A.5th, 1916).

For statutes of the United States on attachment, see e.g.:

U.S.C., Title 28:

§ 737 [now 2710] (Attachment in postal suits)
§ 738 [now 2711] (Attachment; application for warrant)
§ 739 [now 2712] (Attachment; issue of warrant)
§ 740 [now 2713] (Attachment; trial of ownership of property)
§ 741 [now 2714] (Attachment; investment of proceeds of attached property)
§ 742 [now 2715] (Attachment; publication of attachment)
§ 743 [now 2716] (Attachment; personal notice of attachment)
§ 744 [now 2717] (Attachment; discharge; bond)
§ 745 [former] (Attachment; accrued rights not affected)
§ 746 (Attachments dissolved in conformity with State laws)

For statutes of the United States on garnishment, see e.g.:

U.S.C., Title 28:

§ 748 [now 2405] (Garnishees in suits by United States against a corporation)
§ 749 [now 2405] (Same; issue tendered on denial of indebtedness)
§ 750 [now 2405] (Same; garnishee failing to appear)

For statutes of the United States on arrest, see e.g.:

U.S.C., Title 28:

§ 376 [now 1651] (Writs of ne exeat)
§ 755 [former] (Special bail in suits for duties and penalties)
§ 756 [former] (Defendant giving bail in one district and committed in another)
§ 757 [former] (Defendant giving bail in one district and committed in another; defendant held until judgment in first suit)
§ 758 [former] (Bail and affidavits; taking by commissioners)
§ 759 [former] (Calling of bail in Kentucky)
§ 760 [former] (Clerks may take bail de bene esse)
§ 843 [now 2007] (Imprisonment for debt)
§ 844 [now 2007] (Imprisonment for debt; discharge according to State laws)
§ 845 [now 2007] (Imprisonment for debt; jail limits)

For statutes of the United States on replevin, see, e.g.:

U.S.C., Title 28:

§ 747 [now 2463] (Replevy of property taken under revenue laws)

NOTES OF ADVISORY COMMITTEE ON RULES—1946 SUPPLEMENTARY NOTE

Sections 203 and 204 of the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U.S.C. [App.] § 501 *et seq.* [§§ 523, 524]) provide under certain circumstances for the issuance and continuance of a stay of the execution of any judgment entered against a person in military service, or the vacation or stay of any attachment or garnishment directed against such person's property, money, or debts in the hands of another. See also Note to Rule 62 herein.

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. This subdivision (a)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

(b) TEMPORARY RESTRAINING ORDER; NOTICE; HEARING; DURATION. A temporary restraining order may be granted without written or oral notice to the adverse party or that 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 that 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 claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed 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 the 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; INTERPLEADER; CONSTITUTIONAL CASES. 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; or the provisions of Title 28, U.S.C., § 2361, relating to preliminary injunctions in actions of interpleader or in the nature of interpleader; or Title 28, U.S.C., § 2284, relating to actions required by Act of Congress to be heard and determined by a district court of three judges.

(f) COPYRIGHT IMPOUNDMENT. This rule applies to copyright impoundment proceedings.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 23, 2001, eff. Dec. 1, 2001.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

Note to Subdivisions (a) and (b). These are taken from U.S.C., Title 28, [former] § 381 (Injunctions; preliminary injunctions and temporary restraining orders).

Note to Subdivision (c). Except for the last sentence, this is substantially U.S.C., Title 28, [former] § 382 (Injunctions; security on issuance of). The last sentence continues the following and similar statutes which expressly except the United States or an officer or agency thereof from such security requirements:

U.S.C., Title 15, §§ 77t(b), 78u(e), and 79r(f) (Securities and Exchange Commission).

It also excepts the United States or an officer or agency thereof from such security requirements in any action in which a restraining order or interlocutory judgment of injunction issues in its favor whether there is an express statutory exception from such security requirements or not.

See U.S.C., [former] Title 6 (Official and Penal Bonds) for bonds by surety companies.

Note to Subdivision (d). This is substantially U.S.C., Title 28, [former] § 383 (Injunctions; requisites of order; binding effect).

Note to Subdivision (e). The words "relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee" are words of description and not of limitation.

Compare [former] Equity Rule 73 (Preliminary Injunctions and Temporary Restraining Orders) which is substantially equivalent to the statutes.

For other statutes dealing with injunctions which are continued, see e.g.:

U.S.C., Title 28:

§ 46 [now 2324] (Suits to enjoin orders of Interstate Commerce Commission to be against United States)
§ 47 [now 2325] (Injunctions as to orders of Interstate Commerce Commission; appeal to Supreme Court; time for taking)
§ 378 [former] (Injunctions; when granted)
§ 379 [now 2283] (Injunctions; stay in State courts)
§ 380 [now 1253, 2101, 2281, 2284] (Injunctions; alleged unconstitutionality of State statutes; appeal to Supreme Court)
§ 380a [now 1253, 2101, 2281, 2284] (Injunctions; constitutionality of Federal statute; application for hearing; appeal to Supreme Court)

U.S.C., Title 7:

§ 216 (Court proceedings to enforce orders; injunction)
§ 217 (Proceedings for suspension of orders)

U.S.C., Title 15:

§ 4 (Jurisdiction of courts; duty of district attorney; procedure)
§ 25 (Restraining violations; procedure)
§ 26 (Injunctive relief for private parties; exceptions)
§ 77t(b) (Injunctions and prosecution of offenses)

NOTES OF ADVISORY COMMITTEE ON RULES—1946 AMENDMENT

It has been held that in actions on preliminary injunction bonds the district court has discretion to grant relief in the same proceeding or to require the institution of a new action on the bond. *Russell v. Farley* (1881) 105 U.S. 433, 466. It is believed, however, that in all cases the litigant should have a right to proceed on the bond in the same proceeding, in the manner provided in Rule 73(f) for a similar situation. The paragraph added to Rule 65(c) insures this result and is in the interest of efficiency. There is no reason why Rules 65(c) and 73(f) should operate differently. Compare § 50(n) of the Bankruptcy Act, 11 U.S.C. § 78(n), under which actions on all bonds furnished pursuant to the Act may be proceeded upon summarily in the bankruptcy court. See 2 *Collier on Bankruptcy* (14th ed. by Moore and Oglebay) 1853–1854.

NOTES OF ADVISORY COMMITTEE ON RULES—1948 AMENDMENT

Specific enumeration of statutes dealing with labor injunctions is undesirable due to the enactment of amendatory or new legislation from time to time. The more general and inclusive reference, "any statute of the United States", does not change the intent of subdivision (e) of Rule 65, and the subdivision will have continuing applicability without the need of subsequent readjustment to labor legislation.

The amendment relative to actions of interpleader or in the nature of interpleader substitutes the present statutory reference and will embrace any future amendment to statutory interpleader provided for in Title 28, U.S.C., § 2361.

The Act of August 24, 1937, provided for a district court of three judges to hear and determine an action to enjoin the enforcement of any Act of Congress for repugnance to the Constitution of the United States. The provisions of that Act dealing with the procedure for the issuance of temporary restraining orders and interlocutory and final injunctions have been included in revised Title 28, U.S.C., § 2284, which, however, has been broadened to apply to all actions required to be heard and determined by a district court of three judges. The amendatory saving clause of subdivision (e) of Rule 65 has been broadened accordingly.

NOTES OF ADVISORY COMMITTEE ON RULES—1966 AMENDMENT

Subdivision (a)(2). This new subdivision provides express authority for consolidating the hearing of an application for a preliminary injunction with the trial on the merits. The authority can be exercised with particular profit when it appears that a substantial part of evidence offered on the application will be relevant to the merits and will be presented in such form as to qualify for admission on the trial proper. Repetition of evidence is thereby avoided. The fact that the proceedings have been consolidated should cause no delay in the disposition of the application for the preliminary injunction, for the evidence will be directed in the first instance to that relief, and the preliminary injunction,

if justified by the proof, may be issued in the course of the consolidated proceedings. Furthermore, to consolidate the proceedings will tend to expedite the final disposition of the action. It is believed that consolidation can be usefully availed of in many cases.

The subdivision further provides that even when consolidation is not ordered, evidence received in connection with an application for a preliminary injunction for a preliminary injunction which would be admissible on the trial on the merits forms part of the trial record. This evidence need not be repeated on the trial. On the the other hand, repetition is not altogether prohibited. That would be impractical and unwise. For example, a witness testifying comprehensively on the trial who has previously testified upon the application for a preliminary injunction might sometimes be hamstrung in telling his story if he could not go over some part of his prior testimony to connect it with his present testimony. So also, some repetition of testimony may be called for where the trial is conducted by a judge who did not hear the application for the preliminary injunction. In general, however, repetition can be avoided with an increase of efficiency in the conduct of the case and without any distortion of the presentation of evidence by the parties.

Since an application for a preliminary injunction may be made in an action in which, with respect to all or part of the merits, there is a right to trial by jury, it is appropriate to add the caution appearing in the last sentence of the subdivision. In such a case the jury will have to hear all the evidence bearing on its verdict, even if some part of the evidence has already been heard by the judge alone on the application for the preliminary injunction.

The subdivision is believed to reflect the substance of the best current practice and introduces no novel conception.

Subdivision (b). In view of the possibly drastic consequence of a temporary restraining order, the opposition should be heard, if feasible, before the order is granted. Many judges have properly insisted that, when time does not permit of formal notice of the application to the adverse party, some expedient, such as telephonic notice to the attorney for the adverse party, be resorted to if this can reasonably be done. On occasion, however, temporary restraining orders have been issued without any notice when it was feasible for some fair, although informal, notice to be given. See the emphatic criticisms in *Pennsylvania Rd. Co. v. Transport Workers Union*, 278 F.2d 693, 694 (3d Cir. 1960); *Arvida Corp. v. Sugarman*, 259 F.2d 428, 429 (2d Cir. 1958); *Lummus Co. v. Commonwealth Oil Ref. Co., Inc.*, 297 F.2d 80, 83 (2d Cir. 1961), cert. denied, 368 U.S. 986 (1962).

Heretofore the first sentence of subdivision (b), in referring to a notice ''served'' on the ''adverse party'' on which a ''hearing'' could be held, perhaps invited the interpretation that the order might be granted without notice if the circumstances did not permit of a formal hearing on the basis of a formal notice. The subdivision is amended to make it plain that informal notice, which may be communicated to the attorney rather than the adverse party, is to be preferred to no notice at all.

Before notice can be dispensed with, the applicant's counsel must give his certificate as to any efforts made to give notice and the reasons why notice should not be required. This certificate is in addition to the requirement of an affidavit or verified complaint setting forth the facts as to the irreparable injury which would result before the opposition could be heard.

The amended subdivision continues to recognize that a temporary restraining order may be issued without any notice when the circumstances warrant.

Subdivision (c). Original Rules 65 and 73 contained substantially identical provisions for summary proceedings against sureties on bonds required or permitted by the rules. There was fragmentary coverage of the same subject in the Admiralty Rules. Clearly, a single comprehensive rule is required, and is incorporated as Rule 65.1.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

COMMITTEE NOTES ON RULES—2001 AMENDMENT

New subdivision (f) is added in conjunction with abrogation of the antiquated Copyright Rules of Practice adopted for proceedings under the 1909 Copyright Act. Courts have naturally turned to Rule 65 in response to the apparent inconsistency of the former Copyright Rules with the discretionary impoundment procedure adopted in 1976, 17 U.S.C. §503(a). Rule 65 procedures also have assuaged well-founded doubts whether the Copyright Rules satisfy more contemporary requirements of due process. See, e.g., *Religious Technology Center v. Netcom On-Line Communications Servs., Inc.*, 923 F.Supp. 1231, 1260–1265 (N.D.Cal.1995); *Paramount Pictures Corp. v. Doe*, 821 F.Supp. 82 (E.D.N.Y.1993); *WPOW, Inc. v. MRLJ Enterprises*, 584 F.Supp. 132 (D.D.C.1984).

A common question has arisen from the experience that notice of a proposed impoundment may enable an infringer to defeat the court's capacity to grant effective relief. Impoundment may be ordered on an ex parte basis under subdivision (b) if the applicant makes a strong showing of the reasons why notice is likely to defeat effective relief. Such no-notice procedures are authorized in trademark infringement proceedings, see 15 U.S.C. §1116(d), and courts have provided clear illustrations of the kinds of showings that support ex parte relief. See *Matter of Vuitton et Fils S.A.*, 606 F.2d 1 (2d Cir.1979); *Vuitton v. White*, 945 F.2d 569 (3d Cir.1991). In applying the tests for no-notice relief, the court should ask whether impoundment is necessary, or whether adequate protection can be had by a less intrusive form of no-notice relief shaped as a temporary restraining order.

This new subdivision (f) does not limit use of trademark procedures in cases that combine trademark and copyright claims. Some observers believe that trademark procedures should be adopted for all copyright cases, a proposal better considered by Congressional processes than by rulemaking processes.

Changes Made After Publication and Comments No change has been made.

Rule 65.1. Security: Proceedings Against Sureties

Whenever these rules, including the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions, 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.

(As added Feb. 28, 1966, eff. July 1, 1966; amended Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 12, 2006, eff. Dec. 1, 2006.)

NOTES OF ADVISORY COMMITTEE ON RULES—1966

See Note to Rule 65.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

COMMITTEE NOTES ON RULES—2006 AMENDMENT

Rule 65.1 is amended to conform to the changed title of the Supplemental Rules.

Rule 66. Receivers Appointed by Federal Courts

An action wherein a receiver has been appointed shall not be dismissed except by order of the court. The practice in the administration of estates by receivers or by other similar officers appointed by the court shall be in accordance with the practice heretofore followed in the courts of the United States or as provided in rules promulgated by the district courts. In all other respects the action in which the appointment of a receiver is sought or which is brought by or against a receiver is governed by these rules.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949.)

NOTES OF ADVISORY COMMITTEE ON RULES—1946 AMENDMENT

The title of Rule 66 has been expanded to make clear the subject of the rule, *i.e.*, federal equity receivers.

The first sentence added to Rule 66 prevents a dismissal by any party, after a federal equity receiver has been appointed, except upon leave of court. A party should not be permitted to oust the court and its officer without the consent of that court. See Civil Rule 31(e), Eastern District of Washington.

The second sentence added at the beginning of the rule deals with suits by or against a federal equity receiver. The first clause thereof eliminates the formal ceremony of an ancillary appointment before suit can be brought by a receiver, and is in accord with the more modern state practice, and with more expeditious and less expensive judicial administration. 2 *Moore's Federal Practice* (1938) 2088–2091. For the rule necessitating ancillary appointment, see *Sterrett v. Second Nat. Bank* (1918) 248 U.S. 73; *Kelley v. Queeney* (W.D.N.Y. 1941) 41 F.Supp. 1015; see also *McCandless v. Furlaud* (1934) 293 U.S. 67. This rule has been extensively criticized. First, *Extraterritorial Powers of Receivers* (1932) 27 Ill.L.Rev. 271; Rose, *Extraterritorial Actions by Receivers* (1933) 17 Minn.L.Rev. 704; Laughlin, *The Extraterritorial Powers of Receivers* (1932) 45 Harv.L.Rev. 429; Clark and Moore, *A New Federal Civil Procedure—II, Pleadings and Parties* (1935) 44 Yale L.J. 1291, 1312–1315; Note (1932) 30 Mich.L.Rev. 1322. See also comment in *Bicknell v. Lloyd-Smith* (C.C.A.2d, 1940) 109 F.(2d) 527, cert. den. (1940) 311 U.S. 650. The second clause of the sentence merely incorporates the well-known and general rule that, absent statutory authorization, a federal receiver cannot be sued without leave of the court which appointed him, applied in the federal courts since *Barton v. Barbour* (1881) 104 U.S. 126. See also 1 *Clark on Receivers* (2d ed.) §549. Under 28 U.S.C. §125, leave of court is unnecessary when a receiver is sued "in respect of any act or transaction of his in carrying on the business" connected with the receivership property, but such suit is subject to the general equity jurisdiction of the court in which the receiver was appointed, so far as justice necessitates.

Capacity of a state court receiver to sue or be sued in federal court is governed by Rule 17(b).

The last sentence added to Rule 66 assures the application of the rules in all matters except actual administration of the receivership estate itself. Since this implicitly carries with it the applicability of those rules relating to appellate procedure, the express reference thereto contained in Rule 66 has been stricken as superfluous. Under Rule 81(a)(1) the rules do not apply to bankruptcy proceedings except as they may be made applicable by order of the Supreme Court. Rule 66 is applicable to what is commonly known as a federal "chancery" or "equity" receiver, or similar type of court officer. It is not designed to regulate or affect receivers in bankruptcy, which are governed by the Bankruptcy Act and the General Orders. Since the Federal Rules are applicable in bankruptcy by virtue of General Orders in Bankruptcy 36 and 37 [following section 53 of Title 11, U.S.C.] only to the extent that they are not inconsistent with the Bankruptcy Act or the General Orders, Rule 66 is not applicable to bankruptcy receivers. See *1 Collier on Bankruptcy* (14th ed. by Moore and Oglebay) ¶¶2.23–2.36.

NOTES OF ADVISORY COMMITTEE ON RULES—1948 AMENDMENT

Title 28, U.S.C., §§754 and 959(a), state the capacity of a federal receiver to sue or be sued in a federal court, and a repetitive statement of the statute in Rule 66 is confusing and undesirable. See also Note to Rule 17(b), *supra*.

Rule 67. Deposit in Court

In an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery, a party, upon notice to every other party, and by leave of court, may deposit with the court all or any part of such sum or thing, whether or not that party claims all or any part of the sum or thing. The party making the deposit shall serve the order permitting deposit on the clerk of the court. Money paid into court under this rule shall be deposited and withdrawn in accordance with the provisions of Title 28, U.S.C., §§2041, and 2042; the Act of June 26, 1934, c. 756, §23, as amended (48 Stat. 1236, 58 Stat. 845), U.S.C., Title 31, §725v;[1] or any like statute. The fund shall be deposited in an interest-bearing account or invested in an interest-bearing instrument approved by the court.

(As amended Dec. 29, 1948, eff. Oct. 20, 1949; Apr. 28, 1983, eff. Aug. 1, 1983.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

This rule provides for deposit in court generally, continuing similar special provisions contained in such statutes as U.S.C., Title 28, §41(26) [now 1335, 1397, 2361] (Original jurisdiction of bills of interpleader, and of bills in the nature of interpleader). See generally *Howard v. United States*, 184 U.S. 676 (1902); United States Supreme Court Admiralty Rules (1920), Rules 37 (Bringing Funds into Court), 41 (Funds in Court Registry), and 42 (Claims Against Proceeds in Registry). With the first sentence, compare *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 22, r. 1(1).

NOTES OF ADVISORY COMMITTEE ON RULES—1948 AMENDMENT

The first amendment substitutes the present statutory reference.

Since the Act of June 26, 1934, was amended by Act of December 21, 1944, 58 Stat. 845, correcting references are made.

NOTES OF ADVISORY COMMITTEE ON RULES—1983 AMENDMENT

Rule 67 has been amended in three ways. The first change is the addition of the clause in the first sentence. Some courts have construed the present rule to permit deposit only when the party making it claims no interest in the fund or thing deposited. *E.g.*, *Blasin-Stern v. Beech-Nut Life Savers Corp.*, 429 F.Supp. 533 (D. Puerto Rico 1975); *Dinkins v. General Aniline & Film Corp.*, 214 F.Supp. 281 (S.D.N.Y. 1963). However, there

[1] See References in Text note below.

are situations in which a litigant may wish to be relieved of responsibility for a sum or thing, but continue to claim an interest in all or part of it. In these cases the deposit-in-court procedure should be available; in addition to the advantages to the party making the deposit, the procedure gives other litigants assurance that any judgment will be collectable. The amendment is intended to accomplish that.

The second change is the addition of a requirement that the order of deposit be served on the clerk of the court in which the sum or thing is to be deposited. This is simply to assure that the clerk knows what is being deposited and what his responsibilities are with respect to the deposit. The latter point is particularly important since the rule as amended contemplates that deposits will be placed in interest-bearing accounts; the clerk must know what treatment has been ordered for the particular deposit.

The third change is to require that any money be deposited in an interest-bearing account or instrument approved by the court.

REFERENCES IN TEXT

Act of June 26, 1934, c. 756, §23, as amended (48 Stat. 1236, 58 Stat. 845), 31 U.S.C. §725v, referred to in text, was repealed by Pub. L. 97–258, §5(b), Sept. 13, 1982, 96 Stat. 1074, the first section of which enacted Title 31, Money and Finance. Insofar as not superseded by sections 2041 and 2042 of Title 28, Judiciary and Judicial Procedure, the Act of June 26, 1934, §23, as amended (31 U.S.C. 725v) was reenacted as sections 572a and 2043 of Title 28 by Pub. L. 97–258, §2(g)(3), (4).

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 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 verdict or 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.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

See 2 Minn. Stat. (Mason, 1927) §9323; 4 Mont. Rev. Codes Ann. (1935) §9770; N.Y.C.P.A. (1937) §177.

For the recovery of costs against the United States, see Rule 54(d).

NOTES OF ADVISORY COMMITTEE ON RULES—1946 AMENDMENT

The third sentence of Rule 68 has been altered to make clear that evidence of an unaccepted offer is admissible in a proceeding to determine the costs of the action but is not otherwise admissible.

The two sentences substituted for the deleted last sentence of the rule assure a party the right to make a second offer where the situation permits—as, for example, where a prior offer was not accepted but the plaintiff's judgment is nullified and a new trial ordered, whereupon the defendant desires to make a second offer. It is implicit, however, that as long as the case continues—whether there be a first, second or third trial—and the defendant makes no further offer, his first and only offer will operate to save him the costs from the time of that offer if the plaintiff ultimately obtains a judgment less than the sum offered. In the case of successive offers not accepted, the offeror is saved the costs incurred after the making of the offer which was equal to or greater than the judgment ultimately obtained. These provisions should serve to encourage settlements and avoid protracted litigation.

The phrase ''before the trial begins'', in the first sentence of the rule, has been construed in *Cover v. Chicago Eye Shield Co.* (C.C.A.7th, 1943) 136 F.(2d) 374, cert. den. (1943) 320 U.S. 749.

NOTES OF ADVISORY COMMITTEE ON RULES—1966 AMENDMENT

This logical extension of the concept of offer of judgment is suggested by the common admiralty practice of determining liability before the amount of liability is determined.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

Rule 69. Execution

(a) IN GENERAL. Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable. In aid of the judgment or execution, the judgment creditor or a successor in interest when that interest appears of record, may obtain discovery from any person, including the judgment debtor, in the manner provided in these rules or in the manner provided by the practice of the state in which the district court is held.

(b) AGAINST CERTAIN PUBLIC OFFICERS. When a judgment has been entered against a collector or other officer of revenue under the circumstances stated in Title 28, U.S.C., §2006, or against an officer of Congress in an action mentioned in the Act of March 3, 1875, ch. 130, §8 (18 Stat. 401), U.S.C., Title 2, §118, and when the court has given the certificate of probable cause for the officer's act as provided in those statutes, execution shall not issue against the officer or the officer's property but the final judgment shall be satisfied as provided in such statutes.

(As amended Dec. 29, 1948, eff. Oct. 20, 1949; Mar. 30, 1970, eff. July 1, 1970; Mar. 2, 1987, eff. Aug. 1, 1987.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

Note to Subdivision (a). This follows in substance U.S.C., Title 28, [former] §§727 (Executions as provided by State laws) and 729 [now Title 42, §1988] (Proceedings in vindication of civil rights), except that, as in the similar case of attachments (see note to Rule 64), the rule specifies the applicable State law to be that of the time when the remedy is sought, and thus renders unnecessary, as well as supersedeas, local district court rules.

Statutes of the United States on execution, when applicable, govern under this rule. Among these are:

U.S.C., Title 12:

§91 (Transfers by bank and other acts in contemplation of insolvency)

§632 (Jurisdiction of United States district courts in cases arising out of foreign banking jurisdiction where Federal reserve bank a party)

U.S.C., Title 19:

§199 (Judgments for customs duties, how payable)

U.S.C., Title 26:

§1610(a) [former] (Surrender of property subject to distraint)

U.S.C., Title 28:

§122 [now 1656] (Creation of new district or transfer of territory; lien)

§350 [now 2101] (Time for making application for appeal or certiorari; stay pending application for certiorari)

§489 [now 547] (District Attorneys; reports to Department of Justice)

§574 [now 1921] (Marshals, fees enumerated)

§786 [former] (Judgments for duties; collected in coin)

§811 [now 1961] (Interest on judgments)

§838 [former] (Executions; run in all districts of State)

§839 [now 2413] (Executions; run in every State and Territory)

§840 [former] (Executions; stay on conditions), as modified by Rule 62(b).

§841 [former] (Executions; stay of one term), as modified by Rule 62(f)

§842 [now 2006] (Executions; against officers of revenue in cases of probable cause), as incorporated in *Subdivision (b)* of this rule

§843 [now 2007] (Imprisonment for debt)

§844 [now 2007] (Imprisonment for debt; discharge according to State laws)

§845 [now 2007] (Imprisonment for debt; jail limits)

§846 [now 2005] (Fieri Facias; appraisal of goods; appraisers)

§847 [now 2001] (Sales; real property under order or decree)

§848 [now 2004] (Sales; personal property under order or decree)

§849 [now 2002] (Sales; necessity of notice)

§850 [now 2003] (Sales; death of marshal after levy or after sale)

§869 [former] (Bond in former error and on appeal) as incorporated in Rule 73(c)

§874 [former] (Supersedeas), as modified by Rules 62(d) and 73(d)

U.S.C., Title 31:

§195 [now 3715] (Purchase on execution)

U.S.C., Title 33:

§918 (Collection of defaulted payments)

U.S.C., Title 49:

§74(g) [former] (Causes of action arising out of Federal control of railroads; execution and other process)

Special statutes of the United States on exemption from execution are also continued. Among these are:

U.S.C., Title 2:

§118 (Actions against officers of Congress for official acts)

U.S.C., Title 5:

§729 [see 8346, 8470] (Federal employees retirement annuities not subject to assignment, execution, levy, or other legal process)

U.S.C., Title 10:

§610 [now 3690, 8690] (Exemption of enlisted men from arrest on civil process)

U.S.C., Title 22:

§21(h) [see 4060] (Foreign service retirement and disability system; establishment; rules and regulations; annuities; nonassignable; exemption from legal process)

U.S.C., Title 33:

§916 (Assignment and exemption from claims of creditors) Longshoremen's and Harborworkers' Compensation Act)

U.S.C., Title 38:

§54 [see 5301] (Attachment, levy or seizure of moneys due pensioners prohibited)

§393 [former] (Army and Navy Medal of Honor Roll; pensions additional to other pensions; liability to attachment, etc.) Compare Title 34, §365(c) (Medal of Honor Roll; special pension to persons enrolled)

§618 [see 5301] (Benefits exempt from seizure under process and taxation; no deductions for indebtedness to United States)

U.S.C., Title 43:

§175 (Exemption from execution of homestead land)

U.S.C., Title 48:

§1371*o* (Panama Canal and railroad retirement annuities, exemption from execution and so forth)

NOTES OF ADVISORY COMMITTEE ON RULES—1946
SUPPLEMENTARY NOTE

With respect to the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U.S.C. [App.] §501 *et seq.*) see Notes to Rules 62 and 64 herein.

NOTES OF ADVISORY COMMITTEE ON RULES—1948
AMENDMENT

The amendment substitutes the present statutory reference.

NOTES OF ADVISORY COMMITTEE ON RULES—1970
AMENDMENT

The amendment assures that, in aid of execution on a judgment, all discovery procedures provided in the rules are available and not just discovery via the taking of a deposition. Under the present language, one court has held that Rule 34 discovery is unavailable to the judgment creditor. *M. Lowenstein & Sons, Inc. v. American Underwear Mfg. Co.*, 11 F.R.D. 172 (E.D.Pa. 1951). Notwithstanding the language, and relying heavily on legislative history referring to Rule 33, the Fifth Circuit has held that a judgment creditor may invoke Rule 33 interrogatories. *United States v. McWhirter*, 376 F.2d 102 (5th Cir. 1967). But the court's reasoning does not extend to discovery except as provided in Rules 26–33. One commentator suggests that the existing language might properly be stretched to all discovery, 7 *Moore's Federal Practice* ¶69.05[1] (2d ed. 1966), but another believes that a rules amendment is needed. 3 Barron & Holtzoff, *Federal Practice and Procedure* 1484 (Wright ed. 1958). Both commentators and the court in *McWhirter* are clear that, as a matter of policy, Rule 69 should authorize the use of all discovery devices provided in the rules.

NOTES OF ADVISORY COMMITTEE ON RULES—1987
AMENDMENT

The amendments are technical. No substantive change is intended.

Rule 70. Judgment for Specific Acts; Vesting Title

If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the clerk shall issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment. The court may also in proper cases adjudge the party in contempt. If real or personal property is within the district, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law. When any order or judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution or assistance upon application to the clerk.

NOTES OF ADVISORY COMMITTEE ON RULES—1937

Compare [former] Equity Rules 7 (Process, Mesne and Final), 8 (Enforcement of Final Decrees), and 9 (Writ of Assistance). To avoid possible confusion, both old and new denominations for attachment (sequestration) and execution (assistance) are used in this rule. Compare with the provision in this rule that the judgment may itself vest title, 6 Tenn.Ann.Code (Williams, 1934), §10594; 2 Conn.Gen.Stat. (1930), §5455; N.M.Stat.Ann. (Courtright, 1929), §117–117; 2 Ohio Gen.Code Ann. (Page, 1926), §11590; and England, Supreme Court of Judicature Act (1925), §47.

Rule 71. Process in Behalf of and Against Persons Not Parties

When an order is made in favor of a person who is not a party to the action, that person may enforce obedience to the order by the same process as if a party; and, when obedience to an order may be lawfully enforced against a person who is not a party, that person is liable to the same process for enforcing obedience to the order as if a party.

(As amended Mar. 2, 1987, eff. Aug. 1, 1987.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

Compare [former] Equity Rule 11 (Process in Behalf of and Against Persons Not Parties). Compare also *Terrell v. Allison*, 21 Wall. 289, 22 L.Ed. 634 (U.C., 1875); *Farmers' Loan and Trust Co. v. Chicago and A. Ry. Co.*, 44 Fed. 653 (C.C.Ind., 1890); *Robert Findlay Mfg. Co. v. Hygrade Lighting Fixture Corp.*, 288 Fed. 80 (E.D.N.Y., 1923); *Thompson v. Smith*, Fed.Cas.No. 13,977 (C.C.Minn., 1870).

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

IX. SPECIAL PROCEEDINGS

Rule 71A. Condemnation of Property

(a) APPLICABILITY OF OTHER RULES. The Rules of Civil Procedure for the United States District Courts govern the procedure for the condemnation of real and personal property under the power of eminent domain, except as otherwise provided in this rule.

(b) JOINDER OF PROPERTIES. The plaintiff may join in the same action one or more separate pieces of property, whether in the same or different ownership and whether or not sought for the same use.

(c) COMPLAINT.

(1) *Caption*. The complaint shall contain a caption as provided in Rule 10(a), except that the plaintiff shall name as defendants the property, designated generally by kind, quantity, and location, and at least one of the owners of some part of or interest in the property.

(2) *Contents*. The complaint shall contain a short and plain statement of the authority for the taking, the use for which the property is to be taken, a description of the property sufficient for its identification, the interests to be acquired, and as to each separate piece of property a designation of the defendants who have been joined as owners thereof or of some interest therein. Upon the commencement of the action, the plaintiff need join as defendants only the persons having or claiming an interest in the property whose names are then known, but prior to any hearing involving the compensation to be paid for a piece of property, the plaintiff shall add as defendants all persons having or claiming an interest in that property whose names can be ascertained by a reasonably diligent search of the records, considering the character and value of the property involved and the interests to be acquired, and also those whose names have otherwise been learned. All others may be made defendants under the designation ''Unknown Owners.'' Process shall be served as provided in subdivision (d) of this rule upon all defendants, whether named as defendants at the time of the commencement of the action or subsequently added, and a defendant may answer as provided in subdivision (e) of this rule. The court meanwhile may order such distribution of a deposit as the facts warrant.

(3) *Filing*. In addition to filing the complaint with the court, the plaintiff shall furnish to the clerk at least one copy thereof for the use of the defendants and additional copies at the request of the clerk or of a defendant.

(d) PROCESS.

(1) *Notice; Delivery*. Upon the filing of the complaint the plaintiff shall forthwith deliver to the clerk joint or several notices directed to the defendants named or designated in the complaint. Additional notices directed to defendants subsequently added shall be so delivered. The delivery of the notice and its service have the same effect as the delivery and service of the summons under Rule 4.

(2) *Same; Form*. Each notice shall state the court, the title of the action, the name of the defendant to whom it is directed, that the action is to condemn property, a description of the defendant's property sufficient for its identification, the interest to be taken, the authority for the taking, the uses for which the property is to be taken, that the defendant may serve upon the plaintiff's attorney an answer within 20 days after service of the notice, and that the failure so to serve an answer con-

stitutes a consent to the taking and to the authority of the court to proceed to hear the action and to fix the compensation. The notice shall conclude with the name of the plaintiff's attorney and an address within the district in which action is brought where the attorney may be served. The notice need contain a description of no other property than that to be taken from the defendants to whom it is directed.

(3) *Service of Notice.*

(A) Personal Service. Personal service of the notice (but without copies of the complaint) shall be made in accordance with Rule 4 upon a defendant whose residence is known and who resides within the United States or a territory subject to the administrative or judicial jurisdiction of the United States.

(B) Service by Publication. Upon the filing of a certificate of the plaintiff's attorney stating that the attorney believes a defendant cannot be personally served, because after diligent inquiry within the state in which the complaint is filed the defendant's place of residence cannot be ascertained by the plaintiff or, if ascertained, that it is beyond the territorial limits of personal service as provided in this rule, service of the notice shall be made on this defendant by publication in a newspaper published in the county where the property is located, or if there is no such newspaper, then in a newspaper having a general circulation where the property is located, once a week for not less than three successive weeks. Prior to the last publication, a copy of the notice shall also be mailed to a defendant who cannot be personally served as provided in this rule but whose place of residence is then known. Unknown owners may be served by publication in like manner by a notice addressed to ''Unknown Owners.''

Service by publication is complete upon the date of the last publication. Proof of publication and mailing shall be made by certificate of the plaintiff's attorney, to which shall be attached a printed copy of the published notice with the name and dates of the newspaper marked thereon.

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

(e) APPEARANCE OR ANSWER. If a defendant has no objection or defense to the taking of the defendant's property, the defendant may serve a notice of appearance designating the property in which the defendant claims to be interested. Thereafter, the defendant shall receive notice of all proceedings affecting it. If a defendant has any objection or defense to the taking of the property, the defendant shall serve an answer within 20 days after the service of notice upon the defendant. The answer shall identify the property in which the defendant claims to have an interest, state the nature and extent of the interest claimed, and state all the defendant's objections and defenses to the taking of the property. A defendant waives all defenses and objections not so presented, but at the trial of the issue of just compensation, whether or not the defendant has previously appeared or answered, the defendant may present evidence as to the amount of the compensation to be paid for the property, and the defendant may share in the distribution of the award. No other pleading or motion asserting any additional defense or objection shall be allowed.

(f) AMENDMENT OF PLEADINGS. Without leave of court, the plaintiff may amend the complaint at any time before the trial of the issue of compensation and as many times as desired, but no amendment shall be made which will result in a dismissal forbidden by subdivision (i) of this rule. The plaintiff need not serve a copy of an amendment, but shall serve notice of the filing, as provided in Rule 5(b), upon any party affected thereby who has appeared and, in the manner provided in subdivision (d) of this rule, upon any party affected thereby who has not appeared. The plaintiff shall furnish to the clerk of the court for the use of the defendants at least one copy of each amendment and shall furnish additional copies on the request of the clerk or of a defendant. Within the time allowed by subdivision (e) of this rule a defendant may serve an answer to the amended pleading, in the form and manner and with the same effect as there provided.

(g) SUBSTITUTION OF PARTIES. If a defendant dies or becomes incompetent or transfers an interest after the defendant's joinder, the court may order substitution of the proper party upon motion and notice of hearing. If the motion and notice of hearing are to be served upon a person not already a party, service shall be made as provided in subdivision (d)(3) of this rule.

(h) TRIAL. If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of that issue; but if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix, unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it.

In the event that a commission is appointed the court may direct that not more than two additional persons serve as alternate commissioners to hear the case and replace commissioners who, prior to the time when a decision is filed, are found by the court to be unable or disqualified to perform their duties. An alternate who does not replace a regular commissioner shall be discharged after the commission renders its final decision. Before appointing the members of the commission and alternates the court shall advise the parties of the identity and qualifications of each prospective commissioner and alternate and may permit the parties to examine each such designee. The parties shall not

be permitted or required by the court to suggest nominees. Each party shall have the right to object for valid cause to the appointment of any person as a commissioner or alternate. If a commission is appointed it shall have the authority of a master provided in Rule 53(c) and proceedings before it shall be governed by the provisions of Rule 53(d). Its action and report shall be determined by a majority and its findings and report shall have the effect, and be dealt with by the court in accordance with the practice, prescribed in Rule 53(e), (f), and (g). Trial of all issues shall otherwise be by the court.

(i) DISMISSAL OF ACTION.

(1) *As of Right*. If no hearing has begun to determine the compensation to be paid for a piece of property and the plaintiff has not acquired the title or a lesser interest in or taken possession, the plaintiff may dismiss the action as to that property, without an order of the court, by filing a notice of dismissal setting forth a brief description of the property as to which the action is dismissed.

(2) *By Stipulation*. Before the entry of any judgment vesting the plaintiff with title or a lesser interest in or possession of property, the action may be dismissed in whole or in part, without an order of the court, as to any property by filing a stipulation of dismissal by the plaintiff and the defendant affected thereby; and, if the parties so stipulate, the court may vacate any judgment that has been entered.

(3) *By Order of the Court*. At any time before compensation for a piece of property has been determined and paid and after motion and hearing, the court may dismiss the action as to that property, except that it shall not dismiss the action as to any part of the property of which the plaintiff has taken possession or in which the plaintiff has taken title or a lesser interest, but shall award just compensation for the possession, title or lesser interest so taken. The court at any time may drop a defendant unnecessarily or improperly joined.

(4) *Effect*. Except as otherwise provided in the notice, or stipulation of dismissal, or order of the court, any dismissal is without prejudice.

(j) DEPOSIT AND ITS DISTRIBUTION. The plaintiff shall deposit with the court any money required by law as a condition to the exercise of the power of eminent domain; and, although not so required, may make a deposit when permitted by statute. In such cases the court and attorneys shall expedite the proceedings for the distribution of the money so deposited and for the ascertainment and payment of just compensation. If the compensation finally awarded to any defendant exceeds the amount which has been paid to that defendant on distribution of the deposit, the court shall enter judgment against the plaintiff and in favor of that defendant for the deficiency. If the compensation finally awarded to any defendant is less than the amount which has been paid to that defendant, the court shall enter judgment against that defendant and in favor of the plaintiff for the overpayment.

(k) CONDEMNATION UNDER A STATE'S POWER OF EMINENT DOMAIN. The practice as herein prescribed governs in actions involving the exercise of the power of eminent domain under the law of a state, provided that if the state law makes provision for trial of any issue by jury, or for trial of the issue of compensation by jury or commission or both, that provision shall be followed.

(*l*) COSTS. Costs are not subject to Rule 54(d).

(As added Apr. 30, 1951, eff. Aug. 1, 1951; amended Jan. 21, 1963, eff. July 1, 1963; Apr. 29, 1985, eff. Aug. 1, 1985; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 25, 1988, eff. Aug. 1, 1988; Pub. L. 100–690, title VII, § 7050, Nov. 18, 1988, 102 Stat. 4401; Apr. 22, 1993, eff. Dec. 1, 1993; Mar. 27, 2003, eff. Dec. 1, 2003.)

NOTES OF ADVISORY COMMITTEE ON RULES—1951

Supplementary report

The Court will remember that at its conference on December 2, 1948, the discussion was confined to subdivision (h) of the rule (* * *), the particular question being whether the tribunal to award compensation should be a commission or a jury in cases where the Congress has not made specific provision on the subject. The Advisory Committee was agreed from the outset that a rule should not be promulgated which would overturn the decision of the Congress as to the kind of tribunal to fix compensation, provided that the system established by Congress was found to be working well. We found two instances where the Congress had specified the kind of tribunal to fix compensation. One case was the District of Columbia (U.S.C., [former] Title 40, §§ 361–386) where a rather unique system exists under which the court is required in all cases to order the selection of a ''jury'' of five from among not less than twenty names drawn from ''the special box provided by law.'' They must have the usual qualifications of jurors and in addition must be freeholders of the District and not in the service of the United States or the District. That system has been in effect for many years, and our inquiry revealed that it works well under the conditions prevailing in the District, and is satisfactory to the courts of the District, the legal profession and to property owners.

The other instance is that of the Tennessee Valley Authority, where the act of Congress (U.S.C., Title 16, § 831x) provides that compensation is fixed by three disinterested commissioners appointed by the court, whose award goes before the District Court for confirmation or modification. The Advisory Committee made a thorough inquiry into the practical operation of the TVA commission system. We obtained from counsel for the TVA the results of their experience, which afforded convincing proof that the commission system is preferable under the conditions affecting TVA and that the jury system would not work satisfactorily. We then, under date of February 6, 1947, wrote every Federal judge who had ever sat in a TVA condemnation case, asking his views as to whether the commission system is satisfactory and whether a jury system should be preferred. Of 21 responses from the judges 17 approved the commission system and opposed the substitution of a jury system for the TVA. Many of the judges went further and opposed the use of juries in any condemnation cases. Three of the judges preferred the jury system, and one dealt only with the TVA provision for a three judge district court. The Advisory Committee has not considered abolition of the three judge requirement of the TVA Act, because it seemed to raise a question of jurisdiction, which cannot be altered by rule. Nevertheless the Department of Justice continued its advocacy of the jury system for its asserted expedition and economy; and others favored a uniform procedure. In consequence of these divided counsels the Advisory Committee was itself divided, but in its May 1948 Report to the Court recommended the following rule as approved by a majority (* * *):

(h) Trial. If the action involves the exercise of the power of eminent domain under the law of the United

States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of that issue; but if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix. Trial of all issues shall otherwise be by the court.

The effect of this was to preserve the existing systems in the District of Columbia and in TVA cases, but to provide for a jury to fix compensation in all other cases.

Before the Court's conference of December 2, 1948, the Chief Justice informed the Committee that the Court was particularly interested in the views expressed by Judge John Paul, judge of the United States District Court for the Western District of Virginia, in a letter from him to the chairman of the Advisory Committee, dated February 13, 1947. Copies of all the letters from judges who had sat in TVA cases had been made available to the Court, and this letter from Judge Paul is one of them. Judge Paul strongly opposed jury trials and recommended the commission system in large projects like the TVA, and his views seemed to have impressed the Court and to have been the occasion for the conference.

The reasons which convinced the Advisory Committee that the use of commissioners instead of juries is desirable in TVA cases were these:

1. The TVA condemns large areas of land of similar kind, involving many owners. Uniformity in awards is essential. The commission system tends to prevent discrimination and provide for uniformity in compensation. The jury system tends to lack of uniformity. Once a reasonable and uniform standard of values for the area has been settled by a commission, litigation ends and settlements result.

2. Where large areas are involved many small landowners reside at great distances from the place where a court sits. It is a great hardship on humble people to have to travel long distances to attend a jury trial. A commission may travel around and receive the evidence of the owner near his home.

3. It is impracticable to take juries long distances to view the premises.

4. If the cases are tried by juries the burden on the time of the courts is excessive.

These considerations are the very ones Judge Paul stressed in his letter. He pointed out that they applied not only to the TVA but to other large governmental projects, such as flood control, hydroelectric power, reclamation, national forests, and others. So when the representatives of the Advisory Committee appeared at the Court's conference December 2, 1948, they found it difficult to justify the proposed provision in subdivision (h) of the rule that a jury should be used to fix compensation in all cases where Congress had not specified the tribunal. If our reasons for preserving the TVA system were sound, provision for a jury in similar projects of like magnitude seemed unsound.

Aware of the apparent inconsistency between the acceptance of the TVA system and the provision for a jury in all other cases, the members of the Committee attending the conference of December 2, 1948, then suggested that in the other cases the choice of jury or commission be left to the discretion of the District Court, going back to a suggestion previously made by Committee members and reported at page 15 of the Preliminary Draft of June 1947. They called the attention of the Court to the fact that the entire Advisory Committee had not been consulted about this suggestion and proposed that the draft be returned to the Committee for further consideration, and that was done.

The proposal we now make for subdivision (h) is as follows:

(h) Trial. If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of that issue; but if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix, unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it. If a commission is appointed it shall have the powers of a master provided in subdivision (c) of Rule 53 proceedings before it shall be governed by the provisions of paragraphs (1) and (2) of subdivision (d) of Rule 53. Its action and report shall be determined by a majority and its findings and report shall have the effect, and be dealt with by the court in accordance with the practice, prescribed in paragraph (2) of subdivision (e) of Rule 53. Trial of all issues shall otherwise be by the court.

In the 1948 draft the Committee had been almost evenly divided as between jury or commission and that made it easy for us to agree on the present draft. It would be difficult to state in a rule the various conditions to control the District Court in its choice and we have merely stated generally the matters which should be considered by the District Court.

The rule as now drafted seems to meet Judge Paul's objection. In large projects like the TVA the court may decide to use a commission. In a great number of cases involving only sites for buildings or other small areas, where use of a jury is appropriate, a jury may be chosen. The District Court's discretion may also be influenced by local preference or habit, and the preference of the Department of Justice and the reasons for its preference will doubtless be given weight. The Committee is convinced that there are some types of cases in which use of a commission is preferable and others in which a jury may be appropriately used, and that it would be a mistake to provide that the same kind of tribunal should be used in all cases. We think the available evidence clearly leads to that conclusion.

When this suggestion was made at the conference of December 2, 1948, representatives of the Department of Justice opposed it, expressing opposition to the use of a commission in any case. Their principal ground for opposition to commissions was then based on the assertion that the commission system is too expensive because courts allow commissioners too large compensation. The obvious answer to that is that the compensation of commissioners ought to be fixed or limited by law, as was done in the TVA Act, and the agency dealing with appropriations—either the Administrative Office or some other interested department of the government—should correct that evil, if evil there be, by obtaining such legislation. Authority to promulgate rules of procedure does not include power to fix compensation of government employees. The Advisory Committee is not convinced that even without such legislation the commission system is more expensive than the jury system. The expense of jury trials includes not only the per diem and mileage of the jurors impaneled for a case but like items for the entire venire. In computing cost of jury trials, the salaries of court officials, judges, clerks, marshals and deputies must be considered. No figures have been given to the Committee to establish that the cost of the commission system is the greater.

We earnestly recommend the rule as now drafted for promulgation by the Court, in the public interest.

The Advisory Committee have given more time to this rule, including time required for conferences with the Department of Justice to hear statements of its representatives, than has been required by any other rule. The rule may not be perfect but if faults develop in practice they may be promptly cured. Certainly the present conformity system is atrocious.

Under state practices, just compensation is normally determined by one of three methods: by commissioners; by commissioners with a right of appeal to and trial de novo before a jury; and by a jury, without a commis-

sion. A trial to the court or to the court including a master are, however, other methods that are occasionally used. Approximately 5 states use only commissioners; 23 states use commissioners with a trial de novo before a jury; and 18 states use only the jury. This classification is advisedly stated in approximate terms, since the same state may utilize diverse methods, depending upon different types of condemnations or upon the locality of the property, and since the methods used in a few states do not permit of a categorical classification. To reject the proposed rule and leave the situation as it is would not satisfy the views of the Department of Justice. The Department and the Advisory Committee agree that the use of a commission, with appeal to a jury, is a wasteful system.

The Department of Justice has a voluminous ''Manual on Federal Eminent Domain,'' the 1940 edition of which has 948 pages with an appendix of 73 more pages. The title page informs us the preparation of the manual was begun during the incumbency of Attorney General Cummings, was continued under Attorney General Murphy, and completed during the incumbency of Attorney General Jackson. The preface contains the following statement:

It should also be mentioned that the research incorporated in the manual would be of invaluable assistance in the drafting of a new uniform code, or rules of court, for federal condemnation proceedings, which are now greatly confused, not only by the existence of over seventy federal statutes governing condemnations for different purposes—statutes which sometimes conflict with one another—but also by the countless problems occasioned by the requirements of conformity to state law. Progress of the work has already demonstrated that the need for such reform exists.

It is not surprising that more than once Attorneys General have asked the Advisory Committee to prepare a federal rule and rescue the government from this morass.

The Department of Justice has twice tried and failed to persuade the Congress to provide that juries shall be used in all condemnation cases. The debates in Congress show that part of the opposition to the Department of Justice's bills came from representatives opposed to jury trials in all cases, and in part from a preference for the conformity system. Our present proposal opens the door for district judges to yield to local preferences on the subject. It does much for the Department's points of view. It is a great improvement over the present so-called conformity system. It does away with the wasteful ''double'' system prevailing in 23 states where awards by commissions are followed by jury trials.

Aside from the question as to the choice of a tribunal to award compensation, the proposed rule would afford a simple and improved procedure.

We turn now to an itemized explanation of the other changes we have made in the 1948 draft. Some of these result from recent amendments to the Judicial Code. Others result from a reconsideration by the Advisory Committee of provisions which we thought could be improved.

1. In the amended Judicial Code, the district courts are designated as ''United States District Courts'' instead of ''District Courts of the United States,'' and a corresponding change has been made in the rule.

2. After the 1948 draft was referred back to the committee, the provision in subdivision (c)(2), relating to naming defendants, * * * which provided that the plaintiff shall add as defendants all persons having or claiming an interest in that property whose names can be ascertained by a search of the records to the extent commonly made by competent searchers of title in the vicinity ''in light of the type and value of the property involved,'' the phrase in quotation marks was changed to read ''in the light of the character and value of the property involved and the interests to be acquired.''

The Department of Justice made a counter proposal * * * that there be substituted the words ''reasonably diligent search of the records, considering the type.'' When the American Bar Association thereafter considered the draft, it approved the Advisory Committee's draft of this subdivision, but said that it had no objection to the Department's suggestion. Thereafter, in an effort to eliminate controversy, the Advisory Committee accepted the Department's suggestion as to (c)(2), using the word ''character'' instead of the word ''type.''

The Department of Justice also suggested that in subdivision (d)(3)(2) relating to service by publication, the search for a defendant's residence as a preliminary to publication be limited to the state in which the complaint is filed. Here again the American Bar Association's report expressed the view that the Department's suggestion was unobjectionable and the Advisory Committee thereupon adopted it.

3. Subdivision (k) of the 1948 draft is as follows:

(k) Condemnation Under a State's Power of Eminent Domain. If the action involves the exercise of the power of eminent domain under the law of a state, the practice herein prescribed may be altered to the extent necessary to observe and enforce any condition affecting the substantial rights of a litigant attached by the state law to the exercise of the state's power of eminent domain.

Occasionally condemnation cases under a state's power of eminent domain reach a United States District Court because of diversity of citizenship. Such cases are rare, but provision should be made for them.

The 1948 draft of (k) required a district court to decide whether a provision of state law specifying the tribunal to award compensation is or is not a ''condition'' attached to the exercise of the state's power. On reconsideration we concluded that it would be wise to redraft (k) so as to avoid that troublesome question. As to conditions in state laws which affect the substantial rights of a litigant, the district courts would be bound to give them effect without any rule on the subject. Accordingly we present two alternative revisions. One suggestion supported by a majority of the Advisory Committee is as follows:

(k) Condemnation Under a State's Power of Eminent Domain. The practice herein prescribed governs in actions involving the exercise of the power of eminent domain under the law of a state, provided that if the state law makes provision for trial of any issue by jury, or for trial of the issue of compensation by jury or commission or both, that provision shall be followed.

The other is as follows:

(k) Condemnation Under a State's Power of Eminent Domain. The practice herein prescribed governs in actions involving the exercise of the power of eminent domain under the law of a state, provided that if the state law gives a right to a trial by jury such a trial shall in any case be allowed to the party demanding it within the time permitted by these rules, and in that event no hearing before a commission shall be had.

The first proposal accepts the state law as to the tribunals to fix compensation, and in that respect leaves the parties in precisely the same situation as if the case were pending in a state court, including the use of a commission with appeal to a jury, if the state law so provides. It has the effect of avoiding any question as to whether the decisions in *Erie R. Co. v. Tompkins* and later cases have application to a situation of this kind.

The second proposal gives the parties a right to a jury trial if that is provided for by state law, but prevents the use of both commission and jury. Those members of the Committee who favor the second proposal do so because of the obvious objections to the double trial, with a commission and appeal to a jury. As the decisions in *Erie R. Co. v. Tompkins* and later cases may have a bearing on this point, and the Committee is divided, we think both proposals should be placed before the Court.

4. The provision * * * of the 1948 draft * * * prescribing the effective date of the rule was drafted before the recent amendment of the Judicial Code on that subject. On May 10, 1950, the President approved an act which amended section 2072 of Title 28, United States Code, to read as follows:

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of 90 days after they have been thus reported.

To conform to the statute now in force, we suggest a provision as follows:

Effective Date. This Rule 71A and the amendment to Rule 81(a) will take effect on August 1, 1951. Rule 71A governs all proceedings in actions brought after it takes effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court its application in a particular action pending when the rule takes effect would not be feasible or would work injustice, in which event the former procedure applies.

If the rule is not reported to Congress by May 1, 1951, this provision must be altered.

5. We call attention to the fact that the proposed rule does not contain a provision for the procedure to be followed in order to exercise the right of the United States to take immediate possession or title, when the condemnation proceeding is begun. There are several statutes conferring such a right which are cited in the original notes to the May 1948 draft * * *. The existence of this right is taken into account in the rule. In paragraph (c)(2), * * * it is stated: ''Upon the commencement of the action, the plaintiff need join as defendants only the persons having or claiming an interest in the property whose names are then known.'' That is to enable the United States to exercise the right to immediate title or possession without the delay involved in ascertaining the names of all interested parties. The right is also taken into account in the provision relating to dismissal (paragraph (i) subdivisions (1), (2), and (3), * * *); also in paragraph (j) relating to deposits and their distribution.

The Advisory Committee considered whether the procedure for exercising the right should be specified in the rule and decided against it, as the procedure now being followed seems to be giving no trouble, and to draft a rule to fit all the statutes on the subject might create confusion.

The American Bar Association has taken an active interest in a rule for condemnation cases. In 1944 its House of Delegates adopted a resolution which among other things resolved:

That before adoption by the Supreme Court of the United States of any redraft of the proposed rule, time and opportunity should be afforded to the bar to consider and make recommendations concerning any such redraft.

Accordingly, in 1950 the revised draft was submitted to the American Bar Association and its section of real property, probate and trust law appointed a committee to consider it. That committee was supplied with copies of the written statement from the Department of Justice giving the reasons relied on by the Department for preferring a rule to use juries in all cases. The Advisory Committee's report was approved at a meeting of the section of real property law, and by the House of Delegates at the annual meeting of September 1950. The American Bar Association report gave particular attention to the question whether juries or commissions should be used to fix compensation, approved the Advisory Committee's solution appearing in their latest draft designed to allow use of commissions in projects comparable to the TVA, and rejected the proposal for use of juries in all cases.

In November 1950 a committee of the Federal Bar Association, the chairman of which was a Special Assistant to the Attorney General, made a report which reflected the attitude of the Department of Justice on the condemnation rule.

Aside from subdivision (h) about the tribunal to award compensation the final draft of the condemnation rule here presented has the approval of the American Bar Association and, we understand, the Department of Justice, and we do not know of any opposition to it. Subdivision (h) has the unanimous approval of the Advisory Committee and has been approved by the American Bar Association. The use of commissions in TVA cases, and, by fair inference, in cases comparable to the TVA, is supported by 17 out of 20 judges who up to 1947 had sat in TVA cases. The legal staff of the TVA has vigorously objected to the substitution of juries for commissions in TVA cases. We regret to report that the Department of Justice still asks that subdivision (h) be altered to provide for jury trials in all cases where Congress has not specified the tribunal. We understand that the Department approves the proposal that the system prevailing in 23 states for the ''double'' trial, by commission with appeal to and trial de novo before a jury, should be abolished, and also asks that on demand a jury should be substituted for a commission, in those states where use of a commission alone is now required. The Advisory Committee has no evidence that commissions do not operate satisfactorily in the case of projects comparable to the TVA.

Original report

General Statement. 1. Background. When the Advisory Committee was formulating its recommendations to the Court concerning rules of procedure, which subsequently became the Federal Rules of 1938, the Committee concluded at an early stage not to fix the procedure in condemnation cases. This is a matter principally involving the exercise of the federal power of eminent domain, as very few condemnation cases involving the state's power reach the United States District Courts. The Committee's reasons at that time were that inasmuch as condemnation proceedings by the United States are governed by statutes of the United States, prescribing different procedure for various agencies and departments of the government, or, in the absence of such statutes, by local state practice under the Conformity Act ([former] 40 U.S.C. sec. 258), it would be extremely difficult to draft a uniform rule satisfactory to the various agencies and departments of the government and to private parties; and that there was no general demand for a uniform rule. The Committee continued in that belief until shortly before the preparation of the April 1937 Draft of the Rules, when the officials of the Department of Justice having to do with condemnation cases urgently requested the Committee to propose rules on this subject. The Committee undertook the task and drafted a Condemnation Rule which appeared for the first time as Rule 74 of the April 1937 Draft. After the publication and distribution of this initial draft many objections were urged against it by counsel for various governmental agencies, whose procedure in condemnation cases was prescribed by federal statutes. Some of these agencies wanted to be excepted in whole or in part from the operation of the uniform rule proposed in April 1937. And the Department of Justice changed its position and stated that it preferred to have government condemnations conducted by local attorneys familiar with the state practice, which was applied under the Conformity Act where the Acts of Congress do not prescribe the practice; that it preferred to work under the Conformity Act without a uniform rule of procedure. The profession generally showed little interest in the proposed uniform rule. For these reasons the Advisory Committee in its Final Report to the Court in November 1937 proposed that all of Rule 74 be stricken and that the Federal Rules be made applicable only to appeals in condemnation cases. See note to Rule 74 of the Final Report.

Some six or seven years later when the Advisory Committee was considering the subject of amendments to the Federal Rules both government officials and the profession generally urged the adoption of some uniform procedure. This demand grew out of the volume of condemnation proceedings instituted during the war, and the general feeling of dissatisfaction with the diverse condemnation procedures that were applicable in the federal courts. A strongly held belief was that both the sovereign's power to condemn and the property owner's right to compensation could be promoted by a

simplified rule. As a consequence the Committee proposed a Rule 71A on the subject of condemnation in its Preliminary Draft of May 1944. In the Second Preliminary Draft of May 1945 this earlier proposed Rule 71A was, however, omitted. The Committee did not then feel that it had sufficient time to prepare a revised draft satisfactorily to it which would meet legitimate objections made to the draft of May 1944. To avoid unduly delaying the proposed amendments to existing rules the Committee concluded to proceed in the regular way with the preparation of the amendments to these rules and deal with the question of a condemnation rule as an independent matter. As a consequence it made no recommendations to the Court on condemnation in its Final Report of Proposed Amendments of June 1946; and the amendments which the Court adopted in December 1946 did not deal with condemnation. After concluding its task relative to amendments, the Committee returned to a consideration of eminent domain, its proposed Rule 71A of May 1944, the suggestions and criticisms that had been presented in the interim, and in June 1947 prepared and distributed to the profession another draft of a proposed condemnation rule. This draft contained several alternative provisions, specifically called attention to and asked for opinion relative to these matters, and in particular as to the constitution of the tribunal to award compensation. The present draft was based on the June 1947 formulation, in light of the advice of the profession on both matters of substance and form.

2. Statutory Provisions. The need for a uniform condemnation rule in the federal courts arises from the fact that by various statutes Congress has prescribed diverse procedures for certain condemnation proceedings, and, in the absence of such statutes, has prescribed conformity to local state practice under [former] 40 U.S.C. § 258. This general conformity adds to the diversity of procedure since in the United States there are multifarious methods of procedure in existence. Thus in 1931 it was said that there were 269 different methods of judicial procedure in different classes of condemnation cases and 56 methods of nonjudicial or administrative procedure. First Report of Judicial Council of Michigan, 1931, § 46, pp. 55–56. These numbers have not decreased. Consequently, the general requirement of conformity to state practice and procedure, particularly where the condemnor is the United States, leads to expense, delay and uncertainty. In advocacy of a uniform federal rule, see Armstrong, Proposed Amendments to Federal Rules for Civil Procedure 1944, 4 F.R.D. 124, 134; id., Report of the Advisory Committee on Federal Rules of Civil Procedure Recommending Amendments, 1946, 5 F.R.D. 339, 357.

There are a great variety of Acts of Congress authorizing the exercise of the power of eminent domain by the United States and its officers and agencies. These statutes for the most part do not specify the exact procedure to be followed, but where procedure is prescribed, it is by no means uniform.

The following are instances of Acts which merely authorize the exercise of the power without specific declaration as to the procedure:

U.S.C., Title 16:

§ 404c–11 (Mammoth Cave National Park; acquisition of lands, interests in lands or other property for park by the Secretary of the Interior).

§ 426d (Stones River National Park; acquisition of land for parks by the Secretary of the Army).

§ 450aa (George Washington Carver National Monument; acquisition of land by the Secretary of the Interior).

§ 517 (National forest reservation; title to lands to be acquired by the Secretary of Agriculture).

U.S.C., Title 42:

§§ 1805(b)(5), 1813(b) (Atomic Energy Act).

The following are instances of Acts which authorized condemnation and declare that the procedure is to conform with that of similar actions in state courts:

U.S.C., Title 16:

§ 423k (Richmond National Battlefield Park; acquisition of lands by the Secretary of the Interior).

§ 714 (Exercise by water power licensee of power of eminent domain).

U.S.C., Title 24:

§ 78 (Condemnation of land for the former National Home for Disabled Volunteer Soldiers).

U.S.C., Title 33:

§ 591 (Condemnation of lands and materials for river and harbor improvement by the Secretary of the Army).

U.S.C., Title 40:

§ 257 [now 3113] (Condemnation of realty for sites for public building and for other public uses by the Secretary of the Treasury authorized).

§ 258 [former] (Same procedure).

U.S.C., Title 50:

§ 171 (Acquisition of land by the Secretary of the Army for national defense).

§ 172 (Acquisition of property by the Secretary of the Army, etc., for production of lumber).

§ 632 App. (Second War Powers Act, 1942; acquisition of real property for war purposes by the Secretary of the Army, the Secretary of the Navy and others).

The following are Acts in which a more or less complete code of procedure is set forth in connection with the taking:

U.S.C., Title 16:

§ 831x (Condemnation by Tennessee Valley Authority).

U.S.C., Title 40:

§§ 361–386 [former] (Acquisition of lands in District of Columbia for use of United States; condemnation).

3. Adjustment of Rule to Statutory Provisions. While it was apparent that the principle of uniformity should be the basis for a rule to replace the multiple diverse procedures set out above, there remained a serious question as to whether an exception could properly be made relative to the method of determining compensation. Where Congress had provided for conformity to state law the following were the general methods in use: an initial determination by commissioners, with appeal to a judge; an initial award, likewise made by commissioners, but with the appeal to a jury; and determination by a jury without a previous award by commissioners. In two situations Congress had specified the tribunal to determine the issue of compensation: condemnation by the Tennessee Valley Authority; and condemnation in the District of Columbia. Under the TVA procedure the initial determination of value is by three disinterested commissioners, appointed by the court, from a locality other than the one in which the land lies. Either party may except to the award of the commission; in that case the exceptions are to be heard by three district judges (unless the parties stipulate for a lesser number), with a right of appeal to the circuit court of appeals. The TVA is a regional agency. It is faced with the necessity of acquiring a very substantial acreage within a relatively small area, and charged with the task of carrying on within the Tennessee Valley and in cooperation with the local people a permanent program involving navigation and flood control, electric power, soil conservation, and general regional development. The success of this program is partially dependent upon the good will and cooperation of the people of the Tennessee Valley, and this in turn partially depends upon the land acquisition program. Disproportionate awards among landowners would create dissatisfaction and ill will. To secure uniformity in treatment Congress provided the rather unique procedure of the three-judge court to review de novo the ini-

tial award of the commissioners. This procedure has worked to the satisfaction of the property owners and the TVA. A full statement of the TVA position and experience is set forth in Preliminary Draft of Proposed Rule to Govern Condemnation Cases (June, 1947) 15–19. A large majority of the district judges with experience under this procedure approve it, subject to some objection to the requirement for a three-judge district court to review commissioners' awards. A statutory three-judge requirement is, however, jurisdictional and must be strictly followed. *Stratton v. St. Louis, Southwestern Ry. Co.*, 1930, 51 S.Ct. 8, 282 U.S. 10, 75 L.Ed. 135; *Ayrshire Collieries Corp. v. United States*, 1947, 67 S.Ct. 1168, 331 U.S. 132, 91 L.Ed. 1391. Hence except insofar as the TVA statute itself authorizes the parties to stipulate for a court of less than three judges, the requirement must be followed, and would seem to be beyond alteration by court rule even if change were thought desirable. Accordingly the TVA procedure is retained for the determination of compensation in TVA condemnation cases. It was also thought desirable to retain the specific method Congress had prescribed for the District of Columbia, which is a so-called jury of five appointed by the court. This is a local matter and the specific treatment accorded by Congress has given local satisfaction.

Aside from the foregoing limited exceptions dealing with the TVA and the District of Columbia, the question was whether a uniform method for determining compensation should be a commission with appeal to a district judge, or a commission with appeal to a jury, or a jury without a commission. Experience with the commission on a nationwide basis, and in particular with the utilization of a commission followed by an appeal to a jury, has been that the commission is time consuming and expensive. Furthermore, it is largely a futile procedure where it is preparatory to jury trial. Since in the bulk of states a land owner is entitled eventually to a jury trial, since the jury is a traditional tribunal for the determination of questions of value, and since experience with juries has proved satisfactory to both government and land owner, the right to jury trial is adopted as the general rule. Condemnation involving the TVA and the District of Columbia are the two exceptions. See Note to Subdivision (h), infra.

Note to Subdivision (a). As originally promulgated the Federal Rules governed appeals in condemnation proceedings but were not otherwise applicable. Rule 81(a)(7). Pre-appeal procedure, in the main, conformed to state procedure. See statutes and discussion, supra. The purpose of Rule 71A is to provide a uniform procedure for condemnation in the federal district courts, including the District of Columbia. To achieve this purpose Rule 71A prescribes such specialized procedure as is required by condemnation proceedings, otherwise it utilizes the general framework of the Federal Rules where specific detail is unnecessary. The adoption of Rule 71A, of course, renders paragraph (7) of Rule 81(a) unnecessary.

The promulgation of a rule for condemnation procedure is within the rule-making power. The Enabling Act [Act of June 19, 1934, c. 651, §§1, 2 (48 Stat. 1064), 28 U.S.C. §§723b, 723c [see 2072]] gives the Supreme Court "the power to prescribe, by general rules * * * the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law." Such rules, however, must not abridge, enlarge, or modify substantive rights. In *Kohl v. United States*, 1875, 91 U.S. 367, 23 L.Ed. 449, a proceeding instituted by the United States to appropriate land for a post-office site under a statute enacted for such purpose, the Supreme Court held that "a proceeding to take land in virtue of the government's eminent domain, and determining the compensation to be made for it, is * * * a suit at common law, when initiated in a court." See also *Madisonville Traction Co. v. Saint Bernard Mining Co.*, 1905, 25 S.Ct. 251, 196 U.S. 239, 23 L.Ed. 449, infra, under subdivision (k). And the Conformity Act, [former] 40 U.S.C. §258, which is superseded by Rule 71A, deals only with "practice, pleadings, forms and proceedings and not with matters of substantive laws." *United States v. 243.22 Acres of Land in Village of Farmingdale, Town of Babylon, Suffolk County, N.Y.*, D.C.N.Y. 1942, 43 F.Supp. 561, affirmed 129 F.2d 678, certiorari denied, 63 S.Ct. 441, 317 U.S. 698, 87 L.Ed. 558.

Rule 71A affords a uniform procedure for all cases of condemnation invoking the national power of eminent domain, and, to the extent stated in subdivision (k), for cases invoking a state's power of eminent domain; and supplants all statutes prescribing a different procedure. While the almost exclusive utility of the rule is for the condemnation of real property, it also applies to the condemnation of personal property, either as an incident to real property or as the sole object of the proceeding, when permitted or required by statute. See 38 U.S.C. [former] §438j (World War Veterans' Relief Act); 42 U.S.C. §§1805, 1811, 1813 (Atomic Energy Act); 50 U.S.C. §79 (Nitrates Act); 50 U.S.C. §§161–166 (Helium Gas Act). Requisitioning of personal property with the right in the owner to sue the United States, where the compensation cannot be agreed upon (see 42 U.S.C. §1813, supra, for example) will continue to be the normal method of acquiring personal property and Rule 71A in no way interferes with or restricts any such right. Only where the law requires or permits the formal procedure of condemnation to be utilized will the rule have any applicability to the acquisition of personal property.

Rule 71A is not intended to and does not supersede the Act of February 26, 1931, ch. 307, §§1–5 (46 Stat. 1421), 40 U.S.C. §§258a–258e [now 40 U.S.C. 3114, 3115, 3118], which is a supplementary condemnation statute, permissive in its nature and designed to permit the prompt acquisition of title by the United States, pending the condemnation proceeding, upon a deposit in court. See *United States v. 76,800 Acres, More or Less, of Land, in Bryan and Liberty Counties, Ga.*, D.C.Ga. 1942, 44 F.Supp. 653; *United States v. 17,280 Acres of Land, More or Less, Situated in Saunders County, Nebr.*, D.C.Neb. 1942, 47 F.Supp. 267. The same is true insofar as the following or any other statutes authorize the acquisition of title or the taking of immediate possession:

U.S.C., Title 33:

§594 (When immediate possession of land may be taken; for a work of river and harbor improvements).

U.S.C., Title 42:

§1813(b) (When immediate possession may be taken under Atomic Energy Act).

U.S.C., Title 50:

§171 (Acquisition of land by the Secretary of the Army for national defense).

§632 App. (Second War Powers Act, 1942; acquisition of real property for war purposes by the Secretary of the Army, the Secretary of the Navy, and others).

Note to Subdivision (b). This subdivision provides for broad joinder in accordance with the tenor of other rules such as Rule 18. To require separate condemnation proceedings for each piece of property separately owned would be unduly burdensome and would serve no useful purpose. And a restriction that only properties may be joined which are to be acquired for the same public use would also cause difficulty. For example, a unified project to widen a street, construct a bridge across a navigable river, and for the construction of approaches to the level of the bridge on both sides of the river might involve acquiring property for different public uses. Yet it is eminently desirable that the plaintiff may in one proceeding condemn all the property interests and rights necessary to carry out this project. Rule 21 which allows the court to sever and proceed separately with any claim against a party, and Rule 42(b) giving the court broad discretion to order separate trials give adequate protection to all defendants in condemnation proceedings.

Note to Subdivision (c). Since a condemnation proceeding is in rem and since a great many property owners

are often involved, paragraph (1) requires the property to be named and only one of the owners. In other respects the caption will contain the name of the court, the title of the action, file number, and a designation of the pleading as a complaint in accordance with Rule 10(a).

Since the general standards of pleading are stated in other rules, paragraph (2) prescribes only the necessary detail for condemnation proceedings. Certain statutes allow the United States to acquire title or possession immediately upon commencement of an action. See the Act of February 26, 1931, ch. 307 §§1–5 (46 Stat. 1421), 40 U.S.C. §§258a–258e [now 40 U.S.C. 3114, 3115, 3118], supra; and 33 U.S.C. §594, 42 U.S.C. §1813(b), 50 U.S.C. §§171, 632, supra. To carry out the purpose of such statutes and to aid the condemnor in instituting the action even where title is not acquired at the outset, the plaintiff is initially required to join as defendants only the persons having or claiming an interest in the property whose names are then known. This in no way prejudices the property owner, who must eventually be joined as a defendant, served with process, and allowed to answer before there can be any hearing involving the compensation to be paid for his piece of property. The rule requires the plaintiff to name all persons having or claiming an interest in the property of whom the plaintiff has learned and, more importantly, those appearing of record. By charging the plaintiff with the necessity to make ''a search of the records of the extent commonly made by competent searchers of title in the vicinity in light of the type and value of the property involved'' both the plaintiff and property owner are protected. Where a short term interest in property of little value is involved, as a two or three year easement over a vacant land for purposes of ingress and egress to other property, a search of the records covering a long period of time is not required. Where on the other hand fee simple title in valuable property is being condemned the search must necessarily cover a much longer period of time and be commensurate with the interests involved. But even here the search is related to the type made by competent title searchers in the vicinity. A search that extends back to the original patent may be feasible in some midwestern and western states and be proper under certain circumstances. In the Atlantic seaboard states such a search is normally not feasible nor desirable. There is a common sense business accommodation of what title searchers can and should do. For state statutes requiring persons appearing as owners or otherwise interested in the property to be named as defendants, see 3 Colo. Stat. Ann., 1935, c. 61, §2; Ill. Ann. Stat. (Smith-Hurd) c. 47, §2; 1 Iowa Code, 1946, §472.3; Kans. Stat. Ann., 1935, §26–101; 2 Mass. Laws Ann., 1932, ch. 80A, §4; 7 Mich. Stat. Ann., 1936, §8.2; 2 Minn. Stat., Mason, 1927, §6541; 20 N.J. Stat. Ann., 1939, §1–2; 3 Wash. Revised Stat., Remington, 1932, Title 6, §891. For state provisions allowing persons whose names are not known to be designated under the descriptive term of ''unknown owner'', see Hawaii Revised Laws, 1945, c. 8, §310 (''such [unknown] defendant may be joined in the petition under a fictitious name.''; Ill. Ann. Stat., Smith-Hurd), c. 47, §2 (''Persons interested, whose names are unknown, may be made parties defendant by the description of the unknown owners; . . .''); Maryland Code Ann., 1939, Ar. 33A, §1 (''In case any owner or owners is or are not known, he or they may be described in such petition as the unknown owner or owners, or the unknown heir or heirs of a deceased owner.''); 2 Mass. Laws Ann., 1932, c. 80A, §4 (''Persons not in being, unascertained or unknown who may have an interest in any of such land shall be made parties respondent by such description as seems appropriate, * * *''); New Mex. Stat. Ann., 1941, §25–901 (''the owners * * * shall be parties defendant, by name, if the names are known, and by description of the unknown owners of the land therein described, if their names are unknown.''); Utah Code Ann., 1943, §104–61–7 (''The names of all owners and claimants of the property, if known, or a statement that they are unknown, who must be styled defendants'').

The last sentence of paragraph (2) enables the court to expedite the distribution of a deposit, in whole or in part, as soon as pertinent facts of ownership, value and the like are established. See also subdivision (j).

The signing of the complaint is governed by Rule 11.

Note to Subdivision (d). In lieu of a summons, which is the initial process in other civil actions under Rule 4 (a), subdivision (d) provides for a notice which is to contain sufficient information so that the defendant in effect obtains the plaintiff's statement of his claim against the defendant to whom the notice is directed. Since the plaintiff's attorney is an officer of the court and to prevent unduly burdening the clerk of the court, paragraph (1) of subdivision (d) provides that plaintiff's attorney shall prepare and deliver a notice or notices to the clerk. Flexibility is provided by the provision for joint or several notices, and for additional notices. Where there are only a few defendants it may be convenient to prepare but one notice directed to all the defendants. In other cases where there are many defendants it will be more convenient to prepare two or more notices; but in any event a notice must be directed to each named defendant. Paragraph (2) provides that the notice is to be signed by the plaintiff's attorney. Since the notice is to be delivered to the clerk, the issuance of the notice will appear of record in the court. The clerk should forthwith deliver the notice or notices for service to the marshal or to a person specially appointed to serve the notice. Rule 4 (a). The form of the notice is such that, in addition to informing the defendant of the plaintiff's statement of claim, it tells the defendant precisely what his rights are. Failure on the part of the defendant to serve an answer constitutes a consent to the taking and to the authority of the court to proceed to fix compensation therefor, but it does not preclude the defendant from presenting evidence as to the amount of compensation due him or in sharing the award of distribution. See subdivision (e); Form 28.

While under Rule 4(f) the territorial limits of a summons are normally the territorial limits of the state in which the district court is held, the territorial limits for personal service of a notice under Rule 71A (d)(3) are those of the nation. This extension of process is here proper since the aim of the condemnation proceeding is not to enforce any personal liability and the property owner is helped, not imposed upon, by the best type of service possible. If personal service cannot be made either because the defendant's whereabouts cannot be ascertained, or, if ascertained, the defendant cannot be personally served, as where he resides in a foreign country such as Canada or Mexico, then service by publication is proper. The provisions for this type of service are set forth in the rule and are in no way governed by 28 U.S.C. §118.

Note to Subdivision (e). Departing from the scheme of Rule 12, subdivision (e) requires all defenses and objections to be presented in an answer and does not authorize a preliminary motion. There is little need for the latter in condemnation proceedings. The general standard of pleading is governed by other rules, particularly Rule 8, and this subdivision (e) merely prescribes what matters the answer should set forth. Merely by appearing in the action a defendant can receive notice of all proceedings affecting him. And without the necessity of answering a defendant may present evidence as to the amount of compensation due him, and he may share in the distribution of the award. See also subdivision (d)(2); Form 28.

Note to Subdivision (f). Due to the number of persons who may be interested in the property to be condemned, there is a likelihood that the plaintiff will need to amend his complaint, perhaps many times, to add new parties or state new issues. This subdivision recognizes that fact and does not burden the court with applications by the plaintiff for leave to amend. At the same time all defendants are adequately protected; and their need to amend the answer is adequately protected by Rule 15, which is applicable by virtue of subdivision (a) of this Rule 71A.

Note to Subdivision (g). A condemnation action is a proceeding in rem. Commencement of the action as

against a defendant by virtue of his joinder pursuant to subdivision (c)(2) is the point of cut-off and there is no mandatory requirement for substitution because of a subsequent change of interest, although the court is given ample power to require substitution. Rule 25 is inconsistent with subdivision (g) and hence inapplicable. Accordingly, the time periods of Rule 25 do not govern to require dismissal nor to prevent substitution.

Note to Subdivision (h). This subdivision prescribes the method for determining the issue of just compensation in cases involving the federal power of eminent domain. The method of jury trial provided by subdivision (h) will normally apply in cases involving the state power by virtue of subdivision (k).

Congress has specially constituted a tribunal for the trial of the issue of just compensation in two instances: condemnation under the Tennessee Valley Authority Act; and condemnation in the District of Columbia. These tribunals are retained for reasons set forth in the General Statement: 3. Adjustment of Rule to Statutory Provisions, supra. Subdivision (h) also has prospective application so that if Congress should create another special tribunal, that tribunal will determine the issue of just compensation. Subject to these exceptions the general method of trial of that issue is to be by jury if any party demands it, otherwise that issue, as well as all other issues, are to be tried by the court.

As to the TVA procedure that is continued, U.S.C., Title 16, §831x requires that three commissioners be appointed to fix the compensation; that exceptions to their award are to be heard by three district judges (unless the parties stipulate for a lesser number) and that the district judges try the question de novo; that an appeal to the circuit court of appeals may be taken within 30 days from the filing of the decision of the district judges; and that the circuit court of appeals shall on the record fix compensation ''without regard to the awards of findings theretofore made by the commissioners or the district judges.'' The mode of fixing compensation in the District of Columbia, which is also continued, is prescribed in U.S.C., [former] Title 40, §§361–386. Under §371 the court is required in all cases to order the selection of a jury of five from among not less than 20 names, drawn ''from the special box provided by law.'' They must have the usual qualifications of jurors and in addition must be freeholders of the District, and not in the service of the United States or the District. A special oath is administered to the chosen jurors. The trial proceeds in the ordinary way, except that the jury is allowed to separate after they have begun to consider their verdict.

There is no constitutional right to jury trial in a condemnation proceeding. *Bauman v. Ross*, 1897, 17 S.Ct. 966, 167 U.S. 548, 42 L.Ed. 270. See, also, Hines, Does the Seventh Amendment to the Constitution of the United States Require Jury Trials in all Condemnation Proceedings? 1925, 11 Va.L.Rev. 505; Blair, Federal Condemnation Proceedings and the Seventh Amendment 1927, 41 Harv.L.Rev. 29; 3 Moore's Federal Practice 1938, 3007. Prior to Rule 71A, jury trial in federal condemnation proceedings was, however, enjoyed under the general conformity statute, [former] 40 U.S.C. §258, in states which provided for jury trial. See generally, 2 Lewis, Eminent Domain 3d ed. 1909, §§509, 510; 3 Moore, op. cit. supra. Since the general conformity statute is superseded by Rule 71A, see supra under subdivision (a), and since it was believed that the rule to be substituted should likewise give a right to jury trial, subdivision (h) establishes that method as the general one for determining the issue of just compensation.

Note to Subdivision (i). Both the right of the plaintiff to dismiss by filing a notice of dismissal and the right of the court to permit a dismissal are circumscribed to the extent that where the plaintiff has acquired the title or a lesser interest or possession, viz, any property interest for which just compensation should be paid, the action may not be dismissed, without the defendant's consent, and the property owner remitted to another court, such as the Court of Claims, to recover just compensation for the property right taken. Circuity of action is thus prevented without increasing the liability of the plaintiff to pay just compensation for any interest that is taken. Freedom of dismissal is accorded, where both the condemnor and condemnee agree, up to the time of the entry of judgment vesting plaintiff with title. And power is given to the court, where the parties agree, to vacate the judgment and thus revest title in the property owner. In line with Rule 21, the court may at any time drop a defendant who has been unnecessarily or improperly joined as where it develops that he has no interest.

Note to Subdivision (j). Whatever the substantive law is concerning the necessity of making a deposit will continue to govern. For statutory provisions concerning deposit in court in condemnation proceedings by the United States, see U.S.C., Title 40, §258a [now 40 U.S.C. 3114(a)–(d)]; U.S.C., Title 33, §594—acquisition of title and possession statutes referred to in note to subdivision (a), supra. If the plaintiff is invoking the state's power of eminent domain the necessity of deposit will be governed by the state law. For discussion of such law, see 1 Nichols, Eminent Domain, 2d ed. 1917, §§209–216. For discussion of the function of deposit and the power of the court to enter judgment in cases both of deficiency and overpayment, see *United States v. Miller*, 1943, 63 S.Ct. 276, 317 U.S. 369, 87 L.Ed. 336, 147 A.L.R. 55, rehearing denied, 63 S.Ct. 557, 318 U.S. 798, 87 L.Ed. 1162 (judgment in favor of plaintiff for overpayment ordered).

The court is to make distribution of the deposit as promptly as the facts of the case warrant. See also subdivision (c)(2).

Note to Subdivision (k). While the overwhelming number of cases that will be brought in the federal courts under this rule will be actions involving the federal power of eminent domain, a small percentage of cases may be instituted in the federal court or removed thereto on the basis of diversity or alienage which will involve the power of eminent domain under the law of a state. See *Boom Co. v. Patterson*, 1878, 98 U.S. 403, 25 L.Ed. 206; *Searl v. School District No. 2*, 1888, 8 S.Ct. 460, 124 U.S. 197, 31 L.Ed. 415; *Madisonville Traction Co. v. Saint Bernard Mining Co.*, 1905, 25 S.Ct. 251, 196 U.S. 239, 49 L.Ed. 462. In the Madisonville case, and in cases cited therein, it has been held that condemnation actions brought by state corporations in the exercise of a power delegated by the state might be governed by procedure prescribed by the laws of the United States, whether the cases were begun in or removed to the federal court. See also *Franzen v. Chicago, M. & St. P. Ry. Co.*, C.C.A.7th, 1921, 278 F. 370, 372.

Any condition affecting the substantial right of a litigant attached by state law is to be observed and enforced, such as making a deposit in court where the power of eminent domain is conditioned upon so doing. (See also subdivision (j)). Subject to this qualification, subdivision (k) provides that in cases involving the state power of eminent domain, the practice prescribed by other subdivisions of Rule 71A shall govern.

Note to Subdivision (l). Since the condemnor will normally be the prevailing party and since he should not recover his costs against the property owner, Rule 54(d), which provides generally that costs shall go to the prevailing party, is made inapplicable. Without attempting to state what the rule on costs is, the effect of subdivision (1) is that costs shall be awarded in accordance with the law that has developed in condemnation cases. This has been summarized as follows: ''Costs of condemnation proceedings are not assessable against the condemnee, unless by stipulation he agrees to assume some or all of them. Such normal expenses of the proceeding as bills for publication of notice, commissioners' fees, the cost of transporting commissioners and jurors to take a view, fees for attorneys to represent defendants who have failed to answer, and witness' fees, are properly charged to the government, though not taxed as costs. Similarly, if it is necessary that a conveyance be executed by a commissioner, the United States pay his fees and those for recording the deed. However, the distribution of the award is a mat-

ter in which the United States has no legal interest. Expenses incurred in ascertaining the identity of distributees and deciding between conflicting claimants are properly chargeable against the award, not against the United States, although United States attorneys are expected to aid the court in such matters as amici curiae.'' Lands Division Manual 861. For other discussion and citation, see *Grand River Dam Authority v. Jarvis*, C.C.A.10th, 1942, 124 F.2d 914. Costs may not be taxed against the United States except to the extent permitted by law. *United States v. 125.71 Acres of Land in Loyalhanna Tp., Westmoreland County, Pa.*, D.C.Pa. 1944, 54 F.Supp. 193; Lands Division Manual 859. Even if it were thought desirable to allow the property owner's costs to be taxed against the United States, this is a matter for legislation and not court rule.

NOTES OF ADVISORY COMMITTEE ON RULES—1963 AMENDMENT

This amendment conforms to the amendment of Rule 4(f).

NOTES OF ADVISORY COMMITTEE ON RULES—1985 AMENDMENT

Rule 71A(h) provides that except when Congress has provided otherwise, the issue of just compensation in a condemnation case may be tried by a jury if one of the parties so demands, unless the court in its discretion orders the issue determined by a commission of three persons. In 1980, the Comptroller General of the United States in a Report to Congress recommended that use of the commission procedure should be encouraged in order to improve and expedite the trial of condemnation cases. The Report noted that long delays were being caused in many districts by such factors as crowded dockets, the precedence given criminal cases, the low priority accorded condemnation matters, and the high turnover of Assistant United States Attorneys. The Report concluded that revising Rule 71A to make the use of the commission procedure more attractive might alleviate the situation.

Accordingly, Rule 71A(h) is being amended in a number of respects designed to assure the quality and utility of a Rule 71A commission. First, the amended Rule will give the court discretion to appoint, in addition to the three members of a commission, up to two additional persons as alternate commissioners who would hear the case and be available, at any time up to the filing of the decision by the three-member commission, to replace any commissioner who becomes unable or disqualified to continue. The discretion to appoint alternate commissioners can be particularly useful in protracted cases, avoiding expensive retrials that have been required in some cases because of the death or disability of a commissioner. Prior to replacing a commissioner an alternate would not be present at, or participate in, the commission's deliberations.

Second, the amended Rule requires the court, before appointment, to advise the parties of the identity and qualifications of each prospective commissioner and alternate. The court then may authorize the examination of prospective appointees by the parties and each party has the right to challenge for cause. The objective is to insure that unbiased and competent commissioners are appointed.

The amended Rule does not prescribe a qualification standard for appointment to a commission, although it is understood that only persons possessing background and ability to appraise real estate valuation testimony and to award fair and just compensation on the basis thereof would be appointed. In most situations the chairperson should be a lawyer and all members should have some background qualifying them to weigh proof of value in the real estate field and, when possible, in the particular real estate market embracing the land in question.

The amended Rule should give litigants greater confidence in the commission procedure by affording them certain rights to participate in the appointment of commission members that are roughly comparable to the practice with regard to jury selection. This is accomplished by giving the court permission to allow the parties to examine prospective commissioners and by recognizing the right of each party to object to the appointment of any person for cause.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1988 AMENDMENT

The amendment is technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1993 AMENDMENT

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

COMMITTEE NOTES ON RULES—2003 AMENDMENT

The references to specific subdivisions of Rule 53 are deleted or revised to reflect amendments of Rule 53.

AMENDMENT BY PUBLIC LAW

1988—Subd. (e). Pub. L. 100–690, which directed amendment of subd. (e) by striking ''taking of the defendants property'' and inserting ''taking of the defendant's property'', could not be executed because of the intervening amendment by the Court by order dated Apr. 25, 1988, eff. Aug. 1, 1988.

Rule 72. Magistrate Judges; Pretrial Orders

(a) NONDISPOSITIVE MATTERS. A magistrate judge to whom a pretrial matter not dispositive of a claim or defense of a party is referred to hear and determine shall promptly conduct such proceedings as are required and when appropriate enter into the record a written order setting forth the disposition of the matter. Within 10 days after being served with a copy of the magistrate judge's order, a party may serve and file objections to the order; a party may not thereafter assign as error a defect in the magistrate judge's order to which objection was not timely made. The district judge to whom the case is assigned shall consider such objections and shall modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law.

(b) DISPOSITIVE MOTIONS AND PRISONER PETITIONS. A magistrate judge assigned without consent of the parties to hear a pretrial matter dispositive of a claim or defense of a party or a prisoner petition challenging the conditions of confinement shall promptly conduct such proceedings as are required. A record shall be made of all evidentiary proceedings before the magistrate judge, and a record may be made of such other proceedings as the magistrate judge deems necessary. The magistrate judge shall enter into the record a recommendation for disposition of the matter, including proposed findings of fact when appropriate. The clerk shall forthwith mail copies to all parties.

A party objecting to the recommended disposition of the matter shall promptly arrange for the transcription of the record, or portions of it as all parties may agree upon or the magistrate judge deems sufficient, unless the district judge otherwise directs. Within 10 days after being

served with a copy of the recommended disposition, a party may serve and file specific, written objections to the proposed findings and recommendations. A party may respond to another party's objections within 10 days after being served with a copy thereof. The district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

(As added Apr. 28, 1983, eff. Aug. 1, 1983; amended Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993.)

NOTES OF ADVISORY COMMITTEE ON RULES—1983

Subdivision (a). This subdivision addresses court-ordered referrals of nondispositive matters under 28 U.S.C. § 636(b)(1)(A). The rule calls for a written order of the magistrate's disposition to preserve the record and facilitate review. An oral order read into the record by the magistrate will satisfy this requirement.

No specific procedures or timetables for raising objections to the magistrate's rulings on nondispositive matters are set forth in the Magistrates Act. The rule fixes a 10-day period in order to avoid uncertainty and provide uniformity that will eliminate the confusion that might arise if different periods were prescribed by local rule in different districts. It also is contemplated that a party who is successful before the magistrate will be afforded an opportunity to respond to objections raised to the magistrate's ruling.

The last sentence of subdivision (a) specifies that reconsideration of a magistrate's order, as provided for in the Magistrates Act, shall be by the district judge to whom the case is assigned. This rule does not restrict experimentation by the district courts under 28 U.S.C. § 636(b)(3) involving references of matters other than pretrial matters, such as appointment of counsel, taking of default judgments, and acceptance of jury verdicts when the judge is unavailable.

Subdivision (b). This subdivision governs court-ordered referrals of dispositive pretrial matters and prisoner petitions challenging conditions of confinement, pursuant to statutory authorization in 28 U.S.C. § 636(b)(1)(B). This rule does not extend to habeas corpus petitions, which are covered by the specific rules relating to proceedings under Sections 2254 and 2255 of Title 28.

This rule implements the statutory procedures for making objections to the magistrate's proposed findings and recommendations. The 10-day period, as specified in the statute, is subject to Rule 6(e) which provides for an additional 3-day period when service is made by mail. Although no specific provision appears in the Magistrates Act, the rule specifies a 10-day period for a party to respond to objections to the magistrate's recommendation.

Implementing the statutory requirements, the rule requires the district judge to whom the case is assigned to make a de novo determination of those portions of the report, findings, or recommendations to which timely objection is made. The term ''de novo'' signifies that the magistrate's findings are not protected by the clearly erroneous doctrine, but does not indicate that a second evidentiary hearing is required. See *United States v. Raddatz*, 417 U.S. 667 (1980). See also Silberman, *Masters and Magistrates Part II: The American Analogue*, 50 N.Y.U. L.Rev. 1297, 1367 (1975). When no timely objection is filed, the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation. See *Campbell v. United States Dist. Court*, 501 F.2d 196, 206 (9th Cir. 1974), cert. denied, 419 U.S. 879, quoted in House Report No. 94–1609, 94th Cong. 2d Sess. (1976) at 3. Compare *Park Motor Mart, Inc. v. Ford Motor Co.*, 616 F.2d 603 (1st Cir. 1980). Failure to make timely objection to the magistrate's report prior to its adoption by the district judge may constitute a waiver of appellate review of the district judge's order. See *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

NOTES OF ADVISORY COMMITTEE ON RULES—1991 AMENDMENT

This amendment is intended to eliminate a discrepancy in measuring the 10 days for serving and filing objections to a magistrate's action under subdivisions (a) and (b) of this Rule. The rule as promulgated in 1983 required objections to the magistrate's handling of nondispositive matters to be served and filed within 10 days of entry of the order, but required objections to dispositive motions to be made within 10 days of being served with a copy of the recommended disposition. Subdivision (a) is here amended to conform to subdivision (b) to avoid any confusion or technical defaults, particularly in connection with magistrate orders that rule on both dispositive and nondispositive matters.

The amendment is also intended to assure that objections to magistrate's orders that are not timely made shall not be considered. *Compare* Rule 51.

NOTES OF ADVISORY COMMITTEE ON RULES—1993 AMENDMENT

This revision is made to conform the rule to changes made by the Judicial Improvements Act of 1990.

Rule 73. Magistrate Judges; Trial by Consent and Appeal

(a) POWERS; PROCEDURE. When specially designated to exercise such jurisdiction by local rule or order of the district court and when all parties consent thereto, a magistrate judge may exercise the authority provided by Title 28, U.S.C. § 636(c) and may conduct any or all proceedings, including a jury or nonjury trial, in a civil case. A record of the proceedings shall be made in accordance with the requirements of Title 28, U.S.C. § 636(c)(5).

(b) CONSENT. When a magistrate judge has been designated to exercise civil trial jurisdiction, the clerk shall give written notice to the parties of their opportunity to consent to the exercise by a magistrate judge of civil jurisdiction over the case, as authorized by Title 28, U.S.C. § 636(c). If, within the period specified by local rule, the parties agree to a magistrate judge's exercise of such authority, they shall execute and file a joint form of consent or separate forms of consent setting forth such election.

A district judge, magistrate judge, or other court official may again advise the parties of the availability of the magistrate judge, but, in so doing, shall also advise the parties that they are free to withhold consent without adverse substantive consequences. A district judge or magistrate judge shall not be informed of a party's response to the clerk's notification, unless all parties have consented to the referral of the matter to a magistrate judge.

The district judge, for good cause shown on the judge's own initiative, or under extraordinary circumstances shown by a party, may vacate a reference of a civil matter to a magistrate judge under this subdivision.

(c) APPEAL. In accordance with Title 28, U.S.C. § 636(c)(3), appeal from a judgment entered upon

direction of a magistrate judge in proceedings under this rule will lie to the court of appeals as it would from a judgment of the district court.

[(d) OPTIONAL APPEAL ROUTE.] (Abrogated Apr. 11, 1997, eff. Dec. 1, 1997)

(As added Apr. 28, 1983, eff. Aug. 1, 1983; amended Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 11, 1997, eff. Dec. 1, 1997.)

NOTES OF ADVISORY COMMITTEE ON RULES—1983

Subdivision (a). This subdivision implements the broad authority of the 1979 amendments to the Magistrates Act, 28 U.S.C. §636(c), which permit a magistrate to sit in lieu of a district judge and exercise civil jurisdiction over a case, when the parties consent. See McCabe, *The Federal Magistrate Act of 1979*, 16 Harv. J. Legis. 343, 364–79 (1979). In order to exercise this jurisdiction, a magistrate must be specially designated under 28 U.S.C. §636(c)(1) by the district court or courts he serves. The only exception to a magistrate's exercise of civil jurisdiction, which includes the power to conduct jury and nonjury trials and decide dispositive motions, is the contempt power. A hearing on contempt is to be conducted by the district judge upon certification of the facts and an order to show cause by the magistrate. See 28 U.S.C. §639(e). In view of 28 U.S.C. §636(c)(1) and this rule, it is unnecessary to amend Rule 58 to provide that the decision of a magistrate is a ''decision by the court'' for the purposes of that rule and a ''final decision of the district court'' for purposes of 28 U.S.C. §1291 governing appeals.

Subdivision (b). This subdivision implements the blind consent provision of 28 U.S.C. §636(c)(2) and is designed to ensure that neither the judge nor the magistrate attempts to induce a party to consent to reference of a civil matter under this rule to a magistrate. See House Rep. No. 96–444, 96th Cong. 1st Sess. 8 (1979).

The rule opts for a uniform approach in implementing the consent provision by directing the clerk to notify the parties of their opportunity to elect to proceed before a magistrate and by requiring the execution and filing of a consent form or forms setting forth the election. However, flexibility at the local level is preserved in that local rules will determine how notice shall be communicated to the parties, and local rules will specify the time period within which an election must be made.

The last paragraph of subdivision (b) reiterates the provision in 28 U.S.C. §636(c)(6) for vacating a reference to the magistrate.

Subdivision (c). Under 28 U.S.C. §636(c)(3), the normal route of appeal from the judgment of a magistrate—the only route that will be available unless the parties otherwise agree in advance—is an appeal by the aggrieved party ''directly to the appropriate United States court of appeals from the judgment of the magistrate in the same manner as an appeal from any other judgment of a district court.'' The quoted statutory language indicates Congress' intent that the same procedures and standards of appealability that govern appeals from district court judgments govern appeals from magistrates' judgments.

Subdivision (d). 28 U.S.C. §636(c)(4) offers parties who consent to the exercise of civil jurisdiction by a magistrate an alternative appeal route to that provided in subdivision (c) of this rule. This optional appellate route was provided by Congress in recognition of the fact that not all civil cases warrant the same appellate treatment. In cases where the amount in controversy is not great and there are no difficult questions of law to be resolved, the parties may desire to avoid the expense and delay of appeal to the court of appeals by electing an appeal to the district judge. See McCabe, *The Federal Magistrate Act of 1979*, 16 Harv. J. Legis. 343, 388 (1979). This subdivision provides that the parties may elect the optional appeal route at the time of reference to a magistrate. To this end, the notice by the clerk under subdivision (b) of this rule shall explain the appeal option and the corollary restriction on review by the court of appeals. This approach will avoid later claims of lack of consent to the avenue of appeal. The choice of the alternative appeal route to the judge of the district court should be made by the parties in their forms of consent. Special appellate rules to govern appeals from a magistrate to a district judge appear in new Rules 74 through 76.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendment is technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1993 AMENDMENT

This revision is made to conform the rule to changes made by the Judicial Improvements Act of 1990. The Act requires that, when being reminded of the availability of a magistrate judge, the parties be advised that withholding of consent will have no ''adverse substantive consequences.'' They may, however, be advised if the withholding of consent will have the adverse procedural consequence of a potential delay in trial.

NOTES OF ADVISORY COMMITTEE ON RULES—1997 AMENDMENT

The Federal Courts Improvement Act of 1996 repealed the former provisions of 28 U.S.C. §636(c)(4) and (5) that enabled parties that had agreed to trial before a magistrate judge to agree also that appeal should be taken to the district court. Rule 73 is amended to conform to this change. Rules 74, 75, and 76 are abrogated for the same reason. The portions of Form 33 and Form 34 that referred to appeals to the district court also are deleted.

[Rule 74. Method of Appeal From Magistrate Judge to District Judge Under Title 28, U.S.C. §636(c)(4) and Rule 73(d)] (Abrogated Apr. 11, 1997, eff. Dec. 1, 1997)

NOTES OF ADVISORY COMMITTEE ON RULES—1997 AMENDMENT

Rule 74 is abrogated for the reasons described in the Note to Rule 73.

[Rule 75. Proceedings on Appeal From Magistrate Judge to District Judge Under Rule 73(d)] (Abrogated Apr. 11, 1997, eff. Dec. 1, 1997)

NOTES OF ADVISORY COMMITTEE ON RULES—1997 AMENDMENT

Rule 75 is abrogated for the reasons described in the Note to Rule 73.

[Rule 76. Judgment of the District Judge on the Appeal Under Rule 73(d) and Costs] (Abrogated Apr. 11, 1997, eff. Dec. 1, 1997)

NOTES OF ADVISORY COMMITTEE ON RULES—1997 AMENDMENT

Rule 76 is abrogated for the reasons described in the Note to Rule 73.

X. DISTRICT COURTS AND CLERKS

Rule 77. District Courts and Clerks

(a) DISTRICT COURTS ALWAYS OPEN. The district courts shall be deemed always open for the purpose of filing any pleading or other proper paper, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, and rules.

(b) TRIALS AND HEARINGS; ORDERS IN CHAMBERS. All trials upon the merits shall be con-

ducted in open court and so far as convenient in a regular court room. 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 place either within or without the district; but no hearing, other than one ex parte, shall be conducted outside the district without the consent of all parties affected thereby.

(c) 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 legal holidays, but a district court may provide by local rule or order that its clerk's office shall be open for specified hours on Saturdays or particular legal holidays other than New Year's Day, Birthday of Martin Luther King, Jr., 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 mesne process, for issuing final 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.

(d) 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(b) 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(b) 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.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Dec. 4, 1967, eff. July 1, 1968; Mar. 1, 1971, eff. July 1, 1971; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 23, 2001, eff. Dec. 1, 2001.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

This rule states the substance of U.S.C., Title 28, § 13 [now 452] (Courts open as courts of admiralty and equity). Compare [former] Equity Rules 1 (District Court Always Open For Certain Purposes—Orders at Chambers), 2 (Clerk's Office Always Open, Except, Etc.), 4 (Notice of Orders), and 5 (Motions Grantable of Course by Clerk).

NOTES OF ADVISORY COMMITTEE ON RULES—1946
AMENDMENT

Rule 77(d) has been amended to avoid such situations as the one arising in *Hill v. Hawes* (1944) 320 U.S. 520. In that case, an action instituted in the District Court for the District of Columbia, the clerk failed to give notice of the entry of a judgment for defendant as required by Rule 77(d). The time for taking an appeal then was 20 days under Rule 10 of the Court of Appeals (later enlarged by amendment to thirty days), and due to lack of notice of the entry of judgment the plaintiff failed to file his notice of appeal within the prescribed time. On this basis the trial court vacated the original judgment and then reentered it, whereupon notice of appeal was filed. The Court of Appeals dismissed the appeal as taken too late. The Supreme Court, however, held that although Rule 77(d) did not purport to attach any consequence to the clerk's failure to give notice as specified, the terms of the rule were such that the appellant was entitled to rely on it, and the trial court in such a case, in the exercise of a sound discretion, could vacate the former judgment and enter a new one, so that the appeal would be within the allowed time.

Because of Rule 6(c), which abolished the old rule that the expiration of the term ends a court's power over its judgment, the effect of the decision in *Hill v. Hawes* is to give the district court power, in its discretion and without time limit, and long after the term may have expired, to vacate a judgment and reenter it for the purpose of reviving the right of appeal. This seriously affects the finality of judgments. See also proposed Rule 6(c) and Note; proposed Rule 60(b) and Note; and proposed Rule 73(a) and Note.

Rule 77(d) as amended makes it clear that notification by the clerk of the entry of a judgment has nothing to do with the starting of the time for appeal; that time starts to run from the date of entry of judgment and not from the date of notice of the entry. Notification by the clerk is merely for the convenience of litigants. And lack of such notification in itself has no effect upon the time for appeal; but in considering an application for extension of time for appeal as provided in Rule 73(a), the court may take into account, as one of the factors affecting its decision, whether the clerk failed to give notice as provided in Rule 77(d) or the party failed to receive the clerk's notice. It need not, however, extend the time for appeal merely because the clerk's notice was not sent or received. It would, therefore, be entirely unsafe for a party to rely on absence of notice from the clerk of the entry of a judgment, or to rely on the adverse party's failure to serve notice of the entry of a judgment. Any party may, of course, serve timely notice of the entry of a judgment upon the adverse party and thus preclude a successful application, under Rule 73(a), for the extension of the time for appeal.

NOTES OF ADVISORY COMMITTEE ON RULES—1963
AMENDMENT

Subdivision (c). The amendment authorizes closing of the clerk's office on Saturday as far as civil business is concerned. However, a district court may require its clerk's office to remain open for specified hours on Saturdays or "legal holidays" other than those enumerated. ("Legal holiday" is defined in Rule 6(a), as amended.) The clerk's offices of many district courts have customarily remained open on some of the days appointed as holidays by State law. This practice could be continued by local rule or order.

Subdivision (d). This amendment conforms to the amendment of Rule 5(a). See the Advisory Committee's Note to that amendment.

NOTES OF ADVISORY COMMITTEE ON RULES—1968
AMENDMENT

The provisions of Rule 73(a) are incorporated in Rule 4(a) of the Federal Rules of Appellate Procedure.

NOTES OF ADVISORY COMMITTEE ON RULES—1971
AMENDMENT

The amendment adds Columbus Day to the list of legal holidays. See the Note accompanying the amendment of Rule 6(a).

NOTES OF ADVISORY COMMITTEE ON RULES—1987
AMENDMENT

The amendments are technical. No substantive change is intended. The Birthday of Martin Luther King, Jr. is added to the list of national holidays in Rule 77.

NOTES OF ADVISORY COMMITTEE ON RULES—1991
AMENDMENT

This revision is a companion to the concurrent amendment to Rule 4 of the Federal Rules of Appellate

Procedure. The purpose of the revisions is to permit district courts to ease strict sanctions now imposed on appellants whose notices of appeal are filed late because of their failure to receive notice of entry of a judgment. See, e.g. *Tucker v. Commonwealth Land Title Ins. Co.*, 800 F.2d 1054 (11th Cir. 1986); *Ashby Enterprises, Ltd. v. Weitzman, Dym & Associates*, 780 F.2d 1043 (D.C. Cir. 1986); *In re OPM Leasing Services, Inc.*, 769 F.2d 911 (2d Cir. 1985); *Spika v. Village of Lombard, Ill.*, 763 F.2d 282 (7th Cir. 1985); *Hall v. Community Mental Health Center of Beaver County*, 772 F.2d 42 (3d Cir. 1985); *Wilson v. Atwood v. Stark*, 725 F.2d 255 (5th Cir. en banc), *cert dismissed*, 105 S.Ct. 17 (1984); *Case v. BASF Wyandotte*, 727 F.2d 1034 (Fed. Cir. 1984), *cert. denied*, 105 S.Ct. 386 (1984); *Hensley v. Chesapeake & Ohio R.R.Co.*, 651 F.2d 226 (4th Cir. 1981); *Buckeye Cellulose Corp. v. Electric Construction Co.*, 569 F.2d 1036 (8th Cir. 1978).

Failure to receive notice may have increased in frequency with the growth in the caseload in the clerks' offices. The present strict rule imposes a duty on counsel to maintain contact with the court while a case is under submission. Such contact is more difficult to maintain if counsel is outside the district, as is increasingly common, and can be a burden to the court as well as counsel.

The effect of the revisions is to place a burden on prevailing parties who desire certainty that the time for appeal is running. Such parties can take the initiative to assure that their adversaries receive effective notice. An appropriate procedure for such notice is provided in Rule 5.

The revised rule lightens the responsibility but not the workload of the clerks' offices, for the duty of that office to give notice of entry of judgment must be maintained.

COMMITTEE NOTES ON RULES—2001 AMENDMENT

Rule 77(d) is amended to reflect changes in Rule 5(b). A few courts have experimented with serving Rule 77(d) notices by electronic means on parties who consent to this procedure. The success of these experiments warrants express authorization. Because service is made in the manner provided in Rule 5(b), party consent is required for service by electronic or other means described in Rule 5(b)(2)(D). The same provision is made for a party who wishes to ensure actual communication of the Rule 77(d) notice by also serving notice.

Changes Made After Publication and Comments Rule 77(d) was amended to correct an oversight in the published version. The clerk is to note ''service,'' not ''mailing,'' on the docket.

REFERENCES IN TEXT

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

Rule 78. Motion Day

Unless local conditions make it impracticable, each district court shall 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 the judge at any time or place and on such notice, if any, as the judge considers reasonable may make orders for the advancement, conduct, and hearing of actions.

To expedite its business, the court may make provision by rule or order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition.

(As amended Mar. 2, 1987, eff. Aug. 1, 1987.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

Compare [former] Equity Rule 6 (Motion Day) with the first paragraph of this rule. The second paragraph authorizes a procedure found helpful for the expedition of business in some of the Federal and State courts. See Rule 43(e) of these rules dealing with evidence on motions. Compare *Civil Practice Rules of the Municipal Court of Chicago* (1935), Rules 269, 270, 271.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendment is technical. No substantive change is intended.

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

(a) CIVIL DOCKET. The clerk shall keep a book known as ''civil 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 civil 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, all appearances, orders, verdicts, and judgments shall be entered chronologically in the civil 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. When in an action trial by jury has been properly demanded or ordered the clerk shall enter the word ''jury'' on the folio assigned to that action.

(b) CIVIL 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 civil docket and of every civil judgment and order referred to in subdivision (b) of this rule shall be kept by the clerk under the direction of the court. There shall be prepared under the direction of the court calendars of all actions ready for trial, which shall distinguish ''jury actions'' from ''court actions.''

(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.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Jan. 21, 1963, eff. July 1, 1963.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

Compare [former] Equity Rule 3 (Books Kept by Clerk and Entries Therein). In connection with this rule, see also the following statutes of the United States:

U.S.C., Title 5:

§301 [see Title 28, §526] (Officials for investigation of official acts, records and accounts of marshals,

attorneys, clerks of courts, United States commissioners, referees and trustees)
§ 318 [former] (Accounts of district attorneys)

U.S.C., Title 28:

§ 556 [former] (Clerks of district courts; books open to inspection)
§ 567 [now 751] (Same; accounts)
§ 568 [now 751] (Same; reports and accounts of moneys received; dockets)
§ 813 [former] (Indices of judgment debtors to be kept by clerks)

And see ''Instructions to United States Attorneys, Marshals, Clerks and Commissioners'' issued by the Attorney General of the United States.

NOTES OF ADVISORY COMMITTEE ON RULES—1946 AMENDMENT

Subdivision (a). The amendment substitutes the Director of the Administrative Office of the United States Courts, acting subject to the approval of the Judicial Conference of Senior Circuit Judges, in the place of the Attorney General as a consequence of and in accordance with the provisions of the act establishing the Administrative Office and transferring functions thereto. Act of August 7, 1939, c. 501, §§1–7, 53 Stat. 1223, 28 U.S.C. §§444–450 [now 601–610].

Subdivision (b). The change in this subdivision does not alter the nature of the judgments and orders to be recorded in permanent form but it does away with the express requirement that they be recorded in a book. This merely gives latitude for the preservation of court records in other than book form, if that shall seem advisable, and permits with the approval of the Judicial Conference the adoption of such modern, space-saving methods as microphotography. See *Proposed Improvements in the Administration of the Offices of Clerks of United States District Courts*, prepared by the Bureau of the Budget (1941) 38–42. See also Rule 55, Federal Rules of Criminal Procedure [following section 687 of Title 18 U.S.C.].

Subdivision (c). The words ''Separate and'' have been deleted as unduly rigid. There is no sufficient reason for requiring that the indices in all cases be separate; on the contrary, the requirement frequently increases the labor of persons searching the records as well as the labor of the clerk's force preparing them. The matter should be left to administrative discretion.

The other changes in the subdivision merely conform with those made in subdivision (b) of the rule.

Subdivision (d). Subdivision (d) is a new provision enabling the Administrative Office, with the approval of the Judicial Conference, to carry out any improvements in clerical procedure with respect to books and records which may be deemed advisable. See report cited in Note to subdivision (b), *supra*.

NOTES OF ADVISORY COMMITTEE ON RULES—1948 AMENDMENT

The change in nomenclature conforms to the official designation in Title 28, U.S.C., § 231.

NOTES OF ADVISORY COMMITTEE ON RULES—1963 AMENDMENT

The terminology is clarified without any change of the prescribed practice. See amended Rule 58, and the Advisory Committee's Note thereto.

Rule 80. Stenographer; Stenographic Report or Transcript as Evidence

[(a) STENOGRAPHER.] (Abrogated Dec. 27, 1946, eff. Mar. 19, 1948)

[(b) OFFICIAL STENOGRAPHER.] (Abrogated Dec. 27, 1946, eff. Mar. 19, 1948)

(c) STENOGRAPHIC REPORT OR TRANSCRIPT AS EVIDENCE. Whenever the testimony of a witness at a trial or hearing which was stenographically reported is admissible in evidence at a later trial, it may be proved by the transcript thereof duly certified by the person who reported the testimony.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

Note to Subdivision (a). This follows substantially [former] Equity Rule 50 (Stenographer—Appointment—Fees). [This subdivision was abrogated. See amendment note of Advisory Committee below.]

Note to Subdivision (b). See Reports of Conferences of Senior Circuit Judges with the Chief Justice of the United States (1936), 22 A.B.A.J. 818, 819; (1937), 24 A.B.A.J. 75, 77. [This subdivision was abrogated. See amendment note of Advisory Committee below.]

Note to Subdivision (c). Compare Iowa Code (1935) § 11353.

NOTES OF ADVISORY COMMITTEE ON RULES—1946 AMENDMENT

Subdivisions (a) and (b) of Rule 80 have been abrogated because of Public Law 222, 78th Cong., c. 3, 2d Sess., approved Jan. 20, 1944, 28 U.S.C. § 9a [now 550, 604, 753, 1915, 1920], providing for the appointment of official stenographers for each district court, prescribing their duties, providing for the furnishing of transcripts, the taxation of the fees therefor as costs, and other related matters. This statute has now been implemented by Congressional appropriation available for the fiscal year beginning July 1, 1945.

Subdivision (c) of Rule 80 (Stenographic Report or Transcript as Evidence) has been retained unchanged.

XI. GENERAL PROVISIONS

Rule 81. Applicability in General

(a) PROCEEDINGS TO WHICH THE RULES APPLY.

(1) These rules do not apply to prize proceedings in admiralty governed by Title 10, U.S.C., §§7651–7681. They do apply to proceedings in bankruptcy to the extent provided by the Federal Rules of Bankruptcy Procedure.

(2) These rules are applicable to proceedings for admission to citizenship, habeas corpus, and quo warranto, to the extent that the practice in such proceedings is not set forth in statutes of the United States, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Proceedings, and has heretofore conformed to the practice in civil actions.

(3) In proceedings under Title 9, U.S.C., relating to arbitration, or under the Act of May 20, 1926, ch. 347, § 9 (44 Stat. 585), U.S.C., Title 45, § 159, relating to boards of arbitration of railway labor disputes, these rules apply only to the extent that matters of procedure are not provided for in those statutes. These rules apply to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings.

(4) These rules do not alter the method prescribed by the Act of February 18, 1922, ch. 57, § 2 (42 Stat. 388), U.S.C., Title 7, § 292; or by the Act of June 10, 1930, ch. 436, § 7 (46 Stat. 534), as amended, U.S.C., Title 7, § 499g(c), for instituting proceedings in the United States dis-

trict courts to review orders of the Secretary of Agriculture; or prescribed by the Act of June 25, 1934, ch. 742, §2 (48 Stat. 1214), U.S.C., Title 15, §522, for instituting proceedings to review orders of the Secretary of the Interior; or prescribed by the Act of February 22, 1935, ch. 18, §5 (49 Stat. 31), U.S.C., Title 15, §715d(c), as extended, for instituting proceedings to review orders of petroleum control boards; but the conduct of such proceedings in the district courts shall be made to conform to these rules so far as applicable.

(5) These rules do not alter the practice in the United States district courts prescribed in the Act of July 5, 1935, ch. 372, §§9 and 10 (49 Stat. 453), as amended, U.S.C., Title 29, §§159 and 160, for beginning and conducting proceedings to enforce orders of the National Labor Relations Board; and in respects not covered by those statutes, the practice in the district courts shall conform to these rules so far as applicable.

(6) These rules apply to proceedings for enforcement or review of compensation orders under the Longshoremen's and Harbor Workers' Compensation Act, Act of March 4, 1927, c. 509, §§18, 21 (44 Stat. 1434, 1436), as amended, U.S.C., Title 33, §§918, 921, except to the extent that matters of procedure are provided for in that Act. The provisions for service by publication and for answer in proceedings to cancel certificates of citizenship under the Act of June 27, 1952, c. 477, Title III, c. 2, §340 (66 Stat. 260), U.S.C., Title 8, §1451, remain in effect.

[(7)] (Abrogated Apr. 30, 1951, eff. Aug. 1, 1951)

(b) SCIRE FACIAS AND MANDAMUS. The writs of scire facias and mandamus are abolished. Relief heretofore available by mandamus or scire facias may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules.

(c) REMOVED ACTIONS. These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal. Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, the defendant shall answer or present the other defenses or objections available under these rules within 20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based, or within 20 days after the service of summons upon such initial pleading, then filed, or within 5 days after the filing of the petition for removal, whichever period is longest. If at the time of removal all necessary pleadings have been served, a party entitled to trial by jury under Rule 38 shall be accorded it, if the party's demand therefor is served within 10 days after the petition for removal is filed if the party is the petitioner, or if not the petitioner within 10 days after service on the party of the notice of filing the petition. A party who, prior to removal, has made an express demand for trial by jury in accordance with state law, need not make a demand after removal. If state law applicable in the court from which the case is removed does not require the parties to make express demands in order to claim trial by jury, they need not make demands after removal unless the court directs that they do so within a specified time if they desire to claim trial by jury. The court may make this direction on its own motion and shall do so as a matter of course at the request of any party. The failure of a party to make demand as directed constitutes a waiver by that party of trial by jury.

[(d) DISTRICT OF COLUMBIA; COURTS AND JUDGES.] (Abrogated Dec. 29, 1948, eff. Oct. 20, 1949)

(e) LAW APPLICABLE. Whenever in these rules the law of the state in which the district court is held is made applicable, the law applied in the District of Columbia governs proceedings in the United States District Court for the District of Columbia. When the word ''state'' is used, it includes, if appropriate, the District of Columbia. When the term ''statute of the United States'' is used, it includes, so far as concerns proceedings in the United States District Court for the District of Columbia, any Act of Congress locally applicable to and in force in the District of Columbia. When the law of a state is referred to, the word ''law'' includes the statutes of that state and the state judicial decisions construing them.

(f) REFERENCES TO OFFICER OF THE UNITED STATES. Under any rule in which reference is made to an officer or agency of the United States, the term ''officer'' includes a district director of internal revenue, a former district director or collector of internal revenue, or the personal representative of a deceased district director or collector of internal revenue.

(As amended Dec. 28, 1939, eff. Apr. 3, 1941; Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Apr. 30, 1951, eff. Aug. 1, 1951; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Dec. 4, 1967, eff. July 1, 1968; Mar. 1, 1971, eff. July 1, 1971; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 23, 2001, eff. Dec. 1, 2001; Apr. 29, 2002, eff. Dec. 1, 2002.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

Note to Subdivision (a). Paragraph (1): Compare the enabling act, act of June 19, 1934, U.S.C., Title 28, §§723b [see 2072] (Rules in actions at law; Supreme Court authorized to make) and 723c [see 2072] (Union of equity and action at law rules; power of Supreme Court). For the application of these rules in bankruptcy and copyright proceedings, see Orders xxxvi and xxxvii in Bankruptcy and Rule 1 of Rules of Practice and Procedure under §25 of the copyright act, act of March 4, 1909, U.S.C., Title 17, §25 [see 412, 501 to 504] (Infringement and rules of procedure).

For examples of statutes which are preserved by paragraph (2) see: U.S.C., Title 8, ch. 9 [former] (Naturalization); Title 28, ch. 14 [now 153] (Habeas corpus); Title 28, §§377a–377c (Quo warranto); and such forfeiture statutes as U.S.C., Title 7, §116 (Misbranded seeds, confiscation), and Title 21, §14 [see 334(b)] (Pure Food and Drug Act—condemnation of adulterated or misbranded food; procedure). See also *443 Cans of Frozen Eggs Product v. U.S.*, 226 U.S. 172, 33 S.Ct. 50 (1912).

For examples of statutes which under paragraph (7) will continue to govern procedure in condemnation cases, see U.S.C., [former] Title 40, §258 (Condemnation of realty for sites for public building, etc., procedure); U.S.C., Title 16, §831x (Condemnation by Tennessee Valley Authority); U.S.C., [former] Title 40, §120 (Acquisition of lands for public use in District of Columbia); [former] Title 40, ch. 7 (Acquisition of lands in District of Columbia for use of United States; condemnation).

Note to Subdivision (b). Some statutes which will be affected by this subdivision are:

U.S.C., Title 7:

§ 222 (Federal Trade Commission powers adopted for enforcement of Stockyards Act) (By reference to Title 15, § 49)

U.S.C., Title 15:

§ 49 (Enforcement of Federal Trade Commission orders and antitrust laws)
§ 77t(c) (Enforcement of Securities and Exchange Commission orders and Securities Act of 1933)
§ 78u(f) (Same; Securities Exchange Act of 1934)
§ 79r(g) (Same; Public Utility Holding Company Act of 1935)

U.S.C., Title 16:

§ 820 (Proceedings in equity for revocation or to prevent violations of license of Federal Power Commission licensee)
§ 825m(b) (Mandamus to compel compliance with Federal Water Power Act, etc.)

U.S.C., Title 19:

§ 1333(c) (Mandamus to compel compliance with orders of Tariff Commission, etc.)

U.S.C., Title 28:

§ 377 [now 1651] (Power to issue writs)
§ 572 [now 1923] (Fees, attorneys, solicitors and proctors)
§ 778 [former] (Death of parties; substitution of executor or administrator). Compare Rule 25(a) (Substitution of parties; death), and the note thereto.

U.S.C., Title 33:

§ 495 (Removal of bridges over navigable waters)

U.S.C., Title 45:

§ 88 (Mandamus against Union Pacific Railroad Company)
§ 153(p) (Mandamus to enforce orders of Adjustment Board under Railway Labor Act)
§ 185 (Same; National Air Transport Adjustment Board) (By reference to § 153)

U.S.C., Title 47:

§ 11 (Powers of Federal Communications Commission)
§ 401(a) (Enforcement of Federal Communications Act and orders of Commission)
§ 406 (Same; compelling furnishing of facilities; mandamus)

U.S.C., Title 49:

§ 19a(*l*) [see 11703(a), 14703, 15903(a)] (Mandamus to compel compliance with Interstate Commerce Act)
§ 20(9) [see 11703(a), 14703, 15903(a)] (Jurisdiction to compel compliance with interstate commerce laws by mandamus)

For comparable provisions in state practice see Ill. Rev. Stat. (1937), ch. 110, § 179; Calif. Code Civ. Proc. (Deering, 1937) § 802.

Note to Subdivision (c). Such statutes as the following dealing with the removal of actions are substantially continued and made subject to these rules:

U.S.C., Title 28:

§ 71 [now 1441, 1445, 1447] (Removal of suits from state courts)
§ 72 [now 1446, 1447] (Same; procedure)
§ 73 [former] (Same; suits under grants of land from different states)
§ 74 [now 1443, 1446, 1447] (Same; causes against persons denied civil rights)
§ 75 [now 1446] (Same; petitioner in actual custody of state court)
§ 76 [now 1442, 1446, 1447] (Same; suits and prosecutions against revenue officers)
§ 77 [now 1442] (Same; suits by aliens)
§ 78 [now 1449] (Same; copies of records refused by clerk of state court)
§ 79 [now 1450] (Same; previous attachment bonds or orders)
§ 80 [now 1359, 1447, 1919] (Same; dismissal or remand)
§ 81 [now 1447] (Same; proceedings in suits removed)
§ 82 [former] (Same; record; filing and return)
§ 83 [now 1447, 1448] (Service of process after removal)

U.S.C., Title 28, § 72 [now 1446, 1447], *supra*, however, is modified by shortening the time for pleading in removed actions.

Note to Subdivision (e). The last sentence of this subdivision modifies U.S.C., Title 28, § 725 [now 1652] (Laws of States as rules of decision) in so far as that statute has been construed to govern matters of procedure and to exclude state judicial decisions relative thereto.

NOTES OF ADVISORY COMMITTEE ON RULES—1946 AMENDMENT

Subdivision (a). Despite certain dicta to the contrary [*Lynn v. United States* (C.C.A.5th, 1940) 110 F.(2d) 586; *Mount Tivy Winery, Inc. v. Lewis* (N.D.Cal. 1942) 42 F.Supp. 636], it is manifest that the rules apply to actions against the United States under the Tucker Act [28 U.S.C., §§ 41(20), 250, 251, 254, 257, 258, 287, 289, 292, 761–765 [now 791, 1346, 1401, 1402, 1491, 1493, 1496, 1501, 1503, 2071, 2072, 2411, 2412, 2501, 2506, 2509, 2510]]. See *United States to use of Foster Wheeler Corp. v. American Surety Co. of New York* (E.D.N.Y. 1939) 25 F.Supp. 700; *Boerner v. United States* (E.D.N.Y. 1939) 26 F.Supp. 769; *United States v. Gallagher* (C.C.A.9th, 1945) 151 F.(2d) 556. Rules 1 and 81 provide that the rules shall apply to all suits of a civil nature, whether cognizable as cases at law or in equity, except those specifically excepted; and the character of the various proceedings excepted by express statement in Rule 81, as well as the language of the rules generally, shows that the term ''civil action'' [Rule 2] includes actions against the United States. Moreover, the rules in many places expressly make provision for the situation wherein the United States is a party as either plaintiff or defendant. See Rules 4(d)(4), 12(a), 13(d), 25(d), 37(f), 39(c), 45(c), 54(d), 55(e), 62(e), and 65(c). In *United States v. Sherwood* (1941) 312 U.S. 584, the Solicitor General expressly conceded in his brief for the United States that the rules apply to Tucker Act cases. The Solicitor General stated: ''The Government, of course, recognizes that the Federal Rules of Civil Procedure apply to cases brought under the Tucker Act.'' (Brief for the United States, p. 31). Regarding *Lynn v. United States, supra*, the Solicitor General said: ''In *Lynn v. United States* . . . the Circuit Court of Appeals for the Fifth Circuit went beyond the Government's contention there, and held that an action under the Tucker Act is neither an action at law nor a suit in equity and, seemingly, that the Federal Rules of Civil Procedure are, therefore, inapplicable. We think the suggestion is erroneous. Rules 4(d), 12(a), 39(c), and 55(e) expressly contemplate suits against the United States, and nothing in the enabling Act (48 Stat. 1064) [see 28 U.S.C. 2072] suggests that the Rules are inapplicable to Tucker Act proceedings, which in terms are to accord with court rules and their subsequent modifications (Sec. 4, Act of March 3, 1887, 24 Stat. 505) [see 28 U.S.C. 2071, 2072].'' (Brief for the United States, p. 31, n. 17.)

United States v. Sherwood, supra, emphasizes, however, that the application of the rules in Tucker Act cases affects only matters of procedure and does not operate to extend jurisdiction. See also Rule 82. In the *Sherwood* case, the New York Supreme Court, acting under § 795 of the New York Civil Practice Act, made an order authorizing Sherwood, as a judgment creditor, to maintain a suit under the Tucker Act to recover damages from the United States for breach of its contract with the judgment debtor, Kaiser, for construction of a post office building. Sherwood brought suit against the United States and Kaiser in the District Court for the Eastern District of New York. The question before the United States Supreme Court was whether a United States District Court had jurisdiction to entertain a

suit against the United States wherein private parties were joined as parties defendant. It was contended that either the Federal Rules of Civil Procedure or the Tucker Act, or both, embodied the consent of the United States to be sued in litigations in which issues between the plaintiff and third persons were to be adjudicated. Regarding the effect of the Federal Rules, the Court declared that nothing in the rules, so far as they may be applicable in Tucker Act cases, authorized the maintenance of any suit against the United States to which it had not otherwise consented. The matter involved was not one of procedure but of jurisdiction, the limits of which were marked by the consent of the United States to be sued. The jurisdiction thus limited is unaffected by the Federal Rules of Civil Procedure.

Subdivision (a)(2). The added sentence makes it clear that the rules have not superseded the requirements of U.S.C., Title 28, §466 [now 2253]. *Schenk v. Plummer* (C.C.A. 9th, 1940) 113 F.(2d) 726.

For correct application of the rules in proceedings for forfeiture of property for violation of a statute of the United States, such as under U.S.C., Title 22, §405 (seizure of war materials intended for unlawful export) or U.S.C., Title 21, §334(b) (Federal Food, Drug, and Cosmetic Act; formerly Title 21, §14, Pure Food and Drug Act), see *Reynal v. United States* (C.C.A. 5th, 1945) 153 F.(2d) 929; *United States v. 108 Boxes of Cheddar Cheese* (S.D.Iowa 1943) 3 F.R.D. 40.

Subdivision (a)(3). The added sentence makes it clear that the rules apply to appeals from proceedings to enforce administrative subpoenas. See *Perkins v. Endicott Johnson Corp.* (C.C.A. 2d 1942) 128 F.(2d) 208, aff'd on other grounds (1943) 317 U.S. 501; *Walling v. News Printing, Inc.* (C.C.A. 3d, 1945) 148 F.(2d) 57; *McCrone v. United States* (1939) 307 U.S. 61. And, although the provision allows full recognition of the fact that the rigid application of the rules in the proceedings themselves may conflict with the summary determination desired [*Goodyear Tire & Rubber Co. v. National Labor Relations Board* (C.C.A. 6th, 1941) 122 F.(2d) 450; *Cudahy Packing Co. v. National Labor Relations Board* (C.C.A. 10th, 1941) 117 F.(2d) 692], it is drawn so as to permit application of any of the rules in the proceedings whenever the district court deems them helpful. See, *e.g.*, *Peoples Natural Gas Co. v. Federal Power Commission* (App. D.C. 1942) 127 F.(2d) 153, cert. den. (1942) 316 U.S. 700; *Martin v. Chandis Securities Co.* (C.C.A. 9th, 1942) 128 F.(2d) 731. Compare the application of the rules in summary proceedings in bankruptcy under General Order 37. See 1 *Collier on Bankruptcy* (14th ed. by Moore and Oglebay) 326–327; 2 *Collier, op. cit. supra*, 1401–1402; 3 *Collier, op. cit. supra*, 228–231; 4 *Collier, op. cit. supra*, 1199–1202.

Subdivision (a)(6). Section 405 of U.S.C., Title 8 originally referred to in the last sentence of paragraph (6), has been repealed and §738 [see 1451], U.S.C., Title 8, has been enacted in its stead. The last sentence of paragraph (6) has, therefore, been amended in accordance with this change. The sentence has also been amended so as to refer directly to the statute regarding the provision of time for answer, thus avoiding any confusion attendant upon a change in the statute.

That portion of subdivision (a)(6) making the rules applicable to proceedings for enforcement or review of compensation orders under the Longshoremen's and Harbor Workers' Compensation Act [33 U.S.C. §901 et seq.] was added by an amendment made pursuant to order of the Court, December 28, 1939, effective three months subsequent to the adjournment of the 76th Congress, January 3, 1941.

Subdivision (c). The change in subdivision (c) effects more speedy trials in removed actions. In some states many of the courts have only two terms a year. A case, if filed 20 days before a term, is returnable to that term, but if filed less than 20 days before a term, is returnable to the following term, which convenes six months later. Hence, under the original wording of Rule 81(c), where a case is filed less than 20 days before the term and is removed within a few days but before answer, it is possible for the defendant to delay interposing his answer or presenting his defenses by motion for six months or more. The rule as amended prevents this result.

Subdivision (f). The use of the phrase "the United States or an officer or agency thereof" in the rules (as *e.g.*, in Rule 12(a) and amended Rule 73(a)) could raise the question of whether "officer" includes a collector of internal revenue, a former collector, or the personal representative of a deceased collector, against whom suits for tax refunds are frequently instituted. Difficulty might ensue for the reason that a suit against a collector or his representative has been held to be a personal action. *Sage v. United States* (1919) 250 U.S. 33; *Smietanka v. Indiana Steel Co.* (1921) 257 U.S. 1; *United States v. Nunnally Investment Co.* (1942) 316 U.S. 258. The addition of subdivision (f) to Rule 81 dispels any doubts on the matter and avoids further litigation.

NOTES OF ADVISORY COMMITTEE ON RULES—1948 AMENDMENT

Subdivision (a)—Paragraph (1).—The Copyright Act of March 4, 1909, as amended, was repealed and Title 17, U.S.C., enacted into positive law by the Act of July 30, 1947, c. 391, §§1, 2, 61 Stat. 652. The first amendment, therefore, reflects this change. The second amendment involves a matter of nomenclature and reflects the official designation of the United States District Court for the District of Columbia in Title 28, U.S.C. §§88, 132.

Paragraph (2).—The amendment substitutes the present statutory reference.

Paragraph (3).—The Arbitration Act of February 12, 1925, was repealed and Title 9, U.S.C., enacted into positive law by the Act of July 30, 1947, c. 392, §§1, 2, 61 Stat. 669, and the amendment reflects this change. The Act of May 20, 1926, c. 347, §9 (44 Stat. 585), U.S.C., Title 45, §159, deals with the review by the district court of an award of a board of arbitration under the Railway Labor Act, and provides, *inter alia*, for an appeal within 10 days from a final judgment of the district court to the court of appeals. It is not clear whether Title 28, U.S.C., repealed this time period and substituted the time periods provided for in Title 28, U.S.C., §2107, normally a minimum of 30 days. If there has been no repeal, then the 10-day time period of 45 U.S.C., §159, applies by virtue of the "unless" clause in Rule 73(a); if there has been a repeal, then the other time periods stated in Rule 73(a), normally a minimum of 30 days, apply. For discussion, see Note to Rule 73 (§), *supra*.

Paragraph (4).—The nomenclature of the district courts is changed to conform to the official designation in Title 28, U.S.C., §132(a).

Paragraph (5).—The nomenclature of the district courts is changed to conform to the official designation in Title 28, U.S.C., §132(a). The Act of July 5, 1935, c. 372, §§9 and 10, was amended by Act of June 23, 1947, c. 120, 61 Stat. 143, 146, and will probably be amended from time to time. Insertion in Rule 81(a)(5) of the words "as amended", and deletion of the subsection reference "(e), (g), and (i)" of U.S.C., Title 29, §160, make correcting references and are sufficiently general to include future statutory amendment.

Paragraph (6).—The Chinese Exclusion Acts were repealed by the Act of December 17, 1943, c. 344, §1, 57 Stat. 600, and hence the reference to the Act of September 13, 1888, as amended, is deleted. The Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, was amended by Act of June 25, 1936, c. 804, 49 Stat. 1921, and hence the words "as amended" have been added to reflect this change and, as they are sufficiently general, to include future statutory amendment. The Nationality Act of October 14, 1940, c. 876, 54 Stat. 1137, 1172, repealed and replaced the Act of June 29, 1906, as amended, and correcting statutory references are, therefore, made.

Subdivision (c).—In the first sentence the change in nomenclature conforms to the official designation of district courts in Title 28, U.S.C., §132(a); and the word "all" is deleted as superfluous. The need for revision of the third sentence is occasioned by the procedure for removal set forth in revised Title 28, U.S.C., §1446. Under the prior removal procedure governing civil ac-

tions, 28 U.S.C., §72 (1946), the petition for removal had to be first presented to and filed with the state court, except in the case of removal on the basis of prejudice or local influence, within the time allowed ''to answer or plead to the declaration or complaint of the plaintiff''; and the defendant had to file a transcript of the record in the federal court within thirty days from the date of filing his removal petition. Under §1446(a) removal is effected by a defendant filing with the proper United States district court ''a verified petition containing a short and plain statement of the facts which entitled him or them to removal together with a copy of all process, pleadings, and orders served upon him or them in such action.'' And §1446(b) provides: ''The petition for removal of a civil action or proceeding may be filed within twenty days after commencement of the action or service of process, whichever is later.'' This subsection (b) gives trouble in states where an action may be both commenced and service of process made without serving or otherwise giving the defendant a copy of the complaint or other initial pleading. To cure this statutory defect, the Judge's Committee appointed pursuant to action of the Judicial Conference and headed by Judge Albert B. Maris is proposing an amendment to §1446(b) to read substantially as follows: ''The petition for removal of a civil action or proceedings shall be filed within 20 days after the receipt through service or otherwise by the defendant of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based.'' The revised third sentence of Rule 81(c) is geared to this proposed statutory amendment; and it gives the defendant at least 5 days after removal within which to present his defenses.*

The change in the last sentence of subdivision (c) reflects the fact that a transcript of the record is no longer required under §1446, and safeguards the right to demand a jury trial, where the right has not already been waived and where the parties are at issue—''all necessary pleadings have been served.'' Only, rarely will the last sentence of Rule 81(c) have any applicability, since removal will normally occur before the pleadings are closed, and in this usual situation Rule 38(b) applies and safeguards the right to jury trial. See Moore's Federal practice (1st ed.) 3020.

Subdivision (d).—This subdivision is abrogated because it is obsolete and unnecessary under Title 28, U.S.C. Sections 88, 132, and 133 provide that the District of Columbia constitutes a judicial district, the district court of that district is the United States District Court for the District of Columbia, and the personnel of that court are district judges. Sections 41, 43, and 44 provide that the District of Columbia is a judicial circuit, the court of appeals of that circuit is the United States Court of Appeals for the District of Columbia, and the personnel of that court are circuit judges.

Subdivision (e).—The change in nomenclature conforms to the official designation of the United States District Court for the District of Columbia in Title 28, U.S.C., §§132(a), 88.

*NOTE.—The Supreme Court made these changes in the committee's proposed amendment to Rule 81(c): The phrase, ''or within 20 days after the service of summons upon such initial pleading, then filed,'' was inserted following the phrase, ''within 20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based'', because in several states suit is commenced by service of summons upon the defendant, notifying him that the plaintiff's pleading has been filed with the clerk of court. Thus, he may never receive a copy of the initial pleading. The added phrase is intended to give the defendant 20 days after the service of such summons in which to answer in a removed action, or 5 days after the filing of the petition for removal, whichever is longer. In these states, the 20-day period does not begin to run until such pleading is actually filed. The last word of the third sentence was changed from ''longer'' to ''longest'' because of the added phrase.

The phrase, ''and who has not already waived his right to such trial,'' which previously appeared in the fourth sentence of subsection (c) of Rule 81, was deleted in order to afford a party who has waived his right to trial by jury in a state court an opportunity to assert that right upon removal to a federal court.

NOTES OF ADVISORY COMMITTEE ON RULES—1963 AMENDMENT

Subdivision (a)(4). This change reflects the transfer of functions from the Secretary of Commerce to the Secretary of the Interior made by 1939 Reorganization Plan No. II, §4(e), 53 Stat. 1433.

Subdivision (a)(6). The proper current reference is to the 1952 statute superseding the 1940 statute.

Subdivision (c). Most of the cases have held that a party who has made a proper express demand for jury trial in the State court is not required to renew the demand after removal of the action. *Zakoscielny v. Waterman Steamship Corp.*, 16 F.R.D. 314 (D.Md. 1954); *Talley v. American Bakeries Co.*, 15 F.R.D. 391 (E.D.Tenn. 1954); *Rehrer v. Service Trucking Co.*, 15 F.R.D. 113 (D.Del. 1953); 5 *Moore's Federal Practice* ¶38.39[3] (2d ed. 1951); 1 Barron & Holtzoff, *Federal Practice and Procedure* §132 (Wright ed. 1960). But there is some authority to the contrary. *Petsel v. Chicago, B. & Q.R. Co.*, 101 F.Supp. 1006 (S.D.Iowa 1951) *Nelson v. American Nat. Bank & Trust Co.*, 9 F.R.D. 680 (E.D.Tenn. 1950). The amendment adopts the preponderant view.

In order still further to avoid unintended waivers of jury trial, the amendment provides that where by State law applicable in the court from which the case is removed a party is entitled to jury trial without making an express demand, he need not make a demand after removal. However, the district court for calendar or other purposes may on its own motion direct the parties to state whether they demand a jury, and the court must make such a direction upon the request of any party. Under the amendment a district court may find it convenient to establish a routine practice of giving these directions to the parties in appropriate cases.

Subdivision (f). The amendment recognizes the change of nomenclature made by Treasury Dept. Order 150–26(2), 18 Fed. Reg. 3499 (1953).

As to a special problem arising under Rule 25 (Substitution of parties) in actions for refund of taxes, see the Advisory Committee's Note to the amendment of Rule 25(d), effective July 19, 1961; and 4 *Moore's Federal Practice* §25.09 at 531 (2d ed. 1950).

NOTES OF ADVISORY COMMITTEE ON RULES—1966 AMENDMENT

See Note to Rule 1, supra.

Statutory proceedings to forfeit property for violation of the laws of the United States, formerly governed by the admiralty rules, will be governed by the unified and supplemental rules. See Supplemental Rule A.

Upon the recommendation of the judges of the United States District Court for the District of Columbia, the Federal Rules of Civil Procedure are made applicable to probate proceedings in that court. The exception with regard to adoption proceedings is removed because the court no longer has jurisdiction of those matters; and the words ''mental health'' are substituted for ''lunacy'' to conform to the current characterization in the District.

The purpose of the amendment to paragraph (3) is to permit the deletion from Rule 73(a) of the clause ''unless a shorter time is provided by law.'' The 10 day period fixed for an appeal under 45 U.S.C. §159 is the only instance of a shorter time provided for appeals in civil cases. Apart from the unsettling effect of the clause, it is eliminated because its retention would preserve the 15 day period heretofore allowed by 28 U.S.C. §2107 for appeals from interlocutory decrees in admiralty, it being one of the purposes of the amendment to make the time for appeals in civil and admiralty cases uniform under the unified rules. See Advisory Committee's Note to subdivision (a) of Rule 73.

NOTES OF ADVISORY COMMITTEE ON RULES—1968 AMENDMENT

The amendments eliminate inappropriate references to appellate procedure.

NOTES OF ADVISORY COMMITTEE ON RULES—1971 AMENDMENT

Title 28, U.S.C., § 2243 now requires that the custodian of a person detained must respond to an application for a writ of habeas corpus ''within three days unless for good cause additional time, not exceeding twenty days, is allowed.'' The amendment increases to forty days the additional time that the district court may allow in habeas corpus proceedings involving persons in custody pursuant to a judgment of a state court. The substantial increase in the number of such proceedings in recent years has placed a considerable burden on state authorities. Twenty days has proved in practice too short a time in which to prepare and file the return in many such cases. Allowance of additional time should, of course, be granted only for good cause.

While the time allowed in such a case for the return of the writ may not exceed forty days, this does not mean that the state must necessarily be limited to that period of time to provide for the federal court the transcript of the proceedings of a state trial or plenary hearing if the transcript must be prepared after the habeas corpus proceeding has begun in the federal court.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

COMMITTEE NOTES ON RULES—2001 AMENDMENT

Former Copyright Rule 1 made the Civil Rules applicable to copyright proceedings except to the extent the Civil Rules were inconsistent with Copyright Rules. Abrogation of the Copyright Rules leaves the Civil Rules fully applicable to copyright proceedings. Rule 81(a)(1) is amended to reflect this change.

The District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub.L. 91–358, 84 Stat. 473, transferred mental health proceedings formerly held in the United States District Court for the District of Columbia to local District of Columbia courts. The provision that the Civil Rules do not apply to these proceedings is deleted as superfluous.

The reference to incorporation of the Civil Rules in the Federal Rules of Bankruptcy Procedure has been restyled.

Changes Made After Publication and Comments The Committee Note was amended to correct the inadvertent omission of a negative. As revised, it correctly reflects the language that is stricken from the rule.

COMMITTEE NOTES ON RULES—2002 AMENDMENT

This amendment brings Rule 81(a)(2) into accord with the Rules Governing § 2254 and § 2255 proceedings. In its present form, Rule 81(a)(2) includes return-time provisions that are inconsistent with the provisions in the Rules Governing §§ 2254 and 2255. The inconsistency should be eliminated, and it is better that the time provisions continue to be set out in the other rules without duplication in Rule 81. Rule 81 also directs that the writ be directed to the person having custody of the person detained. Similar directions exist in the § 2254 and § 2255 rules, providing additional detail for applicants subject to future custody. There is no need for partial duplication in Rule 81.

The provision that the civil rules apply to the extent that practice is not set forth in the § 2254 and § 2255 rules dovetails with the provisions in Rule 11 of the § 2254 rules and Rule 12 of the § 2255 rules.

Changes Made After Publication and Comment. The only change since publication is deletion of an inadvertent reference to § 2241 proceedings.

EFFECTIVE DATE OF ABROGATION

Abrogation of par. (7) of subdivision (a) of this rule as effective August 1, 1951, see Effective Date note under Rule 71A.

Rule 82. Jurisdiction and Venue Unaffected

These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. An admiralty or maritime claim within the meaning of Rule 9(h) shall not be treated as a civil action for the purposes of Title 28, U.S.C., §§ 1391–1392.

(As amended Dec. 29, 1948, eff. Oct. 20, 1949; Feb. 28, 1966, eff. July 1, 1966; Apr. 23, 2001, eff. Dec. 1, 2001.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

These rules grant extensive power of joining claims and counterclaims in one action, but, as this rule states, such grant does not extend federal jurisdiction. The rule is declaratory of existing practice under the [former] Federal Equity Rules with regard to such provisions as [former] Equity Rule 26 on Joinder of Causes of Action and [former] Equity Rule 30 on Counterclaims. Compare Shulman and Jaegerman, *Some Jurisdictional Limitations on Federal Procedure*, 45 Yale L.J. 393 (1936).

NOTES OF ADVISORY COMMITTEE ON RULES—1948 AMENDMENT

The change in nomenclature conforms to the official designation of district courts in Title 28, U.S.C., § 132(a).

NOTES OF ADVISORY COMMITTEE ON RULES—1966 AMENDMENT

Title 28, U.S.C. § 1391(b) provides: ''A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law.'' This provision cannot appropriately be applied to what were formerly suits in admiralty. The rationale of decisions holding it inapplicable rests largely on the use of the term ''civil action''; i.e., a suit in admiralty is not a ''civil action'' within the statute. By virtue of the amendment to Rule 1, the provisions of Rule 2 convert suits in admiralty into civil actions. The added sentence is necessary to avoid an undesirable change in existing law with respect to venue.

COMMITTEE NOTES ON RULES—2001 AMENDMENT

The final sentence of Rule 82 is amended to delete the reference to 28 U.S.C. § 1393, which has been repealed.

Style Comment

The recommendation that the change be made without publication carries with it a recommendation that style changes not be made. Styling would carry considerable risks. The first sentence of Rule 82, for example, states that the Civil Rules do not ''extend or limit the jurisdiction of the United States district courts.'' That sentence is a flat lie if ''jurisdiction'' includes personal or quasi-in rem jurisdiction. The styling project on this rule requires publication and comment.

Rule 83. Rules by District Courts; Judge's Directives

(a) LOCAL RULES.

(1) Each district court, acting by a majority of its district judges, may, after giving appropriate public notice and an opportunity for comment, make and amend rules governing its practice. A local rule shall be consistent with—but not duplicative of—Acts of Congress and rules adopted under 28 U.S.C. §§ 2072 and 2075, and shall conform to any uniform numbering system prescribed by the Judicial Conference of the United States. A local rule

takes effect on the date specified by the district court and remains in effect unless amended by the court or abrogated by the judicial council of the circuit. Copies of rules and amendments shall, upon their promulgation, be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public.

(2) A local rule imposing a requirement of form shall not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement.

(b) PROCEDURES WHEN THERE IS NO CONTROLLING LAW. A judge may regulate practice in any manner consistent with federal law, rules adopted under 28 U.S.C. §§ 2072 and 2075, and local rules of the district. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local district rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

(As amended Apr. 29, 1985, eff. Aug. 1, 1985; Apr. 27, 1995, eff. Dec. 1, 1995.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

This rule substantially continues U.S.C., Title 28, § 731 [now 2071] (Rules of practice in district courts) with the additional requirement that copies of such rules and amendments be furnished to the Supreme Court of the United States. See [former] Equity Rule 79 (Additional Rules by District Court). With the last sentence compare United States Supreme Court Admiralty Rules (1920), Rule 44 (Right of Trial Courts To Make Rules of Practice) (originally promulgated in 1842).

NOTES OF ADVISORY COMMITTEE ON RULES—1985 AMENDMENT

Rule 83, which has not been amended since the Federal Rules were promulgated in 1938, permits each district to adopt local rules not inconsistent with the Federal Rules by a majority of the judges. The only other requirement is that copies be furnished to the Supreme Court.

The widespread adoption of local rules and the modest procedural prerequisites for their promulgation have led many commentators to question the soundness of the process as well as the validity of some rules, See 12 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 3152, at 217 (1973); Caballero, *Is There an Over-Exercise of Local Rule-Making Powers by the United States District Courts*?, 24 Fed. Bar News 325 (1977). Although the desirability of local rules for promoting uniform practice within a district is widely accepted, several commentators also have suggested reforms to increase the quality, simplicity, and uniformity of the local rules. See Note, *Rule 83 and the Local Federal Rules*, 67 Colum.L.Rev. 1251 (1967), and Comment, *The Local Rules of Civil Procedure in the Federal District Courts—A Survey*, 1966 Duke L.J. 1011.

The amended Rule attempts, without impairing the procedural validity of existing local rules, to enhance the local rulemaking process by requiring appropriate public notice of proposed rules and an opportunity to comment on them. Although some district courts apparently consult the local bar before promulgating rules, many do not, which has led to criticism of a process that has district judges consulting only with each other. See 12 C. Wright & A. Miller, *supra*, § 3152, at 217; Blair, *The New Local Rules for Federal Practice In Iowa*, 23 Drake L.Rev. 517 (1974). The new language subjects local rulemaking to scrutiny similar to that accompanying the Federal Rules, administrative rulemaking, and legislation. It attempts to assure that the expert advice of practitioners and scholars is made available to the district court before local rules are promulgated. See Weinstein, *Reform of Court Rule-Making Procedures* 84–87, 127–37, 151 (1977).

The amended Rule does not detail the procedure for giving notice and an opportunity to be heard since conditions vary from district to district. Thus, there is no explicit requirement for a public hearing, although a district may consider that procedure appropriate in all or some rulemaking situations. See generally, Weinstein, *supra*, at 117–37, 151. The new Rule does not foreclose any other form of consultation. For example, it can be accomplished through the mechanism of an "Advisory Committee" similar to that employed by the Supreme Court in connection with the Federal Rules themselves.

The amended Rule provides that a local rule will take effect upon the date specified by the district court and will remain in effect unless amended by the district court or abrogated by the judicial council. The effectiveness of a local rule should not be deferred until approved by the judicial council because that might unduly delay promulgation of a local rule that should become effective immediately, especially since some councils do not meet frequently. Similarly, it was thought that to delay a local rule's effectiveness for a fixed period of time would be arbitrary and that to require the judicial council to abrogate a local rule within a specified time would be inconsistent with its power under 28 U.S.C. § 332 (1976) to nullify a local rule at any time. The expectation is that the judicial council will examine all local rules, including those currently in effect, with an eye toward determining whether they are valid and consistent with the Federal Rules, promote inter-district uniformity and efficiency, and do not undermine the basic objectives of the Federal Rules.

The amended Rule requires copies of local rules to be sent upon their promulgation to the judicial council and the Administrative Office of the United States Courts rather than to the Supreme Court. The Supreme Court was the appropriate filing place in 1938, when Rule 83 originally was promulgated, but the establishment of the Administrative Office makes it a more logical place to develop a centralized file of local rules. This procedure is consistent with both the Criminal and the Appellate Rules. See Fed.R.Crim.P. 57(a); Fed.R.App.P. 47. The Administrative Office also will be able to provide improved utilization of the file because of its recent development of a Local Rules Index.

The practice pursued by some judges of issuing standing orders has been controversial, particularly among members of the practicing bar. The last sentence in Rule 83 has been amended to make certain that standing orders are not inconsistent with the Federal Rules or any local district court rules. Beyond that, it is hoped that each district will adopt procedures, perhaps by local rule, for promulgating and reviewing single-judge standing orders.

NOTES OF ADVISORY COMMITTEE ON RULES—1995 AMENDMENT

Subdivison (a). This rule is amended to reflect the requirement that local rules be consistent not only with the national rules but also with Acts of Congress. The amendment also states that local rules should not repeat Acts of Congress or national rules.

The amendment also requires that the numbering of local rules conform with any uniform numbering system that may be prescribed by the Judicial Conference. Lack of uniform numbering might create unnecessary traps for counsel and litigants. A uniform numbering system would make it easier for an increasingly national bar and for litigants to locate a local rule that applies to a particular procedural issue.

Paragraph (2) is new. Its aim is to protect against loss of rights in the enforcement of local rules relating to matters of form. For example, a party should not be deprived of a right to a jury trial because its attorney, unaware of—or forgetting—a local rule directing that jury demands be noted in the caption of the case, in-

cludes a jury demand only in the body of the pleading. The proscription of paragraph (2) is narrowly drawn—covering only violations attributable to nonwillful failure to comply and only those involving local rules directed to matters of form. It does not limit the court's power to impose substantive penalties upon a party if it or its attorney contumaciously or willfully violates a local rule, even one involving merely a matter of form. Nor does it affect the court's power to enforce local rules that involve more than mere matters of form—for example, a local rule requiring parties to identify evidentiary matters relied upon to support or oppose motions for summary judgment.

Subdivision (b). This rule provides flexibility to the court in regulating practice when there is no controlling law. Specifically, it permits the court to regulate practice in any manner consistent with Acts of Congress, with rules adopted under 28 U.S.C. §§2072 and 2075, and with the district local rules.

This rule recognizes that courts rely on multiple directives to control practice. Some courts regulate practice through the published Federal Rules and the local rules of the court. Some courts also have used internal operating procedures, standing orders, and other internal directives. Although such directives continue to be authorized, they can lead to problems. Counsel or litigants may be unaware of various directives. In addition, the sheer volume of directives may impose an unreasonable barrier. For example, it may be difficult to obtain copies of the directives. Finally, counsel or litigants may be unfairly sanctioned for failing to comply with a directive. For these reasons, the amendment to this rule disapproves imposing any sanction or other disadvantage on a person for noncompliance with such an internal directive, unless the alleged violator has been furnished actual notice of the requirement in a particular case.

There should be no adverse consequence to a party or attorney for violating special requirements relating to practice before a particular court unless the party or attorney has actual notice of those requirements. Furnishing litigants with a copy outlining the judge's practices—or attaching instructions to a notice setting a case for conference or trial—would suffice to give actual notice, as would an order in a case specifically adopting by reference a judge's standing order and indicating how copies can be obtained.

Rule 84. Forms

The forms contained in the Appendix of Forms are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

In accordance with the practice found useful in many codes, provision is here made for a limited number of official forms which may serve as guides in pleading. Compare 2 Mass. Gen. Laws (Ter. Ed., 1932) ch. 231, §147, Forms 1–47; English Annual Practice (1937) Appendix A to M, inclusive; Conn. Practice Book (1934) Rules, 47–68, pp. 123–427.

NOTES OF ADVISORY COMMITTEE ON RULES—1946 AMENDMENT

The amendment serves to emphasize that the forms contained in the Appendix of Forms are sufficient to withstand attack under the rules under which they are drawn, and that the practitioner using them may rely on them to that extent. The circuit courts of appeals generally have upheld the use of the forms as promoting desirable simplicity and brevity of statement. *Sierocinski v. E. I. DuPont DeNemours & Co.* (C.C.A. 3d, 1939) 103 F.(2d) 843; *Swift & Co. v. Young* (C.C.A. 4th, 1939) 107 F.(2d) 170; *Sparks v. England* (C.C.A. 8th, 1940) 113 F.(2d) 579; *Ramsouer v. Midland Valley R. Co.* (C.C.A. 8th, 1943) 135 F.(2d) 101. And the forms as a whole have met with widespread approval in the courts. See cases cited in 1 *Moore's Federal Practice* (1938), Cum. Supplement §8.07, under "Page 554"; see also Commentary, *The Official Forms* (1941) 4 Fed. Rules Serv. 954. In Cook, *"Facts" and "Statements of Fact" (1937) 4 U.Chi.L.Rev. 233, 245–246, it is said with reference to what is now Rule 84: ". . . pleaders in the federal courts are not to be left to guess as to the meaning of [the] language" in Rule 8 (a) regarding the form of the complaint. "All of which is as it should be. In no other way can useless litigation be avoided." Ibid.* The amended rule will operate to discourage isolated results such as those found in *Washburn v. Moorman Mfg. Co.* (S.D.Cal. 1938) 25 F.Supp. 546; *Employers Mutual Liability Ins. Co. of Wisconsin v. Blue Line Transfer Co.* (W.D.Mo. 1941) 5 Fed. Rules Serv. 12e.235, Case 2.

Rule 85. Title

These rules may be known and cited as the Federal Rules of Civil Procedure.

Rule 86. Effective Date

(a)[1] [EFFECTIVE DATE OF ORIGINAL RULES.] These rules will take effect on the day which is 3 months subsequent to the adjournment of the second regular session of the 75th Congress, but if that day is prior to September 1, 1938, then these rules will take effect on September 1, 1938. They govern all proceedings in actions brought after they take effect and also 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 when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies.

(b) EFFECTIVE DATE OF AMENDMENTS. The amendments adopted by the Supreme Court on December 27, 1946, and transmitted to the Attorney General on January 2, 1947, shall take effect on the day which is three months subsequent to the adjournment of the first regular session of the 80th Congress, but, if that day is prior to September 1, 1947, then these amendments shall take effect on September 1, 1947. They govern all proceedings in actions brought after they take effect and also 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 when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.

(c) EFFECTIVE DATE OF AMENDMENTS. The amendments adopted by the Supreme Court on December 29, 1948, and transmitted to the Attorney General on December 31, 1948, shall take effect on the day following the adjournment of the first regular session of the 81st Congress.

(d) EFFECTIVE DATE OF AMENDMENTS. The amendments adopted by the Supreme Court on April 17, 1961, and transmitted to the Congress on April 18, 1961, shall take effect on July 19, 1961. They govern all proceedings in actions brought after they take effect and also 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 when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.

[1] Subdivision heading supplied editorially.

(e) EFFECTIVE DATE OF AMENDMENTS. The amendments adopted by the Supreme Court on January 21, 1963, and transmitted to the Congress on January 21, 1963, shall take effect on July 1, 1963. They govern all proceedings in actions brought after they take effect and also 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 when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Apr. 17, 1961, eff. July 19, 1961; Jan. 21 and Mar. 18, 1963, eff. July 1, 1963.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

See [former] Equity Rule 81 (These Rules Effective February 1, 1913—Old Rules Abrogated).

NOTES OF ADVISORY COMMITTEE ON RULES—1948 AMENDMENT

By making the general amendments effective on the day following the adjournment of the first regular session of Congress to which they are transmitted, subdivision (c), *supra*, departs slightly from the prior practice of making amendments effective on the day which is three months subsequent to the adjournment of Congress or on September 1 of that year, whichever day is later. The reason for this departure is that no added period of time is needed for the Bench and Bar to acquaint themselves with the general amendments, which effect a change in nomenclature to conform to revised Title 28, substitute present statutory references to this Title and cure the omission or defect occasioned by the statutory revision in relation to the substitution of public officers, to a cost bond on appeal, and to procedure after removal (see Rules 25(d), 73(c), 81(c)).

EFFECTIVE DATE OF 1966 AMENDMENT; TRANSMISSION TO CONGRESS; RESCISSION

Sections 2–4 of the Order of the Supreme Court, dated Feb. 28, 1966, 383 U.S. 1031, provided:

''2. That the foregoing amendments and additions to the Rules of Civil Procedure shall take effect on July 1, 1966, and shall govern all proceedings in actions brought thereafter and also in all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action then pending would not be feasible or would work injustice, in which event the former procedure applies.

''3. That the Chief Justice be, and he hereby is, authorized to transmit to the Congress the foregoing amendments and additions to the Rules of Civil Procedure in accordance with the provisions of Title 28, U.S.C., §§ 2072 and 2073.

''4. That: (a) subdivision (c) of Rule 6 of the Rules of Civil Procedure for the United States District Courts promulgated by this court on December 20, 1937, effective September 16, 1938; (b) Rule 2 of the Rules for Practice and Procedure under section 25 of An Act To amend and consolidate the Acts respecting copyright, approved March 4, 1909, promulgated by this court on June 1, 1909, effective July 1, 1909; and (c) the Rules of Practice in Admiralty and Maritime Cases, promulgated by this court on December 6, 1920, effective March 7, 1921, as revised, amended and supplemented be, and they hereby are, rescinded, effective July 1, 1966.''

APPENDIX OF FORMS

(See Rule 84)

INTRODUCTORY STATEMENT

1. The following forms are intended for illustration only. They are limited in number. No attempt is made to furnish a manual of forms. Each form assumes the action to be brought in the Southern District of New York. If the district in which an action is brought has divisions, the division should be indicated in the caption.

2. Except where otherwise indicated each pleading, motion, and other paper should have a caption similar to that of the summons, with the designation of the particular paper substituted for the word ''Summons''. In the caption of the summons and in the caption of the complaint all parties must be named but in other pleadings and papers, it is sufficient to state the name of the first party on either side, with an appropriate indication of other parties. See Rules 4(b), 7(b)(2), and 10(a).

3. In Form 3 and the forms following, the words, ''Allegation of jurisdiction,'' are used to indicate the appropriate allegation in Form 2.

4. Each pleading, motion, and other paper is to be signed in his individual name by at least one attorney of record (Rule 11). The attorney's name is to be followed by his address as indicated in Form 3. In forms following Form 3 the signature and address are not indicated.

5. If a party is not represented by an attorney, the signature and address of the party are required in place of those of the attorney.

Form 1. Summons

United States District Court for the Southern District of New York

Civil Action, File Number _____

A. B., Plaintiff
v.
C. D., Defendant } *Summons*

To the above-named Defendant:

You are hereby summoned and required to serve upon _____, plaintiff's attorney, whose address is _____, an answer to the complaint which is herewith served upon you, within 20[1] days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

_____,
Clerk of Court.

[Seal of the U.S. District Court]
Dated _____

(This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure)

[1] If the United States or an officer or agency thereof is a defendant, the time to be inserted as to it is 60 days.

(As amended Dec. 29, 1948, eff. Oct. 20, 1949.)

NOTES OF ADVISORY COMMITTEE ON RULES—1948 AMENDMENT

The change in nomenclature conforms to the official designation of a district court and of a court of appeals in Title 28, U.S.C., §§ 43(a), 132(a); and the more appropriate reference to ''United States Court House, Foley Square, City of New York'' in Form 19 replaces the outmoded reference.

Form 1A. Notice of Lawsuit and Request for Waiver of Service of Summons

TO: _____(A)_____ [as _____(B)_____ of _____(C)_____]

A lawsuit has been commenced against you (or the entity on whose behalf you are addressed). A copy of the complaint is attached to this notice. It has been filed in the United States District Court for the _____(D)_____ and has been assigned docket number _____(E)_____.

This is not a formal summons or notification from the court, but rather my request that you sign and return the enclosed waiver of service in order to save the cost of serving you with a judicial summons and an additional copy of the complaint. The cost of service will be avoided if I receive a signed copy of the waiver within _____(F)_____ days after the date designated below as the date on which this Notice and Request is sent. I enclose a stamped and addressed envelope (or other means of cost-free return) for your use. An extra copy of the waiver is also attached for your records.

If you comply with this request and return the signed waiver, it will be filed with the court and no summons will be served on you. The action will then proceed as if you had been served on the date the waiver is filed, except that you will not be obligated to answer the complaint before 60 days from the date designated below as the date on which this notice is sent (or before 90 days from that date if your address is not in any judicial district of the United States).

If you do not return the signed waiver within the time indicated, I will take appropriate steps to effect formal service in a manner authorized by the Federal Rules of Civil Procedure and will then, to the extent authorized by those Rules, ask the court to require you (or the party on whose behalf you are addressed) to pay the full costs of such service. In that connection, please read the statement concerning the duty of parties to waive the service of the summons, which is set forth on the reverse side (or at the foot) of the waiver form.

I affirm that this request is being sent to you on behalf of the plaintiff, this ____ day of _____, ____.

_____

Signature of Plaintiff's Attorney or Unrepresented Plaintiff

NOTES

A—Name of individual defendant (or name of officer or agent of corporate defendant)

B—Title, or other relationship of individual to corporate defendant

C—Name of corporate defendant, if any

D—District

E—Docket number of action

F—Addressee must be given at least 30 days (60 days if located in foreign country) in which to return waiver

(As added Apr. 22, 1993, eff. Dec. 1, 1993.)

NOTES OF ADVISORY COMMITTEE ON RULES—1993

Forms 1A and 1B reflect the revision of Rule 4. They replace Form 18–A.

Form 1B. Waiver of Service of Summons

TO: _____(name of plaintiff's attorney or unrepresented plaintiff)_____

I acknowledge receipt of your request that I waive service of a summons in the action of _____(caption of action)_____, which is case number _____(docket number)_____ in the United States District Court for the _____(district)_____. I have also received a copy of the complaint in the action, two copies of this instrument, and a means by which I can return the signed waiver to you without cost to me.

I agree to save the cost of service of a summons and an additional copy of the complaint in this lawsuit by not requiring that I (or the entity on whose behalf I am acting) be served with judicial process in the manner provided by Rule 4.

I (or the entity on whose behalf I am acting) will retain all defenses or objections to the lawsuit or to the jurisdiction or venue of the court except for objections based on a defect in the summons or in the service of the summons.

I understand that a judgment may be entered against me (or the party on whose behalf I am acting) if an answer or motion under Rule 12 is not served upon you within 60 days after _____(date request was sent)_____, or within 90 days after that date if the request was sent outside the United States.

_____ _____

Date Signature

Printed/typed name:

_____

[as _____]

[of _____]

To be printed on reverse side of the waiver form or set forth at the foot of the form:

DUTY TO AVOID UNNECESSARY COSTS OF SERVICE OF SUMMONS

Rule 4 of the Federal Rules of Civil Procedure requires certain parties to cooperate in saving unnecessary costs of service of the summons and complaint. A defendant located in the United States who, after being notified of an action and asked by a plaintiff located in the United States to waive service of a summons, fails to do so will be required to bear the cost of such service unless good cause be shown for its failure to sign and return the waiver.

It is not good cause for a failure to waive service that a party believes that the complaint is unfounded, or that the action has been brought in an improper place or in a court that lacks jurisdiction over the subject matter of the action or over its person or property. A party who waives service of the summons retains all defenses and objections (except any relating to the summons or to the service of the summons), and may later object to the jurisdiction of the court or to the place where the action has been brought.

A defendant who waives service must within the time specified on the waiver form serve on the plaintiff's attorney (or unrepresented plaintiff) a response to the complaint and must also file a signed copy of the response with the court. If the answer or motion is not served within this time, a default judgment may be taken against that defendant. By waiving service, a defendant is allowed more time to answer than if the summons had been actually served when the request for waiver of service was received.

(As added Apr. 22, 1993, eff. Dec. 1, 1993.)

NOTES OF ADVISORY COMMITTEE ON RULES—1993

Forms 1A and 1B reflect the revision of Rule 4. They replace Form 18–A.

Form 2. Allegation of Jurisdiction

(a) Jurisdiction founded on diversity of citizenship and amount.

Plaintiff is a [citizen of the State of Connecticut][1] [corporation incorporated under the laws of the State of Connecticut having its principal place of business in the State of Connecticut] and defendant is a corporation incorporated under the laws of the State of New York having its principal place of business in a State other than the State of Connecticut. The matter in controversy exceeds, exclusive of interest and costs, the sum specified by 28 U.S.C. §1332.

(b) Jurisdiction founded on the existence of a Federal question.

The action arises under [the Constitution of the United States, Article __, Section __]; [the __ Amendment to the Constitution of the United States, Section __]; [the Act of __, __ Stat. __; U.S.C., Title __, §__]; [the Treaty of the United States (here describe the treaty)][2] as hereinafter more fully appears.

(c) Jurisdiction founded on the existence of a question arising under particular statutes.

The action arises under the Act of _____, _____ Stat. _____; U.S.C., Title _____, §_____, as hereinafter more fully appears.

(d) Jurisdiction founded on the admiralty or maritime character of the claim.

This is a case of admiralty and maritime jurisdiction, as hereinafter more fully appears. [If the pleader wishes to invoke the distinctively maritime procedures referred to in Rule 9(h), add the following or its substantial equivalent: This is an admiralty or maritime claim within the meaning of Rule 9(h).]

[1] Form for natural person.

[2] Use the appropriate phrase or phrases. The general allegation of the existence of a Federal question is ineffective unless the matters constituting the claim for relief as set forth in the complaint raise a Federal question.

Explanatory Notes

1. *Diversity of Citizenship*. U.S.C., Title 28, §1332 (Diversity of citizenship; amount in controversy; costs), as amended by P.L. 85–554, 72 Stat. 415, July 25, 1958, states in subsection (c) that "For the purposes of this section and section 1441 of this title [removable actions], a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." Thus if the defendant corporation in Form 2(a) had its principal place of business in Connecticut, diversity of citizenship would not exist. An allegation regarding the principal place of business of each corporate party must be made in addition to an allegation regarding its place of incorporation.

2. *Jurisdictional Amount*. U.S.C., Title 28, §1331 (Federal question; amount in controversy; costs) and §1332 (Diversity of citizenship; amount in controversy; costs), as amended by P.L. 85–554, 72 Stat. 415, July 25, 1958, require that the amount in controversy, exclusive of interest and costs, be in excess of $10,000. The allegation as to the amount in controversy may be omitted in any case where by law no jurisdictional amount is required. See, for example, U.S.C., Title 28, §1338 (Patents, copyrights, trade-marks, and unfair competition), §1343 (Civil rights and elective franchise).

3. *Pleading Venue*. Since improper venue is a matter of defense, it is not necessary for plaintiff to include allegations showing the venue to be proper. See 1 Moore's Federal Practice, par. 0.140 [1.—4] (2d ed. 1959).

(As amended Apr. 17, 1961, eff. July 19, 1961; Feb. 28, 1966, eff. July 1, 1966; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 26, 1999, eff. Dec. 1, 1999.)

Notes of Advisory Committee on Rules—1966 Amendment

Since the Civil Rules have not heretofore been applicable to proceedings in Admiralty (Rule 81(a)(1)), Form 2 naturally has not contained a provision for invoking the admiralty jurisdiction. The form has never purported to be comprehensive, as making provision for all possible grounds of jurisdiction; but a provision for invoking the admiralty jurisdiction is particularly appropriate as an incident of unification.

Certain distinctive features of the admiralty practice must be preserved in unification, just as certain distinctive characteristics of equity were preserved in the merger of law and equity in 1938. Rule 9(h) provides the device whereby, after unification, with its abolition of the distinction between civil actions and suits in admiralty, the pleader may indicate his choice of the distinctively maritime procedures, and designates those features that are preserved. This form illustrates an appropriate way in which the pleader may invoke those procedures. Use of this device is not necessary if the claim is cognizable only by virtue of the admiralty and maritime jurisdiction, nor if the claim is within the exclusive admiralty jurisdiction of the district court.

Omission of a statement such as this from the pleading indicates the pleader's choice that the action proceed as a conventional civil action, if this is jurisdictionally possible, without the distinctive maritime remedies and procedures. It should be remembered, however, that Rule 9(h) provides that a pleading may be amended to add or withdraw such an identifying statement subject to the principles stated in Rule 15.

Notes of Advisory Committee on Rules—1993 Amendment

This form is revised to reflect amendments to 28 U.S.C. §§1331 and 1332 providing jurisdiction for federal questions without regard to the amount in controversy and raising the amount required to be in controversy in diversity cases to fifty thousand dollars.

Form 3. Complaint on a Promissory Note

1. Allegation of jurisdiction.

2. Defendant on or about June 1, 1935, executed and delivered to plaintiff a promissory note [in the following words and figures: (here set out the note verbatim)]; [a copy of which is hereto annexed as Exhibit A]; [whereby defendant promised to pay to plaintiff or order on June 1, 1936 the sum of _____ dollars with interest thereon at the rate of six percent. per annum].

3. Defendant owes to plaintiff the amount of said note and interest.

Wherefore plaintiff demands judgment against defendant for the sum of _____ dollars, interest, and costs.

Signed: _____,

Attorney for Plaintiff.

Address: _____

Notes

1. The pleader may use the material in one of the three sets of brackets. His choice will depend upon whether he desires to plead the document verbatim, or by exhibit, or according to its legal effect.

2. Under the rules free joinder of claims is permitted. See rules 8(e) and 18. Consequently the claims set forth in each and all of the following forms may be joined with this complaint or with each other. Ordinarily each claim should be stated in a separate division of the complaint, and the divisions should be designated as counts successively numbered. In particular the rules permit alternative and inconsistent pleading. See Form 10.

(As amended Jan. 21, 1963, eff. July 1, 1963.)

NOTES OF ADVISORY COMMITTEE ON RULES—1963 AMENDMENT

At various places, these Forms [Forms 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 18, 21] allege or refer to damages of ''ten thousand dollars, interest, and costs,'' or the like. The Forms were written at a time when the jurisdictional amount in ordinary ''diversity'' and ''Federal question'' cases was an amount in excess of $3,000, exclusive of interest and costs, so the illustrative amounts set out in the Forms were adequate for jurisdictional purposes. However, U.S.C. Title 28, §1331 (Federal question; amount in controversy; costs) and §1332 (Diversity of citizenship; amount in controversy; costs), as amended by Pub. Law 85–554, 72 Stat. 415, July 25, 1958, now require that the amount in controversy, exclusive of interest and costs, be in excess of $10,000. Accordingly the Forms are misleading. They are amended at appropriate places by deleting the stated dollar amount and substituting a blank, to be properly filled in by the pleader.

Form 4. Complaint on an Account

1. Allegation of jurisdiction.
2. Defendant owes plaintiff _____ dollars according to the account hereto annexed as Exhibit A.

Wherefore (etc. as in Form 3).

(As amended Jan. 21, 1963, eff. July 1, 1963.)

NOTES OF ADVISORY COMMITTEE ON RULES—1963 AMENDMENT

This form was amended in 1963 by deleting the stated dollar amount and substituting a blank, to be properly filled in by the pleader. See Note of Advisory Committee under Form 3.

Form 5. Complaint for Goods Sold and Delivered

1. Allegation of jurisdiction.
2. Defendant owes plaintiff _____ dollars for goods sold and delivered by plaintiff to defendant between June 1, 1936 and December 1, 1936.

Wherefore (etc. as in Form 3).

NOTE

This form may be used where the action is for an agreed price or for the reasonable value of the goods.

(As amended Jan. 21, 1963, eff. July 1, 1963.)

NOTES OF ADVISORY COMMITTEE ON RULES—1963 AMENDMENT

This form was amended in 1963 by deleting the stated dollar amount and substituting a blank, to be properly filled in by the pleader. See Note of Advisory Committee under Form 3.

Form 6. Complaint for Money Lent

1. Allegation of jurisdiction.
2. Defendant owes plaintiff _____ dollars for money lent by plaintiff to defendant on June 1, 1936.

Wherefore (etc. as in Form 3).

(As amended Jan. 21, 1963, eff. July 1, 1963.)

NOTES OF ADVISORY COMMITTEE ON RULES—1963 AMENDMENT

This form was amended in 1963 by deleting the stated dollar amount and substituting a blank, to be properly filled in by the pleader. See Note of Advisory Committee under Form 3.

Form 7. Complaint for Money Paid by Mistake

1. Allegation of jurisdiction.
2. Defendant owes plaintiff _____ dollars for money paid by plaintiff to defendant by mistake on June 1, 1936, under the following circumstances: [here state the circumstances with particularity—see Rule 9(b)].

Wherefore (etc. as in Form 3).

(As amended Jan. 21, 1963, eff. July 1, 1963.)

NOTES OF ADVISORY COMMITTEE ON RULES—1963 AMENDMENT

This form was amended in 1963 by deleting the stated dollar amount and substituting a blank, to be properly filled in by the pleader. See Note of Advisory Committee under Form 3.

Form 8. Complaint for Money Had and Received

1. Allegation of jurisdiction.
2. Defendant owes plaintiff _____ dollars for money had and received from one G. H. on June 1, 1936, to be paid by defendant to plaintiff.

Wherefore (etc. as in Form 3).

(As amended Jan. 21, 1963, eff. July 1, 1963.)

NOTES OF ADVISORY COMMITTEE ON RULES—1963 AMENDMENT

This form was amended in 1963 by deleting the stated dollar amount and substituting a blank, to be properly filled in by the pleader. See Note of Advisory Committee under Form 3.

Form 9. Complaint for Negligence

1. Allegation of jurisdiction.
2. On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway.
3. As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of one thousand dollars.

Wherefore plaintiff demands judgment against defendant in the sum of _____ dollars and costs.

NOTE

Since contributory negligence is an affirmative defense, the complaint need contain no allegation of due care of plaintiff.

(As amended Jan. 21, 1963, eff. July 1, 1963.)

NOTES OF ADVISORY COMMITTEE ON RULES—1963 AMENDMENT

This form was amended in 1963 by deleting the stated dollar amount and substituting a blank, to be properly filled in by the pleader. See Note of Advisory Committee under Form 3.

Form 10. Complaint for Negligence Where Plaintiff Is Unable To Determine Definitely Whether the Person Responsible Is C. D. or E. F. or Whether Both Are Responsible and Where His Evidence May Justify a Finding of Wilfulness or of Recklessness or of Negligence

A. B., Plaintiff *v.* C. D. and E. F., Defendants	*Complaint*

1. Allegation of jurisdiction.

2. On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant C. D. or defendant E. F., or both defendants C. D. and E. F. wilfully or recklessly or negligently drove or caused to be driven a motor vehicle against plaintiff who was then crossing said highway.

3. As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of one thousand dollars.

Wherefore plaintiff demands judgment against C. D. or against E. F. or against both in the sum of _____ dollars and costs.

(As amended Jan. 21, 1963, eff. July 1, 1963.)

NOTES OF ADVISORY COMMITTEE ON RULES—1963 AMENDMENT

This form was amended in 1963 by deleting the stated dollar amount and substituting a blank, to be properly filled in by the pleader. See Note of Advisory Committee under Form 3.

Form 11. Complaint for Conversion

1. Allegation of jurisdiction.

2. On or about December 1, 1936, defendant converted to his own use ten bonds of the _____ Company (here insert brief identification as by number and issue) of the value of _____ dollars, the property of plaintiff.

Wherefore plaintiff demands judgment against defendant in the sum of _____ dollars, interest, and costs.

(As amended Jan. 21, 1963, eff. July 1, 1963.)

NOTES OF ADVISORY COMMITTEE ON RULES—1963 AMENDMENT

This form was amended in 1963 by deleting the stated dollar amount and substituting a blank, to be properly filled in by the pleader. See Note of Advisory Committee under Form 3.

Form 12. Complaint for Specific Performance of Contract To Convey Land

1. Allegation of jurisdiction.

2. On or about December 1, 1936, plaintiff and defendant entered into an agreement in writing a copy of which is hereto annexed as Exhibit A.

3. In accord with the provisions of said agreement plaintiff tendered to defendant the purchase price and requested a conveyance of the land, but defendant refused to accept the tender and refused to make the conveyance.

4. Plaintiff now offers to pay the purchase price.

Wherefore plaintiff demands (1) that defendant be required specifically to perform said agreement, (2) damages in the sum of one thousand dollars, and (3) that if specific performance is not granted plaintiff have judgment against defendant in the sum of _____ dollars.

NOTE

Here, as in Form 3, plaintiff may set forth the contract verbatim in the complaint or plead it, as indicated, by exhibit, or plead it according to its legal effect. Furthermore, plaintiff may seek legal or equitable relief or both even though this was impossible under the system in operation before these rules.

(As amended Jan. 21, 1963, eff. July 1, 1963.)

NOTES OF ADVISORY COMMITTEE ON RULES—1963 AMENDMENT

This form was amended in 1963 by deleting the stated dollar amount and substituting a blank, to be properly filled in by the pleader. See Note of Advisory Committee under Form 3.

Form 13. Complaint on Claim for Debt and To Set Aside Fraudulent Conveyance Under Rule 18(b)

A. B., Plaintiff
v.
C. D. and E. F., Defendants } *Complaint*

1. Allegation of jurisdiction.

2. Defendant C. D. on or about _____ executed and delivered to plaintiff a promissory note [in the following words and figures: (here set out the note verbatim)]; [a copy of which is hereto annexed as Exhibit A]; [whereby defendant C. D. promised to pay to plaintiff or order on _____ the sum of five thousand dollars with interest thereon at the rate of _____ percent. per annum].

3. Defendant C. D. owes to plaintiff the amount of said note and interest.

4. Defendant C. D. on or about _____ conveyed all his property, real and personal [or specify and describe] to defendant E. F. for the purpose of defrauding plaintiff and hindering and delaying the collection of the indebtedness evidenced by the note above referred to.

Wherefore plaintiff demands:

(1) That plaintiff have judgment against defendant C. D. for _____ dollars and interest; (2) that the aforesaid conveyance to defendant E. F. be declared void and the judgment herein be declared a lien on said property; (3) that plaintiff have judgment against the defendants for costs.

(As amended Jan. 21, 1963, eff. July 1, 1963.)

NOTES OF ADVISORY COMMITTEE ON RULES—1963 AMENDMENT

This form was amended in 1963 by deleting the stated dollar amount and substituting a blank, to be properly filled in by the pleader. See Note of Advisory Committee under Form 3.

Form 14. Complaint for Negligence Under Federal Employer's Liability Act

1. Allegation of jurisdiction.

2. During all the times herein mentioned defendant owned and operated in interstate commerce a railroad which passed through a tunnel located at _____ and known as Tunnel No. _____.

3. On or about June 1, 1936, defendant was repairing and enlarging the tunnel in order to protect interstate trains and passengers and freight from injury and in order to make the tunnel more conveniently usable for interstate commerce.

4. In the course of thus repairing and enlarging the tunnel on said day defendant employed plaintiff as one of its workmen, and negligently put plaintiff to work in a portion of the tunnel which defendant had left unprotected and unsupported.

5. By reason of defendant's negligence in thus putting plaintiff to work in that portion of the tunnel, plaintiff was, while so working pursuant to defendant's orders, struck and crushed by a rock, which fell from the unsupported portion of the tunnel, and was (here describe plaintiff's injuries).

6. Prior to these injuries, plaintiff was a strong, able-bodied man, capable of earning and actually earning _____ dollars per day. By these injuries he has been made incapable of any gainful activity, has suffered great physical and mental pain, and has incurred expense in the amount of _____ dollars for medicine, medical attendance, and hospitalization.

Wherefore plaintiff demands judgment against defendant in the sum of _____ dollars and costs.

Form 15. Complaint for Damages Under Merchant Marine Act

1. Allegation of jurisdiction. [If the pleader wishes to invoke the distinctively maritime procedures referred to in Rule 9(h), add the following or its substantial equivalent: This is an admiralty or maritime claim within the meaning of Rule 9(h).]

2. During all the times herein mentioned defendant was the owner of the steamship _____ and used it in the transportation of freight for hire by water in interstate and foreign commerce.

3. During the first part of (month and year) at _____ plaintiff entered the employ of defendant as an able seaman on said steamship under seamen's articles of customary form for a voyage from _____ ports to the Orient and return at a wage of _____ dollars per month and found, which is equal to a wage of _____ dollars per month as a shore worker.

4. On June 1, 1936, said steamship was about _____ days out of the port of _____ and was being navigated by the master and crew on the return voyage to _____ ports. (Here describe weather conditions and the condition of the ship and state as in an ordinary complaint for personal injuries the negligent conduct of defendant.)

5. By reason of defendant's negligence in thus (brief statement of defendant's negligent conduct) and the unseaworthiness of said steamship, plaintiff was (here describe plaintiff's injuries).

6. Prior to these injuries, plaintiff was a strong, able-bodied man, capable of earning and actually earning _____ dollars per day. By these injuries he has been made incapable of any gainful activity; has suffered great physical and mental pain, and has incurred expense in the amount of _____ dollars for medicine, medical attendance, and hospitalization.

Wherefore plaintiff demands judgment against defendant in the sum of _____ dollars and costs.

(As amended Feb. 28, 1966, eff. July 1, 1966.)

NOTES OF ADVISORY COMMITTEE ON RULES—1966 AMENDMENT

See Advisory Committee's Note to Form 2.

Form 16. Complaint for Infringement of Patent

1. Allegation of jurisdiction.

2. On May 16, 1934, United States Letters Patent No. ____ were duly and legally issued to plaintiff for an invention in an electric motor; and since that date plaintiff has been and still is the owner of those Letters Patent.

3. Defendant has for a long time past been and still is infringing those Letters Patent by making, selling, and using electric motors embodying the patented invention, and will continue to do so unless enjoined by this court.

4. Plaintiff has placed the required statutory notice on all electric motors manufactured and sold by him under said Letters Patent, and has given written notice to defendant of his said infringement.

Wherefore plaintiff demands a preliminary and final injunction against continued infringement, an accounting for damages, and an assessment of interest and costs against defendant.

(As amended Jan. 21, 1963, eff. July 1, 1963.)

NOTES OF ADVISORY COMMITTEE ON RULES—1963 AMENDMENT

The prayer for relief is amended to reflect the language of the present patent statute, Title 35, U.S.C., § 284 (Damages).

Form 17. Complaint for Infringement of Copyright and Unfair Competition

1. Allegation of jurisdiction.

2. Prior to March, 1936, plaintiff, who then was and ever since has been a citizen of the United States, created and wrote an original book, entitled _____.

3. This book contains a large amount of material wholly original with plaintiff and is copyrightable subject matter under the laws of the United States.

4. Between March 2, 1936, and March 10, 1936, plaintiff complied in all respects with the Act of (give citation) and all other laws governing copyright, and secured the exclusive rights and privileges in and to the copyright of said book, and received from the Register of Copyrights a certificate of registration, dated and identified as follows: ''March 10, 1936, Class _____, No. _____.''

5. Since March 10, 1936, said book has been published by plaintiff and all copies of it made by plaintiff or under his authority or license have been printed, bound, and published in strict conformity with the provisions of the Act of _____ and all other laws governing copyright.

6. Since March 10, 1936, plaintiff has been and still is the sole proprietor of all rights, title, and interest in and to the copyright in said book.

7. After March 10, 1936, defendant infringed said copyright by publishing and placing upon the market a book entitled _____, which was copied largely from plaintiff's copyrighted book, entitled _____.

8. A copy of plaintiff's copyrighted book is hereto attached as ''Exhibit 1''; and a copy of defendant's infringing book is hereto attached as ''Exhibit 2.''

9. Plaintiff has notified defendant that defendant has infringed the copyright of plaintiff, and defendant has continued to infringe the copyright.

10. After March 10, 1936, and continuously since about _____, defendant has been publish-

ing, selling and otherwise marketing the book entitled _____, and has thereby been engaging in unfair trade practices and unfair competition against plaintiff to plaintiff's irreparable damage.

Wherefore plaintiff demands:

(1) That defendant, his agents, and servants be enjoined during the pendency of this action and permanently from infringing said copyright of said plaintiff in any manner, and from publishing, selling, marketing or otherwise disposing of any copies of the book entitled _____.

(2) That defendant be required to pay to plaintiff such damages as plaintiff has sustained in consequence of defendant's infringement of said copyright and said unfair trade practices and unfair competition and to account for

(a) all gains, profits and advantages derived by defendant by said trade practices and unfair competition and

(b) all gains, profits, and advantages derived by defendant by his infringement of plaintiff's copyright or such damages as to the court shall appear proper within the provisions of the copyright statutes, but not less than two hundred and fifty dollars.

(3) That defendant be required to deliver up to be impounded during the pendency of this action all copies of said book entitled _____ in his possession or under his control and to deliver up for destruction all infringing copies and all plates, molds, and other matter for making such infringing copies.

(4) That defendant pay to plaintiff the costs of this action and reasonable attorney's fees to be allowed to the plaintiff by the court.

(5) That plaintiff have such other and further relief as is just.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948.)

NOTES OF ADVISORY COMMITTEE ON RULES—1946 AMENDMENT

This form, as set out, incorporates amendments made at the same time certain rules of the Federal Rules of Civil Procedure were amended. See Rule 86(b) of such rules.

Form 18. Complaint for Interpleader and Declaratory Relief

1. Allegation of jurisdiction.

2. On or about June 1, 1935, plaintiff issued to G. H. a policy of life insurance whereby plaintiff promised to pay to K. L. as beneficiary the sum of _____ dollars upon the death of G. H. The policy required the payment by G. H. of a stipulated premium on June 1, 1936, and annually thereafter as a condition precedent to its continuance in force.

3. No part of the premium due June 1, 1936, was ever paid and the policy ceased to have any force or effect on July 1, 1936.

4. Thereafter, on September 1, 1936, G. H. and K. L. died as the result of a collision between a locomotive and the automobile in which G. H. and K. L. were riding.

5. Defendant C. D. is the duly appointed and acting executor of the will of G. H.; defendant E. F. is the duly appointed and acting executor of the will of K. L.; defendant X. Y. claims to have been duly designated as beneficiary of said policy in place of K. L.

6. Each of defendants, C. D., E. F., and X. Y. is claiming that the above-mentioned policy was in full force and effect at the time of the death of G. H.; each of them is claiming to be the only person entitled to receive payment of the amount of the policy and has made demand for payment thereof.

7. By reason of these conflicting claims of the defendants, plaintiff is in great doubt as to which defendant is entitled to be paid the amount of the policy, if it was in force at the death of G. H.

Wherefore plaintiff demands that the court adjudge:

(1) That none of the defendants is entitled to recover from plaintiff the amount of said policy or any part thereof.

(2) That each of the defendants be restrained from instituting any action against plaintiff for the recovery of the amount of said policy or any part thereof.

(3) That, if the court shall determine that said policy was in force at the death of G. H., the defendants be required to interplead and settle between themselves their rights to the money due under said policy, and that plaintiff be discharged from all liability in the premises except to the person whom the court shall adjudge entitled to the amount of said policy.

(4) That plaintiff recover its costs.

(As amended Jan. 21, 1963, eff. July 1, 1963.)

NOTES OF ADVISORY COMMITTEE ON RULES—1963 AMENDMENT

This form was amended in 1963 by deleting the stated dollar amount and substituting a blank, to be properly filled in by the pleader. See Note of Advisory Committee under Form 3.

[Form 18–A. Abrogated Apr. 22, 1993, eff. Dec. 1, 1993]

NOTES OF ADVISORY COMMITTEE ON RULES—1993 AMENDMENT

This form is superseded by Forms 1A and 1B in view of the revision of Rule 4.

Form 19. Motion To Dismiss, Presenting Defenses of Failure To State a Claim, of Lack of Service of Process, of Improper Venue, and of Lack of Jurisdiction Under Rule 12(b)

The defendant moves the court as follows:

1. To dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted.

2. To dismiss the action or in lieu thereof to quash the return of service of summons on the grounds (a) that the defendant is a corporation organized under the laws of Delaware and was not and is not subject to service of process within the Southern District of New York, and (b) that the defendant has not been properly served with process in this action, all of which more clearly appears in the affidavits of M. N. and X. Y. hereto annexed as Exhibit A and Exhibit B respectively.

3. To dismiss the action on the ground that it is in the wrong district because (a) the jurisdiction of this court is invoked solely on the ground that the action arises under the Constitution and laws of the United States and (b)

the defendant is a corporation incorporated under the laws of the State of Delaware and is not licensed to do or doing business in the Southern District of New York, all of which more clearly appears in the affidavits of K. L. and V. W. hereto annexed as Exhibits C and D, respectively.

4. To dismiss the action on the ground that the court lacks jurisdiction because the amount actually in controversy is less than ten thousand dollars exclusive of interest and costs.

Signed: _____
Attorney for Defendant.

Address: _____

Notice of Motion

To: _____
Attorney for Plaintiff.

_____

Please take notice, that the undersigned will bring the above motion on for hearing before this Court at Room ___, United States Court House, Foley Square, City of New York, on the _____ day of_____, 20__, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Signed: _____
Attorney for Defendant.

Address: _____

EXPLANATORY NOTES

1. The above motion and notice of motion may be combined and denominated Notice of Motion. See Rule 7(b).

2. As to paragraph 3, see U.S.C., Title 28, §1391 (Venue generally), subsections (b) and (c).

3. As to paragraph 4, see U.S.C., Title 28, §1331 (Federal question; amount in controversy; costs), as amended by P.L. 85–554, 72 Stat. 415, July 25, 1958, requiring that the amount in controversy, exclusive of interest and costs, be in excess of $10,000.

(As amended Dec. 29, 1948, eff. Oct. 20, 1949; Apr. 17, 1961, eff. July 19, 1961; Mar. 27, 2003, eff. Dec. 1, 2003.)

NOTES OF ADVISORY COMMITTEE ON RULES—1948 AMENDMENT

The change in nomenclature conforms to the official designation of a district court and of a court of appeals in Title 28, U.S.C., §§43(a), 132(a); and the more appropriate reference to ''United States Court House, Foley Square, City of New York'' in Form 19 replaces the outmoded reference.

Form 20. Answer Presenting Defenses Under Rule 12(b)

First Defense

The complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense

If defendant is indebted to plaintiffs for the goods mentioned in the complaint, he is indebted to them jointly with G. H. G. H. is alive; is a citizen of the State of New York and a resident of this district, is subject to the jurisdiction of this court, as to both service of process and venue; can be made a party without depriving this court of jurisdiction of the present parties, and has not been made a party.

Third Defense

Defendant admits the allegation contained in paragraphs 1 and 4 of the complaint; alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2 of the complaint; and denies each and every other allegation contained in the complaint.

Fourth Defense

The right of action set forth in the complaint did not accrue within six years next before the commencement of this action.

Counterclaim

(Here set forth any claim as a counterclaim in the manner in which a claim is pleaded in a complaint. No statement of the grounds on which the court's jurisdiction depends need be made unless the counterclaim requires independent grounds of jurisdiction.)

Cross-Claim Against Defendant M. N.

(Here set forth the claim constituting a cross-claim against defendant M. N. in the manner in which a claim is pleaded in a complaint. The statement of grounds upon which the court's jurisdiction depends need not be made unless the cross-claim requires independent grounds of jurisdiction.)

NOTE

The above form contains examples of certain defenses provided for in Rule 12(b). The first defense challenges the legal sufficiency of the complaint. It is a substitute for a general demurrer or a motion to dismiss.

The second defense embodies the old plea in abatement; the decision thereon, however, may well provide under Rules 19 and 21 for the citing in of the party rather than an abatement of the action.

The third defense is an answer on the merits.

The fourth defense is one of the affirmative defenses provided for in Rule 8(c).

The answer also includes a counterclaim and a cross-claim.

NOTES OF ADVISORY COMMITTEE ON RULES—1946 AMENDMENT

The explanatory note incorporates revisions made by the Advisory Committee at the same time amendments to certain rules of the Federal Rules of Civil Procedure were made. See also rule 12(b), as amended.

Form 21. Answer to Complaint Set Forth in Form 8, With Counterclaim for Interpleader

Defense

Defendant admits the allegations stated in paragraph 1 of the complaint; and denies the allegations stated in paragraph 2 to the extent set forth in the counterclaim herein.

Counterclaim for Interpleader

1. Defendant received the sum of _____ dollars as a deposit from E. F.

2. Plaintiff has demanded the payment of such deposit to him by virtue of an assignment of it which he claims to have received from E. F.

3. E. F. has notified the defendant that he claims such deposit, that the purported assignment is not valid, and that he holds the defendant responsible for the deposit.

Wherefore defendant demands:

(1) That the court order E. F. to be made a party defendant to respond to the complaint and to this counterclaim.[1]

(2) That the court order the plaintiff and E. F. to interplead their respective claims.

(3) That the court adjudge whether the plaintiff or E. F. is entitled to the sum of money.

(4) That the court discharge defendant from all liability in the premises except to the person it shall adjudge entitled to the sum of money.

(5) That the court award to the defendant its costs and attorney's fees.

[1] Rule 13(h) provides for the court ordering parties to a counterclaim, but who are not parties to the original action, to be brought in as defendants.

(As amended Jan. 21, 1963, eff. July 1, 1963.)

NOTES OF ADVISORY COMMITTEE ON RULES—1963 AMENDMENT

This form was amended in 1963 by deleting the stated dollar amount and substituting a blank, to be properly filled in by the pleader. See Note of Advisory Committee under Form 3.

[Form 22. Eliminated Jan. 21, 1963, eff. July 1, 1963]

Form 22 for motion to bring in third-party defendant, setting out as an exhibit summons and third-party complaint, and for notice of motion, was eliminated Jan. 21, 1963, eff. July 1, 1963, and superseded by Forms 22–A and 22–B, setting out summons and complaint against third-party defendant, and motion to bring in third-party defendant. See Advisory Committee notes under Forms 22–A and 22–B.

Form 22–A. Summons and Complaint Against Third-Party Defendant

United States District Court for the Southern District of New York

Civil Action, File Number ____

A. B., Plaintiff *v.* C. D., Defendant and Third-Party Plaintiff *v.* E. F., Third-Party Defendant	*Summons*

To the above-named Third-Party Defendant:

You are hereby summoned and required to serve upon _____, plaintiff's attorney whose address is _____, and upon _____, who is attorney for C. D., defendant and third-party plaintiff, and whose address is _____, an answer to the third-party complaint which is herewith served upon you within 20 days after the service of this summons upon you exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the third-party complaint. There is also served upon you herewith a copy of the complaint of the plaintiff which you may but are not required to answer.

_____,

Clerk of Court.

[Seal of District Court]

Dated _____

United States District Court for the Southern District of New York

Civil Action, File Number ____

A. B., Plaintiff *v.* C. D., Defendant and Third-Party Plaintiff *v.* E. F., Third-Party Defendant	*Third-Party Complaint*

1. Plaintiff A. B. has filed against defendant C. D. a complaint, a copy of which is hereto attached as "Exhibit A."

2. (Here state the grounds upon which C. D. is entitled to recover from E. F., all or part of what A. B. may recover from C. D. The statement should be framed as in an original complaint.)

Wherefore C. D. demands judgment against third-party defendant E. F. for all sums[1] that may be adjudged against defendant C. D. in favor of plaintiff A. B.

Signed: _____,

Attorney for C. D., Third-Party Plaintiff.

Address: _____

[1] Make appropriate change where C. D. is entitled to only partial recovery-over against E. F.

(As added Jan. 21, 1963, eff. July 1, 1963.)

NOTES OF ADVISORY COMMITTEE ON RULES—1963

Under the amendment of Rule 14(a), a defendant who files a third-party complaint not later than 10 days after serving his original answer need not obtain leave of court to bring in the third-party defendant by service under Rule 4. Form 22–A is intended for use in these cases.

The changes in the form of summons reflect an earlier amendment of Rule 14(a), effective in 1948, making it permissive, rather than mandatory, for the third-party defendant to answer the plaintiff's complaint. See *Cooper v. D/S A/S Progress*, 188 F.Supp. 578 (E.D.Pa. 1960); 1A Barron & Holtzoff, *Federal Practice and Procedure* 696 (Wright ed. 1960).

Under the amendment of Rule 5(a) requiring, with certain exceptions, that papers be served upon all the parties to the action, the third-party defendant, even if he makes no answer to the plaintiff's complaint, is obliged to serve upon the plaintiff a copy of his answer to the third-party complaint. Similarly, the defendant is obliged to serve upon the plaintiff a copy of the summons and complaint against the third-party defendant.

Form 22–B. Motion To Bring in Third-Party Defendant

Defendant moves for leave, as third-party plaintiff, to cause to be served upon E. F. a summons and third-party complaint, copies of which are hereto attached as Exhibit X.

Signed: _____,

Attorney for Defendant C. D.

Address: _____

Notice of Motion

(Contents the same as in Form 19. The notice should be addressed to all parties to the action.)

Exhibit X

(Contents the same as in Form 22–A.)

(As added Jan. 21, 1963, eff. July 1, 1963.)

NOTES OF ADVISORY COMMITTEE ON RULES—1963

Form 22–B is intended for use when, under amended Rule 14(a), leave of court is required to bring in a third-party defendant.

Form 23. Motion To Intervene as a Defendant Under Rule 24

(Based upon the complaint, Form 16)

United States District Court for the Southern District of New York

Civil Action, File Number ____

A. B., plaintiff *v.* C. D., defendant E. F., applicant for intervention	*Motion to intervene as a defendant*

E. F. moves for leave to intervene as a defendant in this action, in order to assert the defenses set forth in his proposed answer, of which a copy is hereto attached, on the ground that he is the manufacturer and vendor to the defendant, as well as to others, of the articles alleged in the complaint to be an infringement of plaintiff's patent, and as such has a defense to plaintiff's claim presenting both questions of law and of fact which are common to the main action.[1]

Signed: _____,

Attorney for E. F., Applicant for Intervention.

Address: _____

Notice of Motion

(Contents the same as in Form 19)

[1] For other grounds of intervention, either of right or in the discretion of the court, see Rule 24(a) and (b).

United States District Court for the Southern District of New York

Civil Action, File Number ____

A. B., plaintiff *v.* C. D., defendant E. F., intervener	*Intervener's Answer*

First Defense

Intervener admits the allegations stated in paragraphs 1 and 4 of the complaint; denies the allegations in paragraph 3, and denies the allegations in paragraph 2 in so far as they assert the legality of the issuance of the Letters Patent to plaintiff.

Second Defense

Plaintiff is not the first inventor of the articles covered by the Letters Patent specified in his complaint, since articles substantially identical in character were previously patented in Letters Patent granted to intervener on January 5, 1920.

Signed: _____,

Attorney for E. F., Intervener.

Address: _____

(As amended Dec. 29, 1948, eff. Oct. 20, 1949.)

NOTES OF ADVISORY COMMITTEE ON RULES—1948 AMENDMENT

The change in nomenclature conforms to the official designation of a district court and of a court of appeals in Title 28, U.S.C., §§43(a), 132(a); and the more appropriate reference to ''United States Court House, Foley Square, City of New York'' in Form 19 replaces the outmoded reference.

Form 24. Request for Production of Documents, etc., Under Rule 34

Plaintiff A. B. requests defendant C. D. to respond within _____ days to the following requests:

(1) That defendant produce and permit plaintiff to inspect and to copy each of the following documents:

(Here list the documents either individually or by category and describe each of them.)

(Here state the time, place, and manner of making the inspection and performance of any related acts.)

(2) That defendant produce and permit plaintiff to inspect and to copy, test, or sample each of the following objects:

(Here list the objects either individually or by category and describe each of them.)

(Here state the time, place, and manner of making the inspection and performance of any related acts.)

(3) That defendant permit plaintiff to enter (here describe property to be entered) and to inspect and to photograph, test or sample (here describe the portion of the real property and the objects to be inspected).

(Here state the time, place, and manner of making the inspection and performance of any related acts.)

Signed: _____,

Attorney for Plaintiff.

Address: _____

(As amended Mar. 30, 1970, eff. July 1, 1970.)

NOTES OF ADVISORY COMMITTEE ON RULES—1970 AMENDMENT

Form 24 is revised to accord with the changes made in Rule 34.

Form 25. Request for Admission Under Rule 36

Plaintiff A. B. requests defendant C. D. within _____ days after service of this request to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. That each of the following documents, exhibited with this request, is genuine.

(Here list the documents and describe each document.)

2. That each of the following statements is true.

(Here list the statements.)

Signed: _____,

Attorney for Plaintiff.

Address: _____

(As amended Dec. 27, 1946, eff. Mar. 19, 1948.)

Form 26. Allegation of Reason for Omitting Party

When it is necessary, under Rule 19(c), for the pleader to set forth in his pleading the names of persons who ought to be made parties, but who are not so made, there should be an allegation such as the one set out below:

John Doe named in this complaint is not made a party to this action [because he is not subject to the jurisdiction of this court]; [because he cannot be made a party to this action without depriving this court of jurisdiction].

[Form 27. Abrogated Dec. 4, 1967, eff. July 1, 1968]

NOTES OF ADVISORY COMMITTEE ON RULES—1967

The form of notice of appeal is transferred to the Federal Rules of Appellate Procedure as Form 1.

Form 28. Notice: Condemnation

United States District Court for the Southern District of New York

Civil Action, File Number ____

United States of America, Plaintiff *v.* 1,000 Acres of Land in [here insert a general location as "City of ____" or "County of ____"], John Doe et al., and Unknown Owners, Defendants	*Notice*

To (here insert the names of the defendants to whom the notice is directed):

You are hereby notified that a complaint in condemnation has heretofore been filed in the office of the clerk of the United States District Court for the Southern District of New York, in the United States Court House in New York City, New York, for the taking (here state the interest to be acquired, as "an estate in fee simple") for use (here state briefly the use, "as a site for a post-office building") of the following described property in which you have or claim an interest.

(Here insert brief description of the property in which the defendants, to whom the notice is directed, have or claim an interest.)

The authority for the taking is (here state briefly, as "the Act of _____, _____ Stat. _____, U.S.C., Title _____, §_____".)[1]

You are further notified that if you desire to present any objection or defense to the taking of your property you are required to serve your answer on the plaintiff's attorney at the address herein designated within twenty days after _____.[2]

Your answer shall identify the property in which you claim to have an interest, state the nature and extent of the interest you claim, and state all of your objections and defenses to the taking of your property. All defenses and objections not so presented are waived. And in case of your failure so to answer the complaint, judgment of condemnation of that part of the above-described property in which you have or claim an interest will be rendered.

But without answering, you may serve on the plaintiff's attorney a notice of appearance designating the property in which you claim to be interested. Thereafter you will receive notice of all proceedings affecting it. At the trial of the issue of just compensation, whether or not you have previously appeared or answered, you may present evidence as to the amount of the compensation to be paid for your property, and you may share in the distribution of the award.

_____

United States Attorney.

Address _____

(Here state an address within the district where the United States Attorney may be served as "United States Court House, New York, N.Y.".)

Dated _____

[1] And where appropriate add a citation to any applicable Executive Order.

[2] Here insert the words "personal service of this notice upon you," if personal service is to be made pursuant to subdivision (d)(3)(i) of this rule [Rule 71A]; or, insert the date of the last publication of notice, if service by publication is to be made pursuant to subdivision (d)(3)(ii) of this rule.

(As added May 1, 1951, eff. Aug. 1, 1951.)

Form 29. Complaint: Condemnation

United States District Court for the Southern District of New York

Civil Action, File Number ____

United States of America, Plaintiff *v.* 1,000 Acres of Land in [here insert a general location as "City of ____" or "County of ____"], John Doe et al., and Unknown Owners, Defendants	*Complaint*

1. This is an action of a civil nature brought by the United States of America for the taking of property under the power of eminent domain and for the ascertainment and award of just compensation to the owners and parties in interest.[1]

2. The authority for the taking is (here state briefly, as "the Act of _____, _____ Stat. _____, U.S.C., Title _____, §_____")[2].

3. The use for which the property is to be taken is (here state briefly the use, "as a site for a post-office building").

4. The interest to be acquired in the property is (here state the interest as "an estate in fee simple").

5. The property so to be taken is (here set forth a description of the property sufficient for its identification) or (described in Exhibit A hereto attached and made a part hereof).

6. The persons known to the plaintiff to have or claim an interest in the property[3] are:

(Here set forth the names of such persons and the interests claimed.)[4]

7. In addition to the persons named, there are or may be others who have or may claim some interest in the property to be taken, whose names are unknown to the plaintiff and on diligent inquiry have not been ascertained. They are made parties to the action under the designation "Unknown Owners."

Wherefore the plaintiff demands judgment that the property be condemned and that just

compensation for the taking be ascertained and awarded and for such other relief as may be lawful and proper.

_____

United States Attorney.

Address _____

(Here state an address within the district where the United States Attorney may be served, as ''United States Court House, New York, N. Y.''.)

[1] If the plaintiff is not the United States, but is, for example, a corporation invoking the power of eminent domain delegated to it by the state, then this paragraph 1 of the complaint should be appropriately modified and should be preceded by a paragraph appropriately alleging federal jurisdiction for the action, such as diversity. See Form 2.

[2] And where appropriate add a citation to any applicable Executive Order.

[3] At the commencement of the action the plaintiff need name as defendants only the persons having or claiming an interest in the property whose names are then known, but prior to any hearing involving the compensation to be paid for a particular piece of property the plaintiff must add as defendants all persons having or claiming an interest in that property whose names can be ascertained by an appropriate search of the records and also those whose names have otherwise been learned. See Rule 71A(c)(2).

[4] The plaintiff should designate, as to each separate piece of property, the defendants who have been joined as owners thereof or of some interest therein. See Rule 71A(c)(2).

(As added May 1, 1951, eff. Aug. 1, 1951.)

Form 30. Suggestion of Death Upon the Record Under Rule 25(a)(1)

A. B. [describe as a party, or as executor, administrator, or other representative or successor of C. D., the deceased party] suggests upon the record, pursuant to Rule 25(a)(1), the death of C. D. [describe as party] during the pendency of this action.

(Added Jan. 21, 1963, eff. July 1, 1963.)

Form 31. Judgment on Jury Verdict

United States District Court for the Southern District of New York

Civil Action, File Number ____

A. B., Plaintiff
v.
C. D., Defendant } *Judgment*

This action came on for trial before the Court and a jury, Honorable John Marshall, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged

[that the plaintiff A. B. recover of the defendant C. D. the sum of ____, with interest thereon at the rate of __ percent as provided by law, and his costs of action.]

[that the plaintiff take nothing, that the action be dismissed on the merits, and that the defendant C. D. recover of the plaintiff A. B. his costs of action.]

Dated at New York, New York, this ____ day of _____, 20__.

_____,

Clerk of Court.

NOTE

1. This Form is illustrative of the judgment to be entered upon the general verdict of a jury. It deals with the cases where there is a general jury verdict awarding the plaintiff money damages or finding for the defendant, but is adaptable to other situations of jury verdicts.

2. The clerk, unless the court otherwise orders, is required forthwith to prepare, sign, and enter the judgment upon a general jury verdict without awaiting any direction by the court. The form of the judgment upon a special verdict or a general verdict accompanied by answers to interrogatories shall be promptly approved by the court, and the clerk shall thereupon enter it. See Rule 58, as amended.

3. The Rules contemplate a simple judgment promptly entered. See Rule 54(a). Every judgment shall be set forth on a separate document. See Rule 58, as amended.

4. Attorneys are not to submit forms of judgment unless directed in exceptional cases to do so by the court. See Rule 58, as amended.

(As added Jan. 21, 1963, eff. July 1, 1963; amended Mar. 27, 2003, eff. Dec. 1, 2003.)

Form 32. Judgment on Decision by the Court

United States District Court for the Southern District of New York

Civil Action, File Number ____

A. B., Plaintiff
v.
C. D., Defendant } *Judgment*

This action came on for [trial] [hearing] before the Court, Honorable John Marshall, District Judge, presiding, and the issues having been duly [tried] [heard] and a decision having been duly rendered,

It is Ordered and Adjudged

[that the plaintiff A. B. recover of the defendant C. D. the sum of____, with interest thereon at the rate of____ percent as provided by law, and his costs of action.]

[that the plaintiff take nothing, that the action be dismissed on the merits, and that the defendant C. D. recover of the plaintiff A. B. his costs of action.]

Dated at New York, New York, this ____ day of _____, 20__.

_____,

Clerk of Court.

NOTES

1. This Form is illustrative of the judgment to be entered upon a decision of the court. It deals with the cases of decisions by the court awarding a party only money damages or costs, but is adaptable to other decisions by the court.

2. The clerk, unless the court otherwise orders, is required forthwith, without awaiting any direction by the court, to prepare, sign, and enter the judgment 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 form of the judgment upon a decision by the court granting other relief shall be promptly approved by the court, and the clerk shall thereupon enter it. See Rule 58, as amended.

3. See also paragraphs 3–4 of the Explanatory Note to Form 31.

(As added Jan. 21, 1963, eff. July 1, 1963; amended Mar. 27, 2003, eff. Dec. 1, 2003.)

Form 33. Notice of Availability of a Magistrate Judge to Exercise Jurisdiction

In accordance with the provisions of Title 28, U.S.C. §636(c), you are hereby notified that a

United States magistrate judge of this district court is available to exercise the court's jurisdiction and to conduct any or all proceedings in this case including a jury or nonjury trial, and entry of a final judgment. Exercise of this jurisdiction by a magistrate judge is, however, permitted only if all parties voluntarily consent.

You may, without adverse substantive consequences, withhold your consent, but this will prevent the court's jurisdiction from being exercised by a magistrate judge. If any party withholds consent, the identity of the parties consenting or withholding consent will not be communicated to any magistrate judge or to the district judge to whom the case has been assigned.

An appeal from a judgment entered by a magistrate judge may be taken directly to the United States court of appeals for this judicial circuit in the same manner as an appeal from any other judgment of a district court.

Copies of the Form for the ''Consent to Jurisdiction by a United States Magistrate Judge'' are available from the clerk of the court.

(As added Apr. 28, 1983, eff. Aug. 1, 1983; amended Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 11, 1997, eff. Dec. 1, 1997.)

NOTES OF ADVISORY COMMITTEE ON RULES—1993 AMENDMENT

This form, together with Form 34, is revised in light of the Judicial Improvements Act of 1990. Section 308 modified 28 U.S.C. §636(c)(2) to enhance the potential of parties consenting to trial before a magistrate judge. While the exercise of jurisdiction by a magistrate judge remains dependent on the voluntary consent of the parties, the statute provides that the parties should be advised, and may be reminded, of the availability of this option and eliminates the proscription against judicial suggestions of the potential benefits of referral provided the parties are also advised that they ''are free to withhold consent without adverse substantive consequences.'' The parties may be advised if the withholding of consent will result in a potential delay in trial.

Form 34. Consent to Exercise of Jurisdiction by a United States Magistrate Judge

UNITED STATES DISTRICT COURT
_____ DISTRICT OF _____

Plaintiff,
vs.
Defendant.
} *Docket No.* _____

CONSENT TO JURISDICTION BY A UNITED STATES MAGISTRATE JUDGE

In accordance with the provisions of Title 28, U.S.C. §636(c), the undersigned party or parties to the above-captioned civil matter hereby voluntarily consent to have a United States magistrate judge conduct any and all further proceedings in the case, including trial, and order the entry of a final judgment.

_____ _____
Date Signature

Note: Return this form to the Clerk of the Court if you consent to jurisdiction by a magistrate judge. Do not send a copy of this form to any district judge or magistrate judge.

(As added Apr. 28, 1983, eff. Aug. 1, 1983; amended Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 11, 1997, eff. Dec. 1, 1997.)

Form 34A. Order of Reference

UNITED STATES DISTRICT COURT
_____ DISTRICT OF _____

Plaintiff,
vs.
Defendant.
} *Docket No.* _____

ORDER OF REFERENCE

IT IS HEREBY ORDERED that the above-captioned matter be referred to United States Magistrate Judge _____ for all further proceedings and entry of judgment in accordance with Title 28, U.S.C. §636(c) and the consent of the parties.

_____
U.S. District Judge

(As added Apr. 22, 1993, eff. Dec. 1, 1993.)

Form 35. Report of Parties' Planning Meeting

[Caption and Names of Parties]

1. Pursuant to Fed. R. Civ. P. 26(f), a meeting was held on _____(date)_____ at _____(place)_____ and was attended by:
_____(name)_____ for plaintiff(s)
_____(name)_____ for defendant(s) _____(party name)_____
_____(name)_____ for defendant(s) _____(party name)_____

2. Pre-Discovery Disclosures. The parties [have exchanged] [will exchange by _____(date)_____] the information required by [Fed. R. Civ. P. 26(a)(1)] [local rule ____].

3. Discovery Plan. The parties jointly propose to the court the following discovery plan: [Use separate paragraphs or subparagraphs as necessary if parties disagree.]

Discovery will be needed on the following subjects: _____(brief description of subjects on which discovery will be needed)_____

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

The parties have agreed to an order regarding claims of privilege or of protection as trial-preparation material asserted after production, as follows: _____(brief description of provisions of proposed order)_____.

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

Maximum of ____ interrogatories by each party to any other party. [Responses due ____ days after service.]

Maximum of ____ requests for admission by each party to any other party. [Responses due ____ days after service.]

Maximum of _____ depositions by plaintiff(s) and ____ by defendant(s).

Each deposition [other than of _____] limited to maximum of ____ hours unless extended by agreement of parties.

Reports from retained experts under Rule 26(a)(2) due:
from plaintiff(s) by ____(date)____

from defendant(s) by ____(date)____

Supplementations under Rule 26(e) due _____(time(s) or interval(s))_____.

4. Other Items. [Use separate paragraphs or subparagraphs as necessary if parties disagree.]

The parties [request] [do not request] a conference with the court before entry of the scheduling order.

The parties request a pretrial conference in _____(month and year)_____.

Plaintiff(s) should be allowed until _____(date)_____ to join additional parties and until _____(date)_____ to amend the pleadings.

Defendant(s) should be allowed until _____(date)_____ to join additional parties and until _____(date)_____ to amend the pleadings.

All potentially dispositive motions should be filed by _____(date)_____.

Settlement [is likely] [is unlikely] [cannot be evaluated prior to _____(date)_____] [may be enhanced by use of the following alternative dispute resolution procedure: [_____].

Final lists of witnesses and exhibits under Rule 26(a)(3) should be due

from plaintiff(s) by ____(date)____

from defendant(s) by ____(date)____

Parties should have ____ days after service of final lists of witnesses and exhibits to list objections under Rule 26(a)(3).

The case should be ready for trial by _____(date)_____ [and at this time is expected to take approximately _____(length of time)_____].

[Other matters.]

Date: _____

(As added Apr. 22, 1993, eff. Dec. 1, 1993; amended Apr. 12, 2006, eff. Dec. 1, 2006.)

NOTES OF ADVISORY COMMITTEE ON RULES—1993 AMENDMENT

This form illustrates the type of report the parties are expected to submit to the court under revised Rule 26(f) and may be useful as a checklist of items to be discussed at the meeting.

COMMITTEE NOTES ON RULES—2006 AMENDMENT

Changes Made After Publication and Comment. The Committee recommends approval of Form 35 with modifications made from the published version, consistent with changes made to Rule 26(f). The changes are shown below. [Omitted]

SUPPLEMENTAL RULES FOR ADMIRALTY OR MARITIME CLAIMS AND ASSET FORFEITURE ACTIONS[1]

NOTES OF ADVISORY COMMITTEE ON RULES

The amendments to the Federal Rules of Civil Procedure to unify the civil and admiralty procedure, together with the Supplemental Rules for Certain Admiralty and Maritime Claims, completely superseded the Admiralty Rules, effective July 1, 1966. Accordingly, the latter were rescinded.

NOTES OF ADVISORY COMMITTEE ON RULES—1985 AMENDMENT

Since their promulgation in 1966, the Supplemental Rules for Certain Admiralty and Maritime Claims have preserved the special procedures of arrest and attachment unique to admiralty law. In recent years, however, these Rules have been challenged as violating the principles of procedural due process enunciated in the United States Supreme Court's decision in *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), and later developed in *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974); and *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975). These Supreme Court decisions provide five basic criteria for a constitutional seizure of property: (1) effective notice to persons having interests in the property seized, (2) judicial review prior to attachment, (3) avoidance of conclusory allegations in the complaint, (4) security posted by the plaintiff to protect the owner of the property under attachment, and (5) a meaningful and timely hearing after attachment.

Several commentators have found the Supplemental Rules lacking on some or all five grounds. *E.g.*, Batiza & Partridge, *The Constitutional Challenge to Maritime Seizures*, 26 Loy. L. Rev. 203 (1980); Morse, *The Conflict Between the Supreme Court Admiralty Rules and Sniadach-Fuentes: A Collision Course?*, 3 Fla. St. U.L. Rev. 1 (1975). The federal courts have varied in their disposition of challenges to the Supplemental Rules. The Fourth and Fifth Circuits have affirmed the constitutionality of Rule C. *Amstar Corp. v. S/S Alexandros T.*, 664 F.2d 904 (4th Cir. 1981); *Merchants National Bank of Mobile v. The Dredge General G. L. Gillespie*, 663 F.2d 1338 (5th Cir. 1981), *cert. dismissed*, 456 U.S. 966 (1982). However, a district court in the Ninth Circuit found Rule C unconstitutional. *Alyeska Pipeline Service Co. v. The Vessel Bay Ridge*, 509 F. Supp. 1115 (D. Alaska 1981), *appeal dismissed*, 703 F.2d 381 (9th Cir. 1983). Rule B(1) has received similar inconsistent treatment. The Ninth and Eleventh Circuits have upheld its constitutionality. *Polar Shipping, Ltd. v. Oriental Shipping Corp.*, 680 F.2d 627 (9th Cir. 1982); *Schiffahartsgesellschaft Leonhardt & Co. v. A. Bottacchi S. A. de Navegacion*, 732 F.2d 1543 (11th Cir. 1984). On the other hand, a Washington district court has found it to be constitutionally deficient. *Grand Bahama Petroleum Co. v. Canadian Transportation Agencies, Ltd.*, 450 F. Supp. 447 (W.D. Wash. 1978). The constitutionality of both rules was questioned in *Techem Chem Co. v. M/T Choyo Maru*, 416 F. Supp. 960 (D. Md. 1976). Thus, there is uncertainty as to whether the current rules prescribe constitutionally sound procedures for guidance of courts and counsel. See generally Note, *Due Process in Admiralty Arrest and Attachment*, 56 Tex. L. Rev. 1091 (1978).

Due to the controversy and uncertainty that have surrounded the Supplemental Rules, local admiralty bars and the Maritime Law Association of the United States have sought to strengthen the constitutionality of maritime arrest and attachment by encouraging promulgation of local admiralty rules providing for prompt post-seizure hearings. Some districts also adopted rules calling for judicial scrutiny of applications for arrest or attachment. Nonetheless, the result has been a lack of uniformity and continued concern over the constitutionality of the existing practice. The amendments that follow are intended to provide rules that meet the requirements prescribed by the Supreme Court and to develop uniformity in the admiralty practice.

Rule A. Scope of Rules

(1) These Supplemental Rules apply to:

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

(i) maritime attachment and garnishment,

(ii) actions in rem,

(iii) possessory, petitory, and partition actions, and

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

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

[1] Title amended April 12, 2006, effective December 1, 2006.

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

(2) The Federal Rules of Civil Procedure also apply to the foregoing proceedings except to the extent that they are inconsistent with these Supplemental Rules.

(As added Feb. 28, 1966, eff. July 1, 1966; amended Apr. 12, 2006, eff. Dec. 1, 2006.)

NOTES OF ADVISORY COMMITTEE ON RULES

Certain distinctively maritime remedies must be preserved in unified rules. The commencement of an action by attachment or garnishment has heretofore been practically unknown in federal jurisprudence except in admiralty, although the amendment of Rule 4(e) effective July 1, 1963, makes available that procedure in accordance with state law. The maritime proceeding in rem is unique, except as it has been emulated by statute, and is closely related to the substantive maritime law relating to liens. Arrest of the vessel or other maritime property is an historic remedy in controversies over title or right to possession, and in disputes among co-owners over the vessel's employment. The statutory right to limit liability is limited to owners of vessels, and has its own complexities. While the unified federal rules are generally applicable to these distinctive proceedings, certain special rules dealing with them are needed.

Arrest of the person and imprisonment for debt are not included because these remedies are not peculiarly maritime. The practice is not uniform but conforms to state law. See 2 Benedict §286; 28 U.S.C., §2007; FRCP 64, 69. The relevant provisions of Admiralty Rules 2, 3, and 4 are unnecessary or obsolete.

No attempt is here made to compile a complete and self-contained code governing these distinctively maritime remedies. The more limited objective is to carry forward the relevant provisions of the former Rules of Practice for Admiralty and Maritime Cases, modernized and revised to some extent but still in the context of history and precedent. Accordingly, these Rules are not to be construed as limiting or impairing the traditional power of a district court, exercising the admiralty and maritime jurisdiction, to adapt its procedures and its remedies in the individual case, consistently with these rules, to secure the just, speedy, and inexpensive determination of every action. (See *Swift & Co., Packers v. Compania Columbiana Del Caribe, S/A*, 339 U.S. 684, (1950); Rule 1). In addition, of course, the district courts retain the power to make local rules not inconsistent with these rules. See Rule 83; cf. Admiralty Rule 44.

COMMITTEE NOTES ON RULES—2006 AMENDMENT

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

Rule B. In Personam Actions: Attachment and Garnishment

(1) WHEN AVAILABLE; COMPLAINT, AFFIDAVIT, JUDICIAL AUTHORIZATION, AND PROCESS. In an in personam action:

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

(b) The plaintiff or the plaintiff's attorney must sign and file with the complaint an affidavit stating that, to the affiant's knowledge, or on information and belief, the defendant cannot be found within the district. The court must review the complaint and affidavit and, if the conditions of this Rule B appear to exist, enter an order so stating and authorizing process of attachment and garnishment. The clerk may issue supplemental process enforcing the court's order upon application without further court order.

(c) If the plaintiff or the plaintiff's attorney certifies that exigent circumstances make court review impracticable, the clerk must issue the summons and process of attachment and garnishment. The plaintiff has the burden in any post-attachment hearing under Rule E(4)(f) to show that exigent circumstances existed.

(d)(i) If the property is a vessel or tangible property on board a vessel, the summons, process, and any supplemental process must be delivered to the marshal for service.

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

(e) The plaintiff may invoke state-law remedies under Rule 64 for seizure of person or property for the purpose of securing satisfaction of the judgment.

(2) NOTICE TO DEFENDANT. No default judgment may be entered except upon proof—which may be by affidavit—that:

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

(b) the plaintiff or the garnishee has mailed to the defendant the complaint, summons, and process of attachment or garnishment, using any form of mail requiring a return receipt; or

(c) the plaintiff or the garnishee has tried diligently to give notice of the action to the defendant but could not do so.

(3) ANSWER.

(a) *By Garnishee*. The garnishee shall serve an answer, together with answers to any interrogatories served with the complaint, within 20 days after service of process upon the garnishee. Interrogatories to the garnishee may be served with the complaint without leave of court. If the garnishee refuses or neglects to answer on oath as to the debts, credits, or effects of the defendant in the garnishee's hands, or any interrogatories concerning such debts, credits, and effects that may be propounded by the plaintiff, the court may award compulsory process against the garnishee. If the garnishee

admits any debts, credits, or effects, they shall be held in the garnishee's hands or paid into the registry of the court, and shall be held in either case subject to the further order of the court.

(b) *By Defendant*. The defendant shall serve an answer within 30 days after process has been executed, whether by attachment of property or service on the garnishee.

(As added Feb. 28, 1966, eff. July 1, 1966; amended Apr. 29, 1985, eff. Aug. 1, 1985; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 25, 2005, eff. Dec. 1, 2005.)

NOTES OF ADVISORY COMMITTEE ON RULES

Subdivision (1)

This preserves the traditional maritime remedy of attachment and garnishment, and carries forward the relevant substance of Admiralty Rule 2. In addition, or in the alternative, provision is made for the use of similar state remedies made available by the amendment of Rule 4(e) effective July 1, 1963. On the effect of appearance to defend against attachment see Rule E(8).

The rule follows closely the language of Admiralty Rule 2. No change is made with respect to the property subject to attachment. No change is made in the condition that makes the remedy available. The rules have never defined the clause, ''if the defendant shall not be found within the district,'' and no definition is attempted here. The subject seems one best left for the time being to development on a case-by-case basis. The proposal does shift from the marshal (on whom it now rests in theory) to the plaintiff the burden of establishing that the defendant cannot be found in the district.

A change in the context of the practice is brought about by Rule 4(f), which will enable summons to be served throughout the state instead of, as heretofore, only within the district. The Advisory Committee considered whether the rule on attachment and garnishment should be correspondingly changed to permit those remedies only when the defendant cannot be found within the state and concluded that the remedy should not be so limited.

The effect is to enlarge the class of cases in which the plaintiff may proceed by attachment or garnishment although jurisdiction of the person of the defendant may be independently obtained. This is possible at the present time where, for example, a corporate defendant has appointed an agent within the district to accept service of process but is not carrying on activities there sufficient to subject it to jurisdiction. (*Seawind Compania, S.A. v. Crescent Line, Inc.*, 320 F.2d 580 (2d Cir. 1963)), or where, though the foreign corporation's activities in the district are sufficient to subject it personally to the jurisdiction, there is in the district no officer on whom process can be served (*United States v. Cia. Naviera Continental, S.A.*, 178 F.Supp. 561, (S.D.N.Y. 1959)).

Process of attachment or garnishment will be limited to the district. See Rule E(3)(a).

Subdivision (2)

The former Admiralty Rules did not provide for notice to the defendant in attachment and garnishment proceedings. None is required by the principles of due process, since it is assumed that the garnishee or custodian of the property attached will either notify the defendant or be deprived of the right to plead the judgment as a defense in an action against him by the defendant. *Harris v. Balk*, 198 U.S. 215 (1905); *Pennoyer v. Neff*, 95 U.S. 714 (1878). Modern conceptions of fairness, however, dictate that actual notice be given to persons known to claim an interest in the property that is the subject of the action where that is reasonably practicable. In attachment and garnishment proceedings the persons whose interests will be affected by the judgment are identified by the complaint. No substantial burden is imposed on the plaintiff by a simple requirement that he notify the defendant of the action by mail.

In the usual case the defendant is notified of the pendency of the proceedings by the garnishee or otherwise, and appears to claim the property and to make his answer. Hence notice by mail is not routinely required in all cases, but only in those in which the defendant has not appeared prior to the time when a default judgment is demanded. The rule therefore provides only that no default judgment shall be entered except upon proof of notice, or of inability to give notice despite diligent efforts to do so. Thus the burden of giving notice is further minimized.

In some cases the plaintiff may prefer to give notice by serving process in the usual way instead of simply by mail. (Rule 4(d).) In particular, if the defendant is in a foreign country the plaintiff may wish to utilize the modes of notice recently provided to facilitate compliance with foreign laws and procedures (Rule 4(i)). The rule provides for these alternatives.

The rule does not provide for notice by publication because there is no problem concerning unknown claimants, and publication has little utility in proportion to its expense where the identity of the defendant is known.

Subdivision (3)

Subdivision (a) incorporates the substance of Admiralty Rule 36.

The Admiralty Rules were silent as to when the garnishee and the defendant were to answer. See also 2 Benedict ch. XXIV.

The rule proceeds on the assumption that uniform and definite periods of time for responsive pleadings should be substituted for return days (see the discussion under Rule C(6), below). Twenty days seems sufficient time for the garnishee to answer (cf. FRCP 12(a)), and an additional 10 days should suffice for the defendant. When allowance is made for the time required for notice to reach the defendant this gives the defendant in attachment and garnishment approximately the same time that defendants have to answer when personally served.

NOTES OF ADVISORY COMMITTEE ON RULES—1985 AMENDMENT

Rule B(1) has been amended to provide for judicial scrutiny before the issuance of any attachment or garnishment process. Its purpose is to eliminate doubts as to whether the Rule is consistent with the principles of procedural due process enunciated by the Supreme Court in *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); and later developed in *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974); and *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975). Such doubts were raised in *Grand Bahama Petroleum Co. v. Canadian Transportation Agencies, Ltd.*, 450 F. Supp. 447 (W.D. Wash. 1978); and *Schiffahartsgesellschaft Leonhardt & Co. v. A. Bottacchi S.A. de Navegacion*, 552 F. Supp. 771 (S.D. Ga. 1982), which was reversed, 732 F.2d 1543 (11th Cir. 1984). But compare *Polar Shipping Ltd. v. Oriental Shipping Corp.*, 680 F.2d 627 (9th Cir. 1982), in which a majority of the panel upheld the constitutionality of Rule B because of the unique commercial context in which it is invoked. The practice described in Rule B(1) has been adopted in some districts by local rule. E.g., N.D. Calif. Local Rule 603.3; W.D. Wash. Local Admiralty Rule 15(d).

The rule envisions that the order will issue when the plaintiff makes a prima facie showing that he has a maritime claim against the defendant in the amount sued for and the defendant is not present in the district. A simple order with conclusory findings is contemplated. The reference to review by the ''court'' is broad enough to embrace review by a magistrate as well as by a district judge.

The new provision recognizes that in some situations, such as when the judge is unavailable and the ship is about to depart from the jurisdiction, it will be imprac-

ticable, if not impossible, to secure the judicial review contemplated by Rule B(1). When ''exigent circumstances'' exist, the rule enables the plaintiff to secure the issuance of the summons and process of attachment and garnishment, subject to a later showing that the necessary circumstances actually existed. This provision is intended to provide a safety valve without undermining the requirement of preattachment scrutiny. Thus, every effort to secure judicial review, including conducting a hearing by telephone, should be pursued before resorting to the exigent-circumstances procedure.

Rule B(1) also has been amended so that the garnishee shall be named in the ''process'' rather than in the ''complaint.'' This should solve the problem presented in *Filia Compania Naviera, S.A. v. Petroship, S.A.*, 1983 A.M.C. 1 (S.D.N.Y. 1982), and eliminate any need for an additional judicial review of the complaint and affidavit when a garnishee is added.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

COMMITTEE NOTES ON RULES—2000 AMENDMENT

Rule B(1) is amended in two ways, and style changes have been made.

The service provisions of Rule C(3) are adopted in paragraph (d), providing alternatives to service by a marshal if the property to be seized is not a vessel or tangible property on board a vessel.

The provision that allows the plaintiff to invoke state attachment and garnishment remedies is amended to reflect the 1993 amendments of Civil Rule 4. Former Civil Rule 4(e), incorporated in Rule B(1), allowed general use of state quasi-in-rem jurisdiction if the defendant was not an inhabitant of, or found within, the state. Rule 4(e) was replaced in 1993 by Rule 4(n)(2), which permits use of state law to seize a defendant's assets only if personal jurisdiction over the defendant cannot be obtained in the district where the action is brought. Little purpose would be served by incorporating Rule 4(n)(2) in Rule B, since maritime attachment and garnishment are available whenever the defendant is not found within the district, a concept that allows attachment or garnishment even in some circumstances in which personal jurisdiction also can be asserted. In order to protect against any possibility that elimination of the reference to state quasi-in-rem jurisdiction remedies might seem to defeat continued use of state security devices, paragraph (e) expressly incorporates Civil Rule 64. Because Rule 64 looks only to security, not jurisdiction, the former reference to Rule E(8) is deleted as no longer relevant.

Rule B(2)(a) is amended to reflect the 1993 redistribution of the service provisions once found in Civil Rule 4(d) and (i). These provisions are now found in many different subdivisions of Rule 4. The new reference simply incorporates Rule 4, without designating the new subdivisions, because the function of Rule B(2) is simply to describe the methods of notice that suffice to support a default judgment. Style changes also have been made.

COMMITTEE NOTES ON RULES—2005 AMENDMENT

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

Changes Made After Publication and Comment. No changes have been made since publication.

Rule C. In Rem Actions: Special Provisions

(1) WHEN AVAILABLE. An action in rem may be brought:

(a) To enforce any maritime lien;

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

Except as otherwise provided by law a party who may proceed in rem may also, or in the alternative, proceed in personam against any person who may be liable.

Statutory provisions exempting vessels or other property owned or possessed by or operated by or for the United States from arrest or seizure are not affected by this rule. When a statute so provides, an action against the United States or an instrumentality thereof may proceed on in rem principles.

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

(a) be verified;

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

(c) state that the property is within the district or will be within the district while the action is pending.

(3) JUDICIAL AUTHORIZATION AND PROCESS.

(a) *Arrest Warrant.*

(i) The court must review the complaint and any supporting papers. If the conditions for an in rem action appear to exist, the court must issue an order directing the clerk to issue a warrant for the arrest of the vessel or other property that is the subject of the action.

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

(b) *Service.*

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

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

(c) *Deposit in Court*. If the property that is the subject of the action consists in whole or in part of freight, the proceeds of property sold, or other intangible property, the clerk must issue—in addition to the warrant—a summons directing any person controlling the property to show cause why it should not be deposited in court to abide the judgment.

(d) *Supplemental Process*. The clerk may upon application issue supplemental process to enforce the court's order without further court order.

(4) NOTICE. No notice other than execution of process is required when the property that is the subject of the action has been released under Rule E(5). If the property is not released within 10 days after execution, the plaintiff must promptly—or within the time that the court allows—give public notice of the action and arrest in a newspaper designated by court order and having general circulation in the district, but publication may be terminated if the property is released before publication is completed. The notice must specify the time under Rule C(6) to file a statement of interest in or right against the seized property and to answer. This rule does not affect the notice requirements in an action to foreclose a preferred ship mortgage under 46 U.S.C. §§31301 et seq., as amended.

(5) ANCILLARY PROCESS. In any action in rem in which process has been served as provided by this rule, if any part of the property that is the subject of the action has not been brought within the control of the court because it has been removed or sold, or because it is intangible property in the hands of a person who has not been served with process, the court may, on motion, order any person having possession or control of such property or its proceeds to show cause why it should not be delivered into the custody of the marshal or other person or organization having a warrant for the arrest of the property, or paid into court to abide the judgment; and, after hearing, the court may enter such judgment as law and justice may require.

(6) RESPONSIVE PLEADING; INTERROGATORIES.

(a) *Maritime Arrests and Other Proceedings*.

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

(A) within 10 days after the execution of process, or

(B) within the time that the court allows;

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

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

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

(b) *Interrogatories*. Interrogatories may be served with the complaint in an in rem action without leave of court. Answers to the interrogatories must be served with the answer to the complaint.

(As added Feb. 28, 1966, eff. July 1, 1966; amended Apr. 29, 1985, eff. Aug. 1, 1985; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 25, 2005, eff. Dec. 1, 2005; Apr. 12, 2006, eff. Dec. 1, 2006.)

NOTES OF ADVISORY COMMITTEE ON RULES

Subdivision (1).

This rule is designed not only to preserve the proceeding in rem as it now exists in admiralty cases, but to preserve the substance of Admiralty Rules 13–18. The general reference to enforcement of any maritime lien is believed to state the existing law, and is an improvement over the enumeration in the former Admiralty Rules, which is repetitious and incomplete (e.g., there was no reference to general average). The reference to any maritime lien is intended to include liens created by state law which are enforceable in admiralty.

The main concern of Admiralty Rules 13–18 was with the question whether certain actions might be brought in rem or also, or in the alternative, in personam. Essentially, therefore, these rules deal with questions of substantive law, for in general an action in rem may be brought to enforce any maritime lien, and no action in personam may be brought when the substantive law imposes no personal liability.

These rules may be summarized as follows:

1. Cases in which the plaintiff may proceed in rem and/or in personam:

a. Suits for seamen's wages;

b. Suits by materialmen for supplies, repairs, etc.;

c. Suits for pilotage;

d. Suits for collision damages;

e. Suits founded on mere maritime hypothecation;

f. Suits for salvage.

2. Cases in which the plaintiff may proceed only in personam:

a. Suits for assault and beating.

3. Cases in which the plaintiff may proceed only in rem:

a. Suits on bottomry bonds.

The coverage is complete, since the rules omit mention of many cases in which the plaintiff may proceed in rem or in personam. This revision proceeds on the principle that it is preferable to make a general statement as to the availability of the remedies, leaving out conclusions on matters of substantive law. Clearly it is not necessary to enumerate the cases listed under Item 1, above, nor to try to complete the list.

The rule eliminates the provision of Admiralty Rule 15 that actions for assault and beating may be brought only in personam. A preliminary study fails to disclose any reason for the rule. It is subject to so many exceptions that it is calculated to receive rather than to inform. A seaman may sue in rem when he has been beaten by a fellow member of the crew so vicious as to render the vessel unseaworthy. *The Rolph*, 293 Fed. 269, aff'd 299 Fed. 52 (9th Cir. 1923), or where the theory of the action is that a beating by the master is a breach of the obligation under the shipping articles to treat the seaman with proper kindness. *The David Evans*, 187 Fed. 775 (D. Hawaii 1911); and a passenger may sue in rem on the theory that the assault is a breach of the contract of passage, *The Western States*, 159 Fed. 354 (2d Cir. 1908). To say that an action for money damages may be brought only in personam seems equivalent to saying that a maritime lien shall not exist; and that, in turn, seems equivalent to announcing a rule of substantive law rather than a rule of procedure. Dropping the rule will leave it to the courts to determine whether a lien exists as a matter of substantive law.

The specific reference to bottomry bonds is omitted because, as a matter of hornbook substantive law, there is no personal liability on such bonds.

Subdivision (2).

This incorporates the substance of Admiralty Rules 21 and 22.

Subdivision (3).

Derived from Admiralty Rules 10 and 37. The provision that the warrant is to be issued by the clerk is new, but is assumed to state existing law.

There is remarkably little authority bearing on Rule 37, although the subject would seem to be an important one. The rule appears on its face to have provided for a sort of ancillary process, and this may well be the case when tangible property, such as a vessel, is arrested, and intangible property such as freight is incidentally involved. It can easily happen, however, that the only property against which the action may be brought is intangible, as where the owner of a vessel under charter has a lien on subfreights. See 2 Benedict §299 and cases cited. In such cases it would seem that the order to the person holding the fund is equivalent to original process, taking the place of the warrant for arrest. That being so, it would also seem that (1) there should be some provision for notice, comparable to that given when tangible property is arrested, and (2) it should not be necessary, as Rule 37 provided, to petition the court for issuance of the process, but that it should issue as of course. Accordingly the substance of Rule 37 is included in the rule covering ordinary process, and notice will be required by Rule C(4). Presumably the rules omit any requirement of notice in these cases because the holder of the funds (e.g., the cargo owner) would be required on general principles (cf. *Harris v. Balk*, 198 U.S. 215 (1905) to notify his obligee (e.g., the charterer); but in actions in rem such notice seems plainly inadequate because there may be adverse claims to the fund (e.g., there may be liens against the subfreights for seamen's wages, etc.). Compare Admiralty Rule 9.

Subdivision (4).

This carries forward the notice provision of Admiralty Rule 10, with one modification. Notice by publication is too expensive and ineffective a formality to be routinely required. When, as usually happens, the vessel or other property is released on bond or otherwise there is no point in publishing notice; the vessel is freed from the claim of the plaintiff and no other interest in the vessel can be affected by the proceedings. If however, the vessel is not released, general notice is required in order that all persons, including unknown claimants, may appear and be heard, and in order that the judgment in rem shall be binding on all the world.

Subdivision (5).

This incorporates the substance of Admiralty Rule 9.

There are remarkably few cases dealing directly with the rule. In *The George Prescott*, 10 Fed. Cas. 222 (No. 5,339) (E.D.N.Y. 1865), the master and crew of a vessel libeled her for wages, and other lienors also filed libels. One of the lienors suggested to the court that prior to the arrest of the vessel the master had removed the sails, and asked that he be ordered to produce them. He admitted removing the sails and selling them, justifying on the ground that he held a mortgage on the vessel. He was ordered to pay the proceeds into court. Cf. *United States v. The Zarko*, 187 F.Supp. 371 (S.D.Cal. 1960), where an armature belonging to a vessel subject to a preferred ship mortgages was in possession of a repairman claiming a lien.

It is evident that, though the rule has had a limited career in the reported cases, it is a potentially important one. It is also evident that the rule is framed in terms narrower than the principle that supports it. There is no apparent reason for limiting it to ships and their appurtenances (2 Benedict §299). Also, the reference to ''third parties'' in the existing rule seems unfortunate. In The George Prescott, the person who removed and sold the sails was a plaintiff in the action, and relief against him was just as necessary as if he had been a stranger.

Another situation in which process of this kind would seem to be useful is that in which the principal property that is the subject of the action is a vessel, but her pending freight is incidentally involved. The warrant of arrest, and notice of its service, should be all that is required by way of original process and notice; ancillary process without notice should suffice as to the incidental intangibles.

The distinction between Admiralty Rules 9 and 37 is not at once apparent, but seems to be this: Where the action was against property that could not be seized by the marshal because it is intangible, the original process was required to be similar to that issued against a garnishee, and general notice was required (though not provided for by the present rule; cf. Advisory Committee's Note to Rule C(3)). Under Admiralty Rule 9 property had been arrested and general notice had been given, but some of the property had been removed or for some other reason could not be arrested. Here no further notice was necessary.

The rule also makes provision for this kind of situation: The proceeding is against a vessel's pending freight only; summons has been served on the person supposedly holding the funds, and general notice has been given; it develops that another person holds all or part of the funds. Ancillary process should be available here without further notice.

Subdivision (6).

Adherence to the practice of return days seems unsatisfactory. The practice varies significantly from district to district. A uniform rule should be provided so that any claimant or defendant can readily determine when he is required to file or serve a claim or answer.

A virtue of the return-day practice is that it requires claimants to come forward and identify themselves at an early stage of the proceedings—before they could fairly be required to answer. The draft is designed to preserve this feature of the present practice by requiring early filing of the claim. The time schedule contemplated in the draft is closely comparable to the present practice in the Southern District of New York, where the claimant has a minimum of 8 days to claim and three weeks thereafter to answer.

This rule also incorporates the substance of Admiralty Rule 25. The present rule's emphasis on ''the true and bona fide owner'' is omitted, since anyone having the right to possession can claim (2 Benedict §324).

NOTES OF ADVISORY COMMITTEE ON RULES—1985 AMENDMENT

Rule C(3) has been amended to provide for judicial scrutiny before the issuance of any warrant of arrest. Its purpose is to eliminate any doubt as to the rule's constitutionality under the *Sniadach* line of cases. *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974); and *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975). This was thought desirable even though both the Fourth and the Fifth Circuits have upheld the existing rule. *Amstar Corp. v. S/S Alexandros T.*, 664 F.2d 904 (4th Cir. 1981); *Merchants National Bank of Mobile v. The Dredge General G. L. Gillespie*, 663 F.2d 1338 (5th Cir. 1981), *cert. dismissed*, 456 U.S. 966 (1982). A contrary view was taken by Judge Tate in the *Merchants National Bank* case and by the district court in *Alyeska Pipeline Service Co. v. The Vessel Bay Ridge*, 509 F. Supp. 1115 (D. Alaska 1981), *appeal dismissed*, 703 F.2d 381 (9th Cir. 1983).

The rule envisions that the order will issue upon a prima facie showing that the plaintiff has an action in rem against the defendant in the amount sued for and that the property is within the district. A simple order with conclusory findings is contemplated. The reference to review by the ''court'' is broad enough to embrace a magistrate as well as a district judge.

The new provision recognizes that in some situations, such as when a judge is unavailable and the vessel is about to depart from the jurisdiction, it will be impracticable, if not impossible, to secure the judicial review contemplated by Rule C(3). When ''exigent circumstances'' exist, the rule enables the plaintiff to secure the issuance of the summons and warrant of arrest, subject to a later showing that the necessary circum-

stances actually existed. This provision is intended to provide a safety valve without undermining the requirement of pre-arrest scrutiny. Thus, every effort to secure judicial review, including conducting a hearing by telephone, should be pursued before invoking the exigent-circumstances procedure.

The foregoing requirements for prior court review or proof of exigent circumstances do not apply to actions by the United States for forfeitures for federal statutory violations. In such actions a prompt hearing is not constitutionally required, *United States v. Eight Thousand Eight Hundred and Fifty Dollars*, 103 S.Ct. 2005 (1983); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), and could prejudice the government in its prosecution of the claimants as defendants in parallel criminal proceedings since the forfeiture hearing could be misused by the defendants to obtain by way of civil discovery information to which they would not otherwise be entitled and subject the government and the courts to the unnecessary burden and expense of two hearings rather than one.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1991 AMENDMENT

These amendments are designed to conform the rule to Fed.R.Civ.P. 4, as amended. As with recent amendments to Rule 4, it is intended to relieve the Marshals Service of the burden of using its limited personnel and facilities for execution of process in routine circumstances. Doing so may involve a contractual arrangement with a person or organization retained by the government to perform these services, or the use of other government officers and employees, or the special appointment by the court of persons available to perform suitably.

The seizure of a vessel, with or without cargo, remains a task assigned to the Marshal. Successful arrest of a vessel frequently requires the enforcement presence of an armed government official and the cooperation of the United States Coast Guard and other governmental authorities. If the marshal is called upon to seize the vessel, it is expected that the same officer will also be responsible for the seizure of any property on board the vessel at the time of seizure that is to be the object of arrest or attachment.

COMMITTEE NOTES ON RULES—2000 AMENDMENT

Style changes have been made throughout the revised portions of Rule C. Several changes of meaning have been made as well.

Subdivision 2. In rem jurisdiction originally extended only to property within the judicial district. Since 1986, Congress has enacted a number of jurisdictional and venue statutes for forfeiture and criminal matters that in some circumstances permit a court to exercise authority over property outside the district. 28 U.S.C. §1355(b)(1) allows a forfeiture action in the district where an act or omission giving rise to forfeiture occurred, or in any other district where venue is established by §1395 or by any other statute. Section 1355(b)(2) allows an action to be brought as provided in (b)(1) or in the United States District Court for the District of Columbia when the forfeiture property is located in a foreign country or has been seized by authority of a foreign government. Section 1355(d) allows a court with jurisdiction under §1355(b) to cause service in any other district of process required to bring the forfeiture property before the court. Section 1395 establishes venue of a civil proceeding for forfeiture in the district where the forfeiture accrues or the defendant is found; in any district where the property is found; in any district into which the property is brought, if the property initially is outside any judicial district; or in any district where the vessel is arrested if the proceeding is an admiralty proceeding to forfeit a vessel. Section 1395(e) deals with a vessel or cargo entering a port of entry closed by the President, and transportation to or from a state or section declared to be in insurrection. 18 U.S.C. §981(h) creates expanded jurisdiction and venue over property located elsewhere that is related to a criminal prosecution pending in the district. These amendments, and related amendments of Rule E(3), bring these Rules into step with the new statutes. No change is made as to admiralty and maritime proceedings that do not involve a forfeiture governed by one of the new statutes.

Subdivision (2) has been separated into lettered paragraphs to facilitate understanding.

Subdivision (3). Subdivision (3) has been rearranged and divided into lettered paragraphs to facilitate understanding.

Paragraph (b)(i) is amended to make it clear that any supplemental process addressed to a vessel or tangible property on board a vessel, as well as the original warrant, is to be served by the marshal.

Subdivision (4). Subdivision (4) has required that public notice state the time for filing an answer, but has not required that the notice set out the earlier time for filing a statement of interest or claim. The amendment requires that both times be stated.

A new provision is added, allowing termination of publication if the property is released more than 10 days after execution but before publication is completed. Termination will save money, and also will reduce the risk of confusion as to the status of the property.

Subdivision (6). Subdivision (6) has applied a single set of undifferentiated provisions to civil forfeiture proceedings and to in rem admiralty proceedings. Because some differences in procedure are desirable, these proceedings are separated by adopting a new paragraph (a) for civil forfeiture proceedings and recasting the present rule as paragraph (b) for in rem admiralty proceedings. The provision for interrogatories and answers is carried forward as paragraph (c). Although this established procedure for serving interrogatories with the complaint departs from the general provisions of Civil Rule 26(d), the special needs of expedition that often arise in admiralty justify continuing the practice.

Both paragraphs (a) and (b) require a statement of interest or right rather than the ''claim'' formerly required. The new wording permits parallel drafting, and facilitates cross-references in other rules. The substantive nature of the statement remains the same as the former claim. The requirements of (a) and (b) are, however, different in some respects.

In a forfeiture proceeding governed by paragraph (a), a statement must be filed by a person who asserts an interest in or a right against the property involved. This category includes every right against the property, such as a lien, whether or not it establishes ownership or a right to possession. In determining who has an interest in or a right against property, courts may continue to rely on precedents that have developed the meaning of ''claims'' or ''claimants'' for the purpose of civil forfeiture proceedings.

In an admiralty and maritime proceeding governed by paragraph (b), a statement is filed only by a person claiming a right of possession or ownership. Other claims against the property are advanced by intervention under Civil Rule 24, as it may be supplemented by local admiralty rules. The reference to ownership includes every interest that qualifies as ownership under domestic or foreign law. If an ownership interest is asserted, it makes no difference whether its character is legal, equitable, or something else.

Paragraph (a) provides more time than paragraph (b) for filing a statement. Admiralty and maritime in rem proceedings often present special needs for prompt action that do not commonly arise in forfeiture proceedings.

Paragraphs (a) and (b) do not limit the right to make a restricted appearance under Rule E(8).

COMMITTEE NOTES ON RULES—2002 AMENDMENT

Rule C(3) is amended to reflect the provisions of 18 U.S.C. §985, enacted by the Civil Asset Forfeiture Reform Act of 2000, 114 Stat. 202, 214–215. Section 985 provides, subject to enumerated exceptions, that real property that is the subject of a civil forfeiture action is not to be seized until an order of forfeiture is entered. A civil forfeiture action is initiated by filing a complaint, posting notice, and serving notice on the property owner. The summons and arrest procedure is no longer appropriate.

Rule C(6)(a)(i)(A) is amended to adopt the provision enacted by 18 U.S.C. §983(a)(4)(A), shortly before Rule C(6)(a)(i)(A) took effect, that sets the time for filing a verified statement as 30 days rather than 20 days, and that sets the first alternative event for measuring the 30 days as the date of service of the Government's complaint.

Rule C(6)(a)(iii) is amended to give notice of the provision enacted by 18 U.S.C. §983(a)(4)(B) that requires that the answer in a forfeiture proceeding be filed within 20 days. Without this notice, unwary litigants might rely on the provision of Rule 5(d) that allows a reasonable time for filing after service.

Rule C(6)(b)(iv) is amended to change the requirement that an answer be filed within 20 days to a requirement that it be served within 20 days. Service is the ordinary requirement, as in Rule 12(a). Rule 5(d) requires filing within a reasonable time after service.

Changes Made After Publication and Comments. No changes have been made since publication.

COMMITTEE NOTES ON RULES—2005 AMENDMENT

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

Changes Made After Publication and Comment. No changes have been made since publication.

COMMITTEE NOTES ON RULES—2006 AMENDMENT

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

Rule D. Possessory, Petitory, and Partition Actions

In all actions for possession, partition, and to try title maintainable according to the course of the admiralty practice with respect to a vessel, in all actions so maintainable with respect to the possession of cargo or other maritime property, and in all actions by one or more part owners against the others to obtain security for the return of the vessel from any voyage undertaken without their consent, or by one or more part owners against the others to obtain possession of the vessel for any voyage on giving security for its safe return, the process shall be by a warrant of arrest of the vessel, cargo, or other property, and by notice in the manner provided by Rule B(2) to the adverse party or parties.

(As added Feb. 28, 1966, eff. July 1, 1966.)

NOTES OF ADVISORY COMMITTEE ON RULES

This carries forward the substance of Admiralty Rule 19.

Rule 19 provided the remedy of arrest in controversies involving title and possession in general. See *The Tilton*, 23 Fed. Cas. 1277 (No. 14, 054) (C.C.D. Mass. 1830). In addition it provided that remedy in controversies between co-owners respecting the employment of a vessel. It did not deal comprehensively with controversies between co-owners, omitting the remedy of partition. Presumably the omission is traceable to the fact that, when the rules were originally promulgated, concepts of substantive law (sometimes stated as concepts of jurisdiction) denied the remedy of partition except where the parties in disagreement were the owners of equal shares. See The Steamboat Orleans, 36 U.S. (11 Pet.) 175 (1837). The Supreme Court has now removed any doubt as to the jurisdiction of the district courts to partition a vessel, and has held in addition that no fixed principle of federal admiralty law limits the remedy to the case of equal shares. *Madruga v. Superior Court*, 346 U.S. 556 (1954). It is therefore appropriate to include a reference to partition in the rule.

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

(1) APPLICABILITY. Except as otherwise provided, this rule applies to actions in personam with process of maritime attachment and garnishment, actions in rem, and petitory, possessory, and partition actions, supplementing Rules B, C, and D.

(2) COMPLAINT; SECURITY.

(a) *Complaint.* In actions to which this rule is applicable the complaint shall state the circumstances from which the claim arises with such particularity that the defendant or claimant will be able, without moving for a more definite statement, to commence an investigation of the facts and to frame a responsive pleading.

(b) *Security for Costs.* Subject to the provisions of Rule 54(d) and of relevant statutes, the court may, on the filing of the complaint or on the appearance of any defendant, claimant, or any other party, or at any later time, require the plaintiff, defendant, claimant, or other party to give security, or additional security, in such sum as the court shall direct to pay all costs and expenses that shall be awarded against the party by any interlocutory order or by the final judgment, or on appeal by any appellate court.

(3) PROCESS.

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

(b) *Issuance and Delivery.* Issuance and delivery of process in rem, or of maritime attachment and garnishment, shall be held in abeyance if the plaintiff so requests.

(4) EXECUTION OF PROCESS; MARSHAL'S RETURN; CUSTODY OF PROPERTY; PROCEDURES FOR RELEASE.

(a) *In General.* Upon issuance and delivery of the process, or, in the case of summons with process of attachment and garnishment, when it appears that the defendant cannot be found within the district, the marshal or other person or organization having a warrant shall forthwith execute the process in accordance with this subdivision (4), making due and prompt return.

(b) *Tangible Property.* If tangible property is to be attached or arrested, the marshal or other person or organization having the warrant shall take it into the marshal's possession for safe custody. If the character or situa-

tion of the property is such that the taking of actual possession is impracticable, the marshal or other person executing the process shall affix a copy thereof to the property in a conspicuous place and leave a copy of the complaint and process with the person having possession or the person's agent. In furtherance of the marshal's custody of any vessel the marshal is authorized to make a written request to the collector of customs not to grant clearance to such vessel until notified by the marshal or deputy marshal or by the clerk that the vessel has been released in accordance with these rules.

(c) *Intangible Property*. If intangible property is to be attached or arrested the marshal or other person or organization having the warrant shall execute the process by leaving with the garnishee or other obligor a copy of the complaint and process requiring the garnishee or other obligor to answer as provided in Rules B(3)(a) and C(6); or the marshal may accept for payment into the registry of the court the amount owed to the extent of the amount claimed by the plaintiff with interest and costs, in which event the garnishee or other obligor shall not be required to answer unless alias process shall be served.

(d) *Directions With Respect to Property in Custody*. The marshal or other person or organization having the warrant may at any time apply to the court for directions with respect to property that has been attached or arrested, and shall give notice of such application to any or all of the parties as the court may direct.

(e) *Expenses of Seizing and Keeping Property; Deposit*. These rules do not alter the provisions of Title 28, U.S.C., §1921, as amended, relative to the expenses of seizing and keeping property attached or arrested and to the requirement of deposits to cover such expenses.

(f) *Procedure for Release From Arrest or Attachment*. Whenever property is arrested or attached, any person claiming an interest in it shall be entitled to a prompt hearing at which the plaintiff shall be required to show why the arrest or attachment should not be vacated or other relief granted consistent with these rules. This subdivision shall have no application to suits for seamen's wages when process is issued upon a certification of sufficient cause filed pursuant to Title 46, U.S.C. §§603 and 604[1] or to actions by the United States for forfeitures for violation of any statute of the United States.

(5) RELEASE OF PROPERTY.

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

(b) *General Bond*. The owner of any vessel may file a general bond or stipulation, with sufficient surety, to be approved by the court, conditioned to answer the judgment of such court in all or any actions that may be brought thereafter in such court in which the vessel is attached or arrested. Thereupon the execution of all such process against such vessel shall be stayed so long as the amount secured by such bond or stipulation is at least double the aggregate amount claimed by plaintiffs in all actions begun and pending in which such vessel has been attached or arrested. Judgments and remedies may be had on such bond or stipulation as if a special bond or stipulation had been filed in each of such actions. The district court may make necessary orders to carry this rule into effect, particularly as to the giving of proper notice of any action against or attachment of a vessel for which a general bond has been filed. Such bond or stipulation shall be indorsed by the clerk with a minute of the actions wherein process is so stayed. Further security may be required by the court at any time.

If a special bond or stipulation is given in a particular case, the liability on the general bond or stipulation shall cease as to that case.

(c) *Release by Consent or Stipulation; Order of Court or Clerk; Costs*. Any vessel, cargo, or other property in the custody of the marshal or other person or organization having the warrant may be released forthwith upon the marshal's acceptance and approval of a stipulation, bond, or other security, signed by the party on whose behalf the property is detained or the party's attorney and expressly authorizing such release, if all costs and charges of the court and its officers shall have first been paid. Otherwise no property in the custody of the marshal, other person or organization having the warrant, or other officer of the court shall be released without an order of the court; but such order may be entered as of course by the clerk, upon the giving of approved security as provided by law and these rules, or upon the dismissal or discontinuance of the action; but the marshal or other person or organization having the warrant shall not deliver any property so released until the costs and charges of the officers of the court shall first have been paid.

(d) *Possessory, Petitory, and Partition Actions*. The foregoing provisions of this subdivision (5) do not apply to petitory, possessory, and partition actions. In such cases the property arrested shall be released only by order of the court, on such terms and conditions and on the giving of such security as the court may require.

[1] See References in Text note below.

(6) REDUCTION OR IMPAIRMENT OF SECURITY. Whenever security is taken the court may, on motion and hearing, for good cause shown, reduce the amount of security given; and if the surety shall be or become insufficient, new or additional sureties may be required on motion and hearing.

(7) SECURITY ON COUNTERCLAIM.

(a) When a person who has given security for damages in the original action asserts a counterclaim that arises from the transaction or occurrence that is the subject of the original action, a plaintiff for whose benefit the security has been given must give security for damages demanded in the counterclaim unless the court, for cause shown, directs otherwise. Proceedings on the original claim must be stayed until this security is given, unless the court directs otherwise.

(b) The plaintiff is required to give security under Rule E(7)(a) when the United States or its corporate instrumentality counterclaims and would have been required to give security to respond in damages if a private party but is relieved by law from giving security.

(8) RESTRICTED APPEARANCE. An appearance to defend against an admiralty and maritime claim with respect to which there has issued process in rem, or process of attachment and garnishment, may be expressly restricted to the defense of such claim, and in that event is not an appearance for the purposes of any other claim with respect to which such process is not available or has not been served.

(9) DISPOSITION OF PROPERTY; SALES.

(a) *Interlocutory Sales; Delivery*.

(i) On application of a party, the marshal, or other person having custody of the property, the court may order all or part of the property sold—with the sales proceeds, or as much of them as will satisfy the judgment, paid into court to await further orders of the court—if:

(A) the attached or arrested property is perishable, or liable to deterioration, decay, or injury by being detained in custody pending the action;

(B) the expense of keeping the property is excessive or disproportionate; or

(C) there is an unreasonable delay in securing release of the property.

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

(b) *Sales, Proceeds*. All sales of property shall be made by the marshal or a deputy marshal, or by other person or organization having the warrant, or by any other person assigned by the court where the marshal or other person or organization having the warrant is a party in interest; and the proceeds of sale shall be forthwith paid into the registry of the court to be disposed of according to law.

(10) PRESERVATION OF PROPERTY. When the owner or another person remains in possession of property attached or arrested under the provisions of Rule E(4)(b) that permit execution of process without taking actual possession, the court, on a party's motion or on its own, may enter any order necessary to preserve the property and to prevent its removal.

(As added Feb. 28, 1966, eff. July 1, 1966; amended Apr. 29, 1985, eff. Aug. 1, 1985; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 12, 2006, eff. Dec. 1, 2006.)

NOTES OF ADVISORY COMMITTEE ON RULES

Subdivisions (1), (2).

Adapted from Admiralty Rule 24. The rule is based on the assumption that there is no more need for security for costs in maritime personal actions than in civil cases generally, but that there is reason to retain the requirement for actions in which property is seized. As to proceedings for limitation of liability see Rule F(1).

Subdivision (3).

The Advisory Committee has concluded for practical reasons that process requiring seizure of property should continue to be served only within the geographical limits of the district. Compare Rule B(1), continuing the condition that process of attachment and garnishment may be served only if the defendant is not found within the district.

The provisions of Admiralty Rule 1 concerning the persons by whom process is to be served will be superseded by FRCP 4(c).

Subdivision (4).

This rule is intended to preserve the provisions of Admiralty Rules 10 and 36 relating to execution of process, custody of property, seized by the marshal, and the marshal's return. It is also designed to make express provision for matters not heretofore covered.

The provision relating to clearance in subdivision (b) is suggested by Admiralty Rule 44 of the District of Maryland.

Subdivision (d) is suggested by English Rule 12, Order 75.

28 U.S.C. §1921 as amended in 1962 contains detailed provisions relating to the expenses of seizing and preserving property attached or arrested.

Subdivision (5).

In addition to Admiralty Rule 11 (see Rule E(9), the release of property seized on process of attachment or in rem was dealt with by Admiralty Rules 5, 6, 12, and 57, and 28 U.S.C., §2464 (formerly Rev. Stat. §941). The rule consolidates these provisions and makes them uniformly applicable to attachment and garnishment and actions in rem.

The rule restates the substance of Admiralty Rule 5. Admiralty Rule 12 dealt only with ships arrested on in rem process. Since the same ground appears to be covered more generally by 28 U.S.C., §2464, the subject matter of Rule 12 is omitted. The substance of Admiralty Rule 57 is retained. 28 U.S.C., §2464 is incorporated with changes of terminology, and with a substantial change as to the amount of the bond. See 2 Benedict 395 n. 1a; *The Lotosland*, 2 F. Supp. 42 (S.D.N.Y. 1933). The provision for general bond is enlarged to include the contingency of attachment as well as arrest of the vessel.

Subdivision (6).

Adapted from Admiralty Rule 8.

Subdivision (7).

Derived from Admiralty Rule 50.

Title 46, U.S.C., §783 extends the principle of Rule 50 to the Government when sued under the Public Vessels Act, presumably on the theory that the credit of the Government is the equivalent of the best security. The rule adopts this principle and extends it to all cases in

which the Government is defendant although the Suits in Admiralty Act contains no parallel provisions.

Subdivision (8).

Under the liberal joinder provisions of unified rules the plaintiff will be enabled to join with maritime actions in rem, or maritime actions in personam with process of attachment and garnishment, claims with respect to which such process is not available, including nonmaritime claims. Unification should not, however, have the result that, in order to defend against an admiralty and maritime claim with respect to which process in rem or quasi in rem has been served, the claimant or defendant must subject himself personally to the jurisdiction of the court with reference to other claims with respect to which such process is not available or has not been served, especially when such other claims are nonmaritime. So far as attachment and garnishment are concerned this principle holds true whether process is issued according to admiralty tradition and the Supplemental Rules or according to Rule 4(e) as incorporated by Rule B(1).

A similar problem may arise with respect to civil actions other than admiralty and maritime claims within the meaning of Rule 9(h). That is to say, in an ordinary civil action, whether maritime or not, there may be joined in one action claims with respect to which process of attachment and garnishment is available under state law and Rule 4(e) and claims with respect to which such process is not available or has not been served. The general Rules of Civil Procedure do not specify whether an appearance in such cases to defend the claim with respect to which process of attachment and garnishment has issued is an appearance for the purposes of the other claims. In that context the question has been considered best left to case-by-case development. Where admiralty and maritime claims within the meaning of Rule 9(h) are concerned, however, it seems important to include a specific provision to avoid an unfortunate and unintended effect of unification. No inferences whatever as to the effect of such an appearance in an ordinary civil action should be drawn from the specific provision here and the absence of such a provision in the general Rules.

Subdivision (9).

Adapted from Admiralty Rules 11, 12, and 40. Subdivision (a) is necessary because of various provisions as to disposition of property in forfeiture proceedings. In addition to particular statutes, note the provisions of 28 U.S.C., §§ 2461–65.

The provision of Admiralty Rule 12 relating to unreasonable delay was limited to ships but should have broader application. See 2 Benedict 404. Similarly, both Rules 11 and 12 were limited to actions in rem, but should equally apply to attached property.

NOTES OF ADVISORY COMMITTEE ON RULES—1985 AMENDMENT

Rule E(4)(f) makes available the type of prompt post-seizure hearing in proceedings under Supplemental Rules B and C that the Supreme Court has called for in a number of cases arising in other contexts. See *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974). Although post-attachment and post-arrest hearings always have been available on motion, an explicit statement emphasizing promptness and elaborating the procedure has been lacking in the Supplemental Rules. Rule E(4)(f) is designed to satisfy the constitutional requirement of due process by guaranteeing to the shipowner [sic] a prompt post-seizure hearing at which he can attack the complaint, the arrest, the security demanded, or any other alleged deficiency in the proceedings. The amendment also is intended to eliminate the previously disparate treatment under local rules of defendants whose property has been seized pursuant to Supplemental Rules B and C.

The new Rule E(4)(f) is based on a proposal by the Maritime Law Association of the United States and on local admiralty rules in the Eastern, Northern, and Southern Districts of New York. E.D.N.Y. Local Rule 13; N.D.N.Y. Local Rule 13; S.D.N.Y. Local Rule 12. Similar provisions have been adopted by other maritime districts. E.g., N.D. Calif. Local Rule 603.4; W.D. La. Local Admiralty Rule 21. Rule E(4)(f) will provide uniformity in practice and reduce constitutional uncertainties.

Rule E(4)(f) is triggered by the defendant or any other person with an interest in the property seized. Upon an oral or written application similar to that used in seeking a temporary restraining order, see Rule 65(b), the court is required to hold a hearing as promptly as possible to determine whether to allow the arrest or attachment to stand. The plaintiff has the burden of showing why the seizure should not be vacated. The hearing also may determine the amount of security to be granted or the propriety of imposing counter-security to protect the defendant from an improper seizure.

The foregoing requirements for prior court review or proof of exigent circumstances do not apply to actions by the United States for forfeitures for federal statutory violations. In such actions a prompt hearing is not constitutionally required, *United States v. Eight Thousand Eight Hundred and Fifty Dollars*, 103 S.Ct. 2005 (1983); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), and could prejudice the government in its prosecution of the claimants as defendants in parallel criminal proceedings since the forfeiture hearing could be misused by the defendants to obtain by way of civil discovery information to which they would not otherwise be entitled and subject the government and the courts to the unnecessary burden and expense of two hearings rather than one.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1991 AMENDMENT

These amendments are designed to conform this rule to Fed.R.Civ.P. 4, as amended. They are intended to relieve the Marshals Service of the burden of using its limited personnel and facilities for execution of process in routine circumstances. Doing so may involve a contractual arrangement with a person or organization retained by the government to perform these services, or the use of other government officers and employees, or the special appointment by the court of persons available to perform suitably.

COMMITTEE NOTES ON RULES—2000 AMENDMENT

Style changes have been made throughout the revised portions of Rule E. Several changes of meaning have been made as well.

Subdivision (3). Subdivision (3) is amended to reflect the distinction drawn in Rule C(2)(c) and (d). Service in an admiralty or maritime proceeding still must be made within the district, as reflected in Rule C(2)(c), while service in forfeiture proceedings may be made outside the district when authorized by statute, as reflected in Rule C(2)(d).

Subdivision (7). Subdivision (7)(a) is amended to make it clear that a plaintiff need give security to meet a counterclaim only when the counterclaim is asserted by a person who has given security to respond in damages in the original action.

Subdivision (8). Subdivision (8) is amended to reflect the change in Rule B(1)(e) that deletes the former provision incorporating state quasi-in-rem jurisdiction. A restricted appearance is not appropriate when state law is invoked only for security under Civil Rule 64, not as a basis of quasi-in-rem jurisdiction. But if state law allows a special, limited, or restricted appearance as an incident of the remedy adopted from state law, the state practice applies through Rule 64 ''in the manner provided by'' state law.

Subdivision (9). Subdivision 9(b)(ii) is amended to reflect the change in Rule C(6) that substitutes a statement of interest or right for a claim.

Subdivision (10). Subdivision 10 is new. It makes clear the authority of the court to preserve and to prevent removal of attached or arrested property that remains in the possession of the owner or other person under Rule E(4)(b).

COMMITTEE NOTES ON RULES—2006 AMENDMENT

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

REFERENCES IN TEXT

Sections 603 and 604 of Title 46, referred to in subd. (4)(f), were repealed by Pub. L. 98–89, § 4(b), Aug. 26, 1983, 97 Stat. 600, section 1 of which enacted Title 46, Shipping.

Rule F. Limitation of Liability

(1) TIME FOR FILING COMPLAINT; SECURITY. Not later than six months after receipt of a claim in writing, any vessel owner may file a complaint in the appropriate district court, as provided in subdivision (9) of this rule, for limitation of liability pursuant to statute. The owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the owner's interest in the vessel and pending freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of the statutes as amended; or (b) at the owner's option shall transfer to a trustee to be appointed by the court, for the benefit of claimants, the owner's interest in the vessel and pending freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of the statutes as amended. The plaintiff shall also give security for costs and, if the plaintiff elects to give security, for interest at the rate of 6 percent per annum from the date of the security.

(2) COMPLAINT. The complaint shall set forth the facts on the basis of which the right to limit liability is asserted and all facts necessary to enable the court to determine the amount to which the owner's liability shall be limited. The complaint may demand exoneration from as well as limitation of liability. It shall state the voyage if any, on which the demands sought to be limited arose, with the date and place of its termination; the amount of all demands including all unsatisfied liens or claims of lien, in contract or in tort or otherwise, arising on that voyage, so far as known to the plaintiff, and what actions and proceedings, if any, are pending thereon; whether the vessel was damaged, lost, or abandoned, and, if so, when and where; the value of the vessel at the close of the voyage or, in case of wreck, the value of her wreckage, strippings, or proceeds, if any, and where and in whose possession they are; and the amount of any pending freight recovered or recoverable. If the plaintiff elects to transfer the plaintiff's interest in the vessel to a trustee, the complaint must further show any prior paramount liens thereon, and what voyages or trips, if any, she has made since the voyage or trip on which the claims sought to be limited arose, and any existing liens arising upon any such subsequent voyage or trip, with the amounts and causes thereof, and the names and addresses of the lienors, so far as known; and whether the vessel sustained any injury upon or by reason of such subsequent voyage or trip.

(3) CLAIMS AGAINST OWNER; INJUNCTION. Upon compliance by the owner with the requirements of subdivision (1) of this rule all claims and proceedings against the owner or the owner's property with respect to the matter in question shall cease. On application of the plaintiff the court shall enjoin the further prosecution of any action or proceeding against the plaintiff or the plaintiff's property with respect to any claim subject to limitation in the action.

(4) NOTICE TO CLAIMANTS. Upon the owner's compliance with subdivision (1) of this rule the court shall issue a notice to all persons asserting claims with respect to which the complaint seeks limitation, admonishing them to file their respective claims with the clerk of the court and to serve on the attorneys for the plaintiff a copy thereof on or before a date to be named in the notice. The date so fixed shall not be less than 30 days after issuance of the notice. For cause shown, the court may enlarge the time within which claims may be filed. The notice shall be published in such newspaper or newspapers as the court may direct once a week for four successive weeks prior to the date fixed for the filing of claims. The plaintiff not later than the day of second publication shall also mail a copy of the notice to every person known to have made any claim against the vessel or the plaintiff arising out of the voyage or trip on which the claims sought to be limited arose. In cases involving death a copy of such notice shall be mailed to the decedent at the decedent's last known address, and also to any person who shall be known to have made any claim on account of such death.

(5) CLAIMS AND ANSWER. Claims shall be filed and served on or before the date specified in the notice provided for in subdivision (4) of this rule. Each claim shall specify the facts upon which the claimant relies in support of the claim, the items thereof, and the dates on which the same accrued. If a claimant desires to contest either the right to exoneration from or the right to limitation of liability the claimant shall file and serve an answer to the complaint unless the claim has included an answer.

(6) INFORMATION TO BE GIVEN CLAIMANTS. Within 30 days after the date specified in the notice for filing claims, or within such time as the court thereafter may allow, the plaintiff shall mail to the attorney for each claimant (or if the claimant has no attorney to the claimant) a list setting forth (a) the name of each claimant, (b) the name and address of the claimant's attorney (if the claimant is known to have one), (c) the nature of the claim, i.e., whether property loss, property damage, death, personal injury etc., and (d) the amount thereof.

(7) INSUFFICIENCY OF FUND OR SECURITY. Any claimant may by motion demand that the funds deposited in court or the security given by the plaintiff be increased on the ground that they are less than the value of the plaintiff's interest in the vessel and pending freight. Thereupon the court shall cause due appraisement to be made

of the value of the plaintiff's interest in the vessel and pending freight; and if the court finds that the deposit or security is either insufficient or excessive it shall order its increase or reduction. In like manner any claimant may demand that the deposit or security be increased on the ground that it is insufficient to carry out the provisions of the statutes relating to claims in respect of loss of life or bodily injury; and, after notice and hearing, the court may similarly order that the deposit or security be increased or reduced.

(8) OBJECTIONS TO CLAIMS: DISTRIBUTION OF FUND. Any interested party may question or controvert any claim without filing an objection thereto. Upon determination of liability the fund deposited or secured, or the proceeds of the vessel and pending freight, shall be divided pro rata, subject to all relevant provisions of law, among the several claimants in proportion to the amounts of their respective claims, duly proved, saving, however, to all parties any priority to which they may be legally entitled.

(9) VENUE; TRANSFER. The complaint shall be filed in any district in which the vessel has been attached or arrested to answer for any claim with respect to which the plaintiff seeks to limit liability; or, if the vessel has not been attached or arrested, then in any district in which the owner has been sued with respect to any such claim. When the vessel has not been attached or arrested to answer the matters aforesaid, and suit has not been commenced against the owner, the proceedings may be had in the district in which the vessel may be, but if the vessel is not within any district and no suit has been commenced in any district, then the complaint may be filed in any district. For the convenience of parties and witnesses, in the interest of justice, the court may transfer the action to any district; if venue is wrongly laid the court shall dismiss or, if it be in the interest of justice, transfer the action to any district in which it could have been brought. If the vessel shall have been sold, the proceeds shall represent the vessel for the purposes of these rules.

(As added Feb. 28, 1966, eff. July 1, 1966; amended Mar. 2, 1987, eff. Aug. 1, 1987.)

NOTES OF ADVISORY COMMITTEE ON RULES

Subdivision (1).

The amendments of 1936 to the Limitation Act superseded to some extent the provisions of Admiralty Rule 51, especially with respect to the time of filing the complaint and with respect to security. The rule here incorporates in substance the 1936 amendment of the Act (46 U.S.C., § 185) with a slight modification to make it clear that the complaint may be filed at any time not later than six months after a claim has been lodged with the owner.

Subdivision (2).

Derived from Admiralty Rules 51 and 53.

Subdivision (3).

This is derived from the last sentence of 36 [46] U.S.C. § 185 and the last paragraph of Admiralty Rule 51.

Subdivision (4).

Derived from Admiralty Rule 51.

Subdivision (5).

Derived from Admiralty Rules 52 and 53.

Subdivision (6).

Derived from Admiralty Rule 52.

Subdivision (7).

Derived from Admiralty Rules 52 and 36 [46] U.S.C., § 185.

Subdivision (8).

Derived from Admiralty Rule 52.

Subdivision (9).

Derived from Admiralty Rule 54. The provision for transfer is revised to conform closely to the language of 28 U.S.C. §§ 1404(a) and 1406(a), though it retains the existing rule's provision for transfer to any district for convenience. The revision also makes clear what has been doubted: that the court may transfer if venue is wrongly laid.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

Rule G. Forfeiture Actions in Rem

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

(2) COMPLAINT. The complaint must:

(a) be verified;

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

(c) describe the property with reasonable particularity;

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

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

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

(3) JUDICIAL AUTHORIZATION AND PROCESS.

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

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

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

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

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

(c) *Execution of Process*.

(i) The warrant and any supplemental process must be delivered to a person or organization authorized to execute it, who may be: (A) a marshal or any other United States officer or employee; (B) someone under contract with the United States; or (C) someone specially appointed by the court for that purpose.

(ii) The authorized person or organization must execute the warrant and any supple-

mental process on property in the United States as soon as practicable unless:

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

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

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

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

(4) NOTICE.

(a) *Notice by Publication.*

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

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

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

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

(A) describe the property with reasonable particularity;

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

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

(iii) *Frequency of Publication.* Published notice must appear:

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

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

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

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

(B) if the property is outside the United States, publication in a newspaper generally circulated in a district where the action is filed, in a newspaper generally circulated in the country where the property is located, or in legal notices published and generally circulated in the country where the property is located; or

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

(b) *Notice to Known Potential Claimants.*

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

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

(A) the date when the notice is sent;

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

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

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

(iii) *Sending Notice.*

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

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

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

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

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

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

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

(5) RESPONSIVE PLEADINGS.

(a) *Filing a Claim.*

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

(A) identify the specific property claimed;

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

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

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

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

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

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

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

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

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

(iii) A claim filed by a person asserting an interest as a bailee must identify the bailor, and if filed on the bailor's behalf must state the authority to do so.

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

(6) SPECIAL INTERROGATORIES.

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

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

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

(7) PRESERVING, PREVENTING CRIMINAL USE, AND DISPOSING OF PROPERTY; SALES.

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

(b) *Interlocutory Sale or Delivery*.

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

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

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

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

(D) the court finds other good cause.

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

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

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

(v) *Delivery on a Claimant's Motion*. The court may order that the property be delivered to the claimant pending the conclusion of the action if the claimant shows circumstances that would permit sale under Rule G(7)(b)(i) and gives security under these rules.

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

(8) MOTIONS.

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

(b) *Motion To Dismiss the Action*.

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

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

(c) *Motion To Strike a Claim or Answer*.

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

(A) for failing to comply with Rule G(5) or (6), or

(B) because the claimant lacks standing.

(ii) The motion:

(A) must be decided before any motion by the claimant to dismiss the action; and

(B) may be presented as a motion for judgment on the pleadings or as a motion to determine after a hearing or by summary judgment whether the claimant can carry the burden of establishing standing by a preponderance of the evidence.

(d) *Petition To Release Property*.

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

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

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

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

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

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

(As added Apr. 12, 2006, eff. Dec. 1, 2006.)

COMMITTEE NOTES ON RULES—2006

Rule G is added to bring together the central procedures that govern civil forfeiture actions. Civil forfeiture actions are in rem proceedings, as are many admiralty proceedings. As the number of civil forfeiture actions has increased, however, reasons have appeared to create sharper distinctions within the framework of the Supplemental Rules. Civil forfeiture practice will benefit from distinctive provisions that express and focus developments in statutory, constitutional, and decisional law. Admiralty practice will be freed from the pressures that arise when the needs of civil forfeiture proceedings counsel interpretations of common rules that may not be suitable for admiralty proceedings.

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

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

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

Subdivision (1)

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

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

Subdivision (2)

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

Subdivision (3)

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

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

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

Paragraph (c). Subparagraph (ii) requires that the warrant and any supplemental process be served as soon as practicable unless the property is already in the government's possession, custody, or control. But it authorizes the court to order a different time. The authority to order a different time recognizes that the government may have secured orders sealing the complaint in a civil forfeiture action or have won a stay after filing. The seal or stay may be ordered for reasons, such as protection of an ongoing criminal investigation, that would be defeated by prompt service of the warrant. Subparagraph (ii) does not reflect any independent ground for ordering a seal or stay, but merely reflects the consequences for execution when sealing or a stay is ordered. A court also may order a different time for service if good cause is shown for reasons unrelated to a seal or stay. Subparagraph (iv) reflects the uncertainty surrounding service of an arrest warrant on property not in the United States. It is not possible to identify in the rule the appropriate authority for serving process in all other countries. Transmission of the warrant to an appropriate authority, moreover, does not ensure that the warrant will be executed. The rule requires only that the warrant be transmitted to an appropriate authority.

Subdivision (4)

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

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

Subparagraph (iv) states the basic criterion for selecting the means and method of publication. The purpose is to adopt a means reasonably calculated to reach potential claimants. The government should choose from among these means a method that is reasonably likely to reach potential claimants at a cost reasonable in the circumstances.

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

If the property is not in the United States, account must be taken of the sensitivities that surround publication of legal notices in other countries. A foreign country may forbid local publication. If potential claimants are likely to be in the United States, publication in the district where the action is filed may be the best choice. If potential claimants are likely to be located abroad, the better choice may be publication by means generally circulated in the country where the property is located.

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

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

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

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

Subparagraph (ii)(B) directs that the notice state a deadline for filing a claim that is at least 35 days after the notice is sent. This provision applies both in actions that fall within 18 U.S.C. §983(a)(4)(A) and in other actions. Section 983(a)(4)(A) states that a claim should be filed no later than 30 days after service of the complaint. The variation introduced by subparagraph (ii)(B) reflects the procedure of §983(a)(2)(B) for nonjudicial forfeiture proceedings. The nonjudicial procedure requires that a claim be filed ''not later than the deadline set forth in a personal notice letter (which may be not earlier than 35 days after the date the letter is sent) * * *.'' This procedure is as suitable in a civil forfeiture action as in a nonjudicial forfeiture proceeding. Thirty-five days after notice is sent ordinarily will extend the claim time by no more than a brief period; a claimant anxious to expedite proceedings can file the claim before the deadline; and the government has flexibility to set a still longer period when circumstances make that desirable.

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

Notice may be directed to a potential claimant through counsel, but only to counsel already representing the claimant with respect to the seizure of the property, or in a related investigation, administrative forfeiture proceeding, or criminal case.

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

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

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

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

Subdivision (5)

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

If the claimant states its interest in the property to be as bailee, the bailor must be identified. A bailee who files a claim on behalf of a bailor must state the bailee's authority to do so.

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

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

know of the claimant or did not have an address for the claimant.

Paragraph (b). Under 18 U.S.C. §983(a)(4)(B), which governs many forfeiture proceedings, a person who asserts an interest by filing a claim ''shall file an answer to the Government's complaint for forfeiture not later than 20 days after the date of the filing of the claim.'' Paragraph (b) recognizes that this statute works within the general procedures established by Civil Rule 12. Rule 12(a)(4) suspends the time to answer when a Rule 12 motion is served within the time allowed to answer. Continued application of this rule to proceedings governed by §983(a)(4)(B) serves all of the purposes advanced by Rule 12(a)(4), *see U.S. v. $8,221,877.16*, 330 F.3d 141 (3d Cir. 2003); permits a uniform procedure for all civil forfeiture actions; and recognizes that a motion under Rule 12 can be made only after a claim is filed that provides background for the motion.

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

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

Subdivision (6)

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

Special interrogatories served under Rule G(6) do not count against the presumptive 25-interrogatory limit established by Rule 33(a). Rule 33 procedure otherwise applies to these interrogatories.

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

Subdivision (7)

Paragraph (a). Paragraph (a) is adapted from Rule E(9)(b). It provides for preservation orders when the government does not have actual possession of the defendant property. It also goes beyond Rule E(9) by recognizing the need to prevent use of the defendant property in ongoing criminal offenses.

Paragraph (b). Paragraph (b)(i)(C) recognizes the authority, already exercised in some cases, to order sale of property subject to a defaulted mortgage or to defaulted taxes. The authority is narrowly confined to mortgages and tax liens; other lien interests may be addressed, if at all, only through the general good-cause provision. The court must carefully weigh the competing interests in each case.

Paragraph (b)(i)(D) establishes authority to order sale for good cause. Good cause may be shown when the property is subject to diminution in value. Care should be taken before ordering sale to avoid diminished value.

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

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

Subdivision (8)

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

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

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

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

Paragraph (c). As noted with paragraph (b), paragraph (c) governs the procedure for determining whether a claimant has standing. It does not address the principles that govern claim standing.

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

Paragraph (c)(ii) directs that a motion to strike a claim or answer be decided before any motion by the claimant to dismiss the action. A claimant who lacks standing is not entitled to challenge the forfeiture on the merits.

Paragraph (c)(ii) further identifies three procedures for addressing claim standing. If a claim fails on its face to show facts that support claim standing, the claim can be dismissed by judgment on the pleadings. If the claim shows facts that would support claim standing, those facts can be tested by a motion for

summary judgment. If material facts are disputed, precluding a grant of summary judgment, the court may hold an evidentiary hearing. The evidentiary hearing is held by the court without a jury. The claimant has the burden to establish claim standing at a hearing; procedure on a government summary judgment motion reflects this allocation of the burden.

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

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

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

Subdivision (9)

Subdivision (9) serves as a reminder of the need to demand jury trial under Rule 38. It does not expand the right to jury trial. *See U.S. v. One Parcel of Property Located at 32 Medley Lane*, 2005 WL 465241 (D.Conn. 2005), ruling that the court, not the jury, determines whether a forfeiture is constitutionally excessive.

Changes Made After Publication and Comment. Rule G(6)(a) was amended to delete the provision that special interrogatories addressed to a claimant's standing are ''under Rule 33.'' The government was concerned that some forfeitures raise factually complex standing issues that require many interrogatories, severely depleting the presumptive 25-interrogatory limit in Rule 33. The Committee Note is amended to state that the interrogatories do not count against the limit, but that Rule 33 governs the procedure.

Rule G(7)(a) was amended to recognize the court's authority to enter an order necessary to prevent use of the defendant property in a criminal offense.

Rule G(8)(c) was revised to clarify the use of three procedures to challenge a claimant's standing—judgment on the pleadings, summary judgment, or an evidentiary hearing.

Several other rule text changes were made to add clarity on small points or to conform to Style conventions.

Changes were made in the Committee Note to explain some of the rule text revisions, to add clarity on a few points, and to delete statements about complex matters that seemed better left to case-law development.

FEDERAL RULES OF EVIDENCE

(As amended to January 3, 2007)

EFFECTIVE DATE AND APPLICATION OF RULES

Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1926, provided: ''That the following rules shall take effect on the one hundred and eightieth day [July 1, 1975] beginning after the date of the enactment of this Act [Jan. 2, 1975]. These rules apply to actions, cases, and proceedings brought after the rules take effect. These rules also apply to further procedure in actions, cases, and proceedings then pending, except to the extent that application of the rules would not be feasible, or would work injustice, in which event former evidentiary principles apply.''

HISTORICAL NOTE

The Federal Rules of Evidence were adopted by order of the Supreme Court on Nov. 20, 1972, transmitted to Congress by the Chief Justice on Feb. 5, 1973, and to have become effective on July 1, 1973. Pub. L. 93–12, Mar. 30, 1973, 87 Stat. 9, provided that the proposed rules ''shall have no force or effect except to the extent, and with such amendments, as they may be expressly approved by Act of Congress''. Pub. L. 93–595, Jan. 2, 1975, 88 Stat. 1926, enacted the Federal Rules of Evidence proposed by the Supreme Court, with amendments made by Congress, to take effect on July 1, 1975.

The Rules have been amended Oct. 16, 1975, Pub. L. 94–113, §1, 89 Stat. 576, eff. Oct. 31, 1975; Dec. 12, 1975, Pub. L. 94–149, §1, 89 Stat. 805; Oct. 28, 1978, Pub. L. 95–540, §2, 92 Stat. 2046; Nov. 6, 1978, Pub. L. 95–598, title II, §251, 92 Stat. 2673, eff. Oct. 1, 1979; Apr. 30, 1979, eff. Dec. 1, 1980; Apr. 2, 1982, Pub. L. 97–164, title I, §142, title IV, §402, 96 Stat. 45, 57, eff. Oct. 1, 1982; Oct. 12, 1984, Pub. L. 98–473, title IV, §406, 98 Stat. 2067; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 25, 1988, eff. Nov. 1, 1988; Nov. 18, 1988, Pub. L. 100–690, title VII, §§7046, 7075, 102 Stat. 4400, 4405; Jan. 26, 1990, eff. Dec. 1, 1990; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 29, 1994, eff. Dec. 1, 1994; Sept. 13, 1994, Pub. L. 103–322, title IV, §40141, title XXXII, §320935, 108 Stat. 1918, 2135; Apr. 11, 1997, eff. Dec. 1, 1997; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 17, 2000, eff. Dec. 1, 2000; Mar. 27, 2003, eff. Dec. 1, 2003; Apr. 12, 2006, eff. Dec. 1, 2006.

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The table of contents set out above has been editorially created to reflect the current contents of the Federal Rules of Evidence. A table of contents included in the Rules as enacted by Pub. L. 93–595, which was amended by Pub. L. 94–149, §1(1)–(8), Dec. 12, 1975, 89 Stat. 805; Pub. L. 95–540, §2(b), Oct. 28, 1978, 92 Stat. 2047; Pub. L. 100–690, title VII, §7046(b), Nov. 18, 1988, 102 Stat. 4401; Pub. L. 103–322, title IV, §40141(c), Sept. 13, 1994, 108 Stat. 1919, was omitted because it does not reflect certain amendments to the Rules by Public Law and by Court order.

ARTICLE I. GENERAL PROVISIONS

Rule 101. Scope

These rules govern proceedings in the courts of the United States and before the United States bankruptcy judges and United States magistrate judges, to the extent and with the exceptions stated in rule 1101.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1929; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 25, 1988, eff. Nov. 1, 1988; Apr. 22, 1993, eff. Dec. 1, 1993.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

Rule 1101 specifies in detail the courts, proceedings, questions, and stages of proceedings to which the rules apply in whole or in part.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

United States bankruptcy judges are added to conform this rule with Rule 1101(b) and Bankruptcy Rule 9017.

NOTES OF ADVISORY COMMITTEE ON RULES—1988 AMENDMENT

The amendment is technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1993 AMENDMENT

This revision is made to conform the rule to changes made by the Judicial Improvements Act of 1990.

Rule 102. Purpose and Construction

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1929.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

For similar provisions see Rule 2 of the Federal Rules of Criminal Procedure, Rule 1 of the Federal Rules of Civil Procedure, California Evidence Code §2, and New Jersey Evidence Rule 5.

Rule 103. Rulings on Evidence

(a) EFFECT OF ERRONEOUS RULING. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) *Objection*. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) *Offer of Proof*. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

(b) RECORD OF OFFER AND RULING. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) HEARING OF JURY. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) PLAIN ERROR. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1930; Apr. 17, 2000, eff. Dec. 1, 2000.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

Subdivision (a) states the law as generally accepted today. Rulings on evidence cannot be assigned as error unless (1) a substantial right is affected, and (2) the nature of the error was called to the attention of the judge, so as to alert him to the proper course of action and enable opposing counsel to take proper corrective measures. The objection and the offer of proof are the techniques for accomplishing these objectives. For similar provisions see Uniform Rules 4 and 5; California Evidence Code §§353 and 354; Kansas Code of Civil Procedure §§60–404 and 60–405. The rule does not purport to change the law with respect to harmless error. See 28 U.S.C. §2111, F.R.Civ.P. 61, F.R.Crim.P. 52, and decisions construing them. The status of constitutional error as harmless or not is treated in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), reh. denied *id*. 987, 87 S.Ct. 1283, 18 L.Ed.2d 241.

Subdivision (b). The first sentence is the third sentence of Rule 43(c) of the Federal Rules of Civil Procedure virtually verbatim. Its purpose is to reproduce for

an appellate court, insofar as possible, a true reflection of what occurred in the trial court. The second sentence is in part derived from the final sentence of Rule 43(c). It is designed to resolve doubts as to what testimony the witness would have in fact given, and, in nonjury cases, to provide the appellate court with material for a possible final disposition of the case in the event of reversal of a ruling which excluded evidence. See 5 Moore's Federal Practice §43.11 (2d ed. 1968). Application is made discretionary in view of the practical impossibility of formulating a satisfactory rule in mandatory terms.

Subdivision (c). This subdivision proceeds on the supposition that a ruling which excludes evidence in a jury case is likely to be a pointless procedure if the excluded evidence nevertheless comes to the attention of the jury. *Bruton v. United States*, 389 U.S. 818, 88 S.Ct. 126, L.Ed.2d 70 (1968). Rule 43(c) of the Federal Rules of Civil Procedure provides: ''The court may require the offer to be made out of the hearing of the jury.'' *In re McConnell*, 370 U.S. 230, 82 S.Ct. 1288, 8 L.Ed.2d 434 (1962), left some doubt whether questions on which an offer is based must first be asked in the presence of the jury. The subdivision answers in the negative. The judge can foreclose a particular line of testimony and counsel can protect his record without a series of questions before the jury, designed at best to waste time and at worst ''to waft into the jury box'' the very matter sought to be excluded.

Subdivision (d). This wording of the plain error principle is from Rule 52(b) of the Federal Rules of Criminal Procedure. While judicial unwillingness to be constructed by mechanical breakdowns of the adversary system has been more pronounced in criminal cases, there is no scarcity of decisions to the same effect in civil cases. In general, see Campbell, Extent to Which Courts of Review Will Consider Questions Not Properly Raised and Preserved, 7 Wis.L.Rev. 91, 160 (1932); Vestal, Sua Sponte Consideration in Appellate Review, 27 Fordham L.Rev. 477 (1958–59); 64 Harv.L.Rev. 652 (1951). In the nature of things the application of the plain error rule will be more likely with respect to the admission of evidence than to exclusion, since failure to comply with normal requirements of offers of proof is likely to produce a record which simply does not disclose the error.

COMMITTEE NOTES ON RULES—2000 AMENDMENT

The amendment applies to all rulings on evidence whether they occur at or before trial, including so-called ''*in limine*'' rulings. One of the most difficult questions arising from *in limine* and other evidentiary rulings is whether a losing party must renew an objection or offer of proof when the evidence is or would be offered at trial, in order to preserve a claim of error on appeal. Courts have taken differing approaches to this question. Some courts have held that a renewal at the time the evidence is to be offered at trial is always required. *See, e.g., Collins v. Wayne Corp.*, 621 F.2d 777 (5th Cir. 1980). Some courts have taken a more flexible approach, holding that renewal is not required if the issue decided is one that (1) was fairly presented to the trial court for an initial ruling, (2) may be decided as a final matter before the evidence is actually offered, and (3) was ruled on definitively by the trial judge. *See, e.g., Rosenfeld v. Basquiat*, 78 F.3d 84 (2d Cir. 1996) (admissibility of former testimony under the Dead Man's Statute; renewal not required). Other courts have distinguished between objections to evidence, which must be renewed when evidence is offered, and offers of proof, which need not be renewed after a definitive determination is made that the evidence is inadmissible. *See, e.g., Fusco v. General Motors Corp.*, 11 F.3d 259 (1st Cir. 1993). Another court, aware of this Committee's proposed amendment, has adopted its approach. *Wilson v. Williams*, 182 F.3d 562 (7th Cir. 1999) (en banc). Differing views on this question create uncertainty for litigants and unnecessary work for the appellate courts.

The amendment provides that a claim of error with respect to a definitive ruling is preserved for review when the party has otherwise satisfied the objection or offer of proof requirements of Rule 103(a). When the ruling is definitive, a renewed objection or offer of proof at the time the evidence is to be offered is more a formalism than a necessity. *See* Fed.R.Civ.P. 46 (formal exceptions unnecessary); Fed.R.Cr.P.51 (same); *United States v. Mejia-Alarcon*, 995 F.2d 982, 986 (10th Cir. 1993) (''Requiring a party to review an objection when the district court has issued a definitive ruling on a matter that can be fairly decided before trial would be in the nature of a formal exception and therefore unnecessary.''). On the other hand, when the trial court appears to have reserved its ruling or to have indicated that the ruling is provisional, it makes sense to require the party to bring the issue to the court's attention subsequently. *See, e.g., United States v. Vest*, 116 F.3d 1179, 1188 (7th Cir. 1997) (where the trial court ruled *in limine* that testimony from defense witnesses could not be admitted, but allowed the defendant to seek leave at trial to call the witnesses should their testimony turn out to be relevant, the defendant's failure to seek such leave at trial meant that it was ''too late to reopen the issue now on appeal''); *United States v. Valenti*, 60 F.3d 941 (2d Cir. 1995) (failure to proffer evidence at trial waives any claim of error where the trial judge had stated that he would reserve judgment on the *in limine* motion until he had heard the trial evidence).

The amendment imposes the obligation on counsel to clarify whether an *in limine* or other evidentiary ruling is definitive when there is doubt on that point. *See, e.g., Walden v. Georgia-Pacific Corp.*, 126 F.3d 506, 520 (3d Cir. 1997) (although ''the district court told plaintiffs' counsel not to reargue every ruling, it did not countermand its clear opening statement that all of its rulings were tentative, and counsel never requested clarification, as he might have done.'').

Even where the court's ruling is definitive, nothing in the amendment prohibits the court from revisiting its decision when the evidence is to be offered. If the court changes its initial ruling, or if the opposing party violates the terms of the initial ruling, objection must be made when the evidence is offered to preserve the claim of error for appeal. The error, if any, in such a situation occurs only when the evidence is offered and admitted. *United States Aviation Underwriters, Inc. v. Olympia Wings, Inc.*, 896 F.2d 949, 956 (5th Cir. 1990) (''objection is required to preserve error when an opponent, or the court itself, violates a motion *in limine* that was granted''); *United States v. Roenigk*, 810 F.2d 809 (8th Cir. 1987) (claim of error was not preserved where the defendant failed to object at trial to secure the benefit of a favorable advance ruling).

A definitive advance ruling is reviewed in light of the facts and circumstances before the trial court at the time of the ruling. If the relevant facts and circumstances change materially after the advance ruling has been made, those facts and circumstances cannot be relied upon on appeal unless they have been brought to the attention of the trial court by way of a renewed, and timely, objection, offer of proof, or motion to strike. *See Old Chief v. United States*, 519 U.S. 172, 182, n.6 (1997) (''It is important that a reviewing court evaluate the trial court's decision from its perspective when it had to rule and not indulge in review by hindsight.''). Similarly, if the court decides in an advance ruling that proffered evidence is admissible subject to the eventual introduction by the proponent of a foundation for the evidence, and that foundation is never provided, the opponent cannot claim error based on the failure to establish the foundation unless the opponent calls that failure to the court's attention by a timely motion to strike or other suitable motion. *See Huddleston v. United States*, 485 U.S. 681, 690, n.7 (1988) (''It is, of course, not the responsibility of the judge *sua sponte* to ensure that the foundation evidence is offered; the objector must move to strike the evidence if at the close of the trial the offeror has failed to satisfy the condition.'').

Nothing in the amendment is intended to affect the provisions of Fed.R.Civ.P. 72(a) or 28 U.S.C. §636(b)(1)

pertaining to nondispositive pretrial rulings by magistrate judges in proceedings that are not before a magistrate judge by consent of the parties. Fed.R.Civ.P. 72(a) provides that a party who fails to file a written objection to a magistrate judge's nondispositive order within ten days of receiving a copy ''may not thereafter assign as error a defect'' in the order. 28 U.S.C. §636(b)(1) provides that any party ''may serve and file written objections to such proposed findings and recommendations as provided by rules of court'' within ten days of receiving a copy of the order. Several courts have held that a party must comply with this statutory provision in order to preserve a claim of error. *See, e.g., Wells v. Shriners Hospital*, 109 F.3d 198, 200 (4th Cir. 1997) (''[i]n this circuit, as in others, a party 'may' file objections within ten days or he may not, as he chooses, but he 'shall' do so if he wishes further consideration.''). When Fed.R.Civ.P. 72(a) or 28 U.S.C. §636(b)(1) is operative, its requirement must be satisfied in order for a party to preserve a claim of error on appeal, even where Evidence Rule 103(a) would not require a subsequent objection or offer of proof.

Nothing in the amendment is intended to affect the rule set forth in *Luce v. United States*, 469 U.S. 38 (1984), and its progeny. The amendment provides that an objection or offer of proof need not be renewed to preserve a claim of error with respect to a definitive pretrial ruling. *Luce* answers affirmatively a separate question: whether a criminal defendant must testify at trial in order to preserve a claim of error predicated upon a trial court's decision to admit the defendant's prior convictions for impeachment. The *Luce* principle has been extended by many lower courts to other situations. *See United States v. DiMatteo*, 759 F.2d 831 (11th Cir. 1985) (applying *Luce* where the defendant's witness would be impeached with evidence offered under Rule 608). *See also United States v. Goldman*, 41 F.3d 785, 788 (1st Cir. 1994) (''Although *Luce* involved impeachment by conviction under Rule 609, the reasons given by the Supreme Court for requiring the defendant to testify apply with full force to the kind of Rule 403 and 404 objections that are advanced by Goldman in this case.''); *Palmieri v. DeFaria*, 88 F.3d 136 (2d Cir. 1996) (where the plaintiff decided to take an adverse judgment rather than challenge an advance ruling by putting on evidence at trial, the *in limine* ruling would not be reviewed on appeal); *United States v. Ortiz*, 857 F.2d 900 (2d Cir. 1988) (where uncharged misconduct is ruled admissible if the defendant pursues a certain defense, the defendant must actually pursue that defense at trial in order to preserve a claim of error on appeal); *United States v. Bond*, 87 F.3d 695 (5th Cir. 1996) (where the trial court rules *in limine* that the defendant would waive his fifth amendment privilege were he to testify, the defendant must take the stand and testify in order to challenge that ruling on appeal).

The amendment does not purport to answer whether a party who objects to evidence that the court finds admissible in a definitive ruling, and who then offers the evidence to ''remove the sting'' of its anticipated prejudicial effect, thereby waives the right to appeal the trial court's ruling. *See, e.g., United States v. Fisher*, 106 F.3d 622 (5th Cir. 1997) (where the trial judge ruled *in limine* that the government could use a prior conviction to impeach the defendant if he testified, the defendant did not waive his right to appeal by introducing the conviction on direct examination); *Judd v. Rodman*, 105 F.3d 1339 (11th Cir. 1997) (an objection made *in limine* is sufficient to preserve a claim of error when the movant, as a matter of trial strategy, presents the objectionable evidence herself on direct examination to minimize its prejudicial effect); *Gill v. Thomas*, 83 F.3d 537, 540 (1st Cir. 1996) (''by offering the misdemeanor evidence himself, Gill waived his opportunity to object and thus did not preserve the issue for appeal''); *United States v. Williams*, 939 F.2d 721 (9th Cir. 1991) (objection to impeachment evidence was waived where the defendant was impeached on direct examination).

GAP Report—Proposed Amendment to Rule 103(a). The Committee made the following changes to the published draft of the proposed amendment to Evidence Rule 103(a):

1. A minor stylistic change was made in the text, in accordance with the suggestion of the Style Subcommittee of the Standing Committee on Rules of Practice and Procedure.

2. The second sentence of the amended portion of the published draft was deleted, and the Committee Note was amended to reflect the fact that nothing in the amendment is intended to affect the rule of *Luce v. United States*.

3. The Committee Note was updated to include cases decided after the proposed amendment was issued for public comment.

4. The Committee Note was amended to include a reference to a Civil Rule and a statute requiring objections to certain Magistrate Judge rulings to be made to the District Court.

5. The Committee Note was revised to clarify that an advance ruling does not encompass subsequent developments at trial that might be the subject of an appeal.

Rule 104. Preliminary Questions

(a) QUESTIONS OF ADMISSIBILITY GENERALLY. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) RELEVANCY CONDITIONED ON FACT. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) HEARING OF JURY. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.

(d) TESTIMONY BY ACCUSED. The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.

(e) WEIGHT AND CREDIBILITY. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1930; Mar. 2, 1987, eff. Oct. 1, 1987.)

NOTES OF THE ADVISORY COMMITTEE ON PROPOSED RULES

Subdivision (a). The applicability of a particular rule of evidence often depends upon the existence of a condition. Is the alleged expert a qualified physician? Is a witness whose former testimony is offered unavailable? Was a stranger present during a conversation between attorney and client? In each instance the admissibility of evidence will turn upon the answer to the question of the existence of the condition. Accepted practice, incorporated in the rule, places on the judge the responsibility for these determinations. McCormick §53; Morgan, Basic Problems of Evidence 45–50 (1962).

To the extent that these inquiries are factual, the judge acts as a trier of fact. Often, however, rulings on evidence call for an evaluation in terms of a legally set standard. Thus when a hearsay statement is offered as a declaration against interest, a decision must be made whether it possesses the required against-interest characteristics. These decisions, too, are made by the judge.

In view of these considerations, this subdivision refers to preliminary requirements generally by the

broad term ''questions,'' without attempt at specification.

This subdivision is of general application. It must, however, be read as subject to the special provisions for ''conditional relevancy'' in subdivision (b) and those for confessions in subdivision (d).

If the question is factual in nature, the judge will of necessity receive evidence pro and con on the issue. The rule provides that the rules of evidence in general do not apply to this process. McCormick §53, p. 123, n. 8, points out that the authorities are ''scattered and inconclusive,'' and observes:

''Should the exclusionary law of evidence, 'the child of the jury system' in Thayer's phrase, be applied to this hearing before the judge? Sound sense backs the view that it should not, and that the judge should be empowered to hear any relevant evidence, such as affidavits or other reliable hearsay.''

This view is reinforced by practical necessity in certain situations. An item, offered and objected to, may itself be considered in ruling on admissibility, though not yet admitted in evidence. Thus the content of an asserted declaration against interest must be considered in ruling whether it is against interest. Again, common practice calls for considering the testimony of a witness, particularly a child, in determining competency. Another example is the requirement of Rule 602 dealing with personal knowledge. In the case of hearsay, it is enough, if the declarant ''so far as appears [has] had an opportunity to observe the fact declared.'' McCormick, §10, p. 19.

If concern is felt over the use of affidavits by the judge in preliminary hearings on admissibility, attention is directed to the many important judicial determinations made on the basis of affidavits. Rule 47 of the Federal Rules of Criminal Procedure provides:

''An application to the court for an order shall be by motion * * * It may be supported by affidavit.''

The Rules of Civil Procedure are more detailed. Rule 43(e), dealing with motions generally, provides:

''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 depositions.''

Rule 4(g) provides for proof of service by affidavit. Rule 56 provides in detail for the entry of summary judgment based on affidavits. Affidavits may supply the foundation for temporary restraining orders under Rule 65(b).

The study made for the California Law Revision Commission recommended an amendment to Uniform Rule 2 as follows:

''In the determination of the issue aforesaid [preliminary determination], exclusionary rules shall not apply, subject, however, to Rule 45 and any valid claim of privilege.'' Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VIII, Hearsay), Cal. Law Revision Comm'n, Rep., Rec. & Studies, 470 (1962). The proposal was not adopted in the California Evidence Code. The Uniform Rules are likewise silent on the subject. However, New Jersey Evidence Rule 8(1), dealing with preliminary inquiry by the judge, provides:

''In his determination the rules of evidence shall not apply except for Rule 4 [exclusion on grounds of confusion, etc.] or a valid claim of privilege.''

Subdivision (b). In some situations, the relevancy of an item of evidence, in the large sense, depends upon the existence of a particular preliminary fact. Thus when a spoken statement is relied upon to prove notice to X, it is without probative value unless X heard it. Or if a letter purporting to be from Y is relied upon to establish an admission by him, it has no probative value unless Y wrote or authorized it. Relevance in this sense has been labelled ''conditional relevancy.'' Morgan, Basic Problems of Evidence 45–46 (1962). Problems arising in connection with it are to be distinguished from problems of logical relevancy, e.g. evidence in a murder case that accused on the day before purchased a weapon of the kind used in the killing, treated in Rule 401.

If preliminary questions of conditional relevancy were determined solely by the judge, as provided in subdivision (a), the functioning of the jury as a trier of fact would be greatly restricted and in some cases virtually destroyed. These are appropriate questions for juries. Accepted treatment, as provided in the rule, is consistent with that given fact questions generally. The judge makes a preliminary determination whether the foundation evidence is sufficient to support a finding of fulfillment of the condition. If so, the item is admitted. If after all the evidence on the issue is in, pro and con, the jury could reasonably conclude that fulfillment of the condition is not established, the issue is for them. If the evidence is not such as to allow a finding, the judge withdraws the matter from their consideration. Morgan, *supra*; California Evidence Code §403; New Jersey Rule 8(2). See also Uniform Rules 19 and 67.

The order of proof here, as generally, is subject to the control of the judge.

Subdivision (c). Preliminary hearings on the admissibility of confessions must be conducted outside the hearing of the jury. See *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). Otherwise, detailed treatment of when preliminary matters should be heard outside the hearing of the jury is not feasible. The procedure is time consuming. Not infrequently the same evidence which is relevant to the issue of establishment of fulfillment of a condition precedent to admissibility is also relevant to weight or credibility, and time is saved by taking foundation proof in the presence of the jury. Much evidence on preliminary questions, though not relevant to jury issues, may be heard by the jury with no adverse effect. A great deal must be left to the discretion of the judge who will act as the interests of justice require.

Subdivision (d). The limitation upon cross-examination is designed to encourage participation by the accused in the determination of preliminary matters. He may testify concerning them without exposing himself to cross-examination generally. The provision is necessary because of the breadth of cross-examination under Rule 611(b).

The rule does not address itself to questions of the subsequent use of testimony given by an accused at a hearing on a preliminary matter. See *Walder v. United States*, 347 U.S. 62 (1954): *Simmons v. United States*, 390 U.S. 377 (1968): *Harris v. New York*, 401 U.S. 222 (1971)

Subdivision (e). For similar provisions see Uniform Rule 8; California Evidence Code §406; Kansas Code of Civil Procedure §60–408; New Jersey Evidence Rule 8(1).

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 93–650

Rule 104(c) as submitted to the Congress provided that hearings on the admissibility of confessions shall be conducted outside the presence of the jury and hearings on all other preliminary matters should be so conducted when the interests of justice require. The Committee amended the Rule to provide that where an accused is a witness as to a preliminary matter, he has the right, upon his request, to be heard outside the jury's presence. Although recognizing that in some cases duplication of evidence would occur and that the procedure could be subject to abuse, the Committee believed that a proper regard for the right of an accused not to testify generally in the case dictates that he be given an option to testify out of the presence of the jury on preliminary matters.

The Committee construes the second sentence of subdivision (c) as applying to civil actions and proceedings as well as to criminal cases, and on this assumption has left the sentence unamended.

NOTES OF COMMITTEE ON THE JUDICIARY, SENATE REPORT NO. 93–1277

Under rule 104(c) the hearing on a preliminary matter may at times be conducted in front of the jury. Should an accused testify in such a hearing, waiving his privilege against self-incrimination as to the preliminary

issue, rule 104(d) provides that he will not generally be subject to cross-examination as to any other issue. This rule is not, however, intended to immunize the accused from cross-examination where, in testifying about a preliminary issue, he injects other issues into the hearing. If he could not be cross-examined about any issues gratuitously raised by him beyond the scope of the preliminary matters, injustice result. Accordingly, in order to prevent any such unjust result, the committee intends the rule to be construed to provide that the accused may subject himself to cross-examination as to issues raised by his own testimony upon a preliminary matter before a jury.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

Rule 105. Limited Admissibility

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1930.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

A close relationship exists between this rule and Rule 403 which requires exclusion when ''probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.'' The present rule recognizes the practice of admitting evidence for a limited purpose and instructing the jury accordingly. The availability and effectiveness of this practice must be taken into consideration in reaching a decision whether to exclude for unfair prejudice under Rule 403. In *Bruton v. United States*, 389 U.S. 818, 88 S.Ct. 126, 19 L.Ed.2d 70 (1968), the Court ruled that a limiting instruction did not effectively protect the accused against the prejudicial effect of admitting in evidence the confession of a codefendant which implicated him. The decision does not, however, bar the use of limited admissibility with an instruction where the risk of prejudice is less serious.

Similar provisions are found in Uniform Rule 6; California Evidence Code §355; Kansas Code of Civil Procedure §60–406; New Jersey Evidence Rule 6. The wording of the present rule differs, however, in repelling any implication that limiting or curative instructions are sufficient in all situations.

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 93–650

Rule 106 as submitted by the Supreme Court (now Rule 105 in the bill) dealt with the subject of evidence which is admissible as to one party or for one purpose but is not admissible against another party or for another purpose. The Committee adopted this Rule without change on the understanding that it does not affect the authority of a court to order a severance in a multi-defendant case.

Rule 106. Remainder of or Related Writings or Recorded Statements

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1930; Mar. 2, 1987, eff. Oct. 1, 1987.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The rule is an expression of the rule of completeness. McCormick §56. It is manifested as to depositions in Rule 32(a)(4) of the Federal Rules of Civil Procedure, of which the proposed rule is substantially a restatement.

The rule is based on two considerations. The first is the misleading impression created by taking matters out of context. The second is the inadequacy of repair work when delayed to a point later in the trial. See McCormick §56; California Evidence Code §356. The rule does not in any way circumscribe the right of the adversary to develop the matter on cross-examination or as part of his own case.

For practical reasons, the rule is limited to writings and recorded statements and does not apply to conversations.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

ARTICLE II. JUDICIAL NOTICE

Rule 201. Judicial Notice of Adjudicative Facts

(a) SCOPE OF RULE. This rule governs only judicial notice of adjudicative facts.

(b) KINDS OF FACTS. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) WHEN DISCRETIONARY. A court may take judicial notice, whether requested or not.

(d) WHEN MANDATORY. A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) OPPORTUNITY TO BE HEARD. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) TIME OF TAKING NOTICE. Judicial notice may be taken at any stage of the proceeding.

(g) INSTRUCTING JURY. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1930.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

Subdivision (a). This is the only evidence rule on the subject of judicial notice. It deals only with judicial notice of ''adjudicative'' facts. No rule deals with judicial notice of ''legislative'' facts. Judicial notice of matters of foreign law is treated in Rule 44.1 of the Federal Rules of Civil Procedure and Rule 26.1 of the Federal Rules of Criminal Procedure.

The omission of any treatment of legislative facts results from fundamental differences between adjudicative facts and legislative facts. Adjudicative facts are simply the facts of the particular case. Legislative facts, on the other hand, are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body. The terminology was coined by Professor Kenneth Davis in his article An Approach to Problems of Evidence in the Administrative Process, 55

Harv.L.Rev. 364, 404–407 (1942). The following discussion draws extensively upon his writings. In addition, see the same author's Judicial Notice, 55 Colum.L. Rev. 945 (1955); Administrative Law Treatise, ch. 15 (1958); A System of Judicial Notice Based on Fairness and Convenience, in Perspectives of Law 69 (1964).

The usual method of establishing adjudicative facts in through the introduction of evidence, ordinarily consisting of the testimony of witnesses. If particular facts are outside of reasonable controversy, this process is dispensed with as unnecessary. A high degree of indisputability is the essential prerequisite.

Legislative facts are quite different. As Professor Davis says:

''My opinion is that judge-made law would stop growing if judges, in thinking about questions of law and policy, were forbidden to take into account the facts they believe, as distinguished from facts which are 'clearly * * * within the domain of the indisputable.' Facts most needed in thinking about difficult problems of law and policy have a way of being outside the domain of the clearly indisputable.'' A System of Judicial Notice Based on Fairness and Convenience, *supra*, at 82. An illustration is *Hawkins v. United States*, 358 U.S. 74, 79 S.Ct. 136, 3 L.Ed.2d 125 (1958), in which the Court refused to discard the common law rule that one spouse could not testify against the other, saying, ''Adverse testimony given in criminal proceedings would, we think, be likely to destroy almost any marriage.'' This conclusion has a large intermixture of fact, but the factual aspect is scarcely ''indisputable.'' See Hutchins and Slesinger, Some Observations on the Law of Evidence—Family Relations, 13 Minn.L.Rev. 675 (1929). If the destructive effect of the giving of adverse testimony by a spouse is not indisputable, should the Court have refrained from considering it in the absence of supporting evidence?

''If the Model Code or the Uniform Rules had been applicable, the Court would have been barred from thinking about the essential factual ingredient of the problems before it, and such a result would be obviously intolerable. What the law needs as its growing points is more, not less, judicial thinking about the factual ingredients of problems of what the law ought to be, and the needed facts are seldom 'clearly' indisputable.'' Davis, *supra*, at 83.

''Professor Morgan gave the following description of the methodology of determining domestic law:

''In determining the content or applicability of a rule of domestic law, the judge is unrestricted in his investigation and conclusion. He may reject the propositions of either party or of both parties. He may consult the sources of pertinent data to which they refer, or he may refuse to do so. He may make an independent search for persuasive data or rest content with what he has or what the parties present. * * * [T]he parties do no more than to assist; they control no part of the process.'' Morgan, Judicial Notice, 57 Harv.L.Rev. 269, 270–271 (1944).

This is the view which should govern judicial access to legislative facts. It renders inappropriate any limitation in the form of indisputability, any formal requirements of notice other than those already inherent in affording opportunity to hear and be heard and exchanging briefs, and any requirement of formal findings at any level. It should, however, leave open the possibility of introducing evidence through regular channels in appropriate situations. See *Borden's Farm Products Co. v. Baldwin*, 293 U.S. 194, 55 S.Ct. 187, 79 L.Ed. 281 (1934), where the cause was remanded for the taking of evidence as to the economic conditions and trade practices underlying the New York Milk Control Law.

Similar considerations govern the judicial use of non-adjudicative facts in ways other than formulating laws and rules. Thayer described them as a part of the judicial reasoning process.

''In conducting a process of judicial reasoning, as of other reasoning, not a step can be taken without assuming something which has not been proved; and the capacity to do this with competent judgement and efficiency, is imputed to judges and juries as part of their necessary mental outfit.'' Thayer, Preliminary Treatise on Evidence 279–280 (1898).

As Professor Davis points out, A System of Judicial Notice Based on Fairness and Convenience, in Perspectives of Law 69, 73 (1964), every case involves the use of hundreds or thousands of non-evidence facts. When a witness in an automobile accident case says ''car,'' everyone, judge and jury included, furnishes, from non-evidence sources within himself, the supplementing information that the ''car'' is an automobile, not a railroad car, that it is self-propelled, probably by an internal combustion engine, that it may be assumed to have four wheels with pneumatic rubber tires, and so on. The judicial process cannot construct every case from scratch, like Descartes creating a world based on the postulate *Cogito, ergo sum*. These items could not possibly be introduced into evidence, and no one suggests that they be. Nor are they appropriate subjects for any formalized treatment of judicial notice of facts. See Levin and Levy, Persuading the Jury with Facts Not in Evidence: The Fiction-Science Spectrum, 105 U.Pa.L.Rev. 139 (1956).

Another aspect of what Thayer had in mind is the use of non-evidence facts to appraise or assess the adjudicative facts of the case. Pairs of cases from two jurisdictions illustrate this use and also the difference between non-evidence facts thus used and adjudicative facts. In *People v. Strook*, 347 Ill. 460, 179 N.E. 821 (1932), venue in Cook County had been held not established by testimony that the crime was committed at 7956 South Chicago Avenue, since judicial notice would not be taken that the address was in Chicago. However, the same court subsequently ruled that venue in Cook County was established by testimony that a crime occurred at 8900 South Anthony Avenue, since notice would be taken of the common practice of omitting the name of the city when speaking of local addresses, and the witness was testifying in Chicago. *People v. Pride*, 16 Ill.2d 82, 156 N.E.2d 551 (1951). And in *Hughes v. Vestal*, 264 N.C. 500, 142 S.E.2d 361 (1965), the Supreme Court of North Carolina disapproved the trial judge's admission in evidence of a state-published table of automobile stopping distances on the basis of judicial notice, though the court itself had referred to the same table in an earlier case in a ''rhetorical and illustrative'' way in determining that the defendant could not have stopped her car in time to avoid striking a child who suddenly appeared in the highway and that a non-suit was properly granted. *Ennis v. Dupree*, 262 N.C. 224, 136 S.E.2d 702 (1964). See also *Brown v. Hale*, 263 N.C. 176, 139 S.E.2d 210 (1964); *Clayton v. Rimmer*, 262 N.C. 302, 136 S.E.2d 562 (1964). It is apparent that this use of non-evidence facts in evaluating the adjudicative facts of the case is not an appropriate subject for a formalized judicial notice treatment.

In view of these considerations, the regulation of judicial notice of facts by the present rule extends only to adjudicative facts.

What, then, are ''adjudicative'' facts? Davis refers to them as those ''which relate to the parties,'' or more fully:

''When a court or an agency finds facts concerning the immediate parties—who did what, where, when, how, and with what motive or intent—the court or agency is performing an adjudicative function, and the facts are conveniently called adjudicative facts. * * *

''Stated in other terms, the adjudicative facts are those to which the law is applied in the process of adjudication. They are the facts that normally go to the jury in a jury case. They relate to the parties, their activities, their properties, their businesses.'' 2 Administrative Law Treatise 353.

Subdivision (b). With respect to judicial notice of adjudicative facts, the tradition has been one of caution in requiring that the matter be beyond reasonable controversy. This tradition of circumspection appears to be soundly based, and no reason to depart from it is apparent. As Professor Davis says:

''The reason we use trial-type procedure, I think, is that we make the practical judgement, on the basis of experience, that taking evidence, subject to cross-examination and rebuttal, is the best way to resolve controversies involving disputes of adjudicative facts, that is, facts pertaining to the parties. The reason we require a determination on the record is that we think fair procedure in resolving disputes of adjudicative facts calls for giving each party a chance to meet in the appropriate fashion the facts that come to the tribunal's attention, and the appropriate fashion for meeting disputed adjudicative facts includes rebuttal evidence, cross-examination, usually confrontation, and argument (either written or oral or both). The key to a fair trial is opportunity to use the appropriate weapons (rebuttal evidence, cross-examination, and argument) to meet adverse materials that come to the tribunal's attention.'' A System of Judicial Notice Based on Fairness and Convenience, in Perspectives of Law 69, 93 (1964).

The rule proceeds upon the theory that these considerations call for dispensing with traditional methods of proof only in clear cases. Compare Professor Davis' conclusion that judicial notice should be a matter of convenience, subject to requirements of procedural fairness. *Id.*, 94.

This rule is consistent with Uniform Rule 9(1) and (2) which limit judicial notice of facts to those ''so universally known that they cannot reasonably be the subject of dispute,'' those ''so generally known or of such common notoriety within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute,'' and those ''capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy.'' The traditional textbook treatment has included these general categories (matters of common knowledge, facts capable of verification), McCormick §§324, 325, and then has passed on into detailed treatment of such specific topics as facts relating to the personnel and records of the court, *Id.* §327, and other governmental facts, *Id.* §328. The California draftsmen, with a background of detailed statutory regulation of judicial notice, followed a somewhat similar pattern. California Evidence Code §§451, 452. The Uniform Rules, however, were drafted on the theory that these particular matters are included within the general categories and need no specific mention. This approach is followed in the present rule.

The phrase ''propositions of generalized knowledge,'' found in Uniform Rule 9(1) and (2) is not included in the present rule. It was, it is believed, originally included in Model Code Rules 801 and 802 primarily in order to afford some minimum recognition to the right of the judge in his ''legislative'' capacity (not acting as the trier of fact) to take judicial notice of very limited categories of generalized knowledge. The limitations thus imposed have been discarded herein as undesirable, unworkable, and contrary to existing practice. What is left, then, to be considered, is the status of a ''proposition of generalized knowledge'' as an ''adjudicative'' fact to be noticed judicially and communicated by the judge to the jury. Thus viewed, it is considered to be lacking practical significance. While judges use judicial notice of ''propositions of generalized knowledge'' in a variety of situations: determining the validity and meaning of statutes, formulating common law rules, deciding whether evidence should be admitted, assessing the sufficiency and effect of evidence, all are essentially nonadjudicative in nature. When judicial notice is seen as a significant vehicle for progress in the law, these are the areas involved, particularly in developing fields of scientific knowledge. See McCormick 712. It is not believed that judges now instruct juries as to ''propositions of generalized knowledge'' derived from encyclopedias or other sources, or that they are likely to do so, or, indeed, that it is desirable that they do so. There is a vast difference between ruling on the basis of judicial notice that radar evidence of speed is admissible and explaining to the jury its principles and degree of accuracy, or between using a table of stopping distances of automobiles at various speeds in a judicial evaluation of testimony and telling the jury its precise application in the case. For cases raising doubt as to the propriety of the use of medical texts by lay triers of fact in passing on disability claims in administrative proceedings, see *Sayers v. Gardner*, 380 F.2d 940 (6th Cir. 1967); *Ross v. Gardner*, 365 F.2d 554 (6th Cir. 1966); *Sosna v. Celebrezze*, 234 F.Supp. 289 (E.D.Pa. 1964); *Glendenning v. Ribicoff*, 213 F.Supp. 301 (W.D.Mo. 1962).

Subdivisions (c) and (d). Under subdivision (c) the judge has a discretionary authority to take judicial notice, regardless of whether he is so requested by a party. The taking of judicial notice is mandatory, under subdivision (d), only when a party requests it and the necessary information is supplied. This scheme is believed to reflect existing practice. It is simple and workable. It avoids troublesome distinctions in the many situations in which the process of taking judicial notice is not recognized as such.

Compare Uniform Rule 9 making judicial notice of facts universally known mandatory without request, and making judicial notice of facts generally known in the jurisdiction or capable of determination by resort to accurate sources discretionary in the absence of request but mandatory if request is made and the information furnished. But see Uniform Rule 10(3), which directs the judge to decline to take judicial notice if available information fails to convince him that the matter falls clearly within Uniform Rule 9 or is insufficient to enable him to notice it judicially. Substantially the same approach is found in California Evidence Code §§451–453 and in New Jersey Evidence Rule 9. In contrast, the present rule treats alike all adjudicative facts which are subject to judicial notice.

Subdivision (e). Basic considerations of procedural fairness demand an opportunity to be heard on the propriety of taking judicial notice and the tenor of the matter noticed. The rule requires the granting of that opportunity upon request. No formal scheme of giving notice is provided. An adversely affected party may learn in advance that judicial notice is in contemplation, either by virtue of being served with a copy of a request by another party under subdivision (d) that judicial notice be taken, or through an advance indication by the judge. Or he may have no advance notice at all. The likelihood of the latter is enhanced by the frequent failure to recognize judicial notice as such. And in the absence of advance notice, a request made after the fact could not in fairness be considered untimely. See the provision for hearing on timely request in the Administrative Procedure Act, 5 U.S.C. §556(e). See also Revised Model State Administrative Procedure Act (1961), 9C U.L.A. §10(4) (Supp. 1967).

Subdivision (f). In accord with the usual view, judicial notice may be taken at any stage of the proceedings, whether in the trial court or on appeal. Uniform Rule 12; California Evidence Code §459; Kansas Rules of Evidence §60–412; New Jersey Evidence Rule 12; McCormick §330, p. 712.

Subdivision (g). Much of the controversy about judicial notice has centered upon the question whether evidence should be admitted in disproof of facts of which judicial notice is taken.

The writers have been divided. Favoring admissibility are Thayer, Preliminary Treatise on Evidence 308 (1898); 9 Wigmore §2567; Davis, A System of Judicial Notice Based on Fairness and Convenience, in Perspectives of Law, 69, 76–77 (1964). Opposing admissibility are Keeffe, Landis and Shaad, Sense and Nonsense about Judicial Notice, 2 Stan.L.Rev. 664, 668 (1950); McNaughton, Judicial Notice—Excerpts Relating to the Morgan-Whitmore Controversy, 14 Vand.L.Rev. 779 (1961); Morgan, Judicial Notice, 57 Harv.L.Rev. 269, 279 (1944); McCormick 710–711. The Model Code and the Uniform Rules are predicated upon indisputability of judicially noticed facts.

The proponents of admitting evidence in disproof have concentrated largely upon legislative facts. Since the present rule deals only with judicial notice of adjudicative facts, arguments directed to legislative facts lose their relevancy.

Within its relatively narrow area of adjudicative facts, the rule contemplates there is to be no evidence before the jury in disproof. The judge instructs the jury to take judicially noticed facts as established. This position is justified by the undesirable effects of the opposite rule in limiting the rebutting party, though not his opponent, to admissible evidence, in defeating the reasons for judicial notice, and in affecting the substantive law to an extent and in ways largely unforeseeable. Ample protection and flexibility are afforded by the broad provision for opportunity to be heard on request, set forth in subdivision (e).

Authority upon the propriety of taking judicial notice against an accused in a criminal case with respect to matters other than venue is relatively meager. Proceeding upon the theory that the right of jury trial does not extend to matters which are beyond reasonable dispute, the rule does not distinguish between criminal and civil cases. *People v. Mayes*, 113 Cal. 618, 45 P. 860 (1896); *Ross v. United States*, 374 F.2d 97 (8th Cir. 1967). Cf. *State v. Main*, 94 R.I. 338, 180 A.2d 814 (1962); *State v. Lawrence*, 120 Utah 323, 234 P.2d 600 (1951).

Note on Judicial Notice of Law. By rules effective July 1, 1966, the method of invoking the law of a foreign country is covered elsewhere. Rule 44.1 of the Federal Rules of Civil Procedure; Rule 26.1 of the Federal Rules of Criminal Procedure. These two new admirably designed rules are founded upon the assumption that the manner in which law is fed into the judicial process is never a proper concern of the rules of evidence but rather of the rules of procedure. The Advisory Committee on Evidence, believing that this assumption is entirely correct, proposes no evidence rule with respect to judicial notice of law, and suggests that those matters of law which, in addition to foreign-country law, have traditionally been treated as requiring pleading and proof and more recently as the subject of judicial notice be left to the Rules of Civil and Criminal Procedure.

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 93–650

Rule 201(g) as received from the Supreme Court provided that when judicial notice of a fact is taken, the court shall instruct the jury to accept that fact as established. Being of the view that mandatory instruction to a jury in a criminal case to accept as conclusive any fact judicially noticed is inappropriate because contrary to the spirit of the Sixth Amendment right to a jury trial, the Committee adopted the 1969 Advisory Committee draft of this subsection, allowing a mandatory instruction in civil actions and proceedings and a discretionary instruction in criminal cases.

ARTICLE III. PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS

Rule 301. Presumptions in General in Civil Actions and Proceedings

In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1931.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

This rule governs presumptions generally. See Rule 302 for presumptions controlled by state law and Rule 303 [deleted] for those against an accused in a criminal case.

Presumptions governed by this rule are given the effect of placing upon the opposing party the burden of establishing the nonexistence of the presumed fact, once the party invoking the presumption establishes the basic facts giving rise to it. The same considerations of fairness, policy, and probability which dictate the allocation of the burden of the various elements of a case as between the prima facie case of a plaintiff and affirmative defenses also underlie the creation of presumptions. These considerations are not satisfied by giving a lesser effect to presumptions. Morgan and Maguire, Looking Backward and Forward at Evidence, 50 Harv.L.Rev. 909, 913 (1937); Morgan, Instructing the Jury upon Presumptions and Burdon of Proof, 47 Harv.L.Rev. 59, 82 1933); Cleary, Presuming and Pleading: An Essay on Juristic Immaturity, 12 Stan.L.Rev. 5 (1959).

The so-called ''bursting bubble'' theory, under which a presumption vanishes upon the introduction of evidence which would support a finding of the nonexistence of the presumed fact, even though not believed, is rejected as according presumptions too ''slight and evanescent'' an effect. Morgan and Maguire, *supra*, at p. 913.

In the opinion of the Advisory Committee, no constitutional infirmity attends this view of presumptions. In *Mobile, J. & K.C.R. Co. v. Turnipseed*, 219 U.S. 35, 31 S.Ct. 136, 55 L.Ed. 78 (1910), the Court upheld a Mississippi statute which provided that in actions against railroads proof of injury inflicted by the running of trains should be prima facie evidence of negligence by the railroad. The injury in the case had resulted from a derailment. The opinion made the points (1) that the only effect of the statute was to impose on the railroad the duty of producing some evidence to the contrary, (2) that an inference may be supplied by law if there is a rational connection between the fact proved and the fact presumed, as long as the opposite party is not precluded from presenting his evidence to the contrary, and (3) that considerations of public policy arising from the character of the business justified the application in question. Nineteen years later, in *Western & Atlantic R. Co. v. Henderson*, 279 U.S. 639, 49 S.Ct. 445, 73 L.Ed. 884 (1929), the Court overturned a Georgia statute making railroads liable for damages done by trains, unless the railroad made it appear that reasonable care had been used, the presumption being against the railroad. The declaration alleged the death of plaintiff's husband from a grade crossing collision, due to specified acts of negligence by defendant. The jury were instructed that proof of the injury raised a presumption of negligence; the burden shifted to the railroad to prove ordinary care; and unless it did so, they should find for plaintiff. The instruction was held erroneous in an opinion stating (1) that there was no rational connection between the mere fact of collision and negligence on the part of anyone, and (2) that the statute was different from that in *Turnipseed* in imposing a burden upon the railroad. The reader is left in a state of some confusion. Is the difference between a derailment and a grade crossing collision of no significance? Would the *Turnipseed* presumption have been bad if it had imposed a burden of persuasion on defendant, although that would in nowise have impaired its ''rational connection''? If *Henderson* forbids imposing a burden of persuasion on defendants, what happens to affirmative defenses?

Two factors serve to explain *Henderson*. The first was that it was common ground that negligence was indispensable to liability. Plaintiff thought so, drafted her complaint accordingly, and relied upon the presumption. But how in logic could the same presumption establish her alternative grounds of negligence that the engineer was so blind he could not see decedent's truck and that he failed to stop after he saw it? Second, take away the basic assumption of no liability without fault, as *Turnipseed* intimated might be done (''considerations of public policy arising out of the character of the business''), and the structure of the decision in *Henderson* fails. No question of logic would have arisen if the statute had simply said: a prima facie case of liability is made by proof of injury by a train; lack of negligence is an affirmative defense, to be pleaded and

proved as other affirmative defenses. The problem would be one of economic due process only. While it seems likely that the Supreme Court of 1929 would have voted that due process was denied, that result today would be unlikely. See, for example, the shift in the direction of absolute liability in the consumer cases. Prosser, The Assault upon the Citadel (Strict Liability to the Consumer), 69 Yale L.J. 1099 (1960).

Any doubt as to the constitutional permissibility of a presumption imposing a burden of persuasion of the non-existence of the presumed fact in civil cases is laid at rest by *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 79 S.Ct. 921, 3 L.Ed.2d 935 (1959). The Court unhesitatingly applied the North Dakota rule that the presumption against suicide imposed on defendant the burden of proving that the death of insured, under an accidental death clause, was due to suicide.

''Proof of coverage and of death by gunshot wound shifts the burden to the insurer to establish that the death of the insured was due to his suicide.'' 359 U.S. at 443, 79 S.Ct. at 925.

''In a case like this one, North Dakota presumes that death was accidental and places on the insurer the burden of proving that death resulted from suicide.'' *Id.* at 446, 79 S.Ct. at 927.

The rational connection requirement survives in criminal cases, *Tot v. United States*, 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519 (1943), because the Court has been unwilling to extend into that area the greater-includes-the-lesser theory of *Ferry v. Ramsey*, 277 U.S. 88, 48 S.Ct. 443, 72 L.Ed. 796 (1928). In that case the Court sustained a Kansas statute under which bank directors were personally liable for deposits made with their assent and with knowledge of insolvency, and the fact of insolvency was prima facie evidence of assent and knowledge of insolvency. Mr. Justice Holmes pointed out that the state legislature could have made the directors personally liable to depositors in every case. Since the statute imposed a less stringent liability, ''the thing to be considered is the result reached, not the possibly inartificial or clumsy way of reaching it.'' *Id.* at 94, 48 S.Ct. at 444. Mr. Justice Sutherland dissented: though the state could have created an absolute liability, it did not purport to do so; a rational connection was necessary, but lacking, between the liability created and the prima facie evidence of it; the result might be different if the basis of the presumption were being open for business.

The Sutherland view has prevailed in criminal cases by virtue of the higher standard of notice there required. The fiction that everyone is presumed to know the law is applied to the substantive law of crimes as an alternative to complete unenforceability. But the need does not extend to criminal evidence and procedure, and the fiction does not encompass them. ''Rational connection'' is not fictional or artificial, and so it is reasonable to suppose that Gainey should have known that his presence at the site of an illicit still could convict him of being connected with (carrying on) the business, *United States v. Gainey*, 380 U.S. 63, 85 S.Ct. 754, 13 L.Ed.2d 658 (1965), but not that Romano should have known that his presence at a still could convict him of possessing it, *United States v. Romano*, 382 U.S. 136, 86 S.Ct. 279, 15 L.Ed.2d 210 (1965).

In his dissent in Gainey, Mr. Justice Black put it more artistically:

''It might be argued, although the Court does not so argue or hold, that Congress if it wished could make presence at a still a crime in itself, and so Congress should be free to create crimes which are called 'possession' and 'carrying on an illegal distillery business' but which are defined in such a way that unexplained presence is sufficient and indisputable evidence in all cases to support conviction for those offenses. See *Ferry v. Ramsey*, 277 U.S. 88, 48 S.Ct. 443, 72 L.Ed. 796. Assuming for the sake of argument that Congress could make unexplained presence a criminal act, and ignoring also the refusal of this Court in other cases to uphold a statutory presumption on such a theory, see *Heiner v. Donnan*, 285 U.S. 312, 52 S.Ct. 358, 76 L.Ed. 772, there is no indication here that Congress intended to adopt such a misleading method of draftsmanship, nor in my judgement could the statutory provisions if so construed escape condemnation for vagueness, under the principles applied in *Lanzetta v. New Jersey*, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888, and many other cases.'' 380 U.S. at 84, n. 12, 85 S.Ct. at 766.

And the majority opinion in *Romano* agreed with him:

''It may be, of course, that Congress has the power to make presence at an illegal still a punishable crime, but we find no clear indication that it intended to so exercise this power. The crime remains possession, not presence, and with all due deference to the judgement of Congress, the former may not constitutionally be inferred from the latter.'' 382 U.S. at 144, 86 S.Ct. at 284.

The rule does not spell out the procedural aspects of its application. Questions as to when the evidence warrants submission of a presumption and what instructions are proper under varying states of fact are believed to present no particular difficulties.

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 93–650

Rule 301 as submitted by the Supreme Court provided that in all cases a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence. The Committee limited the scope of Rule 301 to ''civil actions and proceedings'' to effectuate its decision not to deal with the question of presumptions in criminal cases. (See note on [proposed] Rule 303 in discussion of Rules deleted). With respect to the weight to be given a presumption in a civil case, the Committee agreed with the judgement implicit in the Court's version that the socalled ''bursting bubble'' theory of presumptions, whereby a presumption vanished upon the appearance of any contradicting evidence by the other party, gives to presumptions too slight an effect. On the other hand, the Committee believed that the Rule proposed by the Court, whereby a presumption permanently alters the burden of persuasion, no matter how much contradicting evidence is introduced—a view shared by only a few courts—lends too great a force to presumptions. Accordingly, the Committee amended the Rule to adopt an intermediate position under which a presumption does not vanish upon the introduction of contradicting evidence, and does not change the burden of persuasion; instead it is merely deemed sufficient evidence of the fact presumed, to be considered by the jury or other finder of fact.

NOTES OF COMMITTEE ON THE JUDICIARY, SENATE REPORT NO. 93–1277

The rule governs presumptions in civil cases generally. Rule 302 provides for presumptions in cases controlled by State law.

As submitted by the Supreme Court, presumptions governed by this rule were given the effect of placing upon the opposing party the burden of establishing the non-existence of the presumed fact, once the party invoking the presumption established the basic facts giving rise to it.

Instead of imposing a burden of persuasion on the party against whom the presumption is directed, the House adopted a provision which shifted the burden of going forward with the evidence. They further provided that ''even though met with contradicting evidence, a presumption is sufficient evidence of the fact presumed, to be considered by the trier of fact.'' The effect of the amendment is that presumptions are to be treated as evidence.

The committee feels the House amendment is ill-advised. As the joint committees (the Standing Committee on Practice and Procedure of the Judicial Conference and the Advisory Committee on the Rules of Evidence) stated: ''Presumptions are not evidence, but ways of dealing with evidence.'' This treatment requires juries to perform the task of considering ''as evi-

dence'' facts upon which they have no direct evidence and which may confuse them in performance of their duties. California had a rule much like that contained in the House amendment. It was sharply criticized by Justice Traynor in *Speck v. Sarver* [20 Cal. 2d 585, 128 P. 2d 16, 21 (1942)] and was repealed after 93 troublesome years [Cal. Ev. Code 1965 § 600].

Professor McCormick gives a concise and compelling critique of the presumption as evidence rule:

* * * * *

> Another solution, formerly more popular than now, is to instruct the jury that the presumption is ''evidence'', to be weighed and considered with the testimony in the case. This avoids the danger that the jury may infer that the presumption is conclusive, but it probably means little to the jury, and certainly runs counter to accepted theories of the nature of evidence. [McCormick, Evidence, 669 (1954); *Id*. 825 (2d ed. 1972)].

For these reasons the committee has deleted that provision of the House-passed rule that treats presumptions as evidence. The effect of the rule as adopted by the committee is to make clear that while evidence of facts giving rise to a presumption shifts the burden of coming forward with evidence to rebut or meet the presumption, it does not shift the burden of persuasion on the existence of the presumed facts. The burden or persuasion remains on the party to whom it is allocated under the rules governing the allocation in the first instance.

The court may instruct the jury that they may infer the existence of the presumed fact from proof of the basic facts giving rise to the presumption. However, it would be inappropriate under this rule to instruct the jury that the inference they are to draw is conclusive.

NOTES OF CONFERENCE COMMITTEE, HOUSE REPORT NO. 93–1597

The House bill provides that a presumption in civil actions and proceedings shifts to the party against whom it is directed the burden of going forward with evidence to meet or rebut it. Even though evidence contradicting the presumption is offered, a presumption is considered sufficient evidence of the presumed fact to be considered by the jury. The Senate amendment provides that a presumption shifts to the party against whom it is directed the burden of going forward with evidence to meet or rebut the presumption, but it does not shift to that party the burden of persuasion on the existence of the presumed fact.

Under the Senate amendment, a presumption is sufficient to get a party past an adverse party's motion to dismiss made at the end of his case-in-chief. If the adverse party offers no evidence contradicting the presumed fact, the court will instruct the jury that if it finds the basic facts, it may presume the existence of the presumed fact. If the adverse party does offer evidence contradicting the presumed fact, the court cannot instruct the jury that it may *presume* the existence of the presumed fact from proof of the basic facts. The court may, however, instruct the jury that it may infer the existence of the presumed fact from proof of the basic facts.

The Conference adopts the Senate amendment.

Rule 302. Applicability of State Law in Civil Actions and Proceedings

In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law.

(Pub. L. 93–595, § 1, Jan. 2, 1975, 88 Stat. 1931.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

A series of Supreme Court decisions in diversity cases leaves no doubt of the relevance of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), to questions of burden of proof. These decisions are *Cities Service Oil Co. v. Dunlap*, 308 U.S. 208, 60 S.Ct. 201, 84 L.Ed. 196 (1939), *Palmer v. Hoffman*, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943), and *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 79 S.Ct. 921, 3 L.Ed.2d 935 (1959). They involved burden of proof, respectively, as to status as bona fide purchasers, contributory negligence, and nonaccidental death (suicide) of an insured. In each instance the state rule was held to be applicable. It does not follow, however, that all presumptions in diversity cases are governed by state law. In each case cited, the burden of proof question had to do with a substantive element of the claim or defense. Application of the state law is called for only when the presumption operates upon such an element. Accordingly the rule does not apply state law when the presumption operates upon a lesser aspect of the case, i.e. ''tactical'' presumptions.

The situations in which the state law is applied have been tagged for convenience in the preceding discussion as ''diversity cases.'' The designation is not a completely accurate one since *Erie* applies to any claim or issue having its source in state law, regardless of the basis of federal jurisdiction, and does not apply to a federal claim or issue, even though jurisdiction is based on diversity. *Vestal, Erie R.R. v. Tompkins*: A Projection, 48 Iowa L.Rev. 248, 257 (1963); Hart and Wechsler, The Federal Courts and the Federal System, 697 (1953); 1A Moore, Federal Practice ¶0.305[3] (2d ed. 1965); Wright, Federal Courts, 217–218 (1963). Hence the rule employs, as appropriately descriptive, the phrase ''as to which state law supplies the rule of decision.'' See A.L.I. Study of the Division of Jurisdiction Between State and Federal Courts, § 2344(c), p. 40, P.F.D. No. 1 (1965).

ARTICLE IV. RELEVANCY AND ITS LIMITS

Rule 401. Definition of "Relevant Evidence"

''Relevant evidence'' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

(Pub. L. 93–595, § 1, Jan. 2, 1975, 88 Stat. 1931.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

Problems of relevancy call for an answer to the question whether an item of evidence, when tested by the processes of legal reasoning, possesses sufficient probative value to justify receiving it in evidence. Thus, assessment of the probative value of evidence that a person purchased a revolver shortly prior to a fatal shooting with which he is charged is a matter of analysis and reasoning.

The variety of relevancy problems is coextensive with the ingenuity of counsel in using circumstantial evidence as a means of proof. An enormous number of cases fall in no set pattern, and this rule is designed as a guide for handling them. On the other hand, some situations recur with sufficient frequency to create patterns susceptible of treatment by specific rules. Rule 404 and those following it are of that variety; they also serve as illustrations of the application of the present rule as limited by the exclusionary principles of Rule 403.

Passing mention should be made of so-called ''conditional'' relevancy. Morgan, Basic Problems of Evidence 45–46 (1962). In this situation, probative value depends not only upon satisfying the basic requirement of relevancy as described above but also upon the existence of some matter of fact. For example, if evidence of a spoken statement is relied upon to prove notice, probative value is lacking unless the person sought to be charged heard the statement. The problem is one of fact, and the only rules needed are for the purpose of determining the respective functions of judge and jury. See Rules 104(b) and 901. The discussion which follows

in the present note is concerned with relevancy generally, not with any particular problem of conditional relevancy.

Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case. Does the item of evidence tend to prove the matter sought to be proved? Whether the relationship exists depends upon principles evolved by experience or science, applied logically to the situation at hand. James, Relevancy, Probability and the Law, 29 Calif.L.Rev. 689, 696, n. 15 (1941), in Selected Writings on Evidence and Trial 610, 615, n. 15 (Fryer ed. 1957). The rule summarizes this relationship as a ''tendency to make the existence'' of the fact to be proved ''more probable or less probable.'' Compare Uniform Rule 1(2) which states the crux of relevancy as ''a tendency in reason,'' thus perhaps emphasizing unduly the logical process and ignoring the need to draw upon experience or science to validate the general principle upon which relevancy in a particular situation depends.

The standard of probability under the rule is ''more * * * probable than it would be without the evidence.'' Any more stringent requirement is unworkable and unrealistic. As McCormick §152, p. 317, says, ''A brick is not a wall,'' or, as Falknor, Extrinsic Policies Affecting Admissibility, 10 Rutgers L.Rev. 574, 576 (1956), quotes Professor McBaine, ''* * * [I]t is not to be supposed that every witness can make a home run.'' Dealing with probability in the language of the rule has the added virtue of avoiding confusion between questions of admissibility and questions of the sufficiency of the evidence.

The rule uses the phrase ''fact that is of consequence to the determination of the action'' to describe the kind of fact to which proof may properly be directed. The language is that of California Evidence Code §210; it has the advantage of avoiding the loosely used and ambiguous word ''material.'' Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Art. I. General Provisions), Cal. Law Revision Comm'n, Rep., Rec. & Studies, 10–11 (1964). The fact to be proved may be ultimate, intermediate, or evidentiary; it matters not, so long as it is of consequence in the determination of the action. Cf. Uniform Rule 1(2) which requires that the evidence relate to a ''material'' fact.

The fact to which the evidence is directed need not be in dispute. While situations will arise which call for the exclusion of evidence offered to prove a point conceded by the opponent, the ruling should be made on the basis of such considerations as waste of time and undue prejudice (see Rule 403), rather than under any general requirement that evidence is admissible only if directed to matters in dispute. Evidence which is essentially background in nature can scarcely be said to involve disputed matter, yet it is universally offered and admitted as an aid to understanding. Charts, photographs, views of real estate, murder weapons, and many other items of evidence fall in this category. A rule limiting admissibility to evidence directed to a controversial point would invite the exclusion of this helpful evidence, or at least the raising of endless questions over its admission. Cf. California Evidence Code §210, defining relevant evidence in terms of tendency to prove a disputed fact.

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1931.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The provisions that all relevant evidence is admissible, with certain exceptions, and that evidence which is not relevant is not admissible are ''a presupposition involved in the very conception of a rational system of evidence.'' Thayer, Preliminary Treatise on Evidence 264 (1898). They constitute the foundation upon which the structure of admission and exclusion rests. For similar provisions see California Evidence Code §§350, 351. Provisions that all relevant evidence is admissible are found in Uniform Rule 7(f); Kansas Code of Civil Procedure §60–407(f); and New Jersey Evidence Rule 7(f); but the exclusion of evidence which is not relevant is left to implication.

Not all relevant evidence is admissible. The exclusion of relevant evidence occurs in a variety of situations and may be called for by these rules, by the Rules of Civil and Criminal Procedure, by Bankruptcy Rules, by Act of Congress, or by constitutional considerations.

Succeeding rules in the present article, in response to the demands of particular policies, require the exclusion of evidence despite its relevancy. In addition, Article V recognizes a number of privileges; Article VI imposes limitations upon witnesses and the manner of dealing with them; Article VII specifies requirements with respect to opinions and expert testimony; Article VIII excludes hearsay not falling within an exception; Article IX spells out the handling of authentication and identification; and Article X restricts the manner of proving the contents of writings and recordings.

The Rules of Civil and Criminal Procedure in some instances require the exclusion of relevant evidence. For example, Rules 30(b) and 32(a)(3) of the Rules of Civil Procedure, by imposing requirements of notice and unavailability of the deponent, place limits on the use of relevant depositions. Similarly, Rule 15 of the Rules of Criminal Procedure restricts the use of depositions in criminal cases, even though relevant. And the effective enforcement of the command, originally statutory and now found in Rule 5(a) of the Rules of Criminal Procedure, that an arrested person be taken without unnecessary delay before a commissioner of other similar officer is held to require the exclusion of statements elicited during detention in violation thereof. *Mallory v. United States*, 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed.2d 1479 (1957); 18 U.S.C. §3501(c).

While congressional enactments in the field of evidence have generally tended to expand admissibility beyond the scope of the common law rules, in some particular situations they have restricted the admissibility of relevant evidence. Most of this legislation has consisted of the formulation of a privilege or of a prohibition against disclosure. 8 U.S.C. §1202(f), records of refusal of visas or permits to enter United States confidential, subject to discretion of Secretary of State to make available to court upon certification of need; 10 U.S.C. §3693, replacement certificate of honorable discharge from Army not admissible in evidence; 10 U.S.C. §8693, same as to Air Force; 11 U.S.C. §25(a)(10), testimony given by bankrupt on his examination not admissible in criminal proceedings against him, except that given in hearing upon objection to discharge; 11 U.S.C. §205(a), railroad reorganization petition, if dismissed, not admissible in evidence; 11 U.S.C. §403(a), list of creditors filed with municipal composition plan not an admission; 13 U.S.C. §9(a), census information confidential, retained copies of reports privileged; 47 U.S.C. §605, interception and divulgence of wire or radio communications prohibited unless authorized by sender. These statutory provisions would remain undisturbed by the rules.

The rule recognizes but makes no attempt to spell out the constitutional considerations which impose basic limitations upon the admissibility of relevant evidence. Examples are evidence obtained by unlawful search and seizure, *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914); *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); incriminating statement elicited from an accused in violation of right

to counsel, *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964).

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 93–650

Rule 402 as submitted to the Congress contained the phrase ''or by other rules adopted by the Supreme Court''. To accommodate the view that the Congress should not appear to acquiesce in the Court's judgment that it has authority under the existing Rules Enabling Acts to promulgate Rules of Evidence, the Committee amended the above phrase to read ''or by other rules prescribed by the Supreme Court pursuant to statutory authority'' in this and other Rules where the reference appears.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1932.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The case law recognizes that certain circumstances call for the exclusion of evidence which is of unquestioned relevance. These circumstances entail risks which range all the way from inducing decision on a purely emotional basis, at one extreme, to nothing more harmful than merely wasting time, at the other extreme. Situations in this area call for balancing the probative value of and need for the evidence against the harm likely to result from its admission. Slough, Relevancy Unraveled, 5 Kan. L. Rev. 1, 12–15 (1956); Trautman, Logical or Legal Relevancy—A Conflict in Theory, 5 Van. L. Rev. 385, 392 (1952); McCormick §152, pp. 319–321. The rules which follow in this Article are concrete applications evolved for particular situations. However, they reflect the policies underlying the present rule, which is designed as a guide for the handling of situations for which no specific rules have been formulated.

Exclusion for risk of unfair prejudice, confusion of issues, misleading the jury, or waste of time, all find ample support in the authorities. ''Unfair prejudice'' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.

The rule does not enumerate surprise as a ground for exclusion, in this respect following Wigmore's view of the common law. 6 Wigmore §1849. Cf. McCormick §152, p. 320, n. 29, listing unfair surprise as a ground for exclusion but stating that it is usually ''coupled with the danger of prejudice and confusion of issues.'' While Uniform Rule 45 incorporates surprise as a ground and is followed in Kansas Code of Civil Procedure §60–445, surprise is not included in California Evidence Code §352 or New Jersey Rule 4, though both the latter otherwise substantially embody Uniform Rule 45. While it can scarcely be doubted that claims of unfair surprise may still be justified despite procedural requirements of notice and instrumentalities of discovery, the granting of a continuance is a more appropriate remedy than exclusion of the evidence. Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Art. VI. Extrinsic Policies Affecting Admissibility), Cal. Law Revision Comm'n, Rep., Rec. & Studies, 612 (1964). Moreover, the impact of a rule excluding evidence on the ground of surprise would be difficult to estimate.

In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction. See Rule 106 [now 105] and Advisory Committee's Note thereunder. The availability of other means of proof may also be an appropriate factor.

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(a) CHARACTER EVIDENCE GENERALLY. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) *Character of Accused*. In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(2) *Character of Alleged Victim*. In a criminal case, and subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

(3) *Character of Witness*. Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) OTHER CRIMES, WRONGS, OR ACTS. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1932; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 12, 2006, eff. Dec. 1, 2006.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

Subdivision (a). This subdivision deals with the basic question whether character evidence should be admitted. Once the admissibility of character evidence in some form is established under this rule, reference must then be made to Rule 405, which follows, in order to determine the appropriate method of proof. If the character is that of a witness, see Rules 608 and 610 for methods of proof.

Character questions arise in two fundamentally different ways. (1) Character may itself be an element of a crime, claim, or defense. A situation of this kind is commonly referred to as ''character in issue.'' Illustrations are: the chastity of the victim under a statute specifying her chastity as an element of the crime of seduction, or the competency of the driver in an action for negligently entrusting a motor vehicle to an incompetent driver. No problem of the general relevancy of character evidence is involved, and the present rule therefore has no provision on the subject. The only

question relates to allowable methods of proof, as to which see Rule 405, immediately following. (2) Character evidence is susceptible of being used for the purpose of suggesting an inference that the person acted on the occasion in question consistently with his character. This use of character is often described as ''circumstantial.'' Illustrations are: evidence of a violent disposition to prove that the person was the aggressor in an affray, or evidence of honesty in disproof of a charge of theft. This circumstantial use of character evidence raises questions of relevancy as well as questions of allowable methods of proof.

In most jurisdictions today, the circumstantial use of character is rejected but with important exceptions: (1) an accused may introduce pertinent evidence of good character (often misleadingly described as ''putting his character in issue''), in which event the prosecution may rebut with evidence of bad character; (2) an accused may introduce pertinent evidence of the character of the victim, as in support of a claim of self-defense to a charge of homicide or consent in a case of rape, and the prosecution may introduce similar evidence in rebuttal of the character evidence, or, in a homicide case, to rebut a claim that deceased was the first aggressor, however proved; and (3) the character of a witness may be gone into as bearing on his credibility. McCormick §§155–161. This pattern is incorporated in the rule. While its basis lies more in history and experience than in logic as underlying justification can fairly be found in terms of the relative presence and absence of prejudice in the various situations. Falknor, Extrinsic Policies Affecting Admissibility, 10 Rutger, L.Rev. 574, 584 (1956); McCormick §157. In any event, the criminal rule is so deeply imbedded in our jurisprudence as to assume almost constitutional proportions and to override doubts of the basic relevancy of the evidence.

The limitation to pertinent traits of character, rather than character generally, in paragraphs (1) and (2) is in accordance with the prevailing view. McCormick §158, p. 334. A similar provision in Rule 608, to which reference is made in paragraph (3), limits character evidence respecting witnesses to the trait of truthfulness or untruthfulness.

The argument is made that circumstantial use of character ought to be allowed in civil cases to the same extent as in criminal cases, i.e. evidence of good (nonprejudicial) character would be admissible in the first instance, subject to rebuttal by evidence of bad character. Falknor, Extrinsic Policies Affecting Admissibility, 10 Rutgers L.Rev. 574, 581–583 (1956); Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Art. VI. Extrinsic Policies Affecting Admissibility), Cal. Law Revision Comm'n, Rep., Rec. & Studies, 657–658 (1964). Uniform Rule 47 goes farther, in that it assumes that character evidence in general satisfies the conditions of relevancy, except as provided in Uniform Rule 48. The difficulty with expanding the use of character evidence in civil cases is set forth by the California Law Revision Commission in its ultimate rejection of Uniform Rule 47, *Id.*, 615:

''Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened.''

Much of the force of the position of those favoring greater use of character evidence in civil cases is dissipated by their support of Uniform Rule 48 which excludes the evidence in negligence cases, where it could be expected to achieve its maximum usefulness. Moreover, expanding concepts of ''character,'' which seem of necessity to extend into such areas as psychiatric evaluation and psychological testing, coupled with expanded admissibility, would open up such vistas of mental examinations as caused the Court concern in *Schlagenhauf v. Holder*, 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964). It is believed that those espousing change have not met the burden of persuasion.

Subdivision (b) deals with a specialized but important application of the general rule excluding circumstantial use of character evidence. Consistently with that rule, evidence of other crimes, wrongs, or acts is not admissible to prove character as a basis for suggesting the inference that conduct on a particular occasion was in conformity with it. However, the evidence may be offered for another purpose, such as proof of motive, opportunity, and so on, which does not fall within the prohibition. In this situation the rule does not require that the evidence be excluded. No mechanical solution is offered. The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403. Slough and Knightly, Other Vices, Other Crimes, 41 Iowa L.Rev. 325 (1956).

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 93–650

The second sentence of Rule 404(b) as submitted to the Congress began with the words ''This subdivision does not exclude the evidence when offered''. The Committee amended this language to read ''It may, however, be admissible'', the words used in the 1971 Advisory Committee draft, on the ground that this formulation properly placed greater emphasis on admissibility than did the final Court version.

NOTES OF COMMITTEE ON THE JUDICIARY, SENATE REPORT NO. 93–1277

This rule provides that evidence of other crimes, wrongs, or acts is not admissible to prove character but may be admissible for other specified purposes such as proof of motive.

Although your committee sees no necessity in amending the rule itself, it anticipates that the use of the discretionary word ''may'' with respect to the admissibility of evidence of crimes, wrongs, or acts is not intended to confer any arbitrary discretion on the trial judge. Rather, it is anticipated that with respect to permissible uses for such evidence, the trial judge may exclude it only on the basis of those considerations set forth in Rule 403, i.e. prejudice, confusion or waste of time.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1991 AMENDMENT

Rule 404(b) has emerged as one of the most cited Rules in the Rules of Evidence. And in many criminal cases evidence of an accused's extrinsic acts is viewed as an important asset in the prosecution's case against an accused. Although there are a few reported decisions on use of such evidence by the defense, *see, e.g., United States v. McClure*, 546 F.2nd 670 (5th Cir. 1990) (acts of informant offered in entrapment defense), the overwhelming number of cases involve introduction of that evidence by the prosecution.

The amendment to Rule 404(b) adds a pretrial notice requirement in criminal cases and is intended to reduce surprise and promote early resolution on the issue of admissibility. The notice requirement thus places Rule 404(b) in the mainstream with notice and disclosure provisions in other rules of evidence. *See, e.g.*, Rule 412 (written motion of intent to offer evidence under rule), Rule 609 (written notice of intent to offer conviction older than 10 years), Rule 803(24) and 804(b)(5) (notice of intent to use residual hearsay exceptions).

The Rule expects that counsel for both the defense and the prosecution will submit the necessary request and information in a reasonable and timely fashion.

Other than requiring pretrial notice, no specific time limits are stated in recognition that what constitutes a reasonable request or disclosure will depend largely on the circumstances of each case. *Compare* Fla. Stat. Ann §90.404(2)(b) (notice must be given at least 10 days before trial) *with* Tex.R.Evid. 404(b) (no time limit).

Likewise, no specific form of notice is required. The Committee considered and rejected a requirement that the notice satisfy the particularity requirements normally required of language used in a charging instrument. *Cf.* Fla. Stat. Ann §90.404(2)(b) (written disclosure must describe uncharged misconduct with particularity required of an indictment or information). Instead, the Committee opted for a generalized notice provision which requires the prosecution to apprise the defense of the general nature of the evidence of extrinsic acts. The Committee does not intend that the amendment will supercede other rules of admissibility or disclosure, such as the Jencks Act, 18 U.S.C. §3500, et seq. nor require the prosecution to disclose directly or indirectly the names and addresses of its witnesses, something it is currently not required to do under Federal Rule of Criminal Procedure 16.

The amendment requires the prosecution to provide notice, regardless of how it intends to use the extrinsic act evidence at trial, i.e., during its case-in-chief, for impeachment, or for possible rebuttal. The court in its discretion may, under the facts, decide that the particular request or notice was not reasonable, either because of the lack of timeliness or completeness. Because the notice requirement serves as condition precedent to admissibility of 404(b) evidence, the offered evidence is inadmissible if the court decides that the notice requirement has not been met.

Nothing in the amendment precludes the court from requiring the government to provide it with an opportunity to rule *in limine* on 404(b) evidence before it is offered or even mentioned during trial. When ruling *in limine*, the court may require the government to disclose to it the specifics of such evidence which the court must consider in determining admissibility.

The amendment does not extend to evidence of acts which are ''intrinsic'' to the charged offense, *see United States v. Williams*, 900 F.2d 823 (5th Cir. 1990) (noting distinction between 404(b) evidence and intrinsic offense evidence). Nor is the amendment intended to redefine what evidence would otherwise be admissible under Rule 404(b). Finally, the Committee does not intend through the amendment to affect the role of the court and the jury in considering such evidence. *See United States v. Huddleston*, 485 U.S. 681, 108 S.Ct 1496 (1988).

COMMITTEE NOTES ON RULES—2000 AMENDMENT

Rule 404(a)(1) has been amended to provide that when the accused attacks the character of an alleged victim under subdivision (a)(2) of this Rule, the door is opened to an attack on the same character trait of the accused. Current law does not allow the government to introduce negative character evidence as to the accused unless the accused introduces evidence of good character. *See, e.g., United States v. Fountain*, 768 F.2d 790 (7th Cir. 1985) (when the accused offers proof of self-defense, this permits proof of the alleged victim's character trait for peacefulness, but it does not permit proof of the accused's character trait for violence).

The amendment makes clear that the accused cannot attack the alleged victim's character and yet remain shielded from the disclosure of equally relevant evidence concerning the same character trait of the accused. For example, in a murder case with a claim of self-defense, the accused, to bolster this defense, might offer evidence of the alleged victim's violent disposition. If the government has evidence that the accused has a violent character, but is not allowed to offer this evidence as part of its rebuttal, the jury has only part of the information it needs for an informed assessment of the probabilities as to who was the initial aggressor. This may be the case even if evidence of the accused's prior violent acts is admitted under Rule 404(b), because such evidence can be admitted only for limited purposes and not to show action in conformity with the accused's character on a specific occasion. Thus, the amendment is designed to permit a more balanced presentation of character evidence when an accused chooses to attack the character of the alleged victim.

The amendment does not affect the admissibility of evidence of specific acts of uncharged misconduct offered for a purpose other than proving character under Rule 404(b). Nor does it affect the standards for proof of character by evidence of other sexual behavior or sexual offenses under Rules 412–415. By its placement in Rule 404(a)(1), the amendment covers only proof of character by way of reputation or opinion.

The amendment does not permit proof of the accused's character if the accused merely uses character evidence for a purpose other than to prove the alleged victim's propensity to act in a certain way. *See United States v. Burks*, 470 F.2d 432, 434–5 (D.C.Cir. 1972) (evidence of the alleged victim's violent character, when known by the accused, was admissible ''on the issue of whether or not the defendant reasonably feared he was in danger of imminent great bodily harm''). Finally, the amendment does not permit proof of the accused's character when the accused attacks the alleged victim's character as a witness under Rule 608 or 609.

The term ''alleged'' is inserted before each reference to ''victim'' in the Rule, in order to provide consistency with Evidence Rule 412.

GAP Report—Proposed Amendment to Rule 404(a). The Committee made the following changes to the published draft of the proposed amendment to Evidence Rule 404(a):

1. The term ''a pertinent trait of character'' was changed to ''the same trait of character,'' in order to limit the scope of the government's rebuttal. The Committee Note was revised to accord with this change in the text.

2. The word ''alleged'' was added before each reference in the Rule to a ''victim'' in order to provide consistency with Evidence Rule 412. The Committee Note was amended to accord with this change in the text.

3. The Committee Note was amended to clarify that rebuttal is not permitted under this Rule if the accused proffers evidence of the alleged victim's character for a purpose other than to prove the alleged victim's propensity to act in a certain manner.

COMMITTEE NOTES ON RULES—2006 AMENDMENT

The Rule has been amended to clarify that in a civil case evidence of a person's character is never admissible to prove that the person acted in conformity with the character trait. The amendment resolves the dispute in the case law over whether the exceptions in subdivisions (a)(1) and (2) permit the circumstantial use of character evidence in civil cases. *Compare Carson v. Polley*, 689 F.2d 562, 576 (5th Cir. 1982) (''when a central issue in a case is close to one of a criminal nature, the exceptions to the Rule 404(a) ban on character evidence may be invoked''), *with SEC v. Towers Financial Corp.*, 966 F.Supp. 203 (S.D.N.Y. 1997) (relying on the terms ''accused'' and ''prosecution'' in Rule 404(a) to conclude that the exceptions in subdivisions (a)(1) and (2) are inapplicable in civil cases). The amendment is consistent with the original intent of the Rule, which was to prohibit the circumstantial use of character evidence in civil cases, even where closely related to criminal charges. *See Ginter v. Northwestern Mut. Life Ins. Co.*, 576 F.Supp. 627, 629–30 (D. Ky.1984) (''It seems beyond peradventure of doubt that the drafters of F.R.Evi. 404(a) explicitly intended that all character evidence, except where 'character is at issue' was to be excluded'' in civil cases).

The circumstantial use of character evidence is generally discouraged because it carries serious risks of prejudice, confusion and delay. *See Michelson v. United States*, 335 U.S. 469, 476 (1948) (''The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and

undue prejudice.''). In criminal cases, the so-called ''mercy rule'' permits a criminal defendant to introduce evidence of pertinent character traits of the defendant and the victim. But that is because the accused, whose liberty is at stake, may need ''a counterweight against the strong investigative and prosecutorial resources of the government.'' C. Mueller & L. Kirkpatrick, *Evidence: Practice Under the Rules*, pp. 264–5 (2d ed. 1999). See also Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U.Pa.L.Rev. 845, 855 (1982) (the rule prohibiting circumstantial use of character evidence ''was relaxed to allow the criminal defendant with so much at stake and so little available in the way of conventional proof to have special dispensation to tell the factfinder just what sort of person he really is''). Those concerns do not apply to parties in civil cases.

The amendment also clarifies that evidence otherwise admissible under Rule 404(a)(2) may nonetheless be excluded in a criminal case involving sexual misconduct. In such a case, the admissibility of evidence of the victim's sexual behavior and predisposition is governed by the more stringent provisions of Rule 412.

Nothing in the amendment is intended to affect the scope of Rule 404(b). While Rule 404(b) refers to the ''accused,'' the ''prosecution,'' and a ''criminal case,'' it does so only in the context of a notice requirement. The admissibility standards of Rule 404(b) remain fully applicable to both civil and criminal cases.

Changes Made After Publication and Comments. No changes were made to the text of the proposed amendment as released for public comment. A paragraph was added to the Committee Note to state that the amendment does not affect the use of Rule 404(b) in civil cases.

Rule 405. Methods of Proving Character

(a) REPUTATION OR OPINION. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) SPECIFIC INSTANCES OF CONDUCT. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1932; Mar. 2, 1987, eff. Oct. 1, 1987.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The rule deals only with allowable methods of proving character, not with the admissibility of character evidence, which is covered in Rule 404.

Of the three methods of proving character provided by the rule, evidence of specific instances of conduct is the most convincing. At the same time it possesses the greatest capacity to arouse prejudice, to confuse, to surprise, and to consume time. Consequently the rule confines the use of evidence of this kind to cases in which character is, in the strict sense, in issue and hence deserving of a searching inquiry. When character is used circumstantially and hence occupies a lesser status in the case, proof may be only by reputation and opinion. These latter methods are also available when character is in issue. This treatment is, with respect to specific instances of conduct and reputation, conventional contemporary common law doctrine. McCormick §153.

In recognizing opinion as a means of proving character, the rule departs from usual contemporary practice in favor of that of an earlier day. See 7 Wigmore §1986, pointing out that the earlier practice permitted opinion and arguing strongly for evidence based on personal knowledge and belief as contrasted with ''the secondhand, irresponsible product of multiplied guesses and gossip which we term 'reputation'.'' It seems likely that the persistence of reputation evidence is due to its largely being opinion in disguise. Traditionally character has been regarded primarily in moral overtones of good and bad: chaste, peaceable, truthful, honest. Nevertheless, on occasion nonmoral considerations crop up, as in the case of the incompetent driver, and this seems bound to happen increasingly. If character is defined as the kind of person one is, then account must be taken of varying ways of arriving at the estimate. These may range from the opinion of the employer who has found the man honest to the opinion of the psychiatrist based upon examination and testing. No effective dividing line exists between character and mental capacity, and the latter traditionally has been provable by opinion.

According to the great majority of cases, on cross-examination inquiry is allowable as to whether the reputation witness has heard of particular instances of conduct pertinent to the trait in question. *Michelson v. United States*, 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168 (1948); Annot., 47 A.L.R.2d 1258. The theory is that, since the reputation witness relates what he has heard, the inquiry tends to shed light on the accuracy of his hearing and reporting. Accordingly, the opinion witness would be asked whether he knew, as well as whether he had heard. The fact is, of course, that these distinctions are of slight if any practical significance, and the second sentence of subdivision (a) eliminates them as a factor in formulating questions. This recognition of the propriety of inquiring into specific instances of conduct does not circumscribe inquiry otherwise into the bases of opinion and reputation testimony.

The express allowance of inquiry into specific instances of conduct on cross-examination in subdivision (a) and the express allowance of it as part of a case in chief when character is actually in issue in subdivision (b) contemplate that testimony of specific instances is not generally permissible on the direct examination of an ordinary opinion witness to character. Similarly as to witnesses to the character of witnesses under Rule 608(b). Opinion testimony on direct in these situations ought in general to correspond to reputation testimony as now given, *i.e.*, be confined to the nature and extent of observation and acquaintance upon which the opinion is based. See Rule 701.

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 93–650

Rule 405(a) as submitted proposed to change existing law by allowing evidence of character in the form of opinion as well as reputation testimony. Fearing, among other reasons, that wholesale allowance of opinion testimony might tend to turn a trial into a swearing contest between conflicting character witnesses, the Committee decided to delete from this Rule, as well as from Rule 608(a) which involves a related problem, reference to opinion testimony.

NOTES OF CONFERENCE COMMITTEE, HOUSE REPORT NO. 93–1597

The Senate makes two language changes in the nature of conforming amendments. The Conference adopts the Senate amendments.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendment is technical. No substantive change is intended.

Rule 406. Habit; Routine Practice

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1932.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

An oft-quoted paragraph, McCormick, §162, p. 340, describes habit in terms effectively contrasting it with character:

''Character and habit are close akin. Character is a generalized description of one's disposition, or of one's disposition in respect to a general trait, such as honesty, temperance, or peacefulness. 'Habit,' in modern usage, both lay and psychological, is more specific. It describes one's regular response to a repeated specific situation. If we speak of character for care, we think of the person's tendency to act prudently in all the varying situations of life, in business, family life, in handling automobiles and in walking across the street. A habit, on the other hand, is the person's regular practice of meeting a particular kind of situation with a specific type of conduct, such as the habit of going down a particular stairway two stairs at a time, or of giving the hand-signal for a left turn, or of alighting from railway cars while they are moving. The doing of the habitual acts may become semi-automatic.'' Equivalent behavior on the part of a group is designated ''routine practice of an organization'' in the rule.

Agreement is general that habit evidence is highly persuasive as proof of conduct on a particular occasion. Again quoting McCormick §162, p. 341:

''Character may be thought of as the sum of one's habits though doubtless it is more than this. But unquestionably the uniformity of one's response to habit is far greater than the consistency with which one's conduct conforms to character or disposition. Even though character comes in only exceptionally as evidence of an act, surely any sensible man in investigating whether X did a particular act would be greatly helped in his inquiry by evidence as to whether he was in the habit of doing it.''

When disagreement has appeared, its focus has been upon the question what constitutes habit, and the reason for this is readily apparent. The extent to which instances must be multiplied and consistency of behavior maintained in order to rise to the status of habit inevitably gives rise to differences of opinion. Lewan, Rationale of Habit Evidence, 16 Syracuse L.Rev. 39, 49 (1964). While adequacy of sampling and uniformity of response are key factors, precise standards for measuring their sufficiency for evidence purposes cannot be formulated.

The rule is consistent with prevailing views. Much evidence is excluded simply because of failure to achieve the status of habit. Thus, evidence of intemperate ''habits'' is generally excluded when offered as proof of drunkenness in accident cases, Annot., 46 A.L.R.2d 103, and evidence of other assaults is inadmissible to prove the instant one in a civil assault action, Annot., 66 A.L.R.2d 806. In *Levin v. United States*, 119 U.S.App.D.C. 156, 338 F.2d 265 (1964), testimony as to the religious ''habits'' of the accused, offered as tending to prove that he was at home observing the Sabbath rather than out obtaining money through larceny by trick, was held properly excluded;

''It seems apparent to us that an individual's religious practices would not be the type of activities which would lend themselves to the characterization of 'invariable regularity.' [1 Wigmore 520.] Certainly the very volitional basis of the activity raises serious questions as to its invariable nature, and hence its probative value.'' *Id*. at 272.

These rulings are not inconsistent with the trend towards admitting evidence of business transactions between one of the parties and a third person as tending to prove that he made the same bargain or proposal in the litigated situation. Slough, Relevancy Unraveled, 6 Kan.L.Rev. 38–41 (1957). Nor are they inconsistent with such cases as *Whittemore v. Lockheed Aircraft Corp.*, 65 Cal.App.2d 737, 151 P.2d 670 (1944), upholding the admission of evidence that plaintiff's intestate had on four other occasions flown planes from defendant's factory for delivery to his employer airline, offered to prove that he was piloting rather than a guest on a plane which crashed and killed all on board while en route for delivery.

A considerable body of authority has required that evidence of the routine practice of an organization be corroborated as a condition precedent to its admission in evidence. Slough, Relevancy Unraveled, 5 Kan.L.Rev. 404, 449 (1957). This requirement is specifically rejected by the rule on the ground that it relates to the sufficiency of the evidence rather than admissibility. A similar position is taken in New Jersey Rule 49. The rule also rejects the requirement of the absence of eyewitnesses, sometimes encountered with respect to admitting habit evidence to prove freedom from contributory negligence in wrongful death cases. For comment critical of the requirements see Frank, J., in *Cereste v. New York, N.H. & H.R. Co.*, 231 F.2d 50 (2d Cir. 1956), cert. denied 351 U.S. 951, 76 S.Ct. 848, 100 L.Ed 1475, 10 Vand.L.Rev. 447 (1957); McCormick §162, p. 342. The omission of the requirement from the California Evidence Code is said to have effected its elimination. Comment, Cal.Ev.Code §1105.

Rule 407. Subsequent Remedial Measures

When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1932; Apr. 11, 1997, eff. Dec. 1, 1997.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The rule incorporates conventional doctrine which excludes evidence of subsequent remedial measures as proof of an admission of fault. The rule rests on two grounds. (1) The conduct is not in fact an admission, since the conduct is equally consistent with injury by mere accident or through contributory negligence. Or, as Baron Bramwell put it, the rule rejects the notion that ''because the world gets wiser as it gets older, therefore it was foolish before.'' *Hart v. Lancashire & Yorkshire Ry. Co.*, 21 L.T.R. N.S. 261, 263 (1869). Under a liberal theory of relevancy this ground alone would not support exclusion as the inference is still a possible one. (2) The other, and more impressive, ground for exclusion rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety. The courts have applied this principle to exclude evidence of subsequent repairs, installation of safety devices, changes in company rules, and discharge of employees, and the language of the present rules is broad enough to encompass all of them. See Falknor, Extrinsic Policies Affecting Admissibility, 10 Rutgers L.Rev. 574, 590 (1956).

The second sentence of the rule directs attention to the limitations of the rule. Exclusion is called for only when the evidence of subsequent remedial measures is offered as proof of negligence or culpable conduct. In effect it rejects the suggested inference that fault is admitted. Other purposes are, however, allowable, including ownership or control, existence of duty, and feasibility of precautionary measures, if controverted, and impeachment. 2 Wigmore §283; Annot., 64 A.L.R.2d 1296. Two recent federal cases are illustrative. *Boeing Airplane Co. v. Brown*, 291 F.2d 310 (9th Cir. 1961), an action against an airplane manufacturer for using an allegedly defectively designed alternator shaft which caused a

plane crash, upheld the admission of evidence of subsequent design modification for the purpose of showing that design changes and safeguards were feasible. And *Powers v. J. B. Michael & Co.*, 329 F.2d 674 (6th Cir. 1964), an action against a road contractor for negligent failure to put out warning signs, sustained the admission of evidence that defendant subsequently put out signs to show that the portion of the road in question was under defendant's control. The requirement that the other purpose be controverted calls for automatic exclusion unless a genuine issue be present and allows the opposing party to lay the groundwork for exclusion by making an admission. Otherwise the factors of undue prejudice, confusion of issues, misleading the jury, and waste of time remain for consideration under Rule 403.

For comparable rules, see Uniform Rule 51; California Evidence Code §1151; Kansas Code of Civil Procedure §60–451; New Jersey Evidence Rule 51.

NOTES OF ADVISORY COMMITTEE ON RULES—1997 AMENDMENT

The amendment to Rule 407 makes two changes in the rule. First, the words ''an injury or harm allegedly caused by'' were added to clarify that the rule applies only to changes made after the occurrence that produced the damages giving rise to the action. Evidence of measures taken by the defendant prior to the ''event'' causing ''injury or harm'' do not fall within the exclusionary scope of Rule 407 even if they occurred after the manufacture or design of the product. See *Chase v. General Motors Corp.*, 856 F.2d 17, 21–22 (4th Cir. 1988).

Second, Rule 407 has been amended to provide that evidence of subsequent remedial measures may not be used to prove ''a defect in a product or its design, or that a warning or instruction should have accompanied a product.'' This amendment adopts the view of a majority of the circuits that have interpreted Rule 407 to apply to products liability actions. See *Raymond v. Raymond Corp.*, 938 F.2d 1518, 1522 (1st Cir. 1991); *In re Joint Eastern District and Southern District Asbestos Litigation v. Armstrong World Industries, Inc.*, 995 F.2d 343 (2d Cir. 1993); *Cann v. Ford Motor Co.*, 658 F.2d 54, 60 (2d Cir. 1981), *cert. denied*, 456 U.S. 960 (1982); *Kelly v. Crown Equipment Co.*, 970 F.2d 1273, 1275 (3d Cir. 1992); *Werner v. Upjohn, Inc.*, 628 F.2d 848 (4th Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981); *Grenada Steel Industries, Inc. v. Alabama Oxygen Co., Inc.*, 695 F.2d 883 (5th Cir. 1983); *Bauman v. Volkswagenwerk Aktiengesellschaft*, 621 F.2d 230, 232 (6th Cir. 1980); *Flaminio v. Honda Motor Company, Ltd.*, 733 F.2d 463, 469 (7th Cir. 1984); *Gauthier v. AMF, Inc.*, 788 F.2d 634, 636–37 (9th Cir. 1986).

Although this amendment adopts a uniform federal rule, it should be noted that evidence of subsequent remedial measures may be admissible pursuant to the second sentence of Rule 407. Evidence of subsequent measures that is not barred by Rule 407 may still be subject to exclusion on Rule 403 grounds when the dangers of prejudice or confusion substantially outweigh the probative value of the evidence.

GAP Report on Rule 407. The words ''injury or harm'' were substituted for the word ''event'' in line 3. The stylization changes in the second sentence of the rule were eliminated. The words ''causing 'injury or harm' '' were added to the Committee Note.

Rule 408. Compromise and Offers to Compromise

(a) PROHIBITED USES. Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:

(1) furnishing or offering or promising to furnish—or accepting or offering or promising to accept—a valuable consideration in compromising or attempting to compromise the claim; and

(2) conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.

(b) PERMITTED USES. This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1933; Apr. 12, 2006, eff. Dec. 1, 2006.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

As a matter of general agreement, evidence of an offer-to compromise a claim is not receivable in evidence as an admission of, as the case may be, the validity or invalidity of the claim. As with evidence of subsequent remedial measures, dealt with in Rule 407, exclusion may be based on two grounds. (1) The evidence is irrelevant, since the offer may be motivated by a desire for peace rather than from any concession of weakness of position. The validity of this position will vary as the amount of the offer varies in relation to the size of the claim and may also be influenced by other circumstances. (2) a more consistently impressive ground is promotion of the public policy favoring the compromise and settlement of disputes. McCormick §§76, 251. While the rule is ordinarily phrased in terms of offers of compromise, it is apparent that a similar attitude must be taken with respect to completed compromises when offered against a party thereto. This latter situation will not, of course, ordinarily occur except when a party to the present litigation has compromised with a third person.

The same policy underlies the provision of Rule 68 of the Federal Rules of Civil Procedure that evidence of an unaccepted offer of judgment is not admissible except in a proceeding to determine costs.

The practical value of the common law rule has been greatly diminished by its inapplicability to admissions of fact, even though made in the course of compromise negotiations, unless hypothetical, stated to be ''without prejudice,'' or so connected with the offer as to be inseparable from it. McCormick §251, pp. 540–541. An inevitable effect is to inhibit freedom of communication with respect to compromise, even among lawyers. Another effect is the generation of controversy over whether a given statement falls within or without the protected area. These considerations account for the expansion of the rule herewith to include evidence of conduct or statements made in compromise negotiations, as well as the offer or completed compromise itself. For similar provisions see California Evidence Code §§1152, 1154.

The policy considerations which underlie the rule do not come into play when the effort is to induce a creditor to settle an admittedly due amount for a lessor sum. McCormick §251, p. 540. Hence the rule requires that the claim be disputed as to either validity or amount.

The final sentence of the rule serves to point out some limitations upon its applicability. Since the rule excludes only when the purpose is proving the validity or invalidity of the claim or its amount, an offer for another purpose is not within the rule. The illustrative situations mentioned in the rule are supported by the authorities. As to proving bias or prejudice of a witness, see Annot., 161 A.L.R. 395, *contra, Fenberg v. Rosenthal*, 348 Ill. App. 510, 109 N.E.2d 402 (1952), and negativing a contention of lack of due diligence in presenting a claim, 4 Wigmore §1061. An effort to ''buy off'' the prosecution or a prosecuting witness in a criminal case is not within the policy of the rule of exclusion. McCormick §251, p. 542.

For other rules of similar import, see Uniform Rules 52 and 53; California Evidence Code §1152, 1154; Kansas Code of Civil Procedure §§60–452, 60–453; New Jersey Evidence Rules 52 and 53.

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 93–650

Under existing federal law evidence of conduct and statements made in compromise negotiations is admissible in subsequent litigation between the parties. The second sentence of Rule 408 as submitted by the Supreme Court proposed to reverse that doctrine in the interest of further promoting non-judicial settlement of disputes. Some agencies of government expressed the view that the Court formulation was likely to impede rather than assist efforts to achieve settlement of disputes. For one thing, it is not always easy to tell when compromise negotiations begin, and informal dealings end. Also, parties dealing with government agencies would be reluctant to furnish factual information at preliminary meetings; they would wait until ''compromise negotiations'' began and thus hopefully effect an immunity for themselves with respect to the evidence supplied. In light of these considerations, the Committee recast the Rule so that admissions of liability or opinions given during compromise negotiations continue inadmissible, but evidence of unqualified factual assertions is admissible. The latter aspect of the Rule is drafted, however, so as to preserve other possible objections to the introduction of such evidence. The Committee intends no modification of current law whereby a party may protect himself from future use of his statements by couching them in hypothetical conditional form.

NOTES OF COMMITTEE ON THE JUDICIARY, SENATE REPORT NO. 93–1277

This rule as reported makes evidence of settlement or attempted settlement of a disputed claim inadmissible when offered as an admission of liability or the amount of liability. The purpose of this rule is to encourage settlements which would be discouraged if such evidence were admissible.

Under present law, in most jurisdictions, statements of fact made during settlement negotiations, however, are excepted from this ban and are admissible. The only escape from admissibility of statements of fact made in a settlement negotiation is if the declarant or his representative expressly states that the statement is hypothetical in nature or is made without prejudice. Rule 408 as submitted by the Court reversed the traditional rule. It would have brought statements of fact within the ban and made them, as well as an offer of settlement, inadmissible.

The House amended the rule and would continue to make evidence of facts disclosed during compromise negotiations admissible. It thus reverted to the traditional rule. The House committee report states that the committee intends to preserve current law under which a party may protect himself by couching his statements in hypothetical form [See House Report No. 93–650 above]. The real impact of this amendment, however, is to deprive the rule of much of its salutary effect. The exception for factual admissions was believed by the Advisory Committee to hamper free communication between parties and thus to constitute an unjustifiable restraint upon efforts to negotiate settlements—the encouragement of which is the purpose of the rule. Further, by protecting hypothetically phrased statements, it constituted a preference for the sophisticated, and a trap for the unwary.

Three States which had adopted rules of evidence patterned after the proposed rules prescribed by the Supreme Court opted for versions of rule 408 identical with the Supreme Court draft with respect to the inadmissibility of conduct or statements made in compromise negotiations. [Nev. Rev. Stats. §48.105; N. Mex. Stats. Anno. (1973 Supp.) §20–4–408; West's Wis. Stats. Anno. (1973 Supp.) §904.08].

For these reasons, the committee has deleted the House amendment and restored the rule to the version submitted by the Supreme Court with one additional amendment. This amendment adds a sentence to insure that evidence, such as documents, is not rendered inadmissible merely because it is presented in the course of compromise negotiations if the evidence is otherwise discoverable. A party should not be able to immunize from admissibility documents otherwise discoverable merely by offering them in a compromise negotiation.

NOTES OF CONFERENCE COMMITTEE, HOUSE REPORT NO. 93–1597

The House bill provides that evidence of admissions of liability or opinions given during compromise negotiations is not admissible, but that evidence of facts disclosed during compromise negotiations is not inadmissible by virtue of having been first disclosed in the compromise negotiations. The Senate amendment provides that evidence of conduct or statements made in compromise negotiations is not admissible. The Senate amendment also provides that the rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.

The House bill was drafted to meet the objection of executive agencies that under the rule as proposed by the Supreme Court, a party could present a fact during compromise negotiations and thereby prevent an opposing party from offering evidence of that fact at trial even though such evidence was obtained from independent sources. The Senate amendment expressly precludes this result.

The Conference adopts the Senate amendment.

COMMITTEE NOTES ON RULES—2006 AMENDMENT

Rule 408 has been amended to settle some questions in the courts about the scope of the Rule, and to make it easier to read. First, the amendment provides that Rule 408 does not prohibit the introduction in a criminal case of statements or conduct during compromise negotiations regarding a civil dispute by a government regulatory, investigative, or enforcement agency. *See, e.g., United States v. Prewitt*, 34 F.3d 436, 439 (7th Cir. 1994) (admissions of fault made in compromise of a civil securities enforcement action were admissible against the accused in a subsequent criminal action for mail fraud). Where an individual makes a statement in the presence of government agents, its subsequent admission in a criminal case should not be unexpected. The individual can seek to protect against subsequent disclosure through negotiation and agreement with the civil regulator or an attorney for the government.

Statements made in compromise negotiations of a claim by a government agency may be excluded in criminal cases where the circumstances so warrant under Rule 403. For example, if an individual was unrepresented at the time the statement was made in a civil enforcement proceeding, its probative value in a subsequent criminal case may be minimal. But there is no absolute exclusion imposed by Rule 408.

In contrast, statements made during compromise negotiations of other disputed claims are not admissible in subsequent criminal litigation, when offered to prove liability for, invalidity of, or amount of those claims. When private parties enter into compromise negotiations they cannot protect against the subsequent use of statements in criminal cases by way of private ordering. The inability to guarantee protection against subsequent use could lead to parties refusing to admit fault, even if by doing so they could favorably settle the private matter. Such a chill on settlement negotiations would be contrary to the policy of Rule 408.

The amendment distinguishes statements and conduct (such as a direct admission of fault) made in compromise negotiations of a civil claim by a government agency from an offer or acceptance of a compromise of such a claim. An offer or acceptance of a compromise of any civil claim is excluded under the Rule if offered

against the defendant as an admission of fault. In that case, the predicate for the evidence would be that the defendant, by compromising with the government agency, has admitted the validity and amount of the civil claim, and that this admission has sufficient probative value to be considered as evidence of guilt. But unlike a direct statement of fault, an offer or acceptance of a compromise is not very probative of the defendant's guilt. Moreover, admitting such an offer or acceptance could deter a defendant from settling a civil regulatory action, for fear of evidentiary use in a subsequent criminal action. *See, e.g.*, Fishman, *Jones on Evidence, Civil and Criminal*, §22:16 at 199, n.83 (7th ed. 2000) (''A target of a potential criminal investigation may be unwilling to settle civil claims against him if by doing so he increases the risk of prosecution and conviction.'').

The amendment retains the language of the original rule that bars compromise evidence only when offered as evidence of the ''validity,'' ''invalidity,'' or ''amount'' of the disputed claim. The intent is to retain the extensive case law finding Rule 408 inapplicable when compromise evidence is offered for a purpose other than to prove the validity, invalidity, or amount of a disputed claim. *See, e.g., Athey v. Farmers Ins. Exchange*, 234 F.3d 357 (8th Cir. 2000) (evidence of settlement offer by insurer was properly admitted to prove insurer's bad faith); *Coakley & Williams v. Structural Concrete Equip.*, 973 F.2d 349 (4th Cir. 1992) (evidence of settlement is not precluded by Rule 408 where offered to prove a party's intent with respect to the scope of a release); *Cates v. Morgan Portable Bldg. Corp.*, 708 F.2d 683 (7th Cir. 1985) (Rule 408 does not bar evidence of a settlement when offered to prove a breach of the settlement agreement, as the purpose of the evidence is to prove the fact of settlement as opposed to the validity or amount of the underlying claim); *Uforma/Shelby Bus. Forms, Inc. v. NLRB*, 111 F.3d 1284 (6th Cir. 1997) (threats made in settlement negotiations were admissible; Rule 408 is inapplicable when the claim is based upon a wrong that is committed during the course of settlement negotiations). So for example, Rule 408 is inapplicable if offered to show that a party made fraudulent statements in order to settle a litigation.

The amendment does not affect the case law providing that Rule 408 is inapplicable when evidence of the compromise is offered to prove notice. *See, e.g., United States v. Austin*, 54 F.3d 394 (7th Cir. 1995) (no error to admit evidence of the defendant's settlement with the FTC, because it was offered to prove that the defendant was on notice that subsequent similar conduct was wrongful); *Spell v. McDaniel*, 824 F.2d 1380 (4th Cir. 1987) (in a civil rights action alleging that an officer used excessive force, a prior settlement by the City of another brutality claim was properly admitted to prove that the City was on notice of aggressive behavior by police officers).

The amendment prohibits the use of statements made in settlement negotiations when offered to impeach by prior inconsistent statement or through contradiction. Such broad impeachment would tend to swallow the exclusionary rule and would impair the public policy of promoting settlements. *See McCormick on Evidence* at 186 (5th ed. 1999) (''Use of statements made in compromise negotiations to impeach the testimony of a party, which is not specifically treated in Rule 408, is fraught with danger of misuse of the statements to prove liability, threatens frank interchange of information during negotiations, and generally should not be permitted.''). *See also EEOC v. Gear Petroleum, Inc.*, 948 F.2d 1542 (10th Cir. 1991) (letter sent as part of settlement negotiation cannot be used to impeach defense witnesses by way of contradiction or prior inconsistent statement; such broad impeachment would undermine the policy of encouraging uninhibited settlement negotiations).

The amendment makes clear that Rule 408 excludes compromise evidence even when a party seeks to admit its own settlement offer or statements made in settlement negotiations. If a party were to reveal its own statement or offer, this could itself reveal the fact that the adversary entered into settlement negotiations. The protections of Rule 408 cannot be waived unilaterally because the Rule, by definition, protects both parties from having the fact of negotiation disclosed to the jury. Moreover, proof of statements and offers made in settlement would often have to be made through the testimony of attorneys, leading to the risks and costs of disqualification. *See generally Pierce v. F.R. Tripler & Co.*, 955 F.2d 820, 828 (2d Cir. 1992) (settlement offers are excluded under Rule 408 even if it is the offeror who seeks to admit them; noting that the ''widespread admissibility of the substance of settlement offers could bring with it a rash of motions for disqualification of a party's chosen counsel who would likely become a witness at trial'').

The sentence of the Rule referring to evidence ''otherwise discoverable'' has been deleted as superfluous. *See, e.g.*, Advisory Committee Note to Maine Rule of Evidence 408 (refusing to include the sentence in the Maine version of Rule 408 and noting that the sentence ''seems to state what the law would be if it were omitted''); Advisory Committee Note to Wyoming Rule of Evidence 408 (refusing to include the sentence in Wyoming Rule 408 on the ground that it was ''superfluous''). The intent of the sentence was to prevent a party from trying to immunize admissible information, such as a pre-existing document, through the pretense of disclosing it during compromise negotiations. *See Ramada Development Co. v. Rauch*, 644 F.2d 1097 (5th Cir. 1981). But even without the sentence, the Rule cannot be read to protect pre-existing information simply because it was presented to the adversary in compromise negotiations.

Changes Made After Publication and Comments. In response to public comment, the proposed amendment was changed to provide that statements and conduct during settlement negotiations are to be admissible in subsequent criminal litigation only when made during settlement discussions of a claim brought by a government regulatory agency. Stylistic changes were made in accordance with suggestions from the Style Subcommittee of the Standing Committee. The Committee Note was altered to accord with the change in the text, and also to clarify that fraudulent statements made during settlement negotiations are not protected by the Rule.

Rule 409. Payment of Medical and Similar Expenses

Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1933.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The considerations underlying this rule parallel those underlying Rules 407 and 408, which deal respectively with subsequent remedial measures and offers of compromise. As stated in Annot., 20 A.L.R.2d 291, 293:

''[G]enerally, evidence of payment of medical, hospital, or similar expenses of an injured party by the opposing party, is not admissible, the reason often given being that such payment or offer is usually made from humane impulses and not from an admission of liability, and that to hold otherwise would tend to discourage assistance to the injured person.''

Contrary to Rule 408, dealing with offers of compromise, the present rule does not extend to conduct or statements not a part of the act of furnishing or offering or promising to pay. This difference in treatment arises from fundamental differences in nature. Communication is essential if compromises are to be effected, and consequently broad protection of statements is needed. This is not so in cases of payments or offers or promises to pay medical expenses, where factual statements may be expected to be incidental in nature.

For rules on the same subject, but phrased in terms of ''humanitarian motives,'' see Uniform Rule 52; California Evidence Code §1152; Kansas Code of Civil Procedure §60–452; New Jersey Evidence Rule 52.

Rule 410. Inadmissibility of Pleas, Plea Discussions, and Related Statements

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(1) a plea of guilty which was later withdrawn;

(2) a plea of nolo contendere;

(3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or

(4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1933; Pub. L. 94–149, §1(9), Dec. 12, 1975, 89 Stat. 805; Apr. 30, 1979, eff. Dec. 1, 1980.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

Withdrawn pleas of guilty were held inadmissible in federal prosecutions in *Kercheval v. United States*, 274 U.S. 220, 47 S.Ct. 582, 71 L.Ed. 1009 (1927). The Court pointed out that to admit the withdrawn plea would effectively set at naught the allowance of withdrawal and place the accused in a dilemma utterly inconsistent with the decision to award him a trial. The New York Court of Appeals, in *People v. Spitaleri*, 9 N.Y.2d 168, 212 N.Y.S.2d 53, 173 N.E.2d 35 (1961), reexamined and overturned its earlier decisions which had allowed admission. In addition to the reasons set forth in Kercheval, which was quoted at length, the court pointed out that the effect of admitting the plea was to compel defendant to take the stand by way of explanation and to open the way for the prosecution to call the lawyer who had represented him at the time of entering the plea. State court decisions for and against admissibility are collected in Annot., 86 A.L.R.2d 326.

Pleas of *nolo contendere* are recognized by Rule 11 of the Rules of Criminal Procedure, although the law of numerous States is to the contrary. The present rule gives effect to the principal traditional characteristic of the *nolo* plea, i.e., avoiding the admission of guilt which is inherent in pleas of guilty. This position is consistent with the construction of Section 5 of the Clayton Act, 15 U.S.C. §16(a), recognizing the inconclusive and compromise nature of judgments based on *nolo* pleas. *General Electric Co. v. City of San Antonio*, 334 F.2d 480 (5th Cir. 1964); *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.*, 323 F.2d 412 (7th Cir. 1963), cert. denied 376 U.S. 939, 84 S.Ct. 794, 11 L.Ed.2d 659; *Armco Steel Corp. v. North Dakota*, 376 F.2d 206 (8th Cir. 1967); *City of Burbank v. General Electric Co.*, 329 F.2d 825 (9th Cir. 1964). See also state court decisions in Annot., 18 A.L.R.2d 1287, 1314.

Exclusion of offers to plead guilty or *nolo* has as its purpose the promotion of disposition of criminal cases by compromise. As pointed out in McCormick §251, p. 543

''Effective criminal law administration in many localities would hardly be possible if a large proportion of the charges were not disposed of by such compromises.''

See also *People v. Hamilton*, 60 Cal.2d 105, 32 Cal.Rptr. 4, 383 P.2d 412 (1963), discussing legislation designed to achieve this result. As with compromise offers generally, Rule 408, free communication is needed, and security against having an offer of compromise or related statement admitted in evidence effectively encourages it.

Limiting the exclusionary rule to use against the accused is consistent with the purpose of the rule, since the possibility of use for or against other persons will not impair the effectiveness of withdrawing pleas or the freedom of discussion which the rule is designed to foster. See A.B.A. Standards Relating to Pleas of Guilty §2.2 (1968). See also the narrower provisions of New Jersey Evidence Rule 52(2) and the unlimited exclusion provided in California Evidence Code §1153.

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 93–650

The Committee added the phrase ''Except as otherwise provided by Act of Congress'' to Rule 410 as submitted by the Court in order to preserve particular congressional policy judgments as to the effect of a plea of guilty or of nolo contendere. See 15 U.S.C. 16(a). The Committee intends that its amendment refers to both present statutes and statutes subsequently enacted.

NOTES OF THE COMMITTEE ON THE JUDICIARY, SENATE REPORT NO. 93–1277

As adopted by the House, rule 410 would make inadmissible pleas of guilty or nolo contendere subsequently withdrawn as well as offers to make such pleas. Such a rule is clearly justified as a means of encouraging pleading. However, the House rule would then go on to render inadmissible for any purpose statements made in connection with these pleas or offers as well.

The committee finds this aspect of the House rule unjustified. Of course, in certain circumstances such statements should be excluded. If, for example, a plea is vitiated because of coercion, statements made in connection with the plea may also have been coerced and should be inadmissible on that basis. In other cases, however, voluntary statements of an accused made in court on the record, in connection with a plea, and determined by a court to be reliable should be admissible even though the plea is subsequently withdrawn. This is particularly true in those cases where, if the House rule were in effect, a defendant would be able to contradict his previous statements and thereby lie with impunity [See *Harris v. New York*, 401 U.S. 222 (1971)]. To prevent such an injustice, the rule has been modified to permit the use of such statements for the limited purposes of impeachment and in subsequent perjury or false statement prosecutions.

NOTES OF CONFERENCE COMMITTEE, HOUSE REPORT NO. 93–1597

The House bill provides that evidence of a guilty or nolo contendere plea, of an offer of either plea, or of statements made in connection with such pleas or offers of such pleas, is inadmissible in any civil or criminal action, case or proceeding against the person making such plea or offer. The Senate amendment makes the rule inapplicable to a voluntary and reliable statement made in court on the record where the statement is offered in a subsequent prosecution of the declarant for perjury or false statement.

The issues raised by Rule 410 are also raised by proposed Rule 11(e)(6) of the Federal Rules of Criminal Procedure presently pending before Congress. This proposed rule, which deals with the admissibility of pleas

of guilty or nolo contendere, offers to make such pleas, and statements made in connection with such pleas, was promulgated by the Supreme Court on April 22, 1974, and in the absence of congressional action will become effective on August 1, 1975. The conferees intend to make no change in the presently-existing case law until that date, leaving the courts free to develop rules in this area on a case-by-case basis.

The Conferees further determined that the issues presented by the use of guilty and nolo contendere pleas, offers of such pleas, and statements made in connection with such pleas or offers, can be explored in greater detail during Congressional consideration of Rule 11(e)(6) of the Federal Rules of Criminal Procedure. The Conferees believe, therefore, that it is best to defer its effective date until August 1, 1975. The Conferees intend that Rule 410 would be superseded by any subsequent Federal Rule of Criminal Procedure or Act of Congress with which it is inconsistent, if the Federal Rule of Criminal Procedure or Act of Congress takes effect or becomes law after the date of the enactment of the act establishing the rules of evidence.

The conference adopts the Senate amendment with an amendment that expresses the above intentions.

NOTES OF ADVISORY COMMITTEE ON RULES—1979 AMENDMENT

Present rule 410 conforms to rule 11(e)(6) of the Federal Rules of Criminal Procedure. A proposed amendment to rule 11(e)(6) would clarify the circumstances in which pleas, plea discussions and related statements are inadmissible in evidence; see Advisory Committee Note thereto. The amendment proposed above would make comparable changes in rule 410.

AMENDMENT BY PUBLIC LAW

1975—Pub. L. 94–149 substituted heading reading ''Inadmissibility of Pleas, Offers of Pleas, and Related Statements'' for ''Offer to Plead Guilty; Nolo Contendere; Withdrawn Pleas of Guilty''; substituted in first sentence ''provided in this rule'' for ''provided by Act of Congress'', inserted therein '', and relevant to,'' following 'in connection with'', and deleted therefrom ''action, case, or'' preceding ''proceeding''; added second sentence relating to admissibility of statements in criminal proceedings for perjury or false statements; deleted former second sentence providing that ''This rule shall not apply to the introduction of voluntary and reliable statements made in court on the record in connection with any of the foregoing pleas or offers where offered for impeachment purposes or in a subsequent prosecution of the declarant for perjury or false statement.''; and deleted former second par. providing that ''This rule shall not take effect until August 1, 1975, and shall be superseded by any amendment to the Federal Rules of Criminal Procedure which is inconsistent with this rule, and which takes effect after the date of the enactment of the Act establishing these Federal Rules of Evidence.''

EFFECTIVE DATE OF 1979 AMENDMENT

Pub. L. 96–42, July 31, 1979, 93 Stat. 326, provided in part that the effective date of the amendment transmitted to Congress on Apr. 30, 1979, be extended from Aug. 1, 1979, to Dec. 1, 1980.

Rule 411. Liability Insurance

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1933; Mar. 2, 1987, eff. Oct. 1, 1987.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The courts have with substantial unanimity rejected evidence of liability insurance for the purpose of proving fault, and absence of liability insurance as proof of lack of fault. At best the inference of fault from the fact of insurance coverage is a tenuous one, as is its converse. More important, no doubt, has been the feeling that knowledge of the presence or absence of liability insurance would induce juries to decide cases on improper grounds. McCormick §168; Annot., 4 A.L.R.2d 761. The rule is drafted in broad terms so as to include contributory negligence or other fault of a plaintiff as well as fault of a defendant.

The second sentence points out the limits of the rule, using well established illustrations. *Id.*

For similar rules see Uniform Rule 54; California Evidence Code §1155; Kansas Code of Civil Procedure §60–454; New Jersey Evidence Rule 54.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendment is technical. No substantive change is intended.

Rule 412. Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition

(a) EVIDENCE GENERALLY INADMISSIBLE. The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.

(2) Evidence offered to prove any alleged victim's sexual predisposition.

(b) EXCEPTIONS.

(1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:

(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence;

(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

(C) evidence the exclusion of which would violate the constitutional rights of the defendant.

(2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.

(c) PROCEDURE TO DETERMINE ADMISSIBILITY.

(1) A party intending to offer evidence under subdivision (b) must—

(A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and

(B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

(Added Pub. L. 95–540, §2(a), Oct. 28, 1978, 92 Stat. 2046; amended Pub. L. 100–690, title VII, §7046(a), Nov. 18, 1988, 102 Stat. 4400; Apr. 29, 1994, eff. Dec. 1, 1994; Pub. L. 103–322, title IV, §40141(b), Sept. 13, 1994, 108 Stat. 1919.)

NOTES OF ADVISORY COMMITTEE ON RULES—1994 AMENDMENT

Rule 412 has been revised to diminish some of the confusion engendered by the original rule and to expand the protection afforded alleged victims of sexual misconduct. Rule 412 applies to both civil and criminal proceedings. The rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process. By affording victims protection in most instances, the rule also encourages victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders.

Rule 412 seeks to achieve these objectives by barring evidence relating to the alleged victim's sexual behavior or alleged sexual predisposition, whether offered as substantive evidence or for impeachment, except in designated circumstances in which the probative value of the evidence significantly outweighs possible harm to the victim.

The revised rule applies in all cases involving sexual misconduct without regard to whether the alleged victim or person accused is a party to the litigation. Rule 412 extends to ''pattern'' witnesses in both criminal and civil cases whose testimony about other instances of sexual misconduct by the person accused is otherwise admissible. When the case does not involve alleged sexual misconduct, evidence relating to a third-party witness' alleged sexual activities is not within the ambit of Rule 412. The witness will, however, be protected by other rules such as Rules 404 and 608, as well as Rule 403.

The terminology ''alleged victim'' is used because there will frequently be a factual dispute as to whether sexual misconduct occurred. It does not connote any requirement that the misconduct be alleged in the pleadings. Rule 412 does not, however, apply unless the person against whom the evidence is offered can reasonably be characterized as a ''victim of alleged sexual misconduct.'' When this is not the case, as for instance in a defamation action involving statements concerning sexual misconduct in which the evidence is offered to show that the alleged defamatory statements were true or did not damage the plaintiff's reputation, neither Rule 404 nor this rule will operate to bar the evidence; Rule 401 and 403 will continue to control. Rule 412 will, however, apply in a Title VII action in which the plaintiff has alleged sexual harassment.

The reference to a person ''accused'' is also used in a non-technical sense. There is no requirement that there be a criminal charge pending against the person or even that the misconduct would constitute a criminal offense. Evidence offered to prove allegedly false prior claims by the victim is not barred by Rule 412. However, this evidence is subject to the requirements of Rule 404.

Subdivision (a). As amended, Rule 412 bars evidence offered to prove the victim's sexual behavior and alleged sexual predisposition. Evidence, which might otherwise be admissible under Rules 402, 404(b), 405, 607, 608, 609, or some other evidence rule, must be excluded if Rule 412 so requires. The word ''other'' is used to suggest some flexibility in admitting evidence ''intrinsic'' to the alleged sexual misconduct. *Cf*. Committee Note to 1991 amendment to Rule 404(b).

Past sexual behavior connotes all activities that involve actual physical conduct, i.e. sexual intercourse and sexual contact, or that imply sexual intercourse or sexual contact. *See, e.g., United States v. Galloway*, 937 F.2d 542 (10th Cir. 1991), *cert. denied*, 113 S.Ct. 418 (1992) (use of contraceptives inadmissible since use implies sexual activity); *United States v. One Feather*, 702 F.2d 736 (8th Cir. 1983) (birth of an illegitimate child inadmissible); *State v. Carmichael*, 727 P.2d 918, 925 (Kan. 1986) (evidence of venereal disease inadmissible). In addition, the word ''behavior'' should be construed to include activities of the mind, such as fantasies or dreams. *See* 23 C. Wright & K. Graham, Jr., *Federal Practice and Procedure*, §5384 at p. 548 (1980) (''While there may be some doubt under statutes that require 'conduct,' it would seem that the language of Rule 412 is broad enough to encompass the behavior of the mind.'').

The rule has been amended to also exclude all other evidence relating to an alleged victim of sexual misconduct that is offered to prove a sexual predisposition. This amendment is designed to exclude evidence that does not directly refer to sexual activities or thoughts but that the proponent believes may have a sexual connotation for the factfinder. Admission of such evidence would contravene Rule 412's objectives of shielding the alleged victim from potential embarrassment and safeguarding the victim against stereotypical thinking. Consequently, unless the (b)(2) exception is satisfied, evidence such as that relating to the alleged victim's mode of dress, speech, or life-style will not be admissible.

The introductory phrase in subdivision (a) was deleted because it lacked clarity and contained no explicit reference to the other provisions of law that were intended to be overridden. The conditional clause, ''except as provided in subdivisions (b) and (c)'' is intended to make clear that evidence of the types described in subdivision (a) is admissible only under the strictures of those sections.

The reason for extending the rule to all criminal cases is obvious. The strong social policy of protecting a victim's privacy and encouraging victims to come forward to report criminal acts is not confined to cases that involve a charge of sexual assault. The need to protect the victim is equally great when a defendant is charged with kidnapping, and evidence is offered, either to prove motive or as background, that the defendant sexually assaulted the victim.

The reason for extending Rule 412 to civil cases is equally obvious. The need to protect alleged victims against invasions of privacy, potential embarrassment, and unwarranted sexual stereotyping, and the wish to encourage victims to come forward when they have been sexually molested do not disappear because the context has shifted from a criminal prosecution to a claim for damages or injunctive relief. There is a strong social policy in not only punishing those who engage in sexual misconduct, but in also providing relief to the victim. Thus, Rule 412 applies in any civil case in which a person claims to be the victim of sexual misconduct, such as actions for sexual battery or sexual harassment.

Subdivision (b). Subdivision (b) spells out the specific circumstances in which some evidence may be admissible that would otherwise be barred by the general rule expressed in subdivision (a). As amended, Rule 412 will be virtually unchanged in criminal cases, but will provide protection to any person alleged to be a victim of sexual misconduct regardless of the charge actually brought against an accused. A new exception has been added for civil cases.

In a criminal case, evidence may be admitted under subdivision (b)(1) pursuant to three possible exceptions,

provided the evidence also satisfies other requirements for admissibility specified in the Federal Rules of Evidence, including Rule 403. Subdivisions (b)(1)(A) and (b)(1)(B) require proof in the form of specific instances of sexual behavior in recognition of the limited probative value and dubious reliability of evidence of reputation or evidence in the form of an opinion.

Under subdivision (b)(1)(A), evidence of specific instances of sexual behavior with persons other than the person whose sexual misconduct is alleged may be admissible if it is offered to prove that another person was the source of semen, injury or other physical evidence. Where the prosecution has directly or indirectly asserted that the physical evidence originated with the accused, the defendant must be afforded an opportunity to prove that another person was responsible. *See United States v. Begay*, 937 F.2d 515, 523 n. 10 (10th Cir. 1991). Evidence offered for the specific purpose identified in this subdivision may still be excluded if it does not satisfy Rules 401 or 403. *See, e.g., United States v. Azure*, 845 F.2d 1503, 1505–06 (8th Cir. 1988) (10 year old victim's injuries indicated recent use of force; court excluded evidence of consensual sexual activities with witness who testified at in camera hearing that he had never hurt victim and failed to establish recent activities).

Under the exception in subdivision (b)(1)(B), evidence of specific instances of sexual behavior with respect to the person whose sexual misconduct is alleged is admissible if offered to prove consent, or offered by the prosecution. Admissible pursuant to this exception might be evidence of prior instances of sexual activities between the alleged victim and the accused, as well as statements in which the alleged victim expressed an intent to engage in sexual intercourse with the accused, or voiced sexual fantasies involving the specific accused. In a prosection [sic] for child sexual abuse, for example, evidence of uncharged sexual activity between the accused and the alleged victim offered by the prosecution may be admissible pursuant to Rule 404(b) to show a pattern of behavior. Evidence relating to the victim's alleged sexual predisposition is not admissible pursuant to this exception.

Under subdivision (b)(1)(C), evidence of specific instances of conduct may not be excluded if the result would be to deny a criminal defendant the protections afforded by the Constitution. For example, statements in which the victim has expressed an intent to have sex with the first person encountered on a particular occasion might not be excluded without violating the due process right of a rape defendant seeking to prove consent. Recognition of this basic principle was expressed in subdivision (b)(1) of the original rule. The United States Supreme Court has recognized that in various circumstances a defendant may have a right to introduce evidence otherwise precluded by an evidence rule under the Confrontation Clause. *See, e.g., Olden v. Kentucky*, 488 U.S. 227 (1988) (defendant in rape cases had right to inquire into alleged victim's cohabitation with another man to show bias).

Subdivision (b)(2) governs the admissibility of otherwise proscribed evidence in civil cases. It employs a balancing test rather than the specific exceptions stated in subdivision (b)(1) in recognition of the difficulty of foreseeing future developments in the law. Greater flexibility is needed to accommodate evolving causes of action such as claims for sexual harassment.

The balancing test requires the proponent of the evidence, whether plaintiff or defendant, to convince the court that the probative value of the proffered evidence "substantially outweighs the danger of harm to any victim and of unfair prejudice of any party." This test for admitting evidence offered to prove sexual behavior or sexual propensity in civil cases differs in three respects from the general rule governing admissibility set forth in Rule 403. First, it reverses the usual procedure spelled out in Rule 403 by shifting the burden to the proponent to demonstrate admissibility rather than making the opponent justify exclusion of the evidence. Second, the standard expressed in subdivision (b)(2) is more stringent than in the original rule; it raises the threshold for admission by requiring that the probative value of the evidence *substantially* outweigh the specified dangers. Finally, the Rule 412 test puts "harm to the victim" on the scale in addition to prejudice to the parties.

Evidence of reputation may be received in a civil case only if the alleged victim has put his or her reputation into controversy. The victim may do so without making a specific allegation in a pleading. *Cf.* Fed.R.Civ.P. 35(a).

Subdivision (c). Amended subdivision (c) is more concise and understandable than the subdivision it replaces. The requirement of a motion before trial is continued in the amended rule, as is the provision that a late motion may be permitted for good cause shown. In deciding whether to permit late filing, the court may take into account the conditions previously included in the rule: namely whether the evidence is newly discovered and could not have been obtained earlier through the existence of due diligence, and whether the issue to which such evidence relates has newly arisen in the case. The rule recognizes that in some instances the circumstances that justify an application to introduce evidence otherwise barred by Rule 412 will not become apparent until trial.

The amended rule provides that before admitting evidence that falls within the prohibition of Rule 412(a), the court must hold a hearing in camera at which the alleged victim and any party must be afforded the right to be present and an opportunity to be heard. All papers connected with the motion and any record of a hearing on the motion must be kept and remain under seal during the course of trial and appellate proceedings unless otherwise ordered. This is to assure that the privacy of the alleged victim is preserved in all cases in which the court rules that proffered evidence is not admissible, and in which the hearing refers to matters that are not received, or are received in another form.

The procedures set forth in subdivision (c) do not apply to discovery of a victim's past sexual conduct or predisposition in civil cases, which will be continued to be governed by Fed.R.Civ.P. 26. In order not to undermine the rationale of Rule 412, however, courts should enter appropriate orders pursuant to Fed.R.Civ.P. 26(c) to protect the victim against unwarranted inquiries and to ensure confidentiality. Courts should presumptively issue protective orders barring discovery unless the party seeking discovery makes a showing that the evidence sought to be discovered would be relevant under the facts and theories of the particular case, and cannot be obtained except through discovery. In an action for sexual harassment, for instance, while some evidence of the alleged victim's sexual behavior and/or predisposition in the workplace may perhaps be relevant, non-work place conduct will usually be irrelevant. *Cf. Burns v. McGregor Electronic Industries, Inc.*, 989 F.2d 959, 962–63 (8th Cir. 1993) (posing for a nude magazine outside work hours is irrelevant to issue of unwelcomeness of sexual advances at work). Confidentiality orders should be presumptively granted as well.

One substantive change made in subdivision (c) is the elimination of the following sentence: "Notwithstanding subdivision (b) of Rule 104, if the relevancy of the evidence which the accused seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the hearing in chambers or at a subsequent hearing in chambers scheduled for such purpose, shall accept evidence on the issue of whether such condition of fact is fulfilled and shall determine such issue." On its face, this language would appear to authorize a trial judge to exclude evidence of past sexual conduct between an alleged victim and an accused or a defendant in a civil case based upon the judge's belief that such past acts did not occur. Such an authorization raises questions of invasion of the right to a jury trial under the Sixth and Seventh Amendments. *See* 1 S. Saltzburg & M. Martin, *Federal Rules Of Evidence Manual*, 396–97 (5th ed. 1990).

The Advisory Committee concluded that the amended rule provided adequate protection for all persons claim-

ing to be the victims of sexual misconduct, and that it was inadvisable to continue to include a provision in the rule that has been confusing and that raises substantial constitutional issues.

[The Supreme Court withheld that portion of the proposed amendment to Rule 412 transmitted to the Court by the Judicial Conference of the United States which would apply that Rule to civil cases. This Note was not revised to account for the Court's action, because the Note is the commentary of the advisory committee. The proposed amendment to Rule 412 was subsequently amended by section 40141(b) of Pub. L. 103–322. See below.]

CONGRESSIONAL MODIFICATION OF PROPOSED 1994 AMENDMENT

Section 40141(a) of Pub. L. 103–322 [set out as a note under section 2074 of this title] provided that the amendment proposed by the Supreme Court in its order of Apr. 29, 1994, affecting Rule 412 of the Federal Rules of Evidence would take effect on Dec. 1, 1994, as otherwise provided by law, and as amended by section 40141(b) of Pub. L. 103–322. See 1994 Amendment note below.

AMENDMENT BY PUBLIC LAW

1994—Pub. L. 103–322 amended rule generally. Prior to amendment, rule contained provisions relating to the relevance and admissibility of a victim's past sexual behavior in criminal sex offense cases under chapter 109A of Title 18, Crimes and Criminal Procedure.

1988—Pub. L. 100–690, §7046(a)(1), substituted ''Sex Offense'' for ''Rape'' in catchline.

Subd. (a). Pub. L. 100–690, §7046(a)(2), (3), substituted ''an offense under chapter 109A of title 18, United States Code'' for ''rape or of assault with intent to commit rate'' and ''such offense'' for ''such rape or assault''.

Subd. (b). Pub. L. 100–690, §7046(a)(2), (5), substituted ''an offense under chapter 109A of title 18, United States Code'' for ''rape or of assault with intent to commit rape'' in introductory provisions and ''such offense'' for ''rape or assault'' in subd. (b)(2)(B).

Subds. (c)(1), (d). Pub. L. 100–690, §7046(a)(4), substituted ''an offense under chapter 109A of title 18, United States Code'' for ''rape or assault with intent to commit rape''.

EFFECTIVE DATE

Section 3 of Pub. L. 95–540 provided that: ''The amendments made by this Act [enacting this rule] shall apply to trials which begin more than thirty days after the date of the enactment of this Act [Oct. 28, 1978].''

Rule 413. Evidence of Similar Crimes in Sexual Assault Cases

(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) For purposes of this rule and Rule 415, ''offense of sexual assault'' means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved—

(1) any conduct proscribed by chapter 109A of title 18, United States Code;

(2) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;

(3) contact, without consent, between the genitals or anus of the defendant and any part of another person's body;

(4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or

(5) an attempt or conspiracy to engage in conduct described in paragraphs (1)–(4).

(Added Pub. L. 103–322, title XXXII, §320935(a), Sept. 13, 1994, 108 Stat. 2135.)

EFFECTIVE DATE

Section 320935(b)–(e) of Pub. L. 103–322, as amended by Pub. L. 104–208, div. A, title I, §101(a), [title I, §120], Sept. 30, 1996, 110 Stat. 3009, 3009–25, provided that:

''(b) IMPLEMENTATION.—The amendments made by subsection (a) [enacting this rule and rules 414 and 415 of these rules] shall become effective pursuant to subsection (d).

''(c) RECOMMENDATIONS BY JUDICIAL CONFERENCE.—Not later than 150 days after the date of enactment of this Act [Sept. 13, 1994], the Judicial Conference of the United States shall transmit to Congress a report containing recommendations for amending the Federal Rules of Evidence as they affect the admission of evidence of a defendant's prior sexual assault or child molestation crimes in cases involving sexual assault and child molestation. The Rules Enabling Act [28 U.S.C. 2072] shall not apply to the recommendations made by the Judicial Conference pursuant to this section.

''(d) CONGRESSIONAL ACTION.—

''(1) If the recommendations described in subsection (c) are the same as the amendment made by subsection (a), then the amendments made by subsection (a) shall become effective 30 days after the transmittal of the recommendations.

''(2) If the recommendations described in subsection (c) are different than the amendments made by subsection (a), the amendments made by subsection (a) shall become effective 150 days after the transmittal of the recommendations unless otherwise provided by law.

''(3) If the Judicial Conference fails to comply with subsection (c), the amendments made by subsection (a) shall become effective 150 days after the date the recommendations were due under subsection (c) unless otherwise provided by law.

''(e) APPLICATION.—The amendments made by subsection (a) shall apply to proceedings commenced on or after the effective date of such amendments [July 9, 1995], including all trials commenced on or after the effective date of such amendments.''

[The Judicial Conference transmitted to Congress on Feb. 9, 1995, a report containing recommendations described in subsec. (c) that were different than the amendments made by subsec. (a). The amendments made by subsec. (a) became effective July 9, 1995.]

Rule 414. Evidence of Similar Crimes in Child Molestation Cases

(a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In a case in which the Government intends to offer evidence under this rule, the attorney

for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) For purposes of this rule and Rule 415, ''child'' means a person below the age of fourteen, and ''offense of child molestation'' means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved—

(1) any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child;

(2) any conduct proscribed by chapter 110 of title 18, United States Code;

(3) contact between any part of the defendant's body or an object and the genitals or anus of a child;

(4) contact between the genitals or anus of the defendant and any part of the body of a child;

(5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or

(6) an attempt or conspiracy to engage in conduct described in paragraphs (1)–(5).

(Added Pub. L. 103–322, title XXXII, §320935(a), Sept. 13, 1994, 108 Stat. 2136.)

EFFECTIVE DATE

Rule effective July 9, 1995, see section 320935(b)–(e) of Pub. L. 103–322, set out as a note under rule 413 of these rules.

Rule 415. Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation

(a) In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these rules.

(b) A party who intends to offer evidence under this Rule shall disclose the evidence to the party against whom it will be offered, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(Added Pub. L. 103–322, title XXXII, §320935(a), Sept. 13, 1994, 108 Stat. 2137.)

EFFECTIVE DATE

Rule effective July 9, 1995, see section 320935(b)–(e) of Pub. L. 103–322, set out as a note under rule 413 of these rules.

ARTICLE V. PRIVILEGES

Rule 501. General Rule

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1933.)

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 93–650

Article V as submitted to Congress contained thirteen Rules. Nine of those Rules defined specific nonconstitutional privileges which the federal courts must recognize (i.e. required reports, lawyer-client, psychotherapist-patient, husband-wife, communications to clergymen, political vote, trade secrets, secrets of state and other official information, and identity of informer). Another Rule provided that only those privileges set forth in Article V or in some other Act of Congress could be recognized by the federal courts. The three remaining Rules addressed collateral problems as to waiver of privilege by voluntary disclosure, privileged matter disclosed under compulsion or without opportunity to claim privilege, comment upon or inference from a claim of privilege, and jury instruction with regard thereto.

The Committee amended Article V to eliminate all of the Court's specific Rules on privileges. Instead, the Committee, through a single Rule, 501, left the law of privileges in its present state and further provided that privileges shall continue to be developed by the courts of the United States under a uniform standard applicable both in civil and criminal cases. That standard, derived from Rule 26 of the Federal Rules of Criminal Procedure, mandates the application of the principles of the common law as interpreted by the Courts of the United States in the light of reason and experience. The words ''person, government, State, or political subdivision thereof'' were added by the Committee to the lone term ''witness'' used in Rule 26 to make clear that, as under present law, not only witnesses may have privileges. The Committee also included in its amendment a proviso modeled after Rule 302 and similar to language added by the Committee to Rule 601 relating to the competency of witnesses. The proviso is designed to require the application of State privilege law in civil actions and proceedings governed by *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), a result in accord with current federal court decisions. See *Republic Gear Co. v. Borg-Warner Corp.*, 381 F.2d 551, 555–556 n.2 (2nd Cir. 1967). The Committee deemed the proviso to be necessary in the light of the Advisory Committee's view (see its note to Court [proposed] Rule 501) that this result is not mandated under *Erie*.

The rationale underlying the proviso is that federal law should not supersede that of the States in substantive areas such as privilege absent a compelling reason. The Committee believes that in civil cases in the federal courts where an element of a claim or defense is not grounded upon a federal question, there is no federal interest strong enough to justify departure from State policy. In addition, the Committee considered that the Court's proposed Article V would have

promoted forum shopping in some civil actions, depending upon differences in the privilege law applied as among the State and federal courts. The Committee's proviso, on the other hand, under which the federal courts are bound to apply the State's privilege law in actions founded upon a State-created right or defense removes the incentive to ''shop''.

NOTES OF COMMITTEE ON THE JUDICIARY, SENATE REPORT NO. 93–1277

Article V as submitted to Congress contained 13 rules. Nine of those rules defined specific nonconstitutional privileges which the Federal courts must recognize (i.e., required reports, lawyer-client, psychotherapist-patient, husband-wife, communications to clergymen, political vote, trade secrets, secrets of state and other official information, and identity of informer). Many of these rules contained controversial modifications or restrictions upon common law privileges. As noted supra, the House amended article V to eliminate all of the Court's specific rules on privileges. Through a single rule, 501, the House provided that privileges shall be governed by the principles of the common law as interpreted by the courts of the United States in the light of reason and experience (a standard derived from rule 26 of the Federal Rules of Criminal Procedure) except in the case of an element of a civil claim or defense as to which State law supplies the rule of decision, in which event state privilege law was to govern.

The committee agrees with the main thrust of the House amendment: that a federally developed common law based on modern reason and experience shall apply except where the State nature of the issues renders deference to State privilege law the wiser course, as in the usual diversity case. The committee understands that thrust of the House amendment to require that State privilege law be applied in ''diversity'' cases (actions on questions of State law between citizens of different States arising under 28 U.S.C. §1332). The language of the House amendment, however, goes beyond this in some respects, and falls short of it in others: State privilege law applies even in nondiversity. Federal question civil cases, where an issue governed by State substantive law is the object of the evidence (such issues do sometimes arise in such cases); and, in all instances where State privilege law is to be applied, e.g., on proof of a State issue in a diversity case, a close reading reveals that State privilege law is not to be applied unless the matter to be proved is an element of that state claim or defense, as distinguished from a step along the way in the proof of it.

The committee is concerned that the language used in the House amendment could be difficult to apply. It provides that ''in civil actions * * * with respect to an element of a claim or defense as to which State law supplies the rule of decision,'' State law on privilege applies. The question of what is an element of a claim or defense is likely to engender considerable litigation. If the matter in question constitutes an element of a claim, State law supplies the privilege rule; whereas if it is a mere item of proof with respect to a claim, then, even though State law might supply the rule of decision, Federal law on the privilege would apply. Further, disputes will arise as to how the rule should be applied in an antitrust action or in a tax case where the Federal statute is silent as to a particular aspect of the substantive law in question, but Federal cases had incorporated State law by reference to State law. [For a discussion of reference to State substantive law, see note on Federal Incorporation by Reference of State Law, Hart & Wechsler, The Federal Courts and the Federal System, pp. 491–494 (2d ed. 1973).] Is a claim (or defense) based on such a reference a claim or defense as to which federal or State law supplies the rule of decision?

Another problem not entirely avoidable is the complexity or difficulty the rule introduces into the trial of a Federal case containing a combination of Federal and State claims and defenses, e.g. an action involving Federal antitrust and State unfair competition claims. Two different bodies of privilege law would need to be consulted. It may even develop that the same witness-testimony might be relevant on both counts and privileged as to one but not the other. [The problems with the House formulation are discussed in Rothstein, The Proposed Amendments to the Federal Rules of Evidence, 62 Georgetown University Law Journal 125 (1973) at notes 25, 26 and 70–74 and accompanying text.]

The formulation adopted by the House is pregnant with litigious mischief. The committee has, therefore, adopted what we believe will be a clearer and more practical guideline for determining when courts should respect State rules of privilege. Basically, it provides that in criminal and Federal question civil cases, federally evolved rules on privilege should apply since it is Federal policy which is being enforced. [It is also intended that the Federal law of privileges should be applied with respect to pendant State law claims when they arise in a Federal question case.] Conversely, in diversity cases where the litigation in question turns on a substantive question of State law, and is brought in the Federal courts because the parties reside in different States, the committee believes it is clear that State rules of privilege should apply unless the proof is directed at a claim or defense for which Federal law supplies the rule of decision (a situation which would not commonly arise.) [While such a situation might require use of two bodies of privilege law, federal and state, in the same case, nevertheless the occasions on which this would be required are considerably reduced as compared with the House version, and confined to situations where the Federal and State interests are such as to justify application of neither privilege law to the case as a whole. If the rule proposed here results in two conflicting bodies of privilege law applying to the same piece of evidence in the same case, it is contemplated that the rule favoring reception of the evidence should be applied. This policy is based on the present rule 43(a) of the Federal Rules of Civil Procedure which provides:

In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made.] It is intended that the State rules of privilege should apply equally in original diversity actions and diversity actions removed under 28 U.S.C. §1441(b).

Two other comments on the privilege rule should be made. The committee has received a considerable volume of correspondence from psychiatric organizations and psychiatrists concerning the deletion of rule 504 of the rule submitted by the Supreme Court. It should be clearly understood that, in approving this general rule as to privileges, the action of Congress should not be understood as disapproving any recognition of a psychiatrist-patient, or husband-wife, or any other of the enumerated privileges contained in the Supreme Court rules. Rather, our action should be understood as reflecting the view that the recognition of a privilege based on a confidential relationship and other privileges should be determined on a case-by-case basis.

Further, we would understand that the prohibition against spouses testifying against each other is considered a rule of privilege and covered by this rule and not by rule 601 of the competency of witnesses.

NOTES OF CONFERENCE COMMITTEE, HOUSE REPORT NO. 93–1597

Rule 501 deals with the privilege of a witness not to testify. Both the House and Senate bills provide that federal privilege law applies in criminal cases. In civil actions and proceedings, the House bill provides that state privilege law applies ''to an element of a claim or defense as to which State law supplies the rule of decision.'' The Senate bill provides that ''in civil actions and proceedings arising under 28 U.S.C. §1332 or 28 U.S.C. §1335, or between citizens of different States and removed under 28 U.S.C. §1441(b) the privilege of a wit-

ness, person, government, State or political subdivision thereof is determined in accordance with State law, unless with respect to the particular claim or defense, Federal law supplies the rule of decision.''

The wording of the House and Senate bills differs in the treatment of civil actions and proceedings. The rule in the House bill applies to evidence that relates to ''an element of a claim or defense.'' If an item of proof tends to support or defeat a claim or defense, or an element of a claim or defense, and if state law supplies the rule of decision for that claim or defense, then state privilege law applies to that item of proof.

Under the provision in the House bill, therefore, state privilege law will usually apply in diversity cases. There may be diversity cases, however, where a claim or defense is based upon federal law. In such instances, Federal privilege law will apply to evidence relevant to the federal claim or defense. See *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173 (1942).

In nondiversity jurisdiction civil cases, federal privilege law will generally apply. In those situations where a federal court adopts or incorporates state law to fill interstices or gaps in federal statutory phrases, the court generally will apply federal privilege law. As Justice Jackson has said:

A federal court sitting in a non-diversity case such as this does not sit as a local tribunal. In some cases it may see fit for special reasons to give the law of a particular state highly persuasive or even controlling effect, but in the last analysis its decision turns upon the law of the United States, not that of any state.

D'Oench, Duhme & Co. v. Federal Deposit Insurance Corp., 315 U.S. 447, 471 (1942) (Jackson, J., concurring). When a federal court chooses to absorb state law, it is applying the state law as a matter of federal common law. Thus, state law does not supply the rule of decision (even though the federal court may apply a rule derived from state decisions), and state privilege law would not apply. See C. A. Wright, Federal Courts 251–252 (2d ed. 1970); *Holmberg v. Armbrecht*, 327 U.S. 392 (1946); *DeSylva v. Ballentine*, 351 U.S. 570, 581 (1956); 9 Wright & Miller, Federal Rules and Procedure §2408.

In civil actions and proceedings, where the rule of decision as to a claim or defense or as to an element of a claim or defense is supplied by state law, the House provision requires that state privilege law apply.

The Conference adopts the House provision.

ARTICLE VI. WITNESSES

Rule 601. General Rule of Competency

Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1934.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

This general ground-clearing eliminates all grounds of incompetency not specifically recognized in the succeeding rules of this Article. Included among the grounds thus abolished are religious belief, conviction of crime, and connection with the litigation as a party or interested person or spouse of a party or interested person. With the exception of the so-called Dead Man's Acts, American jurisdictions generally have ceased to recognize these grounds.

The Dead Man's Acts are surviving traces of the common law disqualification of parties and interested persons. They exist in variety too great to convey conviction of their wisdom and effectiveness. These rules contain no provision of this kind. For the reasoning underlying the decision not to give effect to state statutes in diversity cases, see the Advisory Committee's Note to Rule 501.

No mental or moral qualifications for testifying as a witness are specified. Standards of mental capacity have proved elusive in actual application. A leading commentator observes that few witnesses are disqualified on that ground. Weihofen, Testimonial Competence and Credibility, 34 Geo. Wash.L.Rev. 53 (1965). Discretion is regularly exercised in favor of allowing the testimony. A witness wholly without capacity is difficult to imagine. The question is one particularly suited to the jury as one of weight and credibility, subject to judicial authority to review the sufficiency of the evidence. 2 Wigmore §§501, 509. Standards of moral qualification in practice consist essentially of evaluating a person's truthfulness in terms of his own answers about it. Their principal utility is in affording an opportunity on voir dire examination to impress upon the witness his moral duty. This result may, however, be accomplished more directly, and without haggling in terms of legal standards, by the manner of administering the oath or affirmation under Rule 603.

Admissibility of religious belief as a ground of impeachment is treated in Rule 610. Conviction of crime as a ground of impeachment is the subject of Rule 609. Marital relationship is the basis for privilege under Rule 505. Interest in the outcome of litigation and mental capacity are, of course, highly relevant to credibility and require no special treatment to render them admissible along with other matters bearing upon the perception, memory, and narration of witnesses.

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 93–650

Rule 601 as submitted to the Congress provided that ''Every person is competent to be a witness except as otherwise provided in these rules.'' One effect of the Rule as proposed would have been to abolish age, mental capacity, and other grounds recognized in some State jurisdictions as making a person incompetent as a witness. The greatest controversy centered around the Rule's rendering inapplicable in the federal courts the so-called Dead Man's Statutes which exist in some States. Acknowledging that there is substantial disagreement as to the merit of Dead Man's Statutes, the Committee nevertheless believed that where such statutes have been enacted they represent State policy which should not be overturned in the absence of a compelling federal interest. The Committee therefore amended the Rule to make competency in civil actions determinable in accordance with State law with respect to elements of claims or defenses as to which State law supplies the rule of decision. Cf. *Courtland v. Walston & Co., Inc.*, 340 F.Supp. 1076, 1087–1092 (S.D.N.Y. 1972).

NOTES OF COMMITTEE ON THE JUDICIARY, SENATE REPORT NO. 93–1277

The amendment to rule 601 parallels the treatment accorded rule 501 discussed immediately above.

NOTES OF CONFERENCE COMMITTEE, HOUSE REPORT NO. 93–1597

Rule 601 deals with competency of witnesses. Both the House and Senate bills provide that federal competency law applies in criminal cases. In civil actions and proceedings, the House bill provides that state competency law applies ''to an element of a claim or defense as to which State law supplies the rule of decision.'' The Senate bill provides that ''in civil actions and proceedings arising under 28 U.S.C. §1332 or 28 U.S.C. §1335, or between citizens of different States and removed under 28 U.S.C. §1441(b) the competency of a witness, person, government, State or political subdivision thereof is determined in accordance with State law, unless with respect to the particular claim or defense, Federal law supplies the rule of decision.''

The wording of the House and Senate bills differs in the treatment of civil actions and proceedings. The rule in the House bill applies to evidence that relates to ''an element of a claim or defense.'' If an item of

proof tends to support or defeat a claim or defense, or an element of a claim or defense, and if state law supplies the rule of decision for that claim or defense, then state competency law applies to that item of proof.

For reasons similar to those underlying its action on Rule 501, the Conference adopts the House provision.

Rule 602. Lack of Personal Knowledge

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1934; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 25, 1988, eff. Nov. 1, 1988.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

"* * * [T]he rule requiring that a witness who testifies to a fact which can be perceived by the senses must have had an opportunity to observe, and must have actually observed the fact" is a "most pervasive manifestation" of the common law insistence upon "the most reliable sources of information." McCormick §10, p. 19. These foundation requirements may, of course, be furnished by the testimony of the witness himself; hence personal knowledge is not an absolute but may consist of what the witness thinks he knows from personal perception. 2 Wigmore §650. It will be observed that the rule is in fact a specialized application of the provisions of Rule 104(b) on conditional relevancy.

This rule does not govern the situation of a witness who testifies to a hearsay statement as such, if he has personal knowledge of the making of the statement. Rules 801 and 805 would be applicable. This rule would, however, prevent him from testifying to the subject matter of the hearsay statement, as he has no personal knowledge of it.

The reference to Rule 703 is designed to avoid any question of conflict between the present rule and the provisions of that rule allowing an expert to express opinions based on facts of which he does not have personal knowledge.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1988 AMENDMENT

The amendment is technical. No substantive change is intended.

Rule 603. Oath or Affirmation

Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1934; Mar. 2, 1987, eff. Oct. 1, 1987.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The rule is designed to afford the flexibility required in dealing with religious adults, atheists, conscientious objectors, mental defectives, and children. Affirmation is simply a solemn undertaking to tell the truth; no special verbal formula is required. As is true generally, affirmation is recognized by federal law. "Oath" includes affirmation, 1 U.S.C. §1; judges and clerks may administer oaths and affirmations, 28 U.S.C. §§459, 953; and affirmations are acceptable in lieu of oaths under Rule 43(d) of the Federal Rules of Civil Procedure. Perjury by a witness is a crime, 18 U.S.C. §1621.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

Rule 604. Interpreters

An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1934; Mar. 2, 1987, eff. Oct. 1, 1987.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The rule implements Rule 43(f) of the Federal Rules of Civil Procedure and Rule 28(b) of the Federal Rules of Criminal Procedure, both of which contain provisions for the appointment and compensation of interpreters.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendment is technical. No substantive change is intended.

Rule 605. Competency of Judge as Witness

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1934.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

In view of the mandate of 28 U.S.C. §455 that a judge disqualify himself in "any case in which he * * * is or has been a material witness," the likelihood that the presiding judge in a federal court might be called to testify in the trial over which he is presiding is slight. Nevertheless the possibility is not totally eliminated.

The solution here presented is a broad rule of incompetency, rather than such alternatives as incompetency only as to material matters, leaving the matter to the discretion of the judge, or recognizing no incompetency. The choice is the result of inability to evolve satisfactory answers to questions which arise when the judge abandons the bench for the witness stand. Who rules on objections? Who compels him to answer? Can he rule impartially on the weight and admissibility of his own testimony? Can he be impeached or cross-examined effectively? Can he, in a jury trial, avoid conferring his seal of approval on one side in the eyes of the jury? Can he, in a bench trial, avoid an involvement destructive of impartiality? The rule of general incompetency has substantial support. See Report of the Special Committee on the Propriety of Judges Appearing as Witnesses, 36 A.B.A.J. 630 (1950); cases collected in Annot. 157 A.L.R. 311; McCormick §68, p. 147; Uniform Rule 42; California Evidence Code §703; Kansas Code of Civil Procedure §60–442; New Jersey Evidence Rule 42. Cf. 6 Wigmore §1909, which advocates leaving the matter to the discretion of the judge, and statutes to that effect collected in Annot. 157 A.L.R. 311.

The rule provides an "automatic" objection. To require an actual objection would confront the opponent with a choice between not objecting, with the result of allowing the testimony, and objecting, with the probable result of excluding the testimony but at the price of continuing the trial before a judge likely to feel that his integrity had been attacked by the objector.

Rule 606. Competency of Juror as Witness

(a) AT THE TRIAL. A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) INQUIRY INTO VALIDITY OF VERDICT OR INDICTMENT. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1934; Pub. L. 94–149, §1(10), Dec. 12, 1975, 89 Stat. 805; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 12, 2006, eff. Dec. 1, 2006.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

Subdivision (a). The considerations which bear upon the permissibility of testimony by a juror in the trial in which he is sitting as juror bear an obvious similarity to those evoked when the judge is called as a witness. See Advisory Committee's Note to Rule 605. The judge is not, however in this instance so involved as to call for departure from usual principles requiring objection to be made; hence the only provision on objection is that opportunity be afforded for its making out of the presence of the jury. Compare Rules 605.

Subdivision (b). Whether testimony, affidavits, or statements of jurors should be received for the purpose of invalidating or supporting a verdict or indictment, and if so, under what circumstances, has given rise to substantial differences of opinion. The familiar rubric that a juror may not impeach his own verdict, dating from Lord Mansfield's time, is a gross oversimplification. The values sought to be promoted by excluding the evidence include freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment. *McDonald v. Pless*, 238 U.S. 264, 35 S.Ct. 785, 59 L.Ed. 1300 (1915). On the other hand, simply putting verdicts beyond effective reach can only promote irregularity and injustice. The rule offers an accommodation between these competing considerations.

The mental operations and emotional reactions of jurors in arriving at a given result would, if allowed as a subject of inquiry, place every verdict at the mercy of jurors and invite tampering and harassment. See *Grenz v. Werre*, 129 N.W.2d 681 (N.D. 1964). The authorities are in virtually complete accord in excluding the evidence. Fryer, Note on Disqualification of Witnesses, Selected Writings on Evidence and Trial 345, 347 (Fryer ed. 1957); Maguire, Weinstein, et al., Cases on Evidence 887 (5th ed. 1965); 8 Wigmore §2340 (McNaughton Rev. 1961). As to matters other than mental operations and emotional reactions of jurors, substantial authority refuses to allow a juror to disclose irregularities which occur in the jury room, but allows his testimony as to irregularities occurring outside and allows outsiders to testify as to occurrences both inside and out. 8 Wigmore §2354 (McNaughton Rev. 1961). However, the door of the jury room is not necessarily a satisfactory dividing point, and the Supreme Court has refused to accept it for every situation. *Mattox v. United States*, 146 U.S. 140, 13 S.Ct. 50, 36 L.Ed. 917 (1892).

Under the federal decisions the central focus has been upon insulation of the manner in which the jury reached its verdict, and this protection extends to each of the components of deliberation, including arguments, statements, discussions, mental and emotional reactions, votes, and any other feature of the process. Thus testimony or affidavits of jurors have been held incompetent to show a compromise verdict, *Hyde v. United States*, 225 U.S. 347, 382 (1912); a quotient verdict, *McDonald v. Pless*, 238 U.S. 264 (1915); speculation as to insurance coverage, *Holden v. Porter*, 495 F.2d 878 (10th Cir.1969), *Farmers Coop. Elev. Ass'n v. Strand*, 382 F.2d 224, 230 (8th Cir. 1967), cert. denied 389 U.S. 1014; misinterpretations of instructions, *Farmers Coop. Elev. Ass'n v. Strand*, *supra*; mistake in returning verdict, *United States v. Chereton*, 309 F.2d 197 (6th Cir. 1962); interpretation of guilty plea by one defendant as implicating others, *United States v. Crosby*, 294 F.2d 928, 949 (2d Cir. 1961). The policy does not, however, foreclose testimony by jurors as to prejudicial extraneous information or influences injected into or brought to bear upon the deliberative process. Thus a juror is recognized as competent to testify to statements by the bailiff or the introduction of a prejudicial newspaper account into the jury room, *Mattox v. United States*, 146 U.S. 140 (1892). See also *Parker v. Gladden*, 385 U.S. 363 (1966).

This rule does not purport to specify the substantive grounds for setting aside verdicts for irregularity; it deals only with the competency of jurors to testify concerning those grounds. Allowing them to testify as to matters other than their own inner reactions involves no particular hazard to the values sought to be protected. The rules is based upon this conclusion. It makes no attempt to specify the substantive grounds for setting aside verdicts for irregularity.

See also Rule 6(e) of the Federal Rules of Criminal Procedure and 18 U.S.C. §3500, governing the secrecy of grand jury proceedings. The present rules does not relate to secrecy and disclosure but to the competency of certain witnesses and evidence.

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 93–650

As proposed by the Court, Rule 606(b) limited testimony by a juror in the course of an inquiry into the validity of a verdict or indictment. He could testify as to the influence of extraneous prejudicial information brought to the jury's attention (e.g. a radio newscast or a newspaper account) or an outside influence which improperly had been brought to bear upon a juror (e.g. a threat to the safety of a member of his family), but he could not testify as to other irregularities which occurred in the jury room. Under this formulation a quotient verdict could not be attacked through the testimony of a juror, nor could a juror testify to the drunken condition of a fellow juror which so disabled him that he could not participate in the jury's deliberations.

The 1969 and 1971 Advisory Committee drafts would have permitted a member of the jury to testify concerning these kinds of irregularities in the jury room. The Advisory Committee note in the 1971 draft stated that "* * * the door of the jury room is not a satisfactory dividing point, and the Supreme Court has refused to accept it." The Advisory Committee further commented that—

> The trend has been to draw the dividing line between testimony as to mental processes, on the one hand, and as to the existence of conditions or occurrences of events calculated improperly to influence the verdict, on the other hand, without regard to whether the happening is within or without the jury room. * * * The jurors are the persons who know what really happened. Allowing them to testify as to matters other than their own reactions involves no

particular hazard to the values sought to be protected. The rule is based upon this conclusion. It makes no attempt to specify the substantive grounds for setting aside verdicts for irregularity.

Objective jury misconduct may be testified to in California, Florida, Iowa, Kansas, Nebraska, New Jersey, North Dakota, Ohio, Oregon, Tennessee, Texas, and Washington.

Persuaded that the better practice is that provided for in the earlier drafts, the Committee amended subdivision (b) to read in the text of those drafts.

NOTES OF COMMITTEE ON THE JUDICIARY, SENATE REPORT NO. 93–1277

As adopted by the House, this rule would permit the impeachment of verdicts by inquiry into, not the mental processes of the jurors, but what happened in terms of conduct in the jury room. This extension of the ability to impeach a verdict is felt to be unwarranted and ill-advised.

The rule passed by the House embodies a suggestion by the Advisory Committee of the Judicial Conference that is considerably broader than the final version adopted by the Supreme Court, which embodies long-accepted Federal law. Although forbidding the impeachment of verdicts by inquiry into the jurors' mental processes, it deletes from the Supreme Court version the proscription against testimony ''as to any matter or statement occurring during the course of the jury's deliberations.'' This deletion would have the effect of opening verdicts up to challenge on the basis of what happened during the jury's internal deliberations, for example, where a juror alleged that the jury refused to follow the trial judge's instructions or that some of the jurors did not take part in deliberations.

Permitting an individual to attack a jury verdict based upon the jury's internal deliberations has long been recognized as unwise by the Supreme Court. In *McDonald v. Pless*, the Court stated:

* * * * *

> [L]et it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference [238 U.S. 264, at 267 (1914)].

* * * * *

As it stands then, the rule would permit the harassment of former jurors by losing parties as well as the possible exploitation of disgruntled or otherwise badly-motivated ex-jurors.

Public policy requires a finality to litigation. And common fairness requires that absolute privacy be preserved for jurors to engage in the full and free debate necessary to the attainment of just verdicts. Jurors will not be able to function effectively if their deliberations are to be scrutinized in post-trial litigation. In the interest of protecting the jury system and the citizens who make it work, rule 606 should not permit any inquiry into the internal deliberations of the jurors.

NOTES OF CONFERENCE COMMITTEE, HOUSE REPORT NO. 93–1597

Rule 606(b) deals with juror testimony in an inquiry into the validity of a verdict or indictment. The House bill provides that a juror cannot testify about his mental processes or about the effect of anything upon his or another juror's mind as influencing him to assent to or dissent from a verdict or indictment. Thus, the House bill allows a juror to testify about objective matters occurring during the jury's deliberation, such as the misconduct of another juror or the reaching of a quotient verdict. The Senate bill does not permit juror testimony about any matter or statement occurring during the course of the jury's deliberations. The Senate bill does provide, however, that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention and on the question whether any outside influence was improperly brought to bear on any juror.

The Conference adopts the Senate amendment. The Conferees believe that jurors should be encouraged to be conscientious in promptly reporting to the court misconduct that occurs during jury deliberations.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

COMMITTEE NOTES ON RULES—2006 AMENDMENT

Rule 606(b) has been amended to provide that juror testimony may be used to prove that the verdict reported was the result of a mistake in entering the verdict on the verdict form. The amendment responds to a divergence between the text of the Rule and the case law that has established an exception for proof of clerical errors. *See, e.g., Plummer v. Springfield Term. Ry.*, 5 F.3d 1, 3 (1st Cir. 1993) (''A number of circuits hold, and we agree, that juror testimony regarding an alleged clerical error, such as announcing a verdict different than that agreed upon, does not challenge the validity of the verdict or the deliberation of mental processes, and therefore is not subject to Rule 606(b).''); *Teevee Toons, Inc., v. MP3.Com, Inc.*, 148 F.Supp.2d 276, 278 (S.D.N.Y. 2001) (noting that Rule 606(b) has been silent regarding inquiries designed to confirm the accuracy of a verdict).

In adopting the exception for proof of mistakes in entering the verdict on the verdict form, the amendment specifically rejects the broader exception, adopted by some courts, permitting the use of juror testimony to prove that the jurors were operating under a misunderstanding about the consequences of the result that they agreed upon. *See, e.g., Attridge v. Cencorp Div. of Dover Techs. Int'l, Inc.*, 836 F.2d 113, 116 (2d Cir. 1987); *Eastridge Development Co., v. Halpert Associates, Inc.*, 853 F.2d 772 (10th Cir. 1988). The broader exception is rejected because an inquiry into whether the jury misunderstood or misapplied an instruction goes to the jurors' mental processes underlying the verdict, rather than the verdict's accuracy in capturing what the jurors had agreed upon. *See, e.g., Karl v. Burlington Northern R.R.*, 880 F.2d 68, 74 (8th Cir. 1989) (error to receive juror testimony on whether verdict was the result of jurors' misunderstanding of instructions: ''The jurors did not state that the figure written by the foreman was different from that which they agreed upon, but indicated that the figure the foreman wrote down was intended to be a net figure, not a gross figure. Receiving such statements violates Rule 606(b) because the testimony relates to how the jury interpreted the court's instructions, and concerns the jurors' 'mental processes,' which is forbidden by the rule.''); *Robles v. Exxon Corp.*, 862 F.2d 1201, 1208 (5th Cir. 1989) (''the alleged error here goes to the substance of what the jury was asked to decide, necessarily implicating the jury's mental processes insofar as it questions the jury's understanding of the court's instructions and application of those instructions to the facts of the case''). Thus, the exception established by the amendment is limited to cases such as ''where the jury foreperson wrote down, in response to an interrogatory, a number different from that agreed upon by the jury, or mistakenly stated that the defendant was 'guilty' when the jury had actually agreed that the defendant was not guilty.'' *Id.*

It should be noted that the possibility of errors in the verdict form will be reduced substantially by polling the jury. Rule 606(b) does not, of course, prevent this precaution. *See* 8 C. Wigmore, *Evidence*, §2350 at 691 (McNaughten ed. 1961) (noting that the reasons for the rule barring juror testimony, ''namely, the dangers of uncertainty and of tampering with the jurors to procure testimony, disappear in large part if such investigation as may be desired is *made by the judge* and takes place *before the jurors' discharge* and separation'') (emphasis in original). Errors that come to light after polling the jury ''may be corrected on the spot, or the jury may be sent out to continue deliberations, or, if necessary, a new trial may be ordered.'' C. Mueller & L. Kirkpatrick, *Evidence Under the Rules* at 671 (2d ed. 1999) (citing *Sincox v. United States*, 571 F.2d 876, 878–79 (5th Cir. 1978)).

Changes Made After Publication and Comments. Based on public comment, the exception established in the amendment was changed from one permitting proof of a ''clerical mistake'' to one permitting proof that the verdict resulted from a mistake in entering the verdict onto the verdict form. The Committee Note was modified to accord with the change in the text.

AMENDMENT BY PUBLIC LAW

1975—Subd. (b). Pub. L. 94–149 substituted ''which'' for ''what'' in last sentence.

Rule 607. Who May Impeach

The credibility of a witness may be attacked by any party, including the party calling the witness.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1934; Mar. 2, 1987, eff. Oct. 1, 1987.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The traditional rule against impeaching one's own witness is abandoned as based on false premises. A party does not hold out his witnesses as worthy of belief, since he rarely has a free choice in selecting them. Denial of the right leaves the party at the mercy of the witness and the adversary. If the impeachment is by a prior statement, it is free from hearsay dangers and is excluded from the category of hearsay under Rule 801(d)(1). Ladd, Impeachment of One's Own Witness—New Developments 4 U.Chi.L.Rev. 69 (1936); McCormick §38; 3 Wigmore §§896–918. The substantial inroads into the old rule made over the years by decisions, rules, and statutes are evidence of doubts as to its basic soundness and workability. Cases are collected in 3 Wigmore §905. Revised Rule 32(a)(1) of the Federal Rules of Civil Procedure allows any party to impeach a witness by means of his deposition, and Rule 43(b) has allowed the calling and impeachment of an adverse party or person identified with him. Illustrative statutes allowing a party to impeach his own witness under varying circumstances are Ill.Rev. Stats.1967, c. 110, §60; Mass.Laws Annot. 1959, c. 233 §23; 20 N.M.Stats. Annot. 1953, §20–2–4; N.Y. CPLR §4514 (McKinney 1963); 12 Vt.Stats. Annot. 1959, §§1641a, 1642. Complete judicial rejection of the old rule is found in United States v. Freeman, 302 F.2d 347 (2d Cir. 1962). The same result is reached in Uniform Rule 20; California Evidence Code §785; Kansas Code of Civil Procedure §60–420. See also New Jersey Evidence Rule 20.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendment is technical. No substantive change is intended.

Rule 608. Evidence of Character and Conduct of Witness

(a) OPINION AND REPUTATION EVIDENCE OF CHARACTER. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) SPECIFIC INSTANCES OF CONDUCT. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1935; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 25, 1988, eff. Nov. 1, 1988; Mar. 27, 2003, eff. Dec. 1, 2003.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

Subdivision (a). In Rule 404(a) the general position is taken that character evidence is not admissible for the purpose of proving that the person acted in conformity therewith, subject, however, to several exceptions, one of which is character evidence of a witness as bearing upon his credibility. The present rule develops that exception.

In accordance with the bulk of judicial authority, the inquiry is strictly limited to character for veracity, rather than allowing evidence as to character generally. The result is to sharpen relevancy, to reduce surprise, waste of time, and confusion, and to make the lot of the witness somewhat less unattractive. McCormick §44.

The use of opinion and reputation evidence as means of proving the character of witnesses is consistent with Rule 405(a). While the modern practice has purported to exclude opinion witnesses who testify to reputation seem in fact often to be giving their opinions, disguised somewhat misleadingly as reputation. See McCormick §44. And even under the modern practice, a common relaxation has allowed inquiry as to whether the witnesses would believe the principal witness under oath. *United States v. Walker*, 313 F.2d 236 (6th Cir. 1963), and cases cited therein; McCormick §44, pp. 94–95, n. 3.

Character evidence in support of credibility is admissible under the rule only after the witness' character has first been attacked, as has been the case at common law. Maguire, Weinstein, et al., Cases on Evidence 295 (5th ed. 1965); McCormick §49, p. 105; 4 Wigmore §1104. The enormous needless consumption of time which a contrary practice would entail justifies the limitation. Opinion or reputation that the witness is untruthful specifically qualifies as an attack under the rule, and evidence or misconduct, including conviction of crime, and of corruption also fall within this category. Evidence of bias or interest does not. McCormick §49; 4 Wigmore §§1106, 1107. Whether evidence in the form of contradiction is an attack upon the character of the witness must depend §§1108, 1109.

As to the use of specific instances on direct by an opinion witness, see the Advisory Committee's Note to Rule 405, *supra*.

Subdivision (b). In conformity with Rule 405, which forecloses use of evidence of specific incidents as proof in chief of character unless character is an issue in the case, the present rule generally bars evidence of specific instances of conduct of a witness for the purpose of attacking or supporting his credibility. There are, however, two exceptions: (1) specific instances are provable when they have been the subject of criminal conviction, and (2) specific instances may be inquired into on cross-examination of the principal witness or of a witness giving an opinion of his character for truthfulness.

(1) Conviction of crime as a technique of impeachment is treated in detail in Rule 609, and here is merely recognized as an exception to the general rule excluding evidence of specific incidents for impeachment purposes.

(2) Particular instances of conduct, though not the subject of criminal conviction, may be inquired into on cross-examination of the principal witness himself or of a witness who testifies concerning his character for truthfulness. Effective cross-examination demands that some allowance be made for going into matters of this kind, but the possibilities of abuse are substantial. Consequently safeguards are erected in the form of specific requirements that the instances inquired into be probative of truthfulness or its opposite and not remote in time. Also, the overriding protection of Rule 403 requires that probative value not be outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury, and that of Rule 611 bars harassment and undue embarrassment.

The final sentence constitutes a rejection of the doctrine of such cases as *People v. Sorge*, 301 N.Y. 198, 93 N.E.2d 637 (1950), that any past criminal act relevant to credibility may be inquired into on cross-examination, in apparent disregard of the privilege against self-incrimination. While it is clear that an ordinary witness cannot make a partial disclosure of incriminating matter and then invoke the privilege on cross-examination, no tenable contention can be made that merely by testifying he waives his right to foreclose inquiry on cross-examination into criminal activities for the purpose of attacking his credibility. So to hold would reduce the privilege to a nullity. While it is true that an accused, unlike an ordinary witness, has an option whether to testify, if the option can be exercised only at the price of opening up inquiry as to any and all criminal acts committed during his lifetime, the right to testify could scarcely be said to possess much vitality. In *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965), the Court held that allowing comment on the election of an accused not to testify exacted a constitutionally impermissible price, and so here. While no specific provision in terms confers constitutional status on the right of an accused to take the stand in his own defense, the existence of the right is so completely recognized that a denial of it or substantial infringement upon it would surely be of due process dimensions. See *Ferguson v. Georgia*, 365 U.S. 570, 81 S.Ct. 756, 5 L.Ed.2d 783 (1961); McCormick §131; 8 Wigmore §2276 (McNaughton Rev. 1961). In any event, wholly aside from constitutional considerations, the provision represents a sound policy.

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 93–650

Rule 608(a) as submitted by the Court permitted attack to be made upon the character for truthfulness or untruthfulness of a witness either by reputation or opinion testimony. For the same reasons underlying its decision to eliminate the admissibility of opinion testimony in Rule 405(a), the Committee amended Rule 608(a) to delete the reference to opinion testimony.

The second sentence of Rule 608(b) as submitted by the Court permitted specific instances of misconduct of a witness to be inquired into on cross-examination for the purpose of attacking his credibility, if probative of truthfulness or untruthfulness, ''and not remote in time''. Such cross-examination could be of the witness himself or of another witness who testifies as to ''his'' character for truthfulness or untruthfulness.

The Committee amended the Rule to emphasize the discretionary power of the court in permitting such testimony and deleted the reference to remoteness in time as being unnecessary and confusing (remoteness from time of trial or remoteness from the incident involved?). As recast, the Committee amendment also makes clear the antecedent of ''his'' in the original Court proposal.

NOTES OF CONFERENCE COMMITTEE, HOUSE REPORT NO. 93–1597

The Senate amendment adds the words ''opinion or'' to conform the first sentence of the rule with the remainder of the rule.

The Conference adopts the Senate amendment.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1988 AMENDMENT

The amendment is technical. No substantive change is intended.

COMMITTEE NOTES ON RULES—2003 AMENDMENT

The Rule has been amended to clarify that the absolute prohibition on extrinsic evidence applies only when the sole reason for proffering that evidence is to attack or support the witness' character for truthfulness. *See United States v. Abel*, 469 U.S. 45 (1984); *United States v. Fusco*, 748 F.2d 996 (5th Cir. 1984) (Rule 608(b) limits the use of evidence ''designed to show that the witness has done things, unrelated to the suit being tried, that make him more or less believable per se''); Ohio R.Evid. 608(b). On occasion the Rule's use of the overbroad term ''credibility'' has been read ''to bar extrinsic evidence for bias, competency and contradiction impeachment since they too deal with credibility.'' American Bar Association Section of Litigation, *Emerging Problems Under the Federal Rules of Evidence* at 161 (3d ed. 1998). The amendment conforms the language of the Rule to its original intent, which was to impose an absolute bar on extrinsic evidence only if the sole purpose for offering the evidence was to prove the witness' character for veracity. *See* Advisory Committee Note to Rule 608(b) (stating that the Rule is ''[i]n conformity with Rule 405, which forecloses use of evidence of specific incidents as proof in chief of character unless character is in issue in the case . . .'').

By limiting the application of the Rule to proof of a witness' character for truthfulness, the amendment leaves the admissibility of extrinsic evidence offered for other grounds of impeachment (such as contradiction, prior inconsistent statement, bias and mental capacity) to Rules 402 and 403. *See, e.g., United States v. Winchenbach*, 197 F.3d 548 (1st Cir. 1999) (admissibility of a prior inconsistent statement offered for impeachment is governed by Rules 402 and 403, not Rule 608(b)); *United States v. Tarantino*, 846 F.2d 1384 (D.C. Cir. 1988) (admissibility of extrinsic evidence offered to contradict a witness is governed by Rules 402 and 403); *United States v. Lindemann*, 85 F.3d 1232 (7th Cir. 1996) (admissibility of extrinsic evidence of bias is governed by Rules 402 and 403).

It should be noted that the extrinsic evidence prohibition of Rule 608(b) bars any reference to the consequences that a witness might have suffered as a result of an alleged bad act. For example, Rule 608(b) prohibits counsel from mentioning that a witness was suspended or disciplined for the conduct that is the subject of impeachment, when that conduct is offered only to prove the character of the witness. *See United States v. Davis*, 183 F.3d 231, 257 n.12 (3d Cir. 1999) (emphasizing that in attacking the defendant's character for truthfulness ''the government cannot make reference to

Davis's forty-four day suspension or that Internal Affairs found that he lied about'' an incident because ''[s]uch evidence would not only be hearsay to the extent it contains assertion of fact, it would be inadmissible extrinsic evidence under Rule 608(b)''). *See also* Stephen A. Saltzburg, *Impeaching the Witness: Prior Bad Acts and Extrinsic Evidence*, 7 Crim. Just. 28, 31 (Winter 1993) (''counsel should not be permitted to circumvent the no-extrinsic-evidence provision by tucking a third person's opinion about prior acts into a question asked of the witness who has denied the act.'').

For purposes of consistency the term ''credibility'' has been replaced by the term ''character for truthfulness'' in the last sentence of subdivision (b). The term ''credibility'' is also used in subdivision (a). But the Committee found it unnecessary to substitute ''character for truthfulness'' for ''credibility'' in Rule 608(a), because subdivision (a)(1) already serves to limit impeachment to proof of such character.

Rules 609(a) and 610 also use the term ''credibility'' when the intent of those Rules is to regulate impeachment of a witness' character for truthfulness. No inference should be derived from the fact that the Committee proposed an amendment to Rule 608(b) but not to Rules 609 and 610.

Changes Made After Publication and Comments. The last sentence of Rule 608(b) was changed to substitute the term ''character for truthfulness'' for the existing term ''credibility.'' This change was made in accordance with public comment suggesting that it would be helpful to provide uniform terminology throughout Rule 608(b). A stylistic change was also made to the last sentence of Rule 608(b).

Rule 609. Impeachment by Evidence of Conviction of Crime

(a) GENERAL RULE. For the purpose of attacking the character for truthfulness of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.

(b) TIME LIMIT. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) EFFECT OF PARDON, ANNULMENT, OR CERTIFICATE OF REHABILITATION. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime that was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) JUVENILE ADJUDICATIONS. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) PENDENCY OF APPEAL. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1935; Mar. 2, 1987, eff. Oct. 1, 1987; Jan. 26, 1990, eff. Dec. 1, 1990; Apr. 12, 2006, eff. Dec. 1, 2006.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

As a means of impeachment, evidence of conviction of crime is significant only because it stands as proof of the commission of the underlying criminal act. There is little dissent from the general proposition that at least some crimes are relevant to credibility but much disagreement among the cases and commentators about which crimes are usable for this purpose. See McCormick §43; 2 Wright, Federal Practice and Procedure; Criminal §416 (1969). The weight of traditional authority has been to allow use of felonies generally, without regard to the nature of the particular offense, and of *crimen falsi* without regard to the grade of the offense. This is the view accepted by Congress in the 1970 amendment of §14–305 of the District of Columbia Code, P.L. 91–358, 84 Stat. 473. Uniform Rule 21 and Model Code Rule 106 permit only crimes involving ''dishonesty or false statement.'' Others have thought that the trial judge should have discretion to exclude convictions if the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice. *Luck v. United States*, 121 U.S.App.D.C. 151, 348 F.2d 763 (1965); McGowan, Impeachment of Criminal Defendants by Prior Convictions, 1970 Law & Soc. Order 1. Whatever may be the merits of those views, this rule is drafted to accord with the Congressional policy manifested in the 1970 legislation.

The proposed rule incorporates certain basic safeguards, in terms applicable to all witnesses but of particular significance to an accused who elects to testify. These protections include the imposition of definite time limitations, giving effect to demonstrated rehabilitation, and generally excluding juvenile adjudications.

Subdivision (a). For purposes of impeachment, crimes are divided into two categories by the rule: (1) those of what is generally regarded as felony grade, without particular regard to the nature of the offense, and (2) those involving dishonesty or false statement, without regard to the grade of the offense. Provable convictions are not limited to violations of federal law. By reason of our constitutional structure, the federal catalog of crimes is far from being a complete one, and resort must be had to the laws of the states for the specification of many crimes. For example, simple theft as compared with theft from interstate commerce. Other instances of borrowing are the Assimilative Crimes Act, making the state law of crimes applicable to the spe-

cial territorial and maritime jurisdiction of the United States, 18 U.S.C. §13, and the provision of the Judicial Code disqualifying persons as jurors on the grounds of state as well as federal convictions, 28 U.S.C. §1865. For evaluation of the crime in terms of seriousness, reference is made to the congressional measurement of felony (subject to imprisonment in excess of one year) rather than adopting state definitions which vary considerably. See 28 U.S.C. §1865, *supra*, disqualifying jurors for conviction in state or federal court of crime punishable by imprisonment for more than one year.

Subdivision (b). Few statutes recognize a time limit on impeachment by evidence of conviction. However, practical considerations of fairness and relevancy demand that some boundary be recognized. See Ladd, Credibility Tests—Current Trends, 89 U.Pa.L.Rev. 166, 176–177 (1940). This portion of the rule is derived from the proposal advanced in Recommendation Proposing in Evidence Code, §788(5), p. 142, Cal.Law Rev.Comm'n (1965), though not adopted. See California Evidence Code §788.

Subdivision (c). A pardon or its equivalent granted solely for the purpose of restoring civil rights lost by virtue of a conviction has no relevance to an inquiry into character. If, however, the pardon or other proceeding is hinged upon a showing of rehabilitation the situation is otherwise. The result under the rule is to render the conviction inadmissible. The alternative of allowing in evidence both the conviction and the rehabilitation has not been adopted for reasons of policy, economy of time, and difficulties of evaluation.

A similar provision is contained in California Evidence Code §788. Cf. A.L.I. Model Penal Code, Proposed Official Draft §306.6(3)(e) (1962), and discussion in A.L.I. Proceedings 310 (1961).

Pardons based on innocence have the effect, of course, of nullifying the conviction *ab initio*.

Subdivision (d). The prevailing view has been that a juvenile adjudication is not usable for impeachment. *Thomas v. United States*, 74 App.D.C. 167, 121 F.2d 905 (1941); *Cotton v. United States*, 355 F.2d 480 (10th Cir. 1966). This conclusion was based upon a variety of circumstances. By virtue of its informality, frequently diminished quantum of required proof, and other departures from accepted standards for criminal trials under the theory of *parens patriae*, the juvenile adjudication was considered to lack the precision and general probative value of the criminal conviction. While *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967), no doubt eliminates these characteristics insofar as objectionable, other obstacles remain. Practical problems of administration are raised by the common provisions in juvenile legislation that records be kept confidential and that they be destroyed after a short time. While *Gault* was skeptical as to the realities of confidentiality of juvenile records, it also saw no constitutional obstacles to improvement. 387 U.S. at 25, 87 S.Ct. 1428. See also Note, Rights and Rehabilitation in the Juvenile Courts, 67 Colum.L.Rev. 281, 289 (1967). In addition, policy considerations much akin to those which dictate exclusion of adult convictions after rehabilitation has been established strongly suggest a rule of excluding juvenile adjudications. Admittedly, however, the rehabilitative process may in a given case be a demonstrated failure, or the strategic importance of a given witness may be so great as to require the overriding of general policy in the interests of particular justice. See *Giles v. Maryland*, 386 U.S. 66, 87 S.Ct. 793, 17 L.Ed.2d 737 (1967). Wigmore was outspoken in his condemnation of the disallowance of juvenile adjudications to impeach, especially when the witness is the complainant in a case of molesting a minor. 1 Wigmore §196; 3 *Id*. §§924a, 980. The rule recognizes discretion in the judge to effect an accommodation among these various factors by departing from the general principle of exclusion. In deference to the general pattern and policy of juvenile statutes, however, no discretion is accorded when the witness is the accused in a criminal case.

Subdivision (e). The presumption of correctness which ought to attend judicial proceedings supports the position that pendency of an appeal does not preclude use of a conviction for impeachment. *United States v. Empire Packing Co*., 174 F.2d 16 (7th Cir. 1949), cert. denied 337 U.S. 959, 69 S.Ct. 1534, 93 L.Ed. 1758; *Bloch v. United States*, 226 F.2d 185 (9th Cir. 1955), cert. denied 350 U.S. 948, 76 S.Ct. 323, 100 L.Ed. 826 and 353 U.S. 959, 77 S.Ct. 868, 1 L.Ed.2d 910; and see *Newman v. United States*, 331 F.2d 968 (8th Cir. 1964), *Contra, Campbell v. United States*, 85 U.S.App.D.C. 133, 176 F.2d 45 (1949). The pendency of an appeal is, however, a qualifying circumstance properly considerable.

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 93–650

Rule 609(a) as submitted by the Court was modeled after Section 133(a) of Public Law 91–358, 14 D.C. Code 305(b)(1), enacted in 1970. The Rule provided that:

For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted or (2) involved dishonesty or false statement regardless of the punishment.

As reported to the Committee by the Subcommittee, Rule 609(a) was amended to read as follows:

> For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible only if the crime (1) was punishable by death or imprisonment in excess of one year, unless the court determines that the danger of unfair prejudice outweighs the probative value of the evidence of the conviction, or (2) involved dishonesty or false statement.

In full committee, the provision was amended to permit attack upon the credibility of a witness by prior conviction only if the prior crime involved dishonesty or false statement. While recognizing that the prevailing doctrine in the federal courts and in most States allows a witness to be impeached by evidence of prior felony convictions without restriction as to type, the Committee was of the view that, because of the danger of unfair prejudice in such practice and the deterrent effect upon an accused who might wish to testify, and even upon a witness who was not the accused, cross-examination by evidence of prior conviction should be limited to those kinds of convictions bearing directly on credibility, *i.e*., crimes involving dishonesty or false statement.

Rule 609(b) as submitted by the Court was modeled after Section 133(a) of Public Law 91–358, 14 D.C. Code 305(b)(2)(B), enacted in 1970. The Rule provided:

> Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the release of the witness from confinement imposed for his most recent conviction, or the expiration of the period of his parole, probation, or sentence granted or imposed with respect to his most recent conviction, whichever is the later date.

Under this formulation, a witness' entire past record of criminal convictions could be used for impeachment (provided the conviction met the standard of subdivision (a)), if the witness had been most recently released from confinement, or the period of his parole or probation had expired, within ten years of the conviction.

The Committee amended the Rule to read in the text of the 1971 Advisory Committee version to provide that upon the expiration of ten years from the date of a conviction of a witness, or of his release from confinement for that offense, that conviction may no longer be used for impeachment. The Committee was of the view that after ten years following a person's release from confinement (or from the date of his conviction) the probative value of the conviction with respect to that person's credibility diminished to a point where it should no longer be admissible.

Rule 609(c) as submitted by the Court provided in part that evidence of a witness' prior conviction is not admissible to attack his credibility if the conviction

was the subject of a pardon, annulment, or other equivalent procedure, based on a showing of rehabilitation, and the witness has not been convicted of a subsequent crime. The Committee amended the Rule to provide that the ''subsequent crime'' must have been ''punishable by death or imprisonment in excess of one year'', on the ground that a subsequent conviction of an offense not a felony is insufficient to rebut the finding that the witness has been rehabilitated. The Committee also intends that the words ''based on a finding of the rehabilitation of the person convicted'' apply not only to ''certificate of rehabilitation, or other equivalent procedure,'' but also to ''pardon'' and ''annulment.''

NOTES OF COMMITTEE ON THE JUDICIARY, SENATE REPORT NO. 93–1277

As proposed by the Supreme Court, the rule would allow the use of prior convictions to impeach if the crime was a felony or a misdemeanor if the misdemeanor involved dishonesty or false statement. As modified by the House, the rule would admit prior convictions for impeachment purposes only if the offense, whether felony or misdemeanor, involved dishonesty or false statement.

The committee has adopted a modified version of the House-passed rule. In your committee's view, the danger of unfair prejudice is far greater when the accused, as opposed to other witnesses, testifies, because the jury may be prejudiced not merely on the question of credibility but also on the ultimate question of guilt or innocence. Therefore, with respect to defendants, the committee agreed with the House limitation that only offenses involving false statement or dishonesty may be used. By that phrase, the committee means crimes such as perjury or subordination of perjury, false statement, criminal fraud, embezzlement or false pretense, or any other offense, in the nature of crimen falsi the commission of which involves some element of untruthfulness, deceit, or falsification bearing on the accused's propensity to testify truthfully.

With respect to other witnesses, in addition to any prior conviction involving false statement or dishonesty, any other felony may be used to impeach if, and only if, the court finds that the probative value of such evidence outweighs its prejudicial effect against the party offering that witness.

Notwithstanding this provision, proof of any prior offense otherwise admissible under rule 404 could still be offered for the purposes sanctioned by that rule. Furthermore, the committee intends that notwithstanding this rule, a defendant's misrepresentation regarding the existence or nature of prior convictions may be met by rebuttal evidence, including the record of such prior convictions. Similarly, such records may be offered to rebut representations made by the defendant regarding his attitude toward or willingness to commit a general category of offense, although denials or other representations by the defendant regarding the specific conduct which forms the basis of the charge against him shall not make prior convictions admissible to rebut such statement.

In regard to either type of representation, of course, prior convictions may be offered in rebuttal only if the defendant's statement is made in response to defense counsel's questions or is made gratuitously in the course of cross-examination. Prior convictions may not be offered as rebuttal evidence if the prosecution has sought to circumvent the purpose of this rule by asking questions which elicit such representations from the defendant.

One other clarifying amendment has been added to this subsection, that is, to provide that the admissibility of evidence of a prior conviction is permitted only upon cross-examination of a witness. It is not admissible if a person does not testify. It is to be understood, however, that a court record of a prior conviction is admissible to prove that conviction if the witness has forgotten or denies its existence.

Although convictions over ten years old generally do not have much probative value, there may be exceptional circumstances under which the conviction substantially bears on the credibility of the witness. Rather than exclude all convictions over 10 years old, the committee adopted an amendment in the form of a final clause to the section granting the court discretion to admit convictions over 10 years old, but only upon a determination by the court that the probative value of the conviction supported by specific facts and circumstances, substantially outweighs its prejudicial effect.

It is intended that convictions over 10 years old will be admitted very rarely and only in exceptional circumstances. The rules provide that the decision be supported by specific facts and circumstances thus requiring the court to make specific findings on the record as to the particular facts and circumstances it has considered in determining that the probative value of the conviction substantially outweighs its prejudicial impact. It is expected that, in fairness, the court will give the party against whom the conviction is introduced a full and adequate opportunity to contest its admission.

NOTES OF CONFERENCE COMMITTEE, HOUSE REPORT NO. 93–1597

Rule 609 defines when a party may use evidence of a prior conviction in order to impeach a witness. The Senate amendments make changes in two subsections of Rule 609.

The House bill provides that the credibility of a witness can be attacked by proof of prior conviction of a crime only if the crime involves dishonesty or false statement. The Senate amendment provides that a witness' credibility may be attacked if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted or (2) involves dishonesty or false statement, regardless of the punishment.

The Conference adopts the Senate amendment with an amendment. The Conference amendment provides that the credibility of a witness, whether a defendant or someone else, may be attacked by proof of a prior conviction but only if the crime: (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted and the court determines that the probative value of the conviction outweighs its prejudicial effect to the defendant; or (2) involved dishonesty or false statement regardless of the punishment.

By the phrase ''dishonesty and false statement'' the Conference means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of crimen falsi, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully.

The admission of prior convictions involving dishonesty and false statement is not within the discretion of the Court. Such convictions are peculiarly probative of credibility and, under this rule, are always to be admitted. Thus, judicial discretion granted with respect to the admissibility of other prior convictions is not applicable to those involving dishonesty or false statement.

With regard to the discretionary standard established by paragraph (1) of rule 609(a), the Conference determined that the prejudicial effect to be weighed against the probative value of the conviction is specifically the prejudicial effect *to the defendant*. The danger of prejudice to a witness other than the defendant (such as injury to the witness' reputation in his community) was considered and rejected by the Conference as an element to be weighed in determining admissibility. It was the judgment of the Conference that the danger of prejudice to a nondefendant witness is outweighed by the need for the trier of fact to have as much relevant evidence on the issue of credibility as possible. Such evidence should only be excluded where it presents a danger of improperly influencing the outcome of the trial by persuading the trier of fact to convict the defendant on the basis of his prior criminal record.

The House bill provides in subsection (b) that evidence of conviction of a crime may not be used for impeachment purposes under subsection (a) if more than ten years have elapsed since the date of the conviction or the date the witness was released from confinement imposed for the conviction, whichever is later. The Senate amendment permits the use of convictions older than ten years, if the court determines, in the interests of justice, that the probative value of the conviction, supported by specific facts and circumstances, substantially outweighs its prejudicial effect.

The Conference adopts the Senate amendment with an amendment requiring notice by a party that he intends to request that the court allow him to use a conviction older than ten years. The Conferees anticipate that a written notice, in order to give the adversary a fair opportunity to contest the use of the evidence, will ordinarily include such information as the date of the conviction, the jurisdiction, and the offense or statute involved. In order to eliminate the possibility that the flexibility of this provision may impair the ability of a party-opponent to prepare for trial, the Conferees intend that the notice provision operate to avoid surprise.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1990 AMENDMENT

The amendment to Rule 609(a) makes two changes in the rule. The first change removes from the rule the limitation that the conviction may only be elicited during cross-examination, a limitation that virtually every circuit has found to be inapplicable. It is common for witnesses to reveal on direct examination their convictions to ''remove the sting'' of the impeachment. *See e.g., United States v. Bad Cob*, 560 F.2d 877 (8th Cir. 1977). The amendment does not contemplate that a court will necessarily permit proof of prior convictions through testimony, which might be time-consuming and more prejudicial than proof through a written record. Rules 403 and 611(a) provide sufficient authority for the court to protect against unfair or disruptive methods of proof.

The second change effected by the amendment resolves an ambiguity as to the relationship of Rules 609 and 403 with respect to impeachment of witnesses other than the criminal defendant. *See, Green v. Bock Laundry Machine Co.*, 109 S. Ct. 1981, 490 U.S. 504 (1989). The amendment does not disturb the special balancing test for the criminal defendant who chooses to testify. Thus, the rule recognizes that, in virtually every case in which prior convictions are used to impeach the testifying defendant, the defendant faces a unique risk of prejudice—*i.e.*, the danger that convictions that would be excluded under Fed.R.Evid. 404 will be misused by a jury as propensity evidence despite their introduction solely for impeachment purposes. Although the rule does not forbid all use of convictions to impeach a defendant, it requires that the government show that the probative value of convictions as impeachment evidence outweighs their prejudicial effect.

Prior to the amendment, the rule appeared to give the defendant the benefit of the special balancing test when defense witnesses other than the defendant were called to testify. In practice, however, the concern about unfairness to the defendant is most acute when the defendant's own convictions are offered as evidence. Almost all of the decided cases concern this type of impeachment, and the amendment does not deprive the defendant of any meaningful protection, since Rule 403 now clearly protects against unfair impeachment of any defense witness other than the defendant. There are cases in which a defendant might be prejudiced when a defense witness is impeached. Such cases may arise, for example, when the witness bears a special relationship to the defendant such that the defendant is likely to suffer some spill-over effect from impeachment of the witness.

The amendment also protects other litigants from unfair impeachment of their witnesses. The danger of prejudice from the use of prior convictions is not confined to criminal defendants. Although the danger that prior convictions will be misused as character evidence is particularly acute when the defendant is impeached, the danger exists in other situations as well. The amendment reflects the view that it is desirable to protect all litigants from the unfair use of prior convictions, and that the ordinary balancing test of Rule 403, which provides that evidence shall not be excluded unless its prejudicial effect substantially outweighs its probative value, is appropriate for assessing the admissibility of prior convictions for impeachment of any witness other than a criminal defendant.

The amendment reflects a judgment that decisions interpreting Rule 609(a) as requiring a trial court to admit convictions in civil cases that have little, if anything, to do with credibility reach undesirable results. *See, e.g., Diggs v. Lyons*, 741 F.2d 577 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 2157 (1985). The amendment provides the same protection against unfair prejudice arising from prior convictions used for impeachment purposes as the rules provide for other evidence. The amendment finds support in decided cases. *See, e.g., Petty v. Ideco*, 761 F.2d 1146 (5th Cir. 1985); *Czaka v. Hickman*, 703 F.2d 317 (8th Cir. 1983).

Fewer decided cases address the question whether Rule 609(a) provides any protection against unduly prejudicial prior convictions used to impeach government witnesses. Some courts have read Rule 609(a) as giving the government no protection for its witnesses. *See, e.g., United States v. Thorne*, 547 F.2d 56 (8th Cir. 1976); *United States v. Nevitt*, 563 F.2d 406 (9th Cir. 1977), *cert. denied*, 444 U.S. 847 (1979). This approach also is rejected by the amendment. There are cases in which impeachment of government witnesses with prior convictions that have little, if anything, to do with credibility may result in unfair prejudice to the government's interest in a fair trial and unnecessary embarrassment to a witness. Fed.R.Evid. 412 already recognizes this and excluded certain evidence of past sexual behavior in the context of prosecutions for sexual assaults.

The amendment applies the general balancing test of Rule 403 to protect all litigants against unfair impeachment of witnesses. The balancing test protects civil litigants, the government in criminal cases, and the defendant in a criminal case who calls other witnesses. The amendment addresses prior convictions offered under Rule 609, not for other purposes, and does not run afoul, therefore, of *Davis v. Alaska*, 415 U.S. 308 (1974). *Davis* involved the use of a prior juvenile adjudication not to prove a past law violation, but to prove bias. The defendant in a criminal case has the right to demonstrate the bias of a witness and to be assured a fair trial, but not to unduly prejudice a trier of fact. *See generally* Rule 412. In any case in which the trial court believes that confrontation rights require admission of impeachment evidence, obviously the Constitution would take precedence over the rule.

The probability that prior convictions of an ordinary government witness will be unduly prejudicial is low in most criminal cases. Since the behavior of the witness is not the issue in dispute in most cases, there is little chance that the trier of fact will misuse the convictions offered as impeachment evidence as propensity evidence. Thus, trial courts will be skeptical when the government objects to impeachment of its witnesses with prior convictions. Only when the government is able to point to a real danger of prejudice that is sufficient to outweigh substantially the probative value of the conviction for impeachment purposes will the conviction be excluded.

The amendment continues to divide subdivision (a) into subsections (1) and (2) thus facilitating retrieval under current computerized research programs which distinguish the two provisions. The Committee rec-

ommended no substantive change in subdivision (a)(2), even though some cases raise a concern about the proper interpretation of the words ''dishonesty or false statement.'' These words were used but not explained in the original Advisory Committee Note accompanying Rule 609. Congress extensively debated the rule, and the Report of the House and Senate Conference Committee states that ''[b]y the phrase 'dishonesty and false statement,' the Conference means crimes such as perjury, subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of *crimen falsi*, commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully.'' The Advisory Committee concluded that the Conference Report provides sufficient guidance to trial courts and that no amendment is necessary, notwithstanding some decisions that take an unduly broad view of ''dishonesty,'' admitting convictions such as for bank robbery or bank larceny. Subsection (a)(2) continues to apply to any witness, including a criminal defendant.

Finally, the Committee determined that it was unnecessary to add to the rule language stating that, when a prior conviction is offered under Rule 609, the trial court is to consider the probative value of the prior conviction *for impeachment*, not for other purposes. The Committee concluded that the title of the rule, its first sentence, and its placement among the impeachment rules clearly establish that evidence offered under Rule 609 is offered only for purposes of impeachment.

COMMITTEE NOTES ON RULES—2006 AMENDMENT

The amendment provides that Rule 609(a)(2) mandates the admission of evidence of a conviction only when the conviction required the proof of (or in the case of a guilty plea, the admission of) an act of dishonesty or false statement. Evidence of all other convictions is inadmissible under this subsection, irrespective of whether the witness exhibited dishonesty or made a false statement in the process of the commission of the crime of conviction. Thus, evidence that a witness was convicted for a crime of violence, such as murder, is not admissible under Rule 609(a)(2), even if the witness acted deceitfully in the course of committing the crime.

The amendment is meant to give effect to the legislative intent to limit the convictions that are to be automatically admitted under subdivision (a)(2). The Conference Committee provided that by ''dishonesty and false statement'' it meant ''crimes such as perjury, subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the [witness's] propensity to testify truthfully.'' Historically, offenses classified as *crimina falsi* have included only those crimes in which the ultimate criminal act was itself an act of deceit. *See* Green, *Deceit and the Classification of Crimes: Federal Rule of Evidence 609(a)(2) and the Origins of* Crimen Falsi, 90 J. Crim. L. & Criminology 1087 (2000).

Evidence of crimes in the nature of *crimina falsi* must be admitted under Rule 609(a)(2), regardless of how such crimes are specifically charged. For example, evidence that a witness was convicted of making a false claim to a federal agent is admissible under this subdivision regardless of whether the crime was charged under a section that expressly references deceit (*e.g.*, 18 U.S.C. §1001, Material Misrepresentation to the Federal Government) or a section that does not (*e.g.*, 18 U.S.C. §1503, Obstruction of Justice).

The amendment requires that the proponent have ready proof that the conviction required the factfinder to find, or the defendant to admit, an act of dishonesty or false statement. Ordinarily, the statutory elements of the crime will indicate whether it is one of dishonesty or false statement. Where the deceitful nature of the crime is not apparent from the statute and the face of the judgment—as, for example, where the conviction simply records a finding of guilt for a statutory offense that does not reference deceit expressly—a proponent may offer information such as an indictment, a statement of admitted facts, or jury instructions to show that the factfinder had to find, or the defendant had to admit, an act of dishonesty or false statement in order for the witness to have been convicted. *Cf. Taylor v. United States*, 495 U.S. 575, 602 (1990) (providing that a trial court may look to a charging instrument or jury instructions to ascertain the nature of a prior offense where the statute is insufficiently clear on its face); *Shepard v. United States*, 125 S.Ct. 1254 (2005) (the inquiry to determine whether a guilty plea to a crime defined by a nongeneric statute necessarily admitted elements of the generic offense was limited to the charging document's terms, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or a comparable judicial record). But the amendment does not contemplate a ''mini-trial'' in which the court plumbs the record of the previous proceeding to determine whether the crime was in the nature of *crimen falsi*.

The amendment also substitutes the term ''character for truthfulness'' for the term ''credibility'' in the first sentence of the Rule. The limitations of Rule 609 are not applicable if a conviction is admitted for a purpose other than to prove the witness's character for untruthfulness. *See, e.g., United States v. Lopez*, 979 F.2d 1024 (5th Cir. 1992) (Rule 609 was not applicable where the conviction was offered for purposes of contradiction). The use of the term ''credibility'' in subdivision (d) is retained, however, as that subdivision is intended to govern the use of a juvenile adjudication for any type of impeachment.

Changes Made After Publication and Comments. The language of the proposed amendment was changed to provide that convictions are automatically admitted only if it readily can be determined that the elements of the crime, as proved or admitted, required an act of dishonesty or false statement by the witness.

Rule 610. Religious Beliefs or Opinions

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1936; Mar. 2, 1987, eff. Oct. 1, 1987.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

While the rule forecloses inquiry into the religious beliefs or opinions of a witness for the purpose of showing that his character for truthfulness is affected by their nature, an inquiry for the purpose of showing interest or bias because of them is not within the prohibition. Thus disclosure of affiliation with a church which is a party to the litigation would be allowable under the rule. Cf. *Tucker v. Reil*, 51 Ariz. 357, 77 P.2d 203 (1938). To the same effect, though less specifically worded, is California Evidence Code §789. See 3 Wigmore §936.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendment is technical. No substantive change is intended.

Rule 611. Mode and Order of Interrogation and Presentation

(a) CONTROL BY COURT. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of

the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) SCOPE OF CROSS-EXAMINATION. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) LEADING QUESTIONS. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1936; Mar. 2, 1987, eff. Oct. 1, 1987.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

Subdivision (a). Spelling out detailed rules to govern the mode and order of interrogating witnesses presenting evidence is neither desirable nor feasible. The ultimate responsibility for the effective working of the adversary system rests with the judge. The rule sets forth the objectives which he should seek to attain.

Item (1) restates in broad terms the power and obligation of the judge as developed under common law principles. It covers such concerns as whether testimony shall be in the form of a free narrative or responses to specific questions, McCormick §5, the order of calling witnesses and presenting evidence, 6 Wigmore §1867, the use of demonstrative evidence, McCormick §179, and the many other questions arising during the course of a trial which can be solved only by the judge's common sense and fairness in view of the particular circumstances.

Item (2) is addressed to avoidance of needless consumption of time, a matter of daily concern in the disposition of cases. A companion piece is found in the discretion vested in the judge to exclude evidence as a waste of time in Rule 403(b).

Item (3) calls for a judgement under the particular circumstances whether interrogation tactics entail harassment or undue embarrassment. Pertinent circumstances include the importance of the testimony, the nature of the inquiry, its relevance to credibility, waste of time, and confusion. McCormick §42. In *Alford v. United States*, 282 U.S. 687, 694, 51 S.Ct. 218, 75 L.Ed. 624 (1931), the Court pointed out that, while the trial judge should protect the witness from questions which "go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate," this protection by no means forecloses efforts to discredit the witness. Reference to the transcript of the prosecutor's cross-examination in *Berger v. United States*, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935), serves to lay at rest any doubts as to the need for judicial control in this area.

The inquiry into specific instances of conduct of a witness allowed under Rule 608(b) is, of course, subject to this rule.

Subdivision (b). The tradition in the federal courts and in numerous state courts has been to limit the scope of cross-examination to matters testified to on direct, plus matters bearing upon the credibility of the witness. Various reasons have been advanced to justify the rule of limited cross-examination. (1) A party vouches for his own witness but only to the extent of matters elicited on direct. *Resurrection Gold Mining Co. v. Fortune Gold Mining Co.*, 129 F. 668, 675 (8th Cir. 1904), quoted in Maguire, Weinstein, et al., Cases on Evidence 277, n. 38 (5th ed. 1965). But the concept of vouching is discredited, and Rule 607 rejects it. (2) A party cannot ask his own witness leading questions. This is a problem properly solved in terms of what is necessary for a proper development of the testimony rather than by a mechanistic formula similar to the vouching concept. See discussion under subdivision (c). (3) A practice of limited cross-examination promotes orderly presentation of the case. *Finch v. Weiner*, 109 Conn. 616, 145 A. 31 (1929). While this latter reason has merit, the matter is essentially one of the order of presentation and not one in which involvement at the appellate level is likely to prove fruitful. See for example, *Moyer v. Aetna Life Ins. Co.*, 126 F.2d 141 (3rd Cir. 1942); *Butler v. New York Central R. Co.*, 253 F.2d 281 (7th Cir. 1958); *United States v. Johnson*, 285 F.2d 35 (9th Cir. 1960); *Union Automobile Indemnity Ass'n. v. Capitol Indemnity Ins. Co.*, 310 F.2d 318 (7th Cir. 1962). In evaluating these considerations, McCormick says:

"The foregoing considerations favoring the wide-open or restrictive rules may well be thought to be fairly evenly balanced. There is another factor, however, which seems to swing the balance overwhelmingly in favor of the wide-open rule. This is the consideration of economy of time and energy. Obviously, the wide-open rule presents little or no opportunity for dispute in its application. The restrictive practice in all its forms, on the other hand, is productive in many court rooms, of continual bickering over the choice of the numerous variations of the 'scope of the direct' criterion, and of their application to particular cross-questions. These controversies are often reventilated on appeal, and reversals for error in their determination are frequent. Observance of these vague and ambiguous restrictions is a matter of constant and hampering concern to the cross-examiner. If these efforts, delays and misprisions were the necessary incidents to the guarding of substantive rights or the fundamentals of fair trial, they might be worth the cost. As the price of the choice of an obviously debatable regulation of the order of evidence, the sacrifice seems misguided. The American Bar Association's Committee for the Improvement of the Law of Evidence for the year 1937–38 said this:

"The rule limiting cross-examination to the precise subject of the direct examination is probably the most frequent rule (except the Opinion rule) leading in the trial practice today to refined and technical quibbles which obstruct the progress of the trial, confuse the jury, and give rise to appeal on technical grounds only. Some of the instances in which Supreme Courts have ordered new trials for the mere transgression of this rule about the order of evidence have been astounding.

"We recommend that the rule allowing questions upon any part of the issue known to the witness * * * be adopted. * * *'" McCormick, §27, p. 51. See also 5 Moore's Federal Practice ¶43.10 (2nd ed. 1964).

The provision of the second sentence, that the judge may in the interests of justice limit inquiry into new matters on cross-examination, is designed for those situations in which the result otherwise would be confusion, complication, or protraction of the case, not as a matter of rule but as demonstrable in the actual development of the particular case.

The rule does not purport to determine the extent to which an accused who elects to testify thereby waives his privilege against self-incrimination. The question is a constitutional one, rather than a mere matter of administering the trial. Under *Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968), no general waiver occurs when the accused testifies on such preliminary matters as the validity of a search and seizure or the admissibility of a confession. Rule 104(d), *supra*. When he testifies on the merits, however, can he foreclose inquiry into an aspect or element of the crime by avoiding it on direct? The affirmative answer given in *Tucker v. United States*, 5 F.2d 818 (8th Cir. 1925), is inconsistent with the description of the waiver as extending to "all other relevant facts" in *Johnson v. United States*, 318 U.S. 189, 195, 63 S.Ct. 549, 87 L.Ed. 704 (1943). See also *Brown v. United States*, 356 U.S. 148, 78 S.Ct. 622, 2 L.Ed.2d 589 (1958). The situation of an accused who desires to testify on some but not all counts of a multiple-count indictment is one to be approached, in the first instance at least, as a problem of severance under

Rule 14 of the Federal Rules of Criminal Procedure. *Cross v. United States*, 118 U.S.App.D.C. 324, 335 F.2d 987 (1964). Cf. *United States v. Baker*, 262 F.Supp. 657, 686 (D.D.C. 1966). In all events, the extent of the waiver of the privilege against self-incrimination ought not to be determined as a by-product of a rule on scope of cross-examination.

Subdivision (c). The rule continues the traditional view that the suggestive powers of the leading question are as a general proposition undesirable. Within this tradition, however, numerous exceptions have achieved recognition: The witness who is hostile, unwilling, or biased; the child witness or the adult with communication problems; the witness whose recollection is exhausted; and undisputed preliminary matters. 3 Wigmore §§ 774–778. An almost total unwillingness to reverse for infractions has been manifested by appellate courts. See cases cited in 3 Wigmore § 770. The matter clearly falls within the area of control by the judge over the mode and order of interrogation and presentation and accordingly is phrased in words of suggestion rather than command.

The rule also conforms to tradition in making the use of leading questions on cross-examination a matter of right. The purpose of the qualification ''ordinarily'' is to furnish a basis for denying the use of leading questions when the cross-examination is cross-examination in form only and not in fact, as for example the ''cross-examination'' of a party by his own counsel after being called by the opponent (savoring more of re-direct) or of an insured defendant who proves to be friendly to the plaintiff.

The final sentence deals with categories of witnesses automatically regarded and treated as hostile. Rule 43(b) of the Federal Rules of Civil Procedure has included only ''an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party.'' This limitation virtually to persons whose statements would stand as admissions is believed to be an unduly narrow concept of those who may safely be regarded as hostile without further demonstration. See, for example, *Maryland Casualty Co. v. Kador*, 225 F.2d 120 (5th Cir. 1955), and *Degelos v. Fidelity and Casualty Co.*, 313 F.2d 809 (5th Cir. 1963), holding despite the language of Rule 43(b) that an insured fell within it, though not a party in an action under the Louisiana direct action statute. The phrase of the rule, ''witness identified with'' an adverse party, is designed to enlarge the category of persons thus callable.

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 93–650

As submitted by the Court, Rule 611(b) provided:

A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. In the interests of justice, the judge may limit cross-examination with respect to matters not testified to on direct examination.

The Committee amended this provision to return to the rule which prevails in the federal courts and thirty-nine State jurisdictions. As amended, the Rule is in the text of the 1969 Advisory Committee draft. It limits cross-examination to credibility and to matters testified to on direct examination, unless the judge permits more, in which event the cross-examiner must proceed as if on direct examination. This traditional rule facilitates orderly presentation by each party at trial. Further, in light of existing discovery procedures, there appears to be no need to abandon the traditional rule.

The third sentence of Rule 611(c) as submitted by the Court provided that:

> In civil cases, a party is entitled to call an adverse party or witness identified with him and interrogate by leading questions.

The Committee amended this Rule to permit leading questions to be used with respect to any hostile witness, not only an adverse party or person identified with such adverse party. The Committee also substituted the word ''When'' for the phrase ''In civil cases'' to reflect the possibility that in criminal cases a defendant may be entitled to call witnesses identified with the government, in which event the Committee believed the defendant should be permitted to inquire with leading questions.

NOTES OF COMMITTEE ON THE JUDICIARY, SENATE REPORT NO. 93–1277

Rule 611(b) as submitted by the Supreme Court permitted a broad scope of cross-examination: ''cross-examination on any matter relevant to any issue in the case'' unless the judge, in the interests of justice, limited the scope of cross-examination.

The House narrowed the Rule to the more traditional practice of limiting cross-examination to the subject matter of direct examination (and credibility), but with discretion in the judge to permit inquiry into additional matters in situations where that would aid in the development of the evidence or otherwise facilitate the conduct of the trial.

The committee agrees with the House amendment. Although there are good arguments in support of broad cross-examination from perspectives of developing all relevant evidence, we believe the factors of insuring an orderly and predictable development of the evidence weigh in favor of the narrower rule, especially when discretion is given to the trial judge to permit inquiry into additional matters. The committee expressly approves this discretion and believes it will permit sufficient flexibility allowing a broader scope of cross-examination whenever appropriate.

The House amendment providing broader discretionary cross-examination permitted inquiry into additional matters only as if on direct examination. As a general rule, we concur with this limitation, however, we would understand that this limitation would not preclude the utilization of leading questions if the conditions of subsection (c) of this rule were met, bearing in mind the judge's discretion in any case to limit the scope of cross-examination [see McCormick on Evidence, §§ 24–26 (especially 24) (2d ed. 1972)].

Further, the committee has received correspondence from Federal judges commenting on the applicability of this rule to section 1407 of title 28. It is the committee's judgment that this rule as reported by the House is flexible enough to provide sufficiently broad cross-examination in appropriate situations in multidistrict litigation.

As submitted by the Supreme Court, the rule provided: ''In civil cases, a party is entitled to call an adverse party or witness identified with him and interrogate by leading questions.''

The final sentence of subsection (c) was amended by the House for the purpose of clarifying the fact that a ''hostile witness''—that is a witness who is hostile in fact—could be subject to interrogation by leading questions. The rule as submitted by the Supreme Court declared certain witnesses hostile as a matter of law and thus subject to interrogation by leading questions without any showing of hostility in fact. These were adverse parties or witnesses identified with adverse parties. However, the wording of the first sentence of subsection (c) while generally, prohibiting the use of leading questions on direct examination, also provides ''except as may be necessary to develop his testimony.'' Further, the first paragraph of the Advisory Committee note explaining the subsection makes clear that they intended that leading questions could be asked of a hostile witness or a witness who was unwilling or biased and even though that witness was not associated with an adverse party. Thus, we question whether the House amendment was necessary.

However, concluding that it was not intended to affect the meaning of the first sentence of the subsection and was intended solely to clarify the fact that leading questions are permissible in the interrogation of a witness, who is hostile in fact, the committee accepts that House amendment.

The final sentence of this subsection was also amended by the House to cover criminal as well as civil cases.

The committee accepts this amendment, but notes that it may be difficult in criminal cases to determine when a witness is ''identified with an adverse party,'' and thus the rule should be applied with caution.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendment is technical. No substantive change is intended.

Rule 612. Writing Used To Refresh Memory

Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh memory for the purpose of testifying, either—

(1) while testifying, or

(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,

an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1936; Mar. 2, 1987, eff. Oct. 1, 1987.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The treatment of writings used to refresh recollection while on the stand is in accord with settled doctrine. McCormick §9, p. 15. The bulk of the case law has, however, denied the existence of any right to access by the opponent when the writing is used prior to taking the stand, though the judge may have discretion in the matter. *Goldman v. United States*, 316 U.S. 129, 62 S.Ct. 993, 86 L.Ed. 1322 (1942); *Needelman v. United States*, 261 F.2d 802 (5th Cir. 1958), cert. dismissed 362 U.S. 600, 80 S.Ct. 960, 4 L.Ed.2d 980, rehearing denied 363 U.S. 858, 80 S.Ct. 1606, 4 L.Ed.2d 1739, Annot., 82 A.L.R.2d 473, 562 and 7 A.L.R.3d 181, 247. An increasing group of cases has repudiated the distinction, *People v. Scott*, 29 Ill.2d 97, 193 N.E.2d 814 (1963); *State v. Mucci*, 25 N.J. 423, 136 A.2d 761 (1957); *State v. Hunt*, 25 N.J. 514, 138 A.2d 1 (1958); *State v. Desolvers*, 40 R.I. 89, 100, A. 64 (1917), and this position is believed to be correct. As Wigmore put it, ''the risk of imposition and the need of safeguard is just as great'' in both situations. 3 Wigmore §762, p. 111. To the same effect is McCormick §9, p. 17.

The purpose of the phrase ''for the purpose of testifying'' is to safeguard against using the rule as a pretext for wholesale exploration of an opposing party's files and to insure that access is limited only to those writings which may fairly be said in fact to have an impact upon the testimony of the witness.

The purpose of the rule is the same as that of the *Jencks* statute, 18 U.S.C. §3500: to promote the search of credibility and memory. The same sensitivity to disclosure of government files may be involved; hence the rule is expressly made subject to the statute, subdivision (a) of which provides: ''In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of a subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.'' Items falling within the purview of the statute are producible only as provided by its terms, *Palermo v. United States*, 360 U.S. 343, 351 (1959), and disclosure under the rule is limited similarly by the statutory conditions. With this limitation in mind, some differences of application may be noted. The *Jencks* statute applies only to statements of witnesses; the rule is not so limited. The statute applies only to criminal cases; the rule applies to all cases. The statute applies only to government witnesses; the rule applies to all witnesses. The statute contains no requirement that the statement be consulted for purposes of refreshment before or while testifying; the rule so requires. Since many writings would qualify under either statute or rule, a substantial overlap exists, but the identity of procedures makes this of no importance.

The consequences of nonproduction by the government in a criminal case are those of the *Jencks* statute, striking the testimony or in exceptional cases a mistrial. 18 U.S.C. §3500(d). In other cases these alternatives are unduly limited, and such possibilities as contempt, dismissal, finding issues against the offender, and the like are available. See Rule 16(g) of the Federal Rules of Criminal Procedure and Rule 37(b) of the Federal Rules of Civil Procedure for appropriate sanctions.

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 93–650

As submitted to Congress, Rule 612 provided that except as set forth in 18 U.S.C. 3500, if a witness uses a writing to refresh his memory for the purpose of testifying, ''either before or while testifying,'' an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness on it, and to introduce in evidence those portions relating to the witness' testimony. The Committee amended the Rule so as still to require the production of writings used by a witness while testifying, but to render the production of writings used by a witness to refresh his memory before testifying discretionary with the court in the interests of justice, as is the case under existing federal law. See *Goldman v. United States*, 316 U.S. 129 (1942). The Committee considered that permitting an adverse party to require the production of writings used before testifying could result in fishing expeditions among a multitude of papers which a witness may have used in preparing for trial.

The Committee intends that nothing in the Rule be construed as barring the assertion of a privilege with respect to writings used by a witness to refresh his memory.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendment is technical. No substantive change is intended.

Rule 613. Prior Statements of Witnesses

(a) EXAMINING WITNESS CONCERNING PRIOR STATEMENT. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) EXTRINSIC EVIDENCE OF PRIOR INCONSISTENT STATEMENT OF WITNESS. Extrinsic evidence of a prior inconsistent statement by a witness is not

admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1936; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 25, 1988, eff. Nov. 1, 1988.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

Subdivision (a). The Queen's Case, 2 Br. & B. 284, 129 Eng. Rep. 976 (1820), laid down the requirement that a cross-examiner, prior to questioning the witness about his own prior statement in writing, must first show it to the witness. Abolished by statute in the country of its origin, the requirement nevertheless gained currency in the United States. The rule abolishes this useless impediment, to cross-examination. Ladd, Some Observations on Credibility: Impeachment of Witnesses, 52 Cornell L.Q. 239, 246–247 (1967); McCormick §28; 4 Wigmore §§1259–1260. Both oral and written statements are included.

The provision for disclosure to counsel is designed to protect against unwarranted insinuations that a statement has been made when the fact is to the contrary.

The rule does not defeat the application of Rule 1002 relating to production of the original when the contents of a writing are sought to be proved. Nor does it defeat the application of Rule 26(b)(3) of the Rules of Civil Procedure, as revised, entitling a person on request to a copy of his own statement, though the operation of the latter may be suspended temporarily.

Subdivision (b). The familiar foundation requirement that an impeaching statement first be shown to the witness before it can be proved by extrinsic evidence is preserved but with some modifications. See Ladd, Some Observations on Credibility: Impeachment of Witnesses, 52 Cornell L.Q. 239, 247 (1967). The traditional insistence that the attention of the witness be directed to the statement on cross-examination is relaxed in favor of simply providing the witness an opportunity to explain and the opposite party an opportunity to examine on the statement, with no specification of any particular time or sequence. Under this procedure, several collusive witnesses can be examined before disclosure of a joint prior inconsistent statement. See Comment to California Evidence Code §770. Also, dangers of oversight are reduced.

See McCormick §37, p. 68.

In order to allow for such eventualities as the witness becoming unavailable by the time the statement is discovered, a measure of discretion is conferred upon the judge. Similar provisions are found in California Evidence Code §770 and New Jersey Evidence Rule 22(b).

Under principles of *expression unius* the rule does not apply to impeachment by evidence of prior inconsistent conduct. The use of inconsistent statements to impeach a hearsay declaration is treated in Rule 806.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1988 AMENDMENT

The amendment is technical. No substantive change is intended.

Rule 614. Calling and Interrogation of Witnesses by Court

(a) CALLING BY COURT. The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

(b) INTERROGATION BY COURT. The court may interrogate witnesses, whether called by itself or by a party.

(c) OBJECTIONS. Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1937.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

Subdivision (a). While exercised more frequently in criminal than in civil cases, the authority of the judge to call witnesses is well established. McCormick §8, p. 14; Maguire, Weinstein, et al., Cases on Evidence 303–304 (5th ed. 1965); 9 Wigmore §2484. One reason for the practice, the old rule against impeaching one's own witness, no longer exists by virtue of Rule 607, *supra*. Other reasons remain, however, to justify the continuation of the practice of calling court's witnesses. The right to cross-examine, with all it implies, is assured. The tendency of juries to associate a witness with the party calling him, regardless of technical aspects of vouching, is avoided. And the judge is not imprisoned within the case as made by the parties.

Subdivision (b). The authority of the judge to question witnesses is also well established. McCormick §8, pp. 12–13; Maguire, Weinstein, et al., Cases on Evidence 737–739 (5th ed. 1965); 3 Wigmore §784. The authority is, of course, abused when the judge abandons his proper role and assumes that of advocate, but the manner in which interrogation should be conducted and the proper extent of its exercise are not susceptible of formulation in a rule. The omission in no sense precludes courts of review from continuing to reverse for abuse.

Subdivision (c). The provision relating to objections is designed to relieve counsel of the embarrassment attendant upon objecting to questions by the judge in the presence of the jury, while at the same time assuring that objections are made in apt time to afford the opportunity to take possible corrective measures. Compare the "automatic" objection feature of Rule 605 when the judge is called as a witness.

Rule 615. Exclusion of Witnesses

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a person authorized by statute to be present.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1937; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 25, 1988, eff. Nov. 1, 1988; Pub. L. 100–690, title VII, §7075(a), Nov. 18, 1988, 102 Stat. 4405; Apr. 24, 1998, eff. Dec. 1, 1998.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The efficacy of excluding or sequestering witnesses has long been recognized as a means of discouraging and exposing fabrication, inaccuracy, and collusion. 6 Wigmore §§1837–1838. The authority of the judge is admitted, the only question being whether the matter is committed to his discretion or one of right. The rule takes the latter position. No time is specified for making the request.

Several categories of persons are excepted. (1) Exclusion of persons who are parties would raise serious problems of confrontation and due process. Under accepted practice they are not subject to exclusion. 6

Wigmore §1841. (2) As the equivalent of the right of a natural-person party to be present, a party which is not a natural person is entitled to have a representative present. Most of the cases have involved allowing a police officer who has been in charge of an investigation to remain in court despite the fact that he will be a witness. *United States v. Infanzon*, 235 F.2d 318 (2d Cir. 1956); *Portomene v. United States*, 221 F.2d 582 (5th Cir. 1955); *Powell v. United States*, 208 F.2d 618 (6th Cir. 1953); *Jones v. United States*, 252 F.Supp. 781 (W.D.Okl. 1966). Designation of the representative by the attorney rather than by the client may at first glance appear to be an inversion of the attorney-client relationship, but it may be assumed that the attorney will follow the wishes of the client, and the solution is simple and workable. See California Evidence Code §777. (3) The category contemplates such persons as an agent who handled the transaction being litigated or an expert needed to advise counsel in the management of the litigation. See 6 Wigmore §1841, n. 4.

NOTES OF COMMITTEE ON THE JUDICIARY, SENATE REPORT NO. 93–1277

Many district courts permit government counsel to have an investigative agent at counsel table throughout the trial although the agent is or may be a witness. The practice is permitted as an exception to the rule of exclusion and compares with the situation defense counsel finds himself in—he always has the client with him to consult during the trial. The investigative agent's presence may be extremely important to government counsel, especially when the case is complex or involves some specialized subject matter. The agent, too, having lived with the case for a long time, may be able to assist in meeting trial surprises where the best-prepared counsel would otherwise have difficulty. Yet, it would not seem the Government could often meet the burden under rule 615 of showing that the agent's presence is essential. Furthermore, it could be dangerous to use the agent as a witness as early in the case as possible, so that he might then help counsel as a nonwitness, since the agent's testimony could be needed in rebuttal. Using another, nonwitness agent from the same investigative agency would not generally meet government counsel's needs.

This problem is solved if it is clear that investigative agents are within the group specified under the second exception made in the rule, for ''an officer or employee of a party which is not a natural person designated as its representative by its attorney.'' It is our understanding that this was the intention of the House committee. It is certainly this committee's construction of the rule.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendment is technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1988 AMENDMENT

The amendment is technical. No substantive change is intended.

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The amendment is in response to: (1) the Victim's Rights and Restitution Act of 1990, 42 U.S.C. §10606, which guarantees, within certain limits, the right of a crime victim to attend the trial; and (2) the Victim Rights Clarification Act of 1997 (18 U.S.C. §3510).

AMENDMENT BY PUBLIC LAW

1988—Pub. L. 100–690, which directed amendment of rule by inserting ''a'' before ''party which is not a natural person.'', could not be executed because the words ''party which is not a natural person.'' did not appear. However, the word ''a'' was inserted by the intervening amendment by the Court by order dated Apr. 25, 1988, eff. Nov. 1, 1988.

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

Rule 701. Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1937; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 17, 2000, eff. Dec. 1, 2000.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The rule retains the traditional objective of putting the trier of fact in possession of an accurate reproduction of the event.

Limitation (a) is the familiar requirement of first-hand knowledge or observation.

Limitation (b) is phrased in terms of requiring testimony to be helpful in resolving issues. Witnesses often find difficulty in expressing themselves in language which is not that of an opinion or conclusion. While the courts have made concessions in certain recurring situations, necessity as a standard for permitting opinions and conclusions has proved too elusive and too unadaptable to particular situations for purposes of satisfactory judicial administration. McCormick §11. Moreover, the practical impossibility of determinating by rule what is a ''fact,'' demonstrated by a century of litigation of the question of what is a fact for purposes of pleading under the Field Code, extends into evidence also. 7 Wigmore §1919. The rule assumes that the natural characteristics of the adversary system will generally lead to an acceptable result, since the detailed account carries more conviction than the broad assertion, and a lawyer can be expected to display his witness to the best advantage. If he fails to do so, cross-examination and argument will point up the weakness. See Ladd, Expert Testimony, 5 Vand.L.Rev. 414, 415–417 (1952). If, despite these considerations, attempts are made to introduce meaningless assertions which amount to little more than choosing up sides, exclusion for lack of helpfulness is called for by the rule.

The language of the rule is substantially that of Uniform. Rule 56(1). Similar provisions are California Evidence Code §800; Kansas Code of Civil Procedure §60–456(a); New Jersey Evidence Rule 56(1).

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

COMMITTEE NOTES ON RULES—2000 AMENDMENT

Rule 701 has been amended to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing. Under the amendment, a witness' testimony must be scrutinized under the rules regulating expert opinion to the extent that the witness is providing testimony based on scientific, technical, or other specialized knowledge within the scope of Rule 702. *See generally Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190 (3d Cir. 1995). By channeling testimony that is actually expert testimony to Rule 702, the amendment also ensures that a party will not evade the expert witness disclosure requirements set forth in Fed.R.Civ.P. 26 and Fed.R.Crim.P. 16 by simply calling an expert witness in the guise of a layperson. *See* Joseph, *Emerging Expert Issues Under the 1993 Disclosure Amendments to the Federal Rules of Civil Proce-*

dure, 164 F.R.D. 97, 108 (1996) (noting that ''there is no good reason to allow what is essentially surprise expert testimony,'' and that ''the Court should be vigilant to preclude manipulative conduct designed to thwart the expert disclosure and discovery process''). *See also United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997) (law enforcement agents testifying that the defendant's conduct was consistent with that of a drug trafficker could not testify as lay witnesses; to permit such testimony under Rule 701 ''subverts the requirements of Federal Rule of Criminal Procedure 16(a)(1)(E)'').

The amendment does not distinguish between expert and lay *witnesses*, but rather between expert and lay *testimony*. Certainly it is possible for the same witness to provide both lay and expert testimony in a single case. *See, e.g., United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997) (law enforcement agents could testify that the defendant was acting suspiciously, without being qualified as experts; however, the rules on experts were applicable where the agents testified on the basis of extensive experience that the defendant was using code words to refer to drug quantities and prices). The amendment makes clear that any part of a witness' testimony that is based upon scientific, technical, or other specialized knowledge within the scope of Rule 702 is governed by the standards of Rule 702 and the corresponding disclosure requirements of the Civil and Criminal Rules.

The amendment is not intended to affect the ''prototypical example[s] of the type of evidence contemplated by the adoption of Rule 701 relat[ing] to the appearance of persons or things, identity, the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, distance, and an endless number of items that cannot be described factually in words apart from inferences.'' *Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190, 1196 (3d Cir. 1995).

For example, most courts have permitted the owner or officer of a business to testify to the value or projected profits of the business, without the necessity of qualifying the witness as an accountant, appraiser, or similar expert. *See, e.g., Lightning Lube, Inc. v. Witco Corp.* 4 F.3d 1153 (3d Cir. 1993) (no abuse of discretion in permitting the plaintiff's owner to give lay opinion testimony as to damages, as it was based on his knowledge and participation in the day-to-day affairs of the business). Such opinion testimony is admitted not because of experience, training or specialized knowledge within the realm of an expert, but because of the particularized knowledge that the witness has by virtue of his or her position in the business. The amendment does not purport to change this analysis. Similarly, courts have permitted lay witnesses to testify that a substance appeared to be a narcotic, so long as a foundation of familiarity with the substance is established. *See, e.g., United States v. Westbrook*, 896 F.2d 330 (8th Cir. 1990) (two lay witnesses who were heavy amphetamine users were properly permitted to testify that a substance was amphetamine; but it was error to permit another witness to make such an identification where she had no experience with amphetamines). Such testimony is not based on specialized knowledge within the scope of Rule 702, but rather is based upon a layperson's personal knowledge. If, however, that witness were to describe how a narcotic was manufactured, or to describe the intricate workings of a narcotic distribution network, then the witness would have to qualify as an expert under Rule 702. *United States v. Figueroa-Lopez, supra*.

The amendment incorporates the distinctions set forth in *State v. Brown*, 836 S.W.2d 530, 549 (1992), a case involving former Tennessee Rule of Evidence 701, a rule that precluded lay witness testimony based on ''special knowledge.'' In *Brown*, the court declared that the distinction between lay and expert witness testimony is that lay testimony ''results from a process of reasoning familiar in everyday life,'' while expert testimony ''results from a process of reasoning which can be mastered only by specialists in the field.'' The court in *Brown* noted that a lay witness with experience could testify that a substance appeared to be blood, but that a witness would have to qualify as an expert before he could testify that bruising around the eyes is indicative of skull trauma. That is the kind of distinction made by the amendment to this Rule.

GAP Report—Proposed Amendment to Rule 701. The Committee made the following changes to the published draft of the proposed amendment to Evidence Rule 701:

1. The words ''within the scope of Rule 702'' were added at the end of the proposed amendment, to emphasize that the Rule does not require witnesses to qualify as experts unless their testimony is of the type traditionally considered within the purview of Rule 702. The Committee Note was amended to accord with this textual change.

2. The Committee Note was revised to provide further examples of the kind of testimony that could and could not be proffered under the limitation imposed by the proposed amendment.

Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1937; Apr. 17, 2000, eff. Dec. 1, 2000.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

An intelligent evaluation of facts is often difficult or impossible without the application of some scientific, technical, or other specialized knowledge. The most common source of this knowledge is the expert witness, although there are other techniques for supplying it.

Most of the literature assumes that experts testify only in the form of opinions. The assumption is logically unfounded. The rule accordingly recognizes that an expert on the stand may give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts. Since much of the criticism of expert testimony has centered upon the hypothetical question, it seems wise to recognize that opinions are not indispensable and to encourage the use of expert testimony in non-opinion form when counsel believes the trier can itself draw the requisite inference. The use of opinions is not abolished by the rule, however. It will continue to be permissible for the experts to take the further step of suggesting the inference which should be drawn from applying the specialized knowledge to the facts. See Rules 703 to 705.

Whether the situation is a proper one for the use of expert testimony is to be determined on the basis of assisting the trier. ''There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute.'' Ladd, Expert Testimony, 5 Vand.L.Rev. 414, 418 (1952). When opinions are excluded, it is because they are unhelpful and therefore superfluous and a waste of time. 7 Wigmore §1918.

The rule is broadly phrased. The fields of knowledge which may be drawn upon are not limited merely to the ''scientific'' and ''technical'' but extend to all ''specialized'' knowledge. Similarly, the expert is viewed, not in a narrow sense, but as a person qualified by ''knowl-

edge, skill, experience, training or education.'' Thus within the scope of the rule are not only experts in the strictest sense of the word, e.g., physicians, physicists, and architects, but also the large group sometimes called ''skilled'' witnesses, such as bankers or landowners testifying to land values.

COMMITTEE NOTES ON RULES—2000 AMENDMENT

Rule 702 has been amended in response to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and to the many cases applying *Daubert*, including *Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167 (1999). In *Daubert* the Court charged trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony, and the Court in *Kumho* clarified that this gatekeeper function applies to all expert testimony, not just testimony based in science. *See also Kumho*, 119 S.Ct. at 1178 (citing the Committee Note to the proposed amendment to Rule 702, which had been released for public comment before the date of the *Kumho* decision). The amendment affirms the trial court's role as gatekeeper and provides some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony. Consistently with *Kumho*, the Rule as amended provides that all types of expert testimony present questions of admissibility for the trial court in deciding whether the evidence is reliable and helpful. Consequently, the admissibility of all expert testimony is governed by the principles of Rule 104(a). Under that Rule, the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence. *See Bourjaily v. United States*, 483 U.S. 171 (1987).

Daubert set forth a non-exclusive checklist for trial courts to use in assessing the reliability of scientific expert testimony. The specific factors explicated by the *Daubert* Court are (1) whether the expert's technique or theory can be or has been tested—that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community. The Court in *Kumho* held that these factors might also be applicable in assessing the reliability of nonscientific expert testimony, depending upon ''the particular circumstances of the particular case at issue.'' 119 S.Ct. at 1175.

No attempt has been made to ''codify'' these specific factors. *Daubert* itself emphasized that the factors were neither exclusive nor dispositive. Other cases have recognized that not all of the specific *Daubert* factors can apply to every type of expert testimony. In addition to *Kumho*, 119 S.Ct. at 1175, *see Tyus v. Urban Search Management*, 102 F.3d 256 (7th Cir. 1996) (noting that the factors mentioned by the Court in *Daubert* do not neatly apply to expert testimony from a sociologist). *See also Kannankeril v. Terminix Int'l, Inc.*, 128 F.3d 802, 809 (3d Cir. 1997) (holding that lack of peer review or publication was not dispositive where the expert's opinion was supported by ''widely accepted scientific knowledge''). The standards set forth in the amendment are broad enough to require consideration of any or all of the specific *Daubert* factors where appropriate.

Courts both before and after *Daubert* have found other factors relevant in determining whether expert testimony is sufficiently reliable to be considered by the trier of fact. These factors include:

(1) Whether experts are ''proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying.'' *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995).

(2) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion. *See General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) (noting that in some cases a trial court ''may conclude that there is simply too great an analytical gap between the data and the opinion proffered'').

(3) Whether the expert has adequately accounted for obvious alternative explanations. *See Claar v. Burlington N.R.R.*, 29 F.3d 499 (9th Cir. 1994) (testimony excluded where the expert failed to consider other obvious causes for the plaintiff's condition). *Compare Ambrosini v. Labarraque*, 101 F.3d 129 (D.C.Cir. 1996) (the possibility of some uneliminated causes presents a question of weight, so long as the most obvious causes have been considered and reasonably ruled out by the expert).

(4) Whether the expert ''is being as careful as he would be in his regular professional work outside his paid litigation consulting.'' *Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 942 (7th Cir. 1997). *See Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1176 (1999) (*Daubert* requires the trial court to assure itself that the expert ''employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field'').

(5) Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give. *See Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1175 (1999) (*Daubert's* general acceptance factor does not ''help show that an expert's testimony is reliable where the discipline itself lacks reliability, as, for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy.''); *Moore v. Ashland Chemical, Inc.*, 151 F.3d 269 (5th Cir. 1998) (en banc) (clinical doctor was properly precluded from testifying to the toxicological cause of the plaintiff's respiratory problem, where the opinion was not sufficiently grounded in scientific methodology); *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188 (6th Cir. 1988) (rejecting testimony based on ''clinical ecology'' as unfounded and unreliable).

All of these factors remain relevant to the determination of the reliability of expert testimony under the Rule as amended. Other factors may also be relevant. *See Kumho*, 119 S.Ct. 1167, 1176 (''[W]e conclude that the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable.''). Yet no single factor is necessarily dispositive of the reliability of a particular expert's testimony. *See, e.g., Heller v. Shaw Industries, Inc.*, 167 F.3d 146, 155 (3d Cir. 1999) (''not only must each stage of the expert's testimony be reliable, but each stage must be evaluated practically and flexibly without bright-line exclusionary (or inclusionary) rules.''); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317, n.5 (9th Cir. 1995) (noting that some expert disciplines ''have the courtroom as a principal theatre of operations'' and as to these disciplines ''the fact that the expert has developed an expertise principally for purposes of litigation will obviously not be a substantial consideration.'').

A review of the caselaw after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule. *Daubert* did not work a ''seachange over federal evidence law,'' and ''the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system.'' *United States v. 14.38 Acres of Land Situated in Leflore County, Mississippi*, 80 F.3d 1074, 1078 (5th Cir. 1996). As the Court in *Daubert* stated: ''Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.'' 509 U.S. at 595. Likewise, this amendment is not intended to provide an excuse for an automatic challenge to the testimony of every expert. *See Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1176 (1999) (noting that the trial judge has the discretion ''both to avoid unnecessary 'reliability' proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises.'').

When a trial court, applying this amendment, rules that an expert's testimony is reliable, this does not necessarily mean that contradictory expert testimony is unreliable. The amendment is broad enough to permit testimony that is the product of competing principles or methods in the same field of expertise. *See, e.g., Heller v. Shaw Industries, Inc.*, 167 F.3d 146, 160 (3d Cir. 1999) (expert testimony cannot be excluded simply because the expert uses one test rather than another, when both tests are accepted in the field and both reach reliable results). As the court stated in *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 744 (3d Cir. 1994), proponents ''do not have to demonstrate to the judge by a preponderance of the evidence that the assessments of their experts are correct, they only have to demonstrate by a preponderance of evidence that their opinions are reliable. . . . The evidentiary requirement of reliability is lower than the merits standard of correctness.'' *See also Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1318 (9th Cir. 1995) (scientific experts might be permitted to testify if they could show that the methods they used were also employed by ''a recognized minority of scientists in their field.''); *Ruiz-Troche v. Pepsi Cola*, 161 F.3d 77, 85 (1st Cir. 1998) (''*Daubert* neither requires nor empowers trial courts to determine which of several competing scientific theories has the best provenance.'').

The Court in *Daubert* declared that the ''focus, of course, must be solely on principles and methodology, not on the conclusions they generate.'' 509 U.S. at 595. Yet as the Court later recognized, ''conclusions and methodology are not entirely distinct from one another.'' *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). Under the amendment, as under *Daubert*, when an expert purports to apply principles and methods in accordance with professional standards, and yet reaches a conclusion that other experts in the field would not reach, the trial court may fairly suspect that the principles and methods have not been faithfully applied. *See Lust v. Merrell Dow Pharmaceuticals, Inc.*, 89 F.3d 594, 598 (9th Cir. 1996). The amendment specifically provides that the trial court must scrutinize not only the principles and methods used by the expert, but also whether those principles and methods have been properly applied to the facts of the case. As the court noted in *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3d Cir. 1994), ''*any* step that renders the analysis unreliable . . . renders the expert's testimony inadmissible. *This is true whether the step completely changes a reliable methodology or merely misapplies that methodology*.''

If the expert purports to apply principles and methods to the facts of the case, it is important that this application be conducted reliably. Yet it might also be important in some cases for an expert to educate the factfinder about general principles, without ever attempting to apply these principles to the specific facts of the case. For example, experts might instruct the factfinder on the principles of thermodynamics, or bloodclotting, or on how financial markets respond to corporate reports, without ever knowing about or trying to tie their testimony into the facts of the case. The amendment does not alter the venerable practice of using expert testimony to educate the factfinder on general principles. For this kind of generalized testimony, Rule 702 simply requires that: (1) the expert be qualified; (2) the testimony address a subject matter on which the factfinder can be assisted by an expert; (3) the testimony be reliable; and (4) the testimony ''fit'' the facts of the case.

As stated earlier, the amendment does not distinguish between scientific and other forms of expert testimony. The trial court's gatekeeping function applies to testimony by any expert. *See Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1171 (1999) (''We conclude that *Daubert's* general holding—setting forth the trial judge's general 'gatekeeping' obligation—applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge.''). While the relevant factors for determining reliability will vary from expertise to expertise, the amendment rejects the premise that an expert's testimony should be treated more permissively simply because it is outside the realm of science. An opinion from an expert who is not a scientist should receive the same degree of scrutiny for reliability as an opinion from an expert who purports to be a scientist. *See Watkins v. Telsmith, Inc.*, 121 F.3d 984, 991 (5th Cir. 1997) (''[I]t seems exactly backwards that experts who purport to rely on general engineering principles and practical experience might escape screening by the district court simply by stating that their conclusions were not reached by any particular method or technique.''). Some types of expert testimony will be more objectively verifiable, and subject to the expectations of falsifiability, peer review, and publication, than others. Some types of expert testimony will not rely on anything like a scientific method, and so will have to be evaluated by reference to other standard principles attendant to the particular area of expertise. The trial judge in all cases of proffered expert testimony must find that it is properly grounded, well-reasoned, and not speculative before it can be admitted. The expert's testimony must be grounded in an accepted body of learning or experience in the expert's field, and the expert must explain how the conclusion is so grounded. *See, e.g.*, American College of Trial Lawyers, *Standards and Procedures for Determining the Admissibility of Expert Testimony after Daubert*, 157 F.R.D. 571, 579 (1994) (''[W]hether the testimony concerns economic principles, accounting standards, property valuation or other non-scientific subjects, it should be evaluated by reference to the 'knowledge and experience' of that particular field.'').

The amendment requires that the testimony must be the product of reliable principles and methods that are reliably applied to the facts of the case. While the terms ''principles'' and ''methods'' may convey a certain impression when applied to scientific knowledge, they remain relevant when applied to testimony based on technical or other specialized knowledge. For example, when a law enforcement agent testifies regarding the use of code words in a drug transaction, the principle used by the agent is that participants in such transactions regularly use code words to conceal the nature of their activities. The method used by the agent is the application of extensive experience to analyze the meaning of the conversations. So long as the principles and methods are reliable and applied reliably to the facts of the case, this type of testimony should be admitted.

Nothing in this amendment is intended to suggest that experience alone—or experience in conjunction with other knowledge, skill, training or education—may not provide a sufficient foundation for expert testimony. To the contrary, the text of Rule 702 expressly contemplates that an expert may be qualified on the basis of experience. In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony. *See, e.g., United States v. Jones*, 107 F.3d 1147 (6th Cir. 1997) (no abuse of discretion in admitting the testimony of a handwriting examiner who had years of practical experience and extensive training, and who explained his methodology in detail); *Tassin v. Sears Roebuck*, 946 F.Supp. 1241, 1248 (M.D.La. 1996) (design engineer's testimony can be admissible when the expert's opinions ''are based on facts, a reasonable investigation, and traditional technical/mechanical expertise, and he provides a reasonable link between the information and procedures he uses and the conclusions he reaches''). *See also Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1178 (1999) (stating that ''no one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience.'').

If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court's gatekeeping function requires more than sim-

ply ''taking the expert's word for it.'' *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1319 (9th Cir. 1995) (''We've been presented with only the experts' qualifications, their conclusions and their assurances of reliability. Under *Daubert*, that's not enough.''). The more subjective and controversial the expert's inquiry, the more likely the testimony should be excluded as unreliable. *See O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090 (7th Cir. 1994) (expert testimony based on a completely subjective methodology held properly excluded). *See also Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1176 (1999) (''[I]t will at times be useful to ask even of a witness whose expertise is based purely on experience, say, a perfume tester able to distinguish among 140 odors at a sniff, whether his preparation is of a kind that others in the field would recognize as acceptable.'').

Subpart (1) of Rule 702 calls for a quantitative rather than qualitative analysis. The amendment requires that expert testimony be based on sufficient underlying ''facts or data.'' The term ''data'' is intended to encompass the reliable opinions of other experts. See the original Advisory Committee Note to Rule 703. The language ''facts or data'' is broad enough to allow an expert to rely on hypothetical facts that are supported by the evidence. *Id.*

When facts are in dispute, experts sometimes reach different conclusions based on competing versions of the facts. The emphasis in the amendment on ''sufficient facts or data'' is not intended to authorize a trial court to exclude an expert's testimony on the ground that the court believes one version of the facts and not the other.

There has been some confusion over the relationship between Rules 702 and 703. The amendment makes clear that the sufficiency of the basis of an expert's testimony is to be decided under Rule 702. Rule 702 sets forth the overarching requirement of reliability, and an analysis of the sufficiency of the expert's basis cannot be divorced from the ultimate reliability of the expert's opinion. In contrast, the ''reasonable reliance'' requirement of Rule 703 is a relatively narrow inquiry. When an expert relies on inadmissible information, Rule 703 requires the trial court to determine whether that information is of a type reasonably relied on by other experts in the field. If so, the expert can rely on the information in reaching an opinion. However, the question whether the expert is relying on a *sufficient* basis of information—whether admissible information or not—is governed by the requirements of Rule 702.

The amendment makes no attempt to set forth procedural requirements for exercising the trial court's gatekeeping function over expert testimony. *See* Daniel J. Capra, *The Daubert Puzzle*, 38 Ga.L.Rev. 699, 766 (1998) (''Trial courts should be allowed substantial discretion in dealing with *Daubert* questions; any attempt to codify procedures will likely give rise to unnecessary changes in practice and create difficult questions for appellate review.''). Courts have shown considerable ingenuity and flexibility in considering challenges to expert testimony under *Daubert*, and it is contemplated that this will continue under the amended Rule. *See, e.g., Cortes-Irizarry v. Corporacion Insular*, 111 F.3d 184 (1st Cir. 1997) (discussing the application of *Daubert* in ruling on a motion for summary judgment); *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 736, 739 (3d Cir. 1994) (discussing the use of *in limine* hearings); *Claar v. Burlington N.R.R.*, 29 F.3d 499, 502–05 (9th Cir. 1994) (discussing the trial court's technique of ordering experts to submit serial affidavits explaining the reasoning and methods underlying their conclusions).

The amendment continues the practice of the original Rule in referring to a qualified witness as an ''expert.'' This was done to provide continuity and to minimize change. The use of the term ''expert'' in the Rule does not, however, mean that a jury should actually be informed that a qualified witness is testifying as an ''expert.'' Indeed, there is much to be said for a practice that prohibits the use of the term ''expert'' by both the parties and the court at trial. Such a practice ''ensures that trial courts do not inadvertently put their stamp of authority'' on a witness's opinion, and protects against the jury's being ''overwhelmed by the so-called 'experts'.'' Hon. Charles Richey, *Proposals to Eliminate the Prejudicial Effect of the Use of the Word ''Expert'' Under the Federal Rules of Evidence in Criminal and Civil Jury Trials*, 154 F.R.D. 537, 559 (1994) (setting forth limiting instructions and a standing order employed to prohibit the use of the term ''expert'' in jury trials).

GAP Report—Proposed Amendment to Rule 702. The Committee made the following changes to the published draft of the proposed amendment to Evidence Rule 702:

1. The word ''reliable'' was deleted from Subpart (1) of the proposed amendment, in order to avoid an overlap with Evidence Rule 703, and to clarify that an expert opinion need not be excluded simply because it is based on hypothetical facts. The Committee Note was amended to accord with this textual change.

2. The Committee Note was amended throughout to include pertinent references to the Supreme Court's decision in *Kumho Tire Co. v. Carmichael*, which was rendered after the proposed amendment was released for public comment. Other citations were updated as well.

3. The Committee Note was revised to emphasize that the amendment is not intended to limit the right to jury trial, nor to permit a challenge to the testimony of every expert, nor to preclude the testimony of experience-based experts, nor to prohibit testimony based on competing methodologies within a field of expertise.

4. Language was added to the Committee Note to clarify that no single factor is necessarily dispositive of the reliability inquiry mandated by Evidence Rule 702.

Rule 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1937; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 17, 2000, eff. Dec. 1, 2000.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

Facts or data upon which expert opinions are based may, under the rule, be derived from three possible sources. The first is the firsthand observation of the witness, with opinions based thereon traditionally allowed. A treating physician affords an example. Rheingold, The Basis of Medical Testimony, 15 Vand.L.Rev. 473, 489 (1962). Whether he must first relate his observations is treated in Rule 705. The second source, presentation at the trial, also reflects existing practice. The technique may be the familiar hypothetical question or having the expert attend the trial and hear the testimony establishing the facts. Problems of determining what testimony the expert relied upon, when the latter technique is employed and the testimony is in conflict, may be resolved by resort to Rule 705. The third source contemplated by the rule consists of presentation of data to the expert outside of court and other than by his own perception. In this respect the rule is designed to broaden the basis for expert opinions beyond that current in many jurisdictions and to bring the judicial

practice into line with the practice of the experts themselves when not in court. Thus a physician in his own practice bases his diagnosis on information from numerous sources and of considerable variety, including statements by patients and relatives, reports and opinions from nurses, technicians and other doctors, hospital records, and X rays. Most of them are admissible in evidence, but only with the expenditure of substantial time in producing and examining various authenticating witnesses. The physician makes life-and-death decisions in reliance upon them. His validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes. Rheingold, *supra*, at 531; McCormick § 15. A similar provision is California Evidence Code § 801(b).

The rule also offers a more satisfactory basis for ruling upon the admissibility of public opinion poll evidence. Attention is directed to the validity of the techniques employed rather than to relatively fruitless inquiries whether hearsay is involved. See Judge Feinberg's careful analysis in *Zippo Mfg. Co. v. Rogers Imports, Inc.*, 216 F.Supp. 670 (S.D.N.Y. 1963) See also Blum et al, The Art of Opinion Research: A Lawyer's Appraisal of an Emerging Service, 24 U.Chi.L.Rev. 1 (1956); Bonynge, Trademark Surveys and Techniques and Their Use in Litigation, 48 A.B.A.J. 329 (1962); Zeisel, The Uniqueness of Survey Evidence, 45 Cornell L.Q. 322 (1960); Annot., 76 A.L.R.2d 919.

If it be feared that enlargement of permissible data may tend to break down the rules of exclusion unduly, notice should be taken that the rule requires that the facts or data "be of a type reasonably relied upon by experts in the particular field." The language would not warrant admitting in evidence the opinion of an "accidentologist" as to the point of impact in an automobile collision based on statements of bystanders, since this requirement is not satisfied. See Comment, Cal.Law Rev.Comm'n, Recommendation Proposing an Evidence Code 148–150 (1965).

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendment is technical. No substantive change is intended.

COMMITTEE NOTES ON RULES—2000 AMENDMENT

Rule 703 has been amended to emphasize that when an expert reasonably relies on inadmissible information to form an opinion or inference, the underlying information is not admissible simply because the opinion or inference is admitted. Courts have reached different results on how to treat inadmissible information when it is reasonably relied upon by an expert in forming an opinion or drawing an inference. *Compare United States v. Rollins*, 862 F.2d 1282 (7th Cir. 1988) (admitting, as part of the basis of an FBI agent's expert opinion on the meaning of code language, the hearsay statements of an informant), *with United States v. 0.59 Acres of Land*, 109 F.3d 1493 (9th Cir. 1997) (error to admit hearsay offered as the basis of an expert opinion, without a limiting instruction). Commentators have also taken differing views. *See, e.g.*, Ronald Carlson, *Policing the Bases of Modern Expert Testimony*, 39 Vand.L.Rev. 577 (1986) (advocating limits on the jury's consideration of otherwise inadmissible evidence used as the basis for an expert opinion); Paul Rice, *Inadmissible Evidence as a Basis for Expert Testimony: A Response to Professor Carlson*, 40 Vand.L.Rev. 583 (1987) (advocating unrestricted use of information reasonably relied upon by an expert).

When information is reasonably relied upon by an expert and yet is admissible only for the purpose of assisting the jury in evaluating an expert's opinion, a trial court applying this Rule must consider the information's probative value in assisting the jury to weigh the expert's opinion on the one hand, and the risk of prejudice resulting from the jury's potential misuse of the information for substantive purposes on the other. The information may be disclosed to the jury, upon objection, only if the trial court finds that the probative value of the information in assisting the jury to evaluate the expert's opinion substantially outweighs its prejudicial effect. If the otherwise inadmissible information is admitted under this balancing test, the trial judge must give a limiting instruction upon request, informing the jury that the underlying information must not be used for substantive purposes. *See* Rule 105. In determining the appropriate course, the trial court should consider the probable effectiveness or lack of effectiveness of a limiting instruction under the particular circumstances.

The amendment governs only the disclosure to the jury of information that is reasonably relied on by an expert, when that information is not admissible for substantive purposes. It is not intended to affect the admissibility of an expert's testimony. Nor does the amendment prevent an expert from relying on information that is inadmissible for substantive purposes.

Nothing in this Rule restricts the presentation of underlying expert facts or data when offered by an adverse party. *See* Rule 705. Of course, an adversary's attack on an expert's basis will often open the door to a proponent's rebuttal with information that was reasonably relied upon by the expert, even if that information would not have been discloseable initially under the balancing test provided by this amendment. Moreover, in some circumstances the proponent might wish to disclose information that is relied upon by the expert in order to "remove the sting" from the opponent's anticipated attack, and thereby prevent the jury from drawing an unfair negative inference. The trial court should take this consideration into account in applying the balancing test provided by this amendment.

This amendment covers facts or data that cannot be admitted for any purpose other than to assist the jury to evaluate the expert's opinion. The balancing test provided in this amendment is not applicable to facts or data that are admissible for any other purpose but have not yet been offered for such a purpose at the time the expert testifies.

The amendment provides a presumption against disclosure to the jury of information used as the basis of an expert's opinion and not admissible for any substantive purpose, when that information is offered by the proponent of the expert. In a multi-party case, where one party proffers an expert whose testimony is also beneficial to other parties, each such party should be deemed a "proponent" within the meaning of the amendment.

GAP Report—Proposed Amendment to Rule 703. The Committee made the following changes to the published draft of the proposed amendment to Evidence Rule 703:

1. A minor stylistic change was made in the text, in accordance with the suggestion of the Style Subcommittee of the Standing Committee on Rules of Practice and Procedure.

2. The words "in assisting the jury to evaluate the expert's opinion" were added to the text, to specify the proper purpose for offering the otherwise inadmissible information relied on by an expert. The Committee Note was revised to accord with this change in the text.

3. Stylistic changes were made to the Committee Note.

4. The Committee Note was revised to emphasize that the balancing test set forth in the proposal should be used to determine whether an expert's basis may be disclosed to the jury either (1) in rebuttal or (2) on direct examination to "remove the sting" of an opponent's anticipated attack on an expert's basis.

Rule 704. Opinion on Ultimate Issue

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant

in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1937; Pub. L. 98–473, title II, §406, Oct. 12, 1984, 98 Stat. 2067.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The basic approach to opinions, lay and expert, in these rules is to admit them when helpful to the trier of fact. In order to render this approach fully effective and to allay any doubt on the subject, the so-called ''ultimate issue'' rule is specifically abolished by the instant rule.

The older cases often contained strictures against allowing witnesses to express opinions upon ultimate issues, as a particular aspect of the rule against opinions. The rule was unduly restrictive, difficult of application, and generally served only to deprive the trier of fact of useful information. 7 Wigmore §§1920, 1921; McCormick §12. The basis usually assigned for the rule, to prevent the witness from ''usurping the province of the jury,'' is aptly characterized as ''empty rhetoric.'' 7 Wigmore §1920, p. 17. Efforts to meet the felt needs of particular situations led to odd verbal circumlocutions which were said not to violate the rule. Thus a witness could express his estimate of the criminal responsibility of an accused in terms of sanity or insanity, but not in terms of ability to tell right from wrong or other more modern standard. And in cases of medical causation, witnesses were sometimes required to couch their opinions in cautious phrases of ''might or could,'' rather than ''did,'' though the result was to deprive many opinions of the positiveness to which they were entitled, accompanied by the hazard of a ruling of insufficiency to support a verdict. In other instances the rule was simply disregarded, and, as concessions to need, opinions were allowed upon such matters as intoxication, speed, handwriting, and value, although more precise coincidence with an ultimate issue would scarcely be possible.

Many modern decisions illustrate the trend to abandon the rule completely. *People v. Wilson*, 25 Cal.2d 341, 153 P.2d 720 (1944), whether abortion necessary to save life of patient; *Clifford-Jacobs Forging Co. v. Industrial Comm.*, 19 Ill.2d 236, 166 N.E.2d 582 (1960), medical causation; *Dowling v. L. H. Shattuck, Inc.*, 91 N.H. 234, 17 A.2d 529 (1941), proper method of shoring ditch; *Schweiger v. Solbeck*, 191 Or. 454, 230 P.2d 195 (1951), cause of landslide. In each instance the opinion was allowed.

The abolition of the ultimate issue rule does not lower the bars so as to admit all opinions. Under Rules 701 and 702, opinions must be helpful to the trier of fact, and Rule 403 provides for exclusion of evidence which wastes time. These provisions afford ample assurances against the admission of opinions which would merely tell the jury what result to reach, somewhat in the manner of the oath-helpers of an earlier day. They also stand ready to exclude opinions phrased in terms of inadequately explored legal criteria. Thus the question, ''Did T have capacity to make a will?'' would be excluded, while the question, ''Did T have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution?'' would be allowed. McCormick §12.

For similar provisions see Uniform Rule 56(4); California Evidence Code §805; Kansas Code of Civil Procedures §60–456(d); New Jersey Evidence Rule 56(3).

AMENDMENT BY PUBLIC LAW

1984—Pub. L. 98–473 designated existing provisions as subd. (a), inserted ''Except as provided in subdivision (b)'', and added subd. (b).

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion

The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1938; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The hypothetical question has been the target of a great deal of criticism as encouraging partisan bias, affording an opportunity for summing up in the middle of the case, and as complex and time consuming. Ladd, Expert Testimony, 5 Vand.L.Rev. 414, 426–427 (1952). While the rule allows counsel to make disclosure of the underlying facts or data as a preliminary to the giving of an expert opinion, if he chooses, the instances in which he is required to do so are reduced. This is true whether the expert bases his opinion on data furnished him at secondhand or observed by him at firsthand.

The elimination of the requirement of preliminary disclosure at the trial of underlying facts or data has a long background of support. In 1937 the Commissioners on Uniform State Laws incorporated a provision to this effect in the Model Expert Testimony Act, which furnished the basis for Uniform Rules 57 and 58. Rule 4515, N.Y. CPLR (McKinney 1963), provides:

''Unless the court orders otherwise, questions calling for the opinion of an expert witness need not be hypothetical in form, and the witness may state his opinion and reasons without first specifying the data upon which it is based. Upon cross-examination, he may be required to specify the data * * *,''

See also California Evidence Code §802; Kansas Code of Civil Procedure §§60–456, 60–457; New Jersey Evidence Rules 57, 58.

If the objection is made that leaving it to the cross-examiner to bring out the supporting data is essentially unfair, the answer is that he is under no compulsion to bring out any facts or data except those unfavorable to the opinion. The answer assumes that the cross-examiner has the advance knowledge which is essential for effective cross-examination. This advance knowledge has been afforded, though imperfectly, by the traditional foundation requirement. Rule 26(b)(4) of the Rules of Civil Procedure, as revised, provides for substantial discovery in this area, obviating in large measure the obstacles which have been raised in some instances to discovery of findings, underlying data, and even the identity of the experts. Friedenthal, Discovery and Use of an Adverse Party's Expert Information, 14 Stan.L.Rev. 455 (1962).

These safeguards are reinforced by the discretionary power of the judge to require preliminary disclosure in any event.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendment is technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1993 AMENDMENT

This rule, which relates to the manner of presenting testimony at trial, is revised to avoid an arguable conflict with revised Rules 26(a)(2)(B) and 26(e)(1) of the Federal Rules of Civil Procedure or with revised Rule 16 of the Federal Rules of Criminal Procedure, which require disclosure in advance of trial of the basis and reasons for an expert's opinions.

If a serious question is raised under Rule 702 or 703 as to the admissibility of expert testimony, disclosure of the underlying facts or data on which opinions are

based may, of course, be needed by the court before deciding whether, and to what extent, the person should be allowed to testify. This rule does not preclude such an inquiry.

Rule 706. Court Appointed Experts

(a) APPOINTMENT. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.

(b) COMPENSATION. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) DISCLOSURE OF APPOINTMENT. In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d) PARTIES' EXPERTS OF OWN SELECTION. Nothing in this rule limits the parties in calling expert witnesses of their own selection.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1938; Mar. 2, 1987, eff. Oct. 1, 1987.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The practice of shopping for experts, the venality of some experts, and the reluctance of many reputable experts to involve themselves in litigation, have been matters of deep concern. Though the contention is made that court appointed experts acquire an aura of infallibility to which they are not entitled. Levy, Impartial Medical Testimony—Revisited, 34 Temple L.Q. 416 (1961), the trend is increasingly to provide for their use. While experience indicates that actual appointment is a relatively infrequent occurrence, the assumption may be made that the availability of the procedure in itself decreases the need for resorting to it. The ever-present possibility that the judge may appoint an expert in a given case must inevitably exert a sobering effect on the expert witness of a party and upon the person utilizing his services.

The inherent power of a trial judge to appoint an expert of his own choosing is virtually unquestioned. *Scott v. Spanjer Bros., Inc.*, 298 F.2d 928 (2d Cir. 1962); *Danville Tobacco Assn. v. Bryant-Buckner Associates, Inc.*, 333 F.2d 202 (4th Cir. 1964); Sink, The Unused Power of a Federal Judge to Call His Own Expert Witnesses, 29 S.Cal.L.Rev. 195 (1956); 2 Wigmore §563, 9 *Id.* §2484; Annot., 95 A.L.R.2d 383. Hence the problem becomes largely one of detail.

The New York plan is well known and is described in Report by Special Committee of the Association of the Bar of the City of New York: Impartial Medical Testimony (1956). On recommendation of the Section of Judicial Administration, local adoption of an impartial medical plan was endorsed by the American Bar Association. 82 A.B.A.Rep. 184–185 (1957). Descriptions and analyses of plans in effect in various parts of the country are found in Van Dusen, A United States District Judge's View of the Impartial Medical Expert System, 322 F.R.D. 498 (1963); Wick and Kightlinger, Impartial Medical Testimony Under the Federal Civil Rules: A Tale of Three Doctors, 34 Ins. Counsel J. 115 (1967); and numerous articles collected in Klein, Judicial Administration and the Legal Profession 393 (1963). Statutes and rules include California Evidence Code §§730–733; Illinois Supreme Court Rule 215(d), Ill.Rev.Stat.1969, c. 110A, §215(d); Burns Indiana Stats. 1956, §9–1702; Wisconsin Stats.Annot.1958, §957.27.

In the federal practice, a comprehensive scheme for court appointed experts was initiated with the adoption of Rule 28 of the Federal Rules of Criminal Procedure in 1946. The Judicial Conference of the United States in 1953 considered court appointed experts in civil cases, but only with respect to whether they should be compensated from public funds, a proposal which was rejected. Report of the Judicial Conference of the United States 23 (1953). The present rule expands the practice to include civil cases.

Subdivision (a) is based on Rule 28 of the Federal Rules of Criminal Procedure, with a few changes, mainly in the interest of clarity. Language has been added to provide specifically for the appointment either on motion of a party or on the judge's own motion. A provision subjecting the court appointed expert to deposition procedures has been incorporated. The rule has been revised to make definite the right of any party, including the party calling him, to cross-examine.

Subdivision (b) combines the present provision for compensation in criminal cases with what seems to be a fair and feasible handling of civil cases, originally found in the Model Act and carried from there into Uniform Rule 60. See also California Evidence Code §§730–731. The special provision for Fifth Amendment compensation cases is designed to guard against reducing constitutionally guaranteed just compensation by requiring the recipient to pay costs. See Rule 71A(*l*) of the Rules of Civil Procedure.

Subdivision (c) seems to be essential if the use of court appointed experts is to be fully effective. Uniform Rule 61 so provides.

Subdivision (d) is in essence the last sentence of Rule 28(a) of the Federal Rules of Criminal Procedure.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

ARTICLE VIII. HEARSAY

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

INTRODUCTORY NOTE: THE HEARSAY PROBLEM

The factors to be considered in evaluating the testimony of a witness are perception, memory, and narration. Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 Harv.L.Rev. 177 (1948), Selected Writings on Evidence and Trial 764, 765 (Fryer ed. 1957); Shientag, Cross-Examination—A Judge's Viewpoint, 3 Record 12 (1948); Strahorn, A Reconsideration of the Hearsay Rule and Admissions, 85 U.Pa.L.Rev. 484, 485 (1937), Selected Writings, *supra*, 756, 757: Weinstein, Probative Force of Hearsay, 46 Iowa L.Rev. 331 (1961). Sometimes a fourth is added, sincerity, but in fact it seems merely to be an aspect of the three already mentioned.

In order to encourage the witness to do his best with respect to each of these factors, and to expose any inaccuracies which may enter in, the Anglo-American tra-

dition has evolved three conditions under which witnesses will ideally be required to testify: (1) under oath, (2) in the personal presence of the trier of fact, (3) subject to cross-examination.

(1) Standard procedure calls for the swearing of witnesses. While the practice is perhaps less effective than in an earlier time, no disposition to relax the requirement is apparent, other than to allow affirmation by persons with scruples against taking oaths.

(2) The demeanor of the witness traditionally has been believed to furnish trier and opponent with valuable clues. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 495–496, 71 S.Ct. 456, 95 L.Ed. 456 (1951); Sahm, Demeanor Evidence: Elusive and Intangible Imponderables, 47 A.B.A.J. 580 (1961), quoting numerous authorities. The witness himself will probably be impressed with the solemnity of the occasion and the possibility of public disgrace. Willingness to falsify may reasonably become more difficult in the presence of the person against whom directed. Rules 26 and 43(a) of the Federal Rules of Criminal and Civil Procedure, respectively, include the general requirement that testimony be taken orally in open court. The Sixth Amendment right of confrontation is a manifestation of these beliefs and attitudes.

(3) Emphasis on the basis of the hearsay rule today tends to center upon the condition of cross-examination. All may not agree with Wigmore that cross-examination is ''beyond doubt the greatest legal engine ever invented for the discovery of truth,'' but all will agree with his statement that it has become a ''vital feature'' of the Anglo-American system. 5 Wigmore §1367, p. 29. The belief, or perhaps hope, that cross-examination is effective in exposing imperfections of perception, memory, and narration is fundamental. Morgan, Foreword to Model Code of Evidence 37 (1942).

The logic of the preceding discussion might suggest that no testimony be received unless in full compliance with the three ideal conditions. No one advocates this position. Common sense tells that much evidence which is not given under the three conditions may be inherently superior to much that is. Moreover, when the choice is between evidence which is less than best and no evidence at all, only clear folly would dictate an across-the-board policy of doing without. The problem thus resolves itself into effecting a sensible accommodation between these considerations and the desirability of giving testimony under the ideal conditions.

The solution evolved by the common law has been a general rule excluding hearsay but subject to numerous exceptions under circumstances supposed to furnish guarantees of trustworthiness. Criticisms of this scheme are that it is bulky and complex, fails to screen good from bad hearsay realistically, and inhibits the growth of the law of evidence.

Since no one advocates excluding all hearsay, three possible solutions may be considered: (1) abolish the rule against hearsay and admit all hearsay; (2) admit hearsay possessing sufficient probative force, but with procedural safeguards; (3) revise the present system of class exceptions.

(1) Abolition of the hearsay rule would be the simplest solution. The effect would not be automatically to abolish the giving of testimony under ideal conditions. If the declarant were available, compliance with the ideal conditions would be optional with either party. Thus the proponent could call the declarant as a witness as a form of presentation more impressive than his hearsay statement. Or the opponent could call the declarant to be cross-examined upon his statement. This is the tenor of Uniform Rule 63(1), admitting the hearsay declaration of a person ''who is present at the hearing and available for cross-examination.'' Compare the treatment of declarations of available declarants in Rule 801(d)(1) of the instant rules. If the declarant were unavailable, a rule of free admissibility would make no distinctions in terms of degrees of noncompliance with the ideal conditions and would exact no liquid pro quo in the form of assurances of trustworthiness. Rule 503 of the Model Code did exactly that, providing for the admissibility of any hearsay declaration by an unavailable declarant, finding support in the Massachusetts act of 1898, enacted at the instance of Thayer, Mass.Gen.L.1932, c. 233 §65, and in the English act of 1938, St.1938, c. 28, Evidence. Both are limited to civil cases. The draftsmen of the Uniform Rules chose a less advanced and more conventional position. Comment, Uniform Rule 63. The present Advisory Committee has been unconvinced of the wisdom of abandoning the traditional requirement of some particular assurance of credibility as a condition precedent to admitting the hearsay declaration of an unavailable declarant.

In criminal cases, the Sixth Amendment requirement of confrontation would no doubt move into a large part of the area presently occupied by the hearsay rule in the event of the abolition of the latter. The resultant split between civil and criminal evidence is regarded as an undesirable development.

(2) Abandonment of the system of class exceptions in favor of individual treatment in the setting of the particular case, accompanied by procedural safeguards, has been impressively advocated. Weinstein, The Probative Force of Hearsay, 46 Iowa L.Rev. 331 (1961). Admissibility would be determined by weighing the probative force of the evidence against the possibility of prejudice, waste of time, and the availability of more satisfactory evidence. The bases of the traditional hearsay exceptions would be helpful in assessing probative force. Ladd, The Relationship of the Principles of Exclusionary Rules of Evidence to the Problem of Proof, 18 Minn.L.Rev. 506 (1934). Procedural safeguards would consist of notice of intention to use hearsay, free comment by the judge on the weight of the evidence, and a greater measure of authority in both trial and appellate judges to deal with evidence on the basis of weight. The Advisory Committee has rejected this approach to hearsay as involving too great a measure of judicial discretion, minimizing the predictability of rulings, enhancing the difficulties of preparation for trial, adding a further element to the already overcomplicated congeries of pre-trial procedures, and requiring substantially different rules for civil and criminal cases. The only way in which the probative force of hearsay differs from the probative force of other testimony is in the absence of oath, demeanor, and cross-examination as aids in determining credibility. For a judge to exclude evidence because he does not believe it has been described as ''altogether atypical, extraordinary. * * *'' Chadbourn, Bentham and the Hearsay Rule—A Benthamic View of Rule 63(4)(c) of the Uniform Rules of Evidence, 75 Harv.L.Rev. 932, 947 (1962).

(3) The approach to hearsay in these rules is that of the common law, i.e., a general rule excluding hearsay, with exceptions under which evidence is not required to be excluded even though hearsay. The traditional hearsay exceptions are drawn upon for the exceptions, collected under two rules, one dealing with situations where availability of the declarant is regarded as immaterial and the other with those where unavailability is made a condition to the admission of the hearsay statement. Each of the two rules concludes with a provision for hearsay statements not within one of the specified exceptions ''but having comparable circumstantial guarantees of trustworthiness.'' Rules 803(24) and 804(b)(6). This plan is submitted as calculated to encourage growth and development in this area of the law, while conserving the values and experience of the past as a guide to the future.

CONFRONTATION AND DUE PROCESS

Until very recently, decisions invoking the confrontation clause of the Sixth Amendment were surprisingly few, a fact probably explainable by the former inapplicability of the clause to the states and by the hearsay rule's occupancy of much the same ground. The pattern which emerges from the earlier cases invoking the clause is substantially that of the hearsay rule, applied to criminal cases: an accused is entitled to have the witnesses against him testify under oath, in the presence of himself and trier, subject to cross-ex-

amination; yet considerations of public policy and necessity require the recognition of such exceptions as dying declarations and former testimony of unavailable witnesses. *Mattox v. United States*, 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895); *Motes v. United States*, 178 U.S. 458, 20 S.Ct. 993, 44 L.Ed. 1150 (1900); *Delaney v. United States*, 263 U.S. 586, 44 S.Ct. 206, 68 L.Ed. 462 (1924). Beginning with *Snyder v. Massachusetts*, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1934), the Court began to speak of confrontation as an aspect of procedural due process, thus extending its applicability to state cases and to federal cases other than criminal. The language of *Snyder* was that of an elastic concept of hearsay. The deportation case of *Bridges v. Wixon*, 326 U.S. 135, 65 S.Ct. 1443, 89 L.Ed. 2103 (1945), may be read broadly as imposing a strictly construed right of confrontation in all kinds of cases or narrowly as the product of a failure of the Immigration and Naturalization Service to follow its own rules. *In re Oliver*, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948), ruled that cross-examination was essential to due process in a state contempt proceeding, but in *United States v. Nugent*, 346 U.S. 1, 73 S.Ct. 991, 97 L.Ed. 1417 (1953), the court held that it was not an essential aspect of a ''hearing'' for a conscientious objector under the Selective Service Act. *Stein v. New York*, 346 U.S. 156, 196, 73 S.Ct. 1077, 97 L.Ed. 1522 (1953), disclaimed any purpose to read the hearsay rule into the Fourteenth Amendment, but in *Greene v. McElroy*, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959), revocation of security clearance without confrontation and cross-examination was held unauthorized, and a similar result was reached in *Willner v. Committee on Character*, 373 U.S. 96, 83 S.Ct. 1175, 10 L.Ed.2d 224 (1963). Ascertaining the constitutional dimensions of the confrontation-hearsay aggregate against the background of these cases is a matter of some difficulty, yet the general pattern is at least not inconsistent with that of the hearsay rule.

In 1965 the confrontation clause was held applicable to the states. *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). Prosecution use of former testimony given at a preliminary hearing where petitioner was not represented by counsel was a violation of the clause. The same result would have followed under conventional hearsay doctrine read in the light of a constitutional right to counsel, and nothing in the opinion suggests any difference in essential outline between the hearsay rule and the right of confrontation. In the companion case of *Douglas v. Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965), however, the result reached by applying the confrontation clause is one reached less readily via the hearsay rule. A confession implicating petitioner was put before the jury by reading it to the witness in portions and asking if he made that statement. The witness refused to answer on grounds of self-incrimination. The result, said the Court, was to deny cross-examination, and hence confrontation. True, it could broadly be said that the confession was a hearsay statement which for all practical purposes was put in evidence. Yet a more easily accepted explanation of the opinion is that its real thrust was in the direction of curbing undesirable prosecutorial behavior, rather than merely applying rules of exclusion, and that the confrontation clause was the means selected to achieve this end. Comparable facts and a like result appeared in *Brookhart v. Janis*, 384 U.S. 1, 86 S.Ct. 1245, 16 L.Ed.2d 314 (1966).

The pattern suggested in *Douglas* was developed further and more distinctly in a pair of cases at the end of the 1966 term. *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967), and *Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967), hinged upon practices followed in identifying accused persons before trial. This pretrial identification was said to be so decisive an aspect of the case that accused was entitled to have counsel present; a pretrial identification made in the absence of counsel was not itself receivable in evidence and, in addition, might fatally infect a courtroom identification. The presence of counsel at the earlier identification was described as a necessary prerequisite for ''a meaningful confrontation at trial.'' *United States v. Wade, supra*, 388 U.S. at p. 236, 87 S.Ct. at p. 1937. *Wade* involved no evidence of the fact of a prior identification and hence was not susceptible of being decided on hearsay grounds. In *Gilbert*, witnesses did testify to an earlier identification, readily classifiable as hearsay under a fairly strict view of what constitutes hearsay. The Court, however, carefully avoided basing the decision on the hearsay ground, choosing confrontation instead. 388 U.S. 263, 272, n. 3, 87 S.Ct. 1951. See also *Parker v. Gladden*, 385 U.S. 363 87 S.Ct. 468, 17 L.Ed.2d 420 (1966), holding that the right of confrontation was violated when the bailiff made prejudicial statements to jurors, and Note, 75, Yale L.J. 1434 (1966).

Under the earlier cases, the confrontation clause may have been little more than a constitutional embodiment of the hearsay rule, even including traditional exceptions but with some room for expanding them along similar lines. But under the recent cases the impact of the clause clearly extends beyond the confines of the hearsay rule. These considerations have led the Advisory Committee to conclude that a hearsay rule can function usefully as an adjunct to the confrontation right in constitutional areas and independently in nonconstitutional areas. In recognition of the separateness of the confrontation clause and the hearsay rule, and to avoid inviting collisions between them or between the hearsay rule and other exclusionary principles, the exceptions set forth in Rules 803 and 804 are stated in terms of exemption from the general exclusionary mandate of the hearsay rule, rather than in positive terms of admissibility. See Uniform Rule 63(1) to (31) and California Evidence Code §§1200–1340.

Rule 801. Definitions

The following definitions apply under this article:

(a) STATEMENT. A ''statement'' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) DECLARANT. A ''declarant'' is a person who makes a statement.

(c) HEARSAY. ''Hearsay'' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) STATEMENTS WHICH ARE NOT HEARSAY. A statement is not hearsay if—

(1) *Prior Statement by Witness*. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

(2) *Admission by Party-Opponent*. The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the

existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1938; Pub. L. 94–113, §1, Oct. 16, 1975, 89 Stat. 576; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 11, 1997, eff. Dec. 1, 1997.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

Subdivision (a). The definition of ''statement'' assumes importance because the term is used in the definition of hearsay in subdivision (c). The effect of the definition of ''statement'' is to exclude from the operation of the hearsay rule all evidence of conduct, verbal or nonverbal, not intended as an assertion. The key to the definition is that nothing is an assertion unless intended to be one.

It can scarcely be doubted that an assertion made in words is intended by the declarant to be an assertion. Hence verbal assertions readily fall into the category of ''statement.'' Whether nonverbal conduct should be regarded as a statement for purposes of defining hearsay requires further consideration. Some nonverbal conduct, such as the act of pointing to identify a suspect in a lineup, is clearly the equivalent of words, assertive in nature, and to be regarded as a statement. Other nonverbal conduct, however, may be offered as evidence that the person acted as he did because of his belief in the existence of the condition sought to be proved, from which belief the existence of the condition may be inferred. This sequence is, arguably, in effect an assertion of the existence of the condition and hence properly includable within the hearsay concept. See Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 Harv.L. Rev. 177, 214, 217 (1948), and the elaboration in Finman, Implied Assertions as Hearsay: Some Criticisms of the Uniform Rules of Evidence, 14 Stan.L.Rev. 682 (1962). Admittedly evidence of this character is untested with respect to the perception, memory, and narration (or their equivalents) of the actor, but the Advisory Committee is of the view that these dangers are minimal in the absence of an intent to assert and do not justify the loss of the evidence on hearsay grounds. No class of evidence is free of the possibility of fabrication, but the likelihood is less with nonverbal than with assertive verbal conduct. The situations giving rise to the nonverbal conduct are such as virtually to eliminate questions of sincerity. Motivation, the nature of the conduct, and the presence or absence of reliance will bear heavily upon the weight to be given the evidence. Falknor, The ''Hear-Say'' Rule as a ''See-Do'' Rule: Evidence of Conduct, 33 Rocky Mt.L.Rev. 133 (1961). Similar considerations govern nonassertive verbal conduct and verbal conduct which is assertive but offered as a basis for inferring something other than the matter asserted, also excluded from the definition of hearsay by the language of subdivision (c).

When evidence of conduct is offered on the theory that it is not a statement, and hence not hearsay, a preliminary determination will be required to determine whether an assertion is intended. The rule is so worded as to place the burden upon the party claiming that the intention existed; ambiguous and doubtful cases will be resolved against him and in favor of admissibility. The determination involves no greater difficulty than many other preliminary questions of fact. Maguire, The Hearsay System: Around and Through the Thicket, 14 Vand.L.Rev. 741, 765–767 (1961).

For similar approaches, see Uniform Rule 62(1); California Evidence Code §§225, 1200; Kansas Code of Civil Procedure §60–459(a); New Jersey Evidence Rule 62(1)

Subdivision (c). The definition follows along familiar lines in including only statements offered to prove the truth of the matter asserted. McCormick §225; 5 Wigmore §1361, 6 *id.* §1766. If the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay. *Emich Motors Corp. v. General Motors Corp.*, 181 F.2d 70 (7th Cir. 1950), rev'd on other grounds 340 U.S. 558, 71 S.Ct. 408, 95 L.Ed 534, letters of complaint from customers offered as a reason for cancellation of dealer's franchise, to rebut contention that franchise was revoked for refusal to finance sales through affiliated finance company. The effect is to exclude from hearsay the entire category of ''verbal acts'' and ''verbal parts of an act,'' in which the statement itself affects the legal rights of the parties or is a circumstance bearing on conduct affecting their rights.

The definition of hearsay must, of course, be read with reference to the definition of statement set forth in subdivision (a).

Testimony given by a witness in the course of court proceedings is excluded since there is compliance with all the ideal conditions for testifying.

Subdivision (d). Several types of statements which would otherwise literally fall within the definition are expressly excluded from it:

(1) *Prior statement by witness.* Considerable controversy has attended the question whether a prior out-of-court statement by a person now available for cross-examination concerning it, under oath and in the presence of the trier of fact, should be classed as hearsay. If the witness admits on the stand that he made the statement and that it was true, he adopts the statement and there is no hearsay problem. The hearsay problem arises when the witness on the stand denies having made the statement or admits having made it but denies its truth. The argument in favor of treating these latter statements as hearsay is based upon the ground that the conditions of oath, cross-examination, and demeanor observation did not prevail at the time the statement was made and cannot adequately be supplied by the later examination. The logic of the situation is troublesome. So far as concerns the oath, its mere presence has never been regarded as sufficient to remove a statement from the hearsay category, and it receives much less emphasis than cross-examination as a truth-compelling device. While strong expressions are found to the effect that no conviction can be had or important right taken away on the basis of statements not made under fear of prosecution for perjury, *Bridges v. Wixon*, 326 U.S. 135, 65 S.Ct. 1443, 89 L.Ed. 2103 (1945), the fact is that, of the many common law exceptions to the hearsay rule, only that for reported testimony has required the statement to have been made under oath. Nor is it satisfactorily explained why cross-examination cannot be conducted subsequently with success. The decisions contending most vigorously for its inadequacy in fact demonstrate quite thorough exploration of the weaknesses and doubts attending the earlier statement. *State v. Saporen*, 205 Minn. 358, 285 N.W. 898 (1939); *Ruhala v. Roby*, 379 Mich. 102, 150 N.W.2d 146 (1967); *People v. Johnson*, 68 Cal.2d 646, 68 Cal.Rptr. 599, 441 P.2d 111 (1968). In respect to demeanor, as Judge Learned Hand observed in *Di Carlo v. United States*, 6 F.2d 364 (2d Cir. 1925), when the jury decides that the truth is not what the witness says now, but what he said before, they are still deciding from what they see and hear in court. The bulk of the case law nevertheless has been against allowing prior statements of witnesses to be used generally as substantive evidence. Most of the writers and Uniform Rule 63(1) have taken the opposite position.

The position taken by the Advisory Committee in formulating this part of the rule is founded upon an unwillingness to countenance the general use of prior prepared statements as substantive evidence, but with a

recognition that particular circumstances call for a contrary result. The judgment is one more of experience than of logic. The rule requires in each instance, as a general safeguard, that the declarant actually testify as a witness, and it then enumerates three situations in which the statement is excepted from the category of hearsay. Compare Uniform Rule 63(1) which allows any out-of-court statement of a declarant who is present at the trial and available for cross-examination.

(A) Prior inconsistent statements traditionally have been admissible to impeach but not as substantive evidence. Under the rule they are substantive evidence. As has been said by the California Law Revision Commission with respect to a similar provision:

''Section 1235 admits inconsistent statements of witnesses because the dangers against which the hearsay rule is designed to protect are largely nonexistent. The declarant is in court and may be examined and cross-examined in regard to his statements and their subject matter. In many cases, the inconsistent statement is more likely to be true than the testimony of the witness at the trial because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy that gave rise to the litigation. The trier of fact has the declarant before it and can observe his demeanor and the nature of his testimony as he denies or tries to explain away the inconsistency. Hence, it is in as good a position to determine the truth or falsity of the prior statement as it is to determine the truth or falsity of the inconsistent testimony given in court. Moreover, Section 1235 will provide a party with desirable protection against the 'turncoat' witness who changes his story on the stand and deprives the party calling him of evidence essential to his case.'' Comment, California Evidence Code §1235. See also McCormick §39. The Advisory Committee finds these views more convincing than those expressed in *People v. Johnson*, 68 Cal.2d 646, 68 Cal.Rptr. 599, 441 P.2d 111 (1968). The constitutionality of the Advisory Committee's view was upheld in *California v. Green*, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970). Moreover, the requirement that the statement be inconsistent with the testimony given assures a thorough exploration of both versions while the witness is on the stand and bars any general and indiscriminate use of previously prepared statements.

(B) Prior consistent statements traditionally have been admissible to rebut charges of recent fabrication or improper influence or motive but not as substantive evidence. Under the rule they are substantive evidence. The prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally.

(C) The admission of evidence of identification finds substantial support, although it falls beyond a doubt in the category of prior out-of-court statements. Illustrative are *People v. Gould*, 54 Cal.2d 621, 7 Cal.Rptr. 273, 354 P.2d 865 (1960); *Judy v. State*, 218 Md. 168, 146 A.2d 29 (1958); *State v. Simmons*, 63 Wash.2d 17, 385 P.2d 389 (1963); California Evidence Code §1238; New Jersey Evidence Rule 63(1)(c); N.Y. Code of Criminal Procedure §393–b. Further cases are found in 4 Wigmore §1130. The basis is the generally unsatisfactory and inconclusive nature of courtroom identifications as compared with those made at an earlier time under less suggestive conditions. The Supreme Court considered the admissibility of evidence of prior identification in *Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967). Exclusion of lineup identification was held to be required because the accused did not then have the assistance of counsel. Significantly, the Court carefully refrained from placing its decision on the ground that testimony as to the making of a prior out-of-court identification (''That's the man'') violated either the hearsay rule or the right of confrontation because not made under oath, subject to immediate cross-examination, in the presence of the trier. Instead the Court observed:

''There is a split among the States concerning the admissibility of prior extra-judicial identifications, as independent evidence of identity, both by the witness and third parties present at the prior identification. See 71 ALR2d 449. It has been held that the prior identification is hearsay, and, when admitted through the testimony of the identifier, is merely a prior consistent statement. The recent trend, however, is to admit the prior identification under the exception that admits as substantive evidence a prior communication by a witness who is available for cross-examination at the trial. See 5 ALR2d Later Case Service 1225–1228. * * *'' 388 U.S. at 272, n. 3, 87 S.Ct. at 1956.

(2) *Admissions*. Admissions by a party-opponent are excluded from the category of hearsay on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule. Strahorn, A Reconsideration of the Hearsay Rule and Admissions, 85 U.Pa.L.Rev. 484, 564 (1937); Morgan, Basic Problems of Evidence 265 (1962); 4 Wigmore §1048. No guarantee of trustworthiness is required in the case of an admission. The freedom which admissions have enjoyed from technical demands of searching for an assurance of trustworthiness in some against-interest circumstance, and from the restrictive influences of the opinion rule and the rule requiring firsthand knowledge, when taken with the apparently prevalent satisfaction with the results, calls for generous treatment of this avenue to admissibility.

The rule specifies five categories of statements for which the responsibility of a party is considered sufficient to justify reception in evidence against him:

(A) A party's own statement is the classic example of an admission. If he has a representative capacity and the statement is offered against him in that capacity, no inquiry whether he was acting in the representative capacity in making the statement is required; the statement need only be relevant to represent affairs. To the same effect in California Evidence Code §1220. Compare Uniform Rule 63(7), requiring a statement to be made in a representative capacity to be admissible against a party in a representative capacity.

(B) Under established principles an admission may be made by adopting or acquiescing in the statement of another. While knowledge of contents would ordinarily be essential, this is not inevitably so: ''X is a reliable person and knows what he is talking about.'' See McCormick §246, p. 527, n. 15. Adoption or acquiescence may be manifested in any appropriate manner. When silence is relied upon, the theory is that the person would, under the circumstances, protest the statement made in his presence, if untrue. The decision in each case calls for an evaluation in terms of probable human behavior. In civil cases, the results have generally been satisfactory. In criminal cases, however, troublesome questions have been raised by decisions holding that failure to deny is an admission: the inference is a fairly weak one, to begin with; silence may be motivated by advice of counsel or realization that ''anything you say may be used against you''; unusual opportunity is afforded to manufacture evidence; and encroachment upon the privilege against self-incrimination seems inescapably to be involved. However, recent decisions of the Supreme Court relating to custodial interrogation and the right to counsel appear to resolve these difficulties. Hence the rule contains no special provisions concerning failure to deny in criminal cases.

(C) No authority is required for the general proposition that a statement authorized by a party to be made should have the status of an admission by the party. However, the question arises whether only statements to third persons should be so regarded, to the exclusion of statements by the agent to the principal. The rule is phrased broadly so as to encompass both. While it may be argued that the agent authorized to make statements to his principal does not speak for him, Morgan, Basic Problems of Evidence 273 (1962), communication to an outsider has not generally been thought to be an essential characteristic of an admis-

sion. Thus a party's books or records are usable against him, without regard to any intent to disclose to third persons. 5 Wigmore §1557. See also McCormick §78, pp. 159–161. In accord is New Jersey Evidence Rule 63(8)(a). Cf. Uniform Rule 63(8)(a) and California Evidence Code §1222 which limit status as an admission in this regard to statements authorized by the party to be made ''for'' him, which is perhaps an ambiguous limitation to statements to third persons. Falknor, Vicarious Admissions and the Uniform Rules, 14 Vand.L. Rev. 855, 860–861 (1961).

(D) The tradition has been to test the admissibility of statements by agents, as admissions, by applying the usual test of agency. Was the admission made by the agent acting in the scope of his employment? Since few principals employ agents for the purpose of making damaging statements, the usual result was exclusion of the statement. Dissatisfaction with this loss of valuable and helpful evidence has been increasing. A substantial trend favors admitting statements related to a matter within the scope of the agency or employment. *Grayson v. Williams*, 256 F.2d 61 (10th Cir. 1958); *Koninklijke Luchtvaart Maatschappij N.V. KLM Royal Dutch Airlines v. Tuller*, 110 U.S.App.D.C. 282, 292 F.2d 775, 784 (1961); *Martin v. Savage Truck Lines, Inc.*, 121 F.Supp. 417 (D.D.C. 1054), and numerous state court decisions collected in 4 Wigmore, 1964 Supp., pp. 66–73, with comments by the editor that the statements should have been excluded as not within scope of agency. For the traditional view see *Northern Oil Co. v. Socony Mobile Oil Co.*, 347 F.2d 81, 85 (2d Cir. 1965) and cases cited therein. Similar provisions are found in Uniform Rule 63(9)(a), Kansas Code of Civil Procedure §60–460(i)(1), and New Jersey Evidence Rule 63(9)(a).

(E) The limitation upon the admissibility of statements of co-conspirators to those made ''during the course and in furtherance of the conspiracy'' is in the accepted pattern. While the broadened view of agency taken in item (iv) might suggest wider admissibility of statements of co-conspirators, the agency theory of conspiracy is at best a fiction and ought not to serve as a basis for admissibility beyond that already established. See Levie, Hearsay and Conspiracy, 52 Mich.L.Rev. 1159 (1954); Comment, 25 U.Chi.L.Rev. 530 (1958). The rule is consistent with the position of the Supreme Court in denying admissibility to statements made after the objectives of the conspiracy have either failed or been achieved. *Krulewitch v. United States*, 336 U.S. 440, 69 S.Ct. 716, 93 L.Ed. 790 (1949); *Wong Sun v. United States*, 371 U.S. 471, 490, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). For similarly limited provisions see California Evidence Code §1223 and New Jersey Rule 63(9)(b). Cf. Uniform Rule 63(9)(b).

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 93–650

Present federal law, except in the Second Circuit, permits the use of prior inconsistent statements of a witness for impeachment only. Rule 801(d)(1) as proposed by the Court would have permitted all such statements to be admissible as substantive evidence, an approach followed by a small but growing number of State jurisdictions and recently held constitutional in *California v. Green*, 399 U.S. 149 (1970). Although there was some support expressed for the Court Rule, based largely on the need to counteract the effect of witness intimidation in criminal cases, the Committee decided to adopt a compromise version of the Rule similar to the position of the Second Circuit. The Rule as amended draws a distinction between types of prior inconsistent statements (other than statements of identification of a person made after perceiving him which are currently admissible, see *United States v. Anderson*, 406 F.2d 719, 720 (4th Cir.), cert. denied, 395 U.S. 967 (1969)) and allows only those made while the declarant was subject to cross-examination at a trial or hearing or in a deposition, to be admissible for their truth. Compare *United States v. DeSisto*, 329 F.2d 929 (2nd Cir.), cert. denied, 377 U.S. 979 (1964); *United States v. Cunningham*, 446 F.2d 194 (2nd Cir. 1971) (restricting the admissibility of prior inconsistent statements as substantive evidence to those made under oath in a formal proceeding, but not requiring that there have been an opportunity for cross-examination). The rationale for the Committee's decision is that (1) unlike in most other situations involving unsworn or oral statements, there can be no dispute as to whether the prior statement was made; and (2) the context of a formal proceeding, an oath, and the opportunity for cross-examination provide firm additional assurances of the reliability of the prior statement.

NOTES OF COMMITTEE ON THE JUDICIARY, SENATE REPORT NO. 93–1277

Rule 801 defines what is and what is not hearsay for the purpose of admitting a prior statement as substantive evidence. A prior statement of a witness at a trial or hearing which is inconsistent with his testimony is, of course, always admissible for the purpose of impeaching the witness' credibility.

As submitted by the Supreme Court, subdivision (d)(1)(A) made admissible as substantive evidence the prior statement of a witness inconsistent with his present testimony.

The House severely limited the admissibility of prior inconsistent statements by adding a requirement that the prior statement must have been subject to cross-examination, thus precluding even the use of grand jury statements. The requirement that the prior statement must have been subject to cross-examination appears unnecessary since this rule comes into play only when the witness testifies in the present trial. At that time, he is on the stand and can explain an earlier position and be cross-examined as to both.

The requirement that the statement be under oath also appears unnecessary. Notwithstanding the absence of an oath contemporaneous with the statement, the witness, when on the stand, qualifying or denying the prior statement, is under oath. In any event, of all the many recognized exceptions to the hearsay rule, only one (former testimony) requires that the out-of-court statement have been made under oath. With respect to the lack of evidence of the demeanor of the witness at the time of the prior statement, it would be difficult to improve upon Judge Learned Hand's observation that when the jury decides that the truth is not what the witness says now but what he said before, they are still deciding from what they see and hear in court [*Di Carlo v. U.S.*, 6 F.2d 364 (2d Cir. 1925)].

The rule as submitted by the Court has positive advantages. The prior statement was made nearer in time to the events, when memory was fresher and intervening influences had not been brought into play. A realistic method is provided for dealing with the turncoat witness who changes his story on the stand [see Comment, California Evidence Code §1235; McCormick, Evidence, §38 (2nd ed. 1972)].

New Jersey, California, and Utah have adopted a rule similar to this one; and Nevada, New Mexico, and Wisconsin have adopted the identical Federal rule.

For all of these reasons, we think the House amendment should be rejected and the rule as submitted by the Supreme Court reinstated. [It would appear that some of the opposition to this Rule is based on a concern that a person could be convicted solely upon evidence admissible under this Rule. The Rule, however, is not addressed to the question of the sufficiency of evidence to send a case to the jury, but merely as to its admissibility. Factual circumstances could well arise where, if this were the sole evidence, dismissal would be appropriate].

As submitted by the Supreme Court and as passed by the House, subdivision (d)(1)(c) of rule 801 made admissible the prior statement identifying a person made after perceiving him. The committee decided to delete this provision because of the concern that a person could be convicted solely upon evidence admissible under this subdivision.

The House approved the long-accepted rule that ''a statement by a coconspirator of a party during the course and in furtherance of the conspiracy'' is not

hearsay as it was submitted by the Supreme Court. While the rule refers to a coconspirator, it is this committee's understanding that the rule is meant to carry forward the universally accepted doctrine that a joint venturer is considered as a coconspirator for the purposes of this rule even though no conspiracy has been charged. *United States v. Rinaldi*, 393 F.2d 97, 99 (2d Cir.), cert. denied 393 U.S. 913 (1968); *United States v. Spencer*, 415 F.2d 1301, 1304 (7th Cir. 1969).

NOTES OF CONFERENCE COMMITTEE, HOUSE REPORT NO. 93–1597

Rule 801 supplies some basic definitions for the rules of evidence that deal with hearsay. Rule 801(d)(1) defines certain statements as not hearsay. The Senate amendments make two changes in it.

The House bill provides that a statement is not hearsay if the declarant testifies and is subject to cross-examination concerning the statement and if the statement is inconsistent with his testimony and was given under oath subject to cross-examination and subject to the penalty of perjury at a trial or hearing or in a deposition. The Senate amendment drops the requirement that the prior statement be given under oath subject to cross-examination and subject to the penalty of perjury at a trial or hearing or in a deposition.

The Conference adopts the Senate amendment with an amendment, so that the rule now requires that the prior inconsistent statement be given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition. The rule as adopted covers statements before a grand jury. Prior inconsistent statements may, of course, be used for impeaching the credibility of a witness. When the prior inconsistent statement is one made by a defendant in a criminal case, it is covered by Rule 801(d)(2).

The House bill provides that a statement is not hearsay if the declarant testifies and is subject to cross-examination concerning the statement and the statement is one of identification of a person made after perceiving him. The Senate amendment eliminated this provision.

The Conference adopts the Senate amendment.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1997 AMENDMENT

Rule 801(d)(2) has been amended in order to respond to three issues raised by *Bourjaily v. United States*, 483 U.S. 171 (1987). First, the amendment codifies the holding in *Bourjaily* by stating expressly that a court shall consider the contents of a coconspirator's statement in determining "the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered." According to *Bourjaily*, Rule 104(a) requires these preliminary questions to be established by a preponderance of the evidence.

Second, the amendment resolves an issue on which the Court had reserved decision. It provides that the contents of the declarant's statement do not alone suffice to establish a conspiracy in which the declarant and the defendant participated. The court must consider in addition the circumstances surrounding the statement, such as the identity of the speaker, the context in which the statement was made, or evidence corroborating the contents of the statement in making its determination as to each preliminary question. This amendment is in accordance with existing practice. Every court of appeals that has resolved this issue requires some evidence in addition to the contents of the statement. *See, e.g.*, *United States v. Beckham*, 968 F.2d 47, 51 (D.C.Cir. 1992); *United States v. Sepulveda*, 15 F.3d 1161, 1181–82 (1st Cir. 1993), *cert. denied*, 114 S.Ct. 2714 (1994); *United States v. Daly*, 842 F.2d 1380, 1386 (2d Cir.), *cert. denied*, 488 U.S. 821 (1988); *United States v. Clark*, 18 F.3d 1337, 1341–42 (6th Cir.), *cert. denied*, 115 S.Ct. 152 (1994); *United States v. Zambrana*, 841 F.2d 1320, 1344–45 (7th Cir. 1988); *United States v. Silverman*, 861 F.2d 571, 577 (9th Cir. 1988); *United States v. Gordon*, 844 F.2d 1397, 1402 (9th Cir. 1988); *United States v. Hernandez*, 829 F.2d 988, 993 (10th Cir. 1987), *cert. denied*, 485 U.S. 1013 (1988); *United States v. Byrom*, 910 F.2d 725, 736 (11th Cir. 1990).

Third, the amendment extends the reasoning of *Bourjaily* to statements offered under subdivisions (C) and (D) of Rule 801(d)(2). In *Bourjaily*, the Court rejected treating foundational facts pursuant to the law of agency in favor of an evidentiary approach governed by Rule 104(a). The Advisory Committee believes it appropriate to treat analogously preliminary questions relating to the declarant's authority under subdivision (C), and the agency or employment relationship and scope thereof under subdivision (D).

GAP Report on Rule 801. The word "shall" was substituted for the word "may" in line 19. The second sentence of the committee note was changed accordingly.

AMENDMENT BY PUBLIC LAW

1975—Subd. (d)(1). Pub. L. 94–113 added cl. (C).

EFFECTIVE DATE OF 1975 AMENDMENT

Section 2 of Pub. L. 94–113 provided that: "This Act [enacting subd. (d)(1)(C)] shall become effective on the fifteenth day after the date of the enactment of this Act [Oct. 16, 1975]."

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1939.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The provision excepting from the operation of the rule hearsay which is made admissible by other rules adopted by the Supreme Court or by Act of Congress continues the admissibility thereunder of hearsay which would not qualify under these Evidence Rules. The following examples illustrate the working of the exception:

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) *Present Sense Impression*. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) *Excited Utterance*. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) *Then Existing Mental, Emotional, or Physical Condition*. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) *Statements for Purposes of Medical Diagnosis or Treatment*. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present

symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) *Recorded Recollection*. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) *Records of Regularly Conducted Activity*. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term ''business'' as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) *Absence of Entry in Records Kept in Accordance With the Provisions of Paragraph (6)*. Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) *Public Records and Reports*. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) *Records of Vital Statistics*. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) *Absence of Public Record or Entry*. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) *Records of Religious Organizations*. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) *Marriage, Baptismal, and Similar Certificates*. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) *Family Records*. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) *Records of Documents Affecting an Interest in Property*. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) *Statements in Documents Affecting an Interest in Property*. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) *Statements in Ancient Documents*. Statements in a document in existence twenty years or more the authenticity of which is established.

(17) *Market Reports, Commercial Publications*. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) *Learned Treatises*. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) *Reputation Concerning Personal or Family History*. Reputation among members of a per-

son's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

(20) *Reputation Concerning Boundaries or General History*. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

(21) *Reputation as to Character*. Reputation of a person's character among associates or in the community.

(22) *Judgment of Previous Conviction*. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) *Judgment as to Personal, Family, or General History, or Boundaries*. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

[(24) Other exceptions.] [Transferred to Rule 807]

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1939; Pub. L. 94–149, §1(11), Dec. 12, 1975, 89 Stat. 805; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 11, 1997, eff. Dec. 1, 1997; Apr. 17, 2000, eff. Dec. 1, 2000.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The exceptions are phrased in terms of nonapplication of the hearsay rule, rather than in positive terms of admissibility, in order to repel any implication that other possible grounds for exclusion are eliminated from consideration.

The present rule proceeds upon the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available. The theory finds vast support in the many exceptions to the hearsay rule developed by the common law in which unavailability of the declarant is not a relevant factor. The present rule is a synthesis of them, with revision where modern developments and conditions are believed to make that course appropriate.

In a hearsay situation, the declarant is, of course, a witness, and neither this rule nor Rule 804 dispenses with the requirement of firsthand knowledge. It may appear from his statement or be inferable from circumstances.

See Rule 602.

Exceptions (1) and (2). In considerable measure these two examples overlap, though based on somewhat different theories. The most significant practical difference will lie in the time lapse allowable between event and statement.

The underlying theory of Exception [paragraph] (1) is that substantial contemporaneity of event and statement negative the likelihood of deliberate of conscious misrepresentation. Moreover, if the witness is the declarant, he may be examined on the statement. If the witness is not the declarant, he may be examined as to the circumstances as an aid in evaluating the statement. Morgan, Basic Problems of Evidence 340–341 (1962).

The theory of Exception [paragraph] (2) is simply that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication. 6 Wigmore §1747, p. 135. Spontaneity is the key factor in each instance, though arrived at by somewhat different routes. Both are needed in order to avoid needless niggling.

While the theory of Exception [paragraph] (2) has been criticized on the ground that excitement impairs accuracy of observation as well as eliminating conscious fabrication, Hutchins and Slesinger, Some Observations on the Law of Evidence: Spontaneous Exclamations, 28 Colum.L.Rev. 432 (1928), it finds support in cases without number. See cases in 6 Wigmore §1750; Annot., 53 A.L.R.2d 1245 (statements as to cause of or responsibility for motor vehicle accident); Annot., 4 A.L.R.3d 149 (accusatory statements by homicide victims). Since unexciting events are less likely to evoke comment, decisions involving Exception [paragraph] (1) are far less numerous. Illustrative are *Tampa Elec. Co. v. Getrost*, 151 Fla. 558, 10 So.2d 83 (1942); *Houston Oxygen Co. v. Davis*, 139 Tex. 1, 161 S.W.2d 474 (1942); and cases cited in McCormick §273, p. 585, n. 4.

With respect to the *time element*, Exception [paragraph] (1) recognizes that in many, if not most, instances precise contemporaneity is not possible, and hence a slight lapse is allowable. Under Exception [paragraph] (2) the standard of measurement is the duration of the state of excitement. ''How long can excitement prevail? Obviously there are no pat answers and the character of the transaction or event will largely determine the significance of the time factor.'' Slough, Spontaneous Statements and State of Mind, 46 Iowa L.Rev. 224, 243 (1961); McCormick §272, p. 580.

Participation by the declarant is not required: a nonparticipant may be moved to describe what he perceives, and one may be startled by an event in which he is not an actor. Slough, *supra*; McCormick, *supra*; 6 Wigmore §1755; Annot., 78 A.L.R.2d 300.

Whether *proof of the startling event* may be made by the statement itself is largely an academic question, since in most cases there is present at least circumstantial evidence that something of a startling nature must have occurred. For cases in which the evidence consists of the condition of the declarant (injuries, state of shock), see *Insurance Co. v. Mosely*, 75 U.S. (8 Wall.), 397, 19 L.Ed. 437 (1869); *Wheeler v. United States*, 93 U.S.App. D.C. 159, 211 F.2d 19 (1953); cert. denied 347 U.S. 1019, 74 S.Ct. 876, 98 L.Ed. 1140; *Wetherbee v. Safety Casualty Co.*, 219 F.2d 274 (5th Cir. 1955); *Lampe v. United States*, 97 U.S.App.D.C. 160, 229 F.2d 43 (1956). Nevertheless, on occasion the only evidence may be the content of the statement itself, and rulings that it may be sufficient are described as ''increasing,'' Slough, *supra* at 246, and as the ''prevailing practice,'' McCormick §272, p. 579. Illustrative are *Armour & Co. v. Industrial Commission*, 78 Colo. 569, 243 P. 546 (1926); *Young v. Stewart*, 191 N.C. 297, 131 S.E. 735 (1926). Moreover, under Rule 104(a) the judge is not limited by the hearsay rule in passing upon preliminary questions of fact.

Proof of declarant's perception by his statement presents similar considerations when declarant is identified. *People v. Poland*, 22 Ill.2d 175, 174 N.E.2d 804 (1961). However, when declarant is an unidentified bystander, the cases indicate hesitancy in upholding the statement alone as sufficient, *Garrett v. Howden*, 73 N.M. 307, 387 P.2d 874 (1963); *Beck v. Dye*, 200 Wash. 1, 92 P.2d 1113 (1939), a result which would under appropriate circumstances be consistent with the rule.

Permissible *subject matter* of the statement is limited under Exception [paragraph] (1) to description or explanation of the event or condition, the assumption being that spontaneity, in the absence of a startling event,

may extend no farther. In Exception [paragraph] (2), however, the statement need only ''relate'' to the startling event or condition, thus affording a broader scope of subject matter coverage. 6 Wigmore §§1750, 1754. See *Sanitary Grocery Co. v. Snead*, 67 App.D.C. 129, 90 F.2d 374 (1937), slip-and-fall case sustaining admissibility of clerk's statement, ''That has been on the floor for a couple of hours,'' and *Murphy Auto Parts Co., Inc. v. Ball*, 101 U.S.App.D.C. 416, 249 F.2d 508 (1957), upholding admission, on issue of driver's agency, of his statement that he had to call on a customer and was in a hurry to get home. Quick, Hearsay, Excitement, Necessity and the Uniform Rules: A Reappraisal of Rule 63(4), 6 Wayne L.Rev. 204, 206–209 (1960).

Similar provisions are found in Uniform Rule 63(4)(a) and (b); California Evidence Code §1240 (as to Exception (2) only); Kansas Code of Civil Procedure §60–460(d)(1) and (2); New Jersey Evidence Rule 63(4).

Exception (3) is essentially a specialized application of Exception [paragraph] (1), presented separately to enhance its usefulness and accessibility. See McCormick §§265, 268.

The exclusion of ''statements of memory or belief to prove the fact remembered or believed'' is necessary to avoid the virtual destruction of the hearsay rule which would otherwise result from allowing state of mind, provable by a hearsay statement, to serve as the basis for an inference of the happening of the event which produced the state of mind). *Shepard v. United States*, 290 U.S. 96, 54 S.Ct. 22, 78 L.Ed. 196 (1933); Maguire, The Hillmon Case—Thirty-three Years After, 38 Harv.L.Rev. 709, 719–731 (1925); Hinton, States of Mind and the Hearsay Rule, 1 U.Chi.L.Rev. 394, 421–423 (1934). The rule of *Mutual Life Ins. Co. v. Hillman*, 145 U.S. 285, 12 S.Ct. 909, 36 L.Ed. 706 (1892), allowing evidence of intention as tending to prove the doing of the act intended, is of course, left undisturbed.

The carving out, from the exclusion mentioned in the preceding paragraph, of declarations relating to the execution, revocation, identification, or terms of declarant's will represents an *ad hoc* judgment which finds ample reinforcement in the decisions, resting on practical grounds of necessity and expediency rather than logic. McCormick §271, pp. 577–578; Annot., 34 A.L.R.2d 588, 62 A.L.R.2d 855. A similar recognition of the need for and practical value of this kind of evidence is found in California Evidence Code §1260.

Exception (4). Even those few jurisdictions which have shied away from generally admitting statements of present condition have allowed them if made to a physician for purposes of diagnosis and treatment in view of the patient's strong motivation to be truthful. McCormick §266, p. 563. The same guarantee of trustworthiness extends to statements of past conditions and medical history, made for purposes of diagnosis or treatment. It also extends to statements as to causation, reasonably pertinent to the same purposes, in accord with the current trend, *Shell Oil Co. v. Industrial Commission*, 2 Ill.2d 590, 119 N.E.2d 224 (1954); McCormick §266, p. 564; New Jersey Evidence Rule 63(12)(c). Statements as to fault would not ordinarily qualify under this latter language. Thus a patient's statement that he was struck by an automobile would qualify but not his statement that the car was driven through a red light. Under the exception the statement need not have been made to a physician. Statements to hospital attendants, ambulance drivers, or even members of the family might be included.

Conventional doctrine has excluded from the hearsay exception, as not within its guarantee of truthfulness, statements to a physician consulted only for the purpose of enabling him to testify. While these statements were not admissible as substantive evidence, the expert was allowed to state the basis of his opinion, including statements of this kind. The distinction thus called for was one most unlikely to be made by juries. The rule accordingly rejects the limitation. This position is consistent with the provision of Rule 703 that the facts on which expert testimony is based need not be admissible in evidence if of a kind ordinarily relied upon by experts in the field.

Exception (5). A hearsay exception for recorded recollection is generally recognized and has been described as having ''long been favored by the federal and practically all the state courts that have had occasion to decide the question.'' *United States v. Kelly*, 349 F.2d 720, 770 (2d Cir. 1965), citing numerous cases and sustaining the exception against a claimed denial of the right of confrontation. Many additional cases are cited in Annot., 82 A.L.R.2d 473, 520. The guarantee of trustworthiness is found in the reliability inherent in a record made while events were still fresh in mind and accurately reflecting them. *Owens v. State*, 67 Md. 307, 316, 10 A. 210, 212 (1887).

The principal controversy attending the exception has centered, not upon the propriety of the exception itself, but upon the question whether a preliminary requirement of impaired memory on the part of the witness should be imposed. The authorities are divided. If regard be had only to the accuracy of the evidence, admittedly impairment of the memory of the witness adds nothing to it and should not be required. McCormick §277, p. 593; 3 Wigmore §738, p. 76; *Jordan v. People*, 151 Colo. 133, 376 P.2d 699 (1962), cert. denied 373 U.S. 944, 83 S.Ct. 1553, 10 L.Ed.2d 699; *Hall v. State*, 223 Md. 158, 162 A.2d 751 (1960); *State v. Bindhammer*, 44 N.J. 372, 209 A.2d 124 (1965). Nevertheless, the absence of the requirement, it is believed, would encourage the use of statements carefully prepared for purposes of litigation under the supervision of attorneys, investigators, or claim adjusters. Hence the example includes a requirement that the witness not have ''sufficient recollection to enable him to testify fully and accurately.'' To the same effect are California Evidence Code §1237 and New Jersey Rule 63(1)(b), and this has been the position of the federal courts. *Vicksburg & Meridian R.R. v. O'Brien*, 119 U.S. 99, 7 S.Ct. 118, 30 L.Ed. 299 (1886); *Ahern v. Webb*, 268 F.2d 45 (10th Cir. 1959); and see *N.L.R.B. v. Hudson Pulp and Paper Corp.*, 273 F.2d 660, 665 (5th Cir. 1960); *N.L.R.B. v. Federal Dairy Co.*, 297 F.2d 487 (1st Cir. 1962). But cf. *United States v. Adams*, 385 F.2d 548 (2d Cir. 1967).

No attempt is made in the exception to spell out the method of establishing the initial knowledge or the contemporaneity and accuracy of the record, leaving them to be dealt with as the circumstances of the particular case might indicate. Multiple person involvement in the process of observing and recording, as in *Rathbun v. Brancatella*, 93 N.J.L. 222, 107 A. 279 (1919), is entirely consistent with the exception.

Locating the exception at this place in the scheme of the rules is a matter of choice. There were two other possibilities. The first was to regard the statement as one of the group of prior statements of a testifying witness which are excluded entirely from the category of hearsay by Rule 801(d)(1). That category, however, requires that declarant be ''subject to cross-examination,'' as to which the impaired memory aspect of the exception raises doubts. The other possibility was to include the exception among those covered by Rule 804. Since unavailability is required by that rule and lack of memory is listed as a species of unavailability by the definition of the term in Rule 804(a)(3), that treatment at first impression would seem appropriate. The fact is, however, that the unavailability requirement of the exception is of a limited and peculiar nature. Accordingly, the exception is located at this point rather than in the context of a rule where unavailability is conceived of more broadly.

Exception (6) represents an area which has received much attention from those seeking to improve the law of evidence. The Commonwealth Fund Act was the result of a study completed in 1927 by a distinguished committee under the chairmanship of Professor Morgan. Morgan et al., The Law of Evidence: Some Proposals for its Reform 63 (1927). With changes too minor to mention, it was adopted by Congress in 1936 as the rule for federal courts. 28 U.S.C. §1732. A number of states took similar action. The Commissioners on Uniform State Laws in 1936 promulgated the Uniform Business Records as Evidence Act, 9A U.L.A. 506, which has acquired a substantial following in the states. Model Code

Rule 514 and Uniform Rule 63(13) also deal with the subject. Difference of varying degrees of importance exist among these various treatments.

These reform efforts were largely within the context of business and commercial records, as the kind usually encountered, and concentrated considerable attention upon relaxing the requirement of producing as witnesses, or accounting for the nonproduction of, all participants in the process of gathering, transmitting, and recording information which the common law had evolved as a burdensome and crippling aspect of using records of this type. In their areas of primary emphasis on witnesses to be called and the general admissibility of ordinary business and commercial records, the Commonwealth Fund Act and the Uniform Act appear to have worked well. The exception seeks to preserve their advantages.

On the subject of what witnesses must be called, the Commonwealth Fund Act eliminated the common law requirement of calling or accounting for all participants by failing to mention it. *United States v. Mortimer*, 118 F.2d 266 (2d Cir. 1941); *La Porte v. United States*, 300 F.2d 878 (9th Cir. 1962); McCormick §290, p. 608. Model Code Rule 514 and Uniform Rule 63(13) did likewise. The Uniform Act, however, abolished the common law requirement in express terms, providing that the requisite foundation testimony might be furnished by ''the custodian or other qualified witness.'' Uniform Business Records as Evidence Act, §2; 9A U.L.A. 506. The exception follows the Uniform Act in this respect.

The element of unusual reliability of business records is said variously to be supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation. McCormick §§281, 286, 287; Laughlin, Business Entries and the Like, 46 Iowa L.Rev. 276 (1961). The model statutes and rules have sought to capture these factors and to extend their impact by employing the phrase ''regular course of business,'' in conjunction with a definition of ''business'' far broader than its ordinarily accepted meaning. The result is a tendency unduly to emphasize a requirement of routineness and repetitiveness and an insistence that other types of records be squeezed into the fact patterns which give rise to traditional business records. The rule therefore adopts the phrase ''the course of a regularly conducted activity'' as capturing the essential basis of the hearsay exception as it has evolved and the essential element which can be abstracted from the various specifications of what is a ''business.''

Amplification of the kinds of activities producing admissible records has given rise to problems which conventional business records by their nature avoid. They are problems of the source of the recorded information, of entries in opinion form, of motivation, and of involvement as participant in the matters recorded.

Sources of information presented no substantial problem with ordinary business records. All participants, including the observer or participant furnishing the information to be recorded, were acting routinely, under a duty of accuracy, with employer reliance on the result, or in short ''in the regular course of business.'' If, however, the supplier of the information does not act in the regular course, an essential link is broken; the assurance of accuracy does not extend to the information itself, and the fact that it may be recorded with scrupulous accuracy is of no avail. An illustration is the police report incorporating information obtained from a bystander: the officer qualifies as acting in the regular course but the informant does not. The leading case, *Johnson v. Lutz*, 253 N.Y. 124, 170 N.E. 517 (1930), held that a report thus prepared was inadmissible. Most of the authorities have agreed with the decision. *Gencarella v. Fyfe*, 171 F.2d 419 (1st Cir. 1948); *Gordon v. Robinson*, 210 F.2d 192 (3d Cir. 1954); *Standard Oil Co. of California v. Moore*, 251 F.2d 188, 214 (9th Cir. 1957), cert. denied 356 U.S. 975, 78 S.Ct. 1139, 2 L.Ed.2d 1148; *Yates v. Bair Transport, Inc.*, 249 F.Supp. 681 (S.D.N.Y. 1965); Annot., 69 A.L.R.2d 1148. Cf. *Hawkins v. Gorea Motor Express, Inc.*, 360 F.2d 933 (2d Cir 1966). *Contra*, 5 Wigmore §1530a, n. 1, pp. 391–392. The point is not dealt with specifically in the Commonwealth Fund Act, the Uniform Act, or Uniform Rule 63(13). However, Model Code Rule 514 contains the requirement ''that it was the regular course of that business for one with personal knowledge * * * to make such a memorandum or record or to transmit information thereof to be included in such a memorandum or record * * *.'' The rule follows this lead in requiring an informant with knowledge acting in the course of the regularly conducted activity.

Entries in the form of opinions were not encountered in traditional business records in view of the purely factual nature of the items recorded, but they are now commonly encountered with respect to medical diagnoses, prognoses, and test results, as well as occasionally in other areas. The Commonwealth Fund Act provided only for records of an ''act, transaction, occurrence, or event,'' while the Uniform Act, Model Code Rule 514, and Uniform Rule 63(13) merely added the ambiguous term ''condition.'' The limited phrasing of the Commonwealth Fund Act, 28 U.S.C. §1732, may account for the reluctance of some federal decisions to admit diagnostic entries. *New York Life Ins. Co. v. Taylor*, 79 U.S.App.D.C. 66, 147 F.2d 297 (1945); *Lyles v. United States*, 103 U.S.App.D.C. 22, 254 F.2d 725 (1957), cert. denied 356 U.S. 961, 78 S.Ct. 997, 2 L.Ed.2d 1067; *England v. United States*, 174 F.2d 466 (5th Cir. 1949); *Skogen v. Dow Chemical Co.*, 375 F.2d 692 (8th Cir. 1967). Other federal decisions, however, experienced no difficulty in freely admitting diagnostic entries. *Reed v. Order of United Commercial Travelers*, 123 F.2d 252 (2d Cir. 1941); *Buckminster's Estate v. Commissioner of Internal Revenue*, 147 F.2d 331 (2d Cir. 1944); *Medina v. Erickson*, 226 F.2d 475 (9th Cir. 1955); *Thomas v. Hogan*, 308 F.2d 355 (4th Cir. 1962); *Glawe v. Rulon*, 284 F.2d 495 (8th Cir. 1960). In the state courts, the trend favors admissibility. *Borucki v. MacKenzie Bros. Co.*, 125 Conn. 92, 3 A.2d 224 (1938); *Allen v. St. Louis Public Service Co.*, 365 Mo. 677, 285 S.W.2d 663, 55 A.L.R.2d 1022 (1956); *People v. Kohlmeyer*, 284 N.Y. 366, 31 N.E.2d 490 (1940); *Weis v. Weis*, 147 Ohio St. 416, 72 N.E.2d 245 (1947). In order to make clear its adherence to the latter position, the rule specifically includes both diagnoses and opinions, in addition to acts, events, and conditions, as proper subjects of admissible entries.

Problems of the motivation of the informant have been a source of difficulty and disagreement. In *Palmer v. Hoffman*, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943), exclusion of an accident report made by the since deceased engineer, offered by defendant railroad trustees in a grade crossing collision case, was upheld. The report was not ''in the regular course of business,'' not a record of the systematic conduct of the business as a business, said the Court. The report was prepared for use in litigating, not railroading. While the opinion mentions the motivation of the engineer only obliquely, the emphasis on records of routine operations is significant only by virtue of impact on motivation to be accurate. Absence of routineness raises lack of motivation to be accurate. The opinion of the Court of Appeals had gone beyond mere lack of motive to be accurate: the engineer's statement was ''dripping with motivations to misrepresent.'' *Hoffman v. Palmer*, 129 F.2d 976, 991 (2d Cir. 1942). The direct introduction of motivation is a disturbing factor, since absence of motivation to misrepresent has not traditionally been a requirement of the rule; that records might be self-serving has not been a ground for exclusion. Laughlin, Business Records and the Like, 46 Iowa L.Rev. 276, 285 (1961). As Judge Clark said in his dissent, ''I submit that there is hardly a grocer's account book which could not be excluded on that basis.'' 129 F.2d at 1002. A physician's evaluation report of a personal injury litigant would appear to be in the routine of his business. If the report is offered by the party at whose instance it was made, however, it has been held inadmissible, *Yates v. Bair Transport, Inc.*, 249 F.Supp. 681 (S.D.N.Y. 1965), otherwise if offered by the opposite party, *Korte v. New York,*

N.H. & H.R. Co., 191 F.2d 86 (2d Cir. 1951), cert. denied 342 U.S. 868, 72 S.Ct. 108, 96 L.Ed. 652.

The decisions hinge on motivation and which party is entitled to be concerned about it. Professor McCormick believed that the doctor's report or the accident report were sufficiently routine to justify admissibility. McCormick §287, p. 604. Yet hesitation must be experienced in admitting everything which is observed and recorded in the course of a regularly conducted activity. Efforts to set a limit are illustrated by *Hartzog v. United States*, 217 F.2d 706 (4th Cir. 1954), error to admit worksheets made by since deceased deputy collector in preparation for the instant income tax evasion prosecution, and *United States v. Ware*, 247 F.2d 698 (7th Cir. 1957), error to admit narcotics agents' records of purchases. See also Exception [paragraph] (8), *infra*, as to the public record aspects of records of this nature. Some decisions have been satisfied as to motivation of an accident report if made pursuant to statutory duty, *United States v. New York Foreign Trade Zone Operators*, 304 F.2d 792 (2d Cir. 1962); *Taylor v. Baltimore & O. R. Co.*, 344 F.2d 281 (2d Cir. 1965), since the report was oriented in a direction other than the litigation which ensued. Cf. *Matthews v. United States*, 217 F.2d 409 (5th Cir. 1954). The formulation of specific terms which would assure satisfactory results in all cases is not possible. Consequently the rule proceeds from the base that records made in the course of a regularly conducted activity will be taken as admissible but subject to authority to exclude if ''the sources of information or other circumstances indicate lack of trustworthiness.''

Occasional decisions have reached for enhanced accuracy by requiring involvement as a participant in matters reported. *Clainos v. United States*, 82 U.S.App.D.C. 278, 163 F.2d 593 (1947), error to admit police records of convictions; *Standard Oil Co. of California v. Moore*, 251 F.2d 188 (9th Cir. 1957), cert. denied 356 U.S. 975, 78 S.Ct. 1139, 2 L.Ed.2d 1148, error to admit employees' records of observed business practices of others. The rule includes no requirement of this nature. Wholly acceptable records may involve matters merely observed, e.g. the weather.

The form which the ''record'' may assume under the rule is described broadly as a ''memorandum, report, record, or data compilation, in any form.'' The expression ''data compilation'' is used as broadly descriptive of any means of storing information other than the conventional words and figures in written or documentary form. It includes, but is by no means limited to, electronic computer storage. The term is borrowed from revised Rule 34(a) of the Rules of Civil Procedure.

Exception (7). Failure of a record to mention a matter which would ordinarily be mentioned is satisfactory evidence of its nonexistence. Uniform Rule 63(14), Comment. While probably not hearsay as defined in Rule 801, *supra*, decisions may be found which class the evidence not only as hearsay but also as not within any exception. In order to set the question at rest in favor of admissibility, it is specifically treated here. McCormick §289, p. 609; Morgan, Basic Problems of Evidence 314 (1962); 5 Wigmore §1531; Uniform Rule 63(14); California Evidence Code §1272; Kansas Code of Civil Procedure §60–460(n); New Jersey Evidence Rule 63(14).

Exception (8). Public records are a recognized hearsay exception at common law and have been the subject of statutes without number. McCormick §291. See, for example, 28 U.S.C. §1733, the relative narrowness of which is illustrated by its nonapplicability to nonfederal public agencies, thus necessitating report to the less appropriate business record exception to the hearsay rule. *Kay v. United States*, 255 F.2d 476 (4th Cir. 1958). The rule makes no distinction between federal and nonfederal offices and agencies.

Justification for the exception is the assumption that a public official will perform his duty properly and the unlikelihood that he will remember details independently of the record. *Wong Wing Foo v. McGrath*, 196 F.2d 120 (9th Cir. 1952), and see *Chesapeake & Delaware Canal Co. v. United States*, 250 U.S. 123, 39 S.Ct. 407, 63 L.Ed. 889 (1919). As to items (a) and (b), further support is found in the reliability factors underlying records of regularly conducted activities generally. See Exception [paragraph] (6), supra.

(a) Cases illustrating the admissibility of records of the office's or agency's own activities are numerous. *Chesapeake & Delaware Canal Co. v. United States*, 250 U.S. 123, 39 S.Ct. 407, 63 L.Ed. 889 (1919), Treasury records of miscellaneous receipts and disbursements; *Howard v. Perrin*, 200 U.S. 71, 26 S.Ct. 195, 50 I.Ed. 374 (1906), General Land Office records; *Ballew v. United States*, 160 U.S. 187, 16 S.Ct. 263, 40 L.Ed. 388 (1895), Pension Office records.

(b) Cases sustaining admissibility of records of matters observed are also numerous. *United States v. Van Hook*, 284 F.2d 489 (7th Cir. 1960), remanded for resentencing 365 U.S. 609, 81 S.Ct. 823, 5 L.Ed.2d 821, letter from induction officer to District Attorney, pursuant to army regulations, stating fact and circumstances of refusal to be inducted; *T'Kach v. United States*, 242 F.2d 937 (5th Cir. 1957), affidavit of White House personnel officer that search of records showed no employment of accused, charged with fraudulently representing himself as an envoy of the President; *Minnehaha County v. Kelley*, 150 F.2d 356 (8th Cir. 1945); Weather Bureau records of rainfall; *United States v. Meyer*, 113 F.2d 387 (7th Cir. 1940), cert. denied 311 U.S. 706, 61 S.Ct. 174, 85 L.Ed. 459, map prepared by government engineer from information furnished by men working under his supervision.

(c) The more controversial area of public records is that of the so-called ''evaluative'' report. The disagreement among the decisions has been due in part, no doubt, to the variety of situations encountered, as well as to differences in principle. Sustaining admissibility are such cases as *United States v. Dumas*, 149 U.S. 278, 13 S.Ct. 872, 37 L.Ed. 734 (1893), statement of account certified by Postmaster General in action against postmaster; *McCarty v. United States*, 185 F.2d 520 (5th Cir. 1950), reh. denied 187 F.2d 234, Certificate of Settlement of General Accounting Office showing indebtedness and letter from Army official stating Government had performed, in action on contract to purchase and remove waste food from Army camp; *Moran v. Pittsburgh-Des Moines Steel Co.*, 183 F.2d 467 (3d Cir. 1950), report of Bureau of Mines as to cause of gas tank explosion; Petition of W—, 164 F.Supp. 659 (E.D.Pa.1958), report by Immigration and Naturalization Service investigator that petitioner was known in community as wife of man to whom she was not married. To the opposite effect and denying admissibility are *Franklin v. Skelly Oil Co.*, 141 F.2d 568 (10th Cir. 1944), State Fire Marshal's report of cause of gas explosion; *Lomax Transp. Co. v. United States*, 183 F.2d 331 (9th Cir. 1950), Certificate of Settlement from General Accounting Office in action for naval supplies lost in warehouse fire; *Yung Jin Teung v. Dulles*, 229 F.2d 244 (2d Cir. 1956), ''Status Reports'' offered to justify delay in processing passport applications. Police reports have generally been excluded except to the extent to which they incorporate firsthand observations of the officer. Annot., 69 A.L.R.2d 1148. Various kinds of evaluative reports are admissible under federal statutes: 7 U.S.C. §78, findings of Secretary of Agriculture prima facie evidence of true grade of grain; 7 U.S.C. §210(f), findings of Secretary of Agriculture prima facie evidence in action for damages against stockyard owner; 7 U.S.C. §292, order by Secretary of Agriculture prima facie evidence in judicial enforcement proceedings against producers association monopoly; 7 U.S.C. §1622(h), Department of Agriculture inspection certificates of products shipped in interstate commerce prima facie evidence; 8 U.S.C. §1440(c), separation of alien from military service on conditions other than honorable provable by certificate from department in proceedings to revoke citizenship; 18 U.S.C. §4245, certificate of Director of Prisons that convicted person has been examined and found probably incompetent at time of trial prima facie evidence in court hearing on competency; 42 U.S.C. §269(b), bill of health by appropriate official prima facie evidence of vessel's sanitary history and condition and compliance

with regulations; 46 U.S.C. §679, certificate of consul presumptive evidence of refusal of master to transport destitute seamen to United States. While these statutory exceptions to the hearsay rule are left undisturbed, Rule 802, the willingness of Congress to recognize a substantial measure of admissibility for evaluative reports is a helpful guide.

Factors which may be of assistance in passing upon the admissibility of evaluative reports include; (1) the timeliness of the investigation, McCormack, Can the Courts Make Wider Use of Reports of Official Investigations? 42 Iowa L.Rev. 363 (1957); (2) the special skill or experience of the official, *id*., (3) whether a hearing was held and the level at which conducted, *Franklin v. Skelly Oil Co*., 141 F.2d 568 (10th Cir. 1944); (4) possible motivation problems suggested by *Palmer v. Hoffman*, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943). Others no doubt could be added.

The formulation of an approach which would give appropriate weight to all possible factors in every situation is an obvious impossibility. Hence the rule, as in Exception [paragraph] (6), assumes admissibility in the first instance but with ample provision for escape if sufficient negative factors are present. In one respect, however, the rule with respect to evaluate reports under item (c) is very specific; they are admissible only in civil cases and against the government in criminal cases in view of the almost certain collision with confrontation rights which would result from their use against the accused in a criminal case.

Exception (9). Records of vital statistics are commonly the subject of particular statutes making them admissible in evidence. Uniform Vital Statistics Act, 9C U.L.A. 350 (1957). The rule is in principle narrower than Uniform Rule 63(16) which includes reports required of persons performing functions authorized by statute, yet in practical effect the two are substantially the same. Comment Uniform Rule 63(16). The exception as drafted is in the pattern of California Evidence Code §1281.

Exception (10). The principle of proving nonoccurrence of an event by evidence of the absence of a record which would regularly be made of its occurrence, developed in Exception [paragraph] (7) with respect to regularly conducted activities, is here extended to public records of the kind mentioned in Exceptions [paragraphs] (8) and (9). 5 Wigmore §1633(6), p. 519. Some harmless duplication no doubt exists with Exception [paragraph] (7). For instances of federal statutes recognizing this method of proof, see 8 U.S.C. §1284(b), proof of absence of alien crewman's name from outgoing manifest prima facie evidence of failure to detain or deport, and 42 U.S.C. §405(c)(3), (4)(B), (4)(C), absence of HEW [Department of Health, Education, and Welfare] record prima facie evidence of no wages or self-employment income.

The rule includes situations in which absence of a record may itself be the ultimate focal point of inquiry, e.g. *People v. Love*, 310 Ill. 558, 142 N.E. 204 (1923), certificate of Secretary of State admitted to show failure to file documents required by Securities Law, as well as cases where the absence of a record is offered as proof of the nonoccurrence of an event ordinarily recorded.

The refusal of the common law to allow proof by certificate of the lack of a record or entry has no apparent justification, 5 Wigmore §1678(7), p. 752. The rule takes the opposite position, as do Uniform Rule 63(17); California Evidence Code §1284; Kansas Code of Civil Procedure §60–460(*c*); New Jersey Evidence Rule 63(17). Congress has recognized certification as evidence of the lack of a record. 8 U.S.C. §1360(d), certificate of Attorney General or other designated officer that no record of Immigration and Naturalization Service of specified nature or entry therein is found, admissible in alien cases.

Exception (11). Records of activities of religious organizations are currently recognized as admissible at least to the extent of the business records exception to the hearsay rule, 5 Wigmore §1523, p. 371, and Exception [paragraph] (6) would be applicable. However, both the business record doctrine and Exception [paragraph] (6) require that the person furnishing the information be one in the business or activity. The result is such decisions as *Daily v. Grand Lodge*, 311 Ill. 184, 142 N.E. 478 (1924), holding a church record admissible to prove fact, date, and place of baptism, but not age of child except that he had at least been born at the time. In view of the unlikelihood that false information would be furnished on occasions of this kind, the rule contains no requirement that the informant be in the course of the activity. See California Evidence Code §1315 and Comment.

Exception (12). The principle of proof by certification is recognized as to public officials in Exceptions [paragraphs] (8) and (10), and with respect to authentication in Rule 902. The present exception is a duplication to the extent that it deals with a certificate by a public official, as in the case of a judge who performs a marriage ceremony. The area covered by the rule is, however, substantially larger and extends the certification procedure to clergymen and the like who perform marriages and other ceremonies or administer sacraments. Thus certificates of such matters as baptism or confirmation, as well as marriage, are included. In principle they are as acceptable evidence as certificates of public officers. See 5 Wigmore §1645, as to marriage certificates. When the person executing the certificate is not a public official, the self-authenticating character of documents purporting to emanate from public officials, see Rule 902, is lacking and proof is required that the person was authorized and did make the certificate. The time element, however, may safely be taken as supplied by the certificate, once authority and authenticity are established, particularly in view of the presumption that a document was executed on the date it bears.

For similar rules, some limited to certificates of marriage, with variations in foundation requirements, see Uniform Rule 63(18); California Evidence Code §1316; Kansas Code of Civil Procedure §60–460(p); New Jersey Evidence Rule 63(18).

Exception (13). Records of family history kept in family Bibles have by long tradition been received in evidence. 5 Wigmore §§1495, 1496, citing numerous statutes and decisions. See also Regulations, Social Security Administration, 20 C.F.R. §404.703(c), recognizing family Bible entries as proof of age in the absence of public or church records. Opinions in the area also include inscriptions on tombstones, publicly displayed pedigrees, and engravings on rings. Wigmore, *supra*. The rule is substantially identical in coverage with California Evidence Code §1312.

Exception (14). The recording of title documents is a purely statutory development. Under any theory of the admissibility of public records, the records would be receivable as evidence of the contents of the recorded document, else the recording process would be reduced to a nullity. When, however, the record is offered for the further purpose of proving execution and delivery, a problem of lack of first-hand knowledge by the recorder, not present as to contents, is presented. This problem is solved, seemingly in all jurisdictions, by qualifying for recording only those documents shown by a specified procedure, either acknowledgement or a form of probate, to have been executed and delivered. 5 Wigmore §§1647–1651. Thus what may appear in the rule, at first glance, as endowing the record with an effect independently of local law and inviting difficulties of an *Erie* nature under *Cities Service Oil Co. v. Dunlap*, 308 U.S. 208, 60 S.Ct. 201, 84 L.Ed. 196 (1939), is not present, since the local law in fact governs under the example.

Exception (15). Dispositive documents often contain recitals of fact. Thus a deed purporting to have been executed by an attorney in fact may recite the existence of the power of attorney, or a deed may recite that the grantors are all the heirs of the last record owner. Under the rule, these recitals are exempted from the hearsay rule. The circumstances under which dispositive documents are executed and the requirement that the recital be germane to the purpose of the document

are believed to be adequate guarantees of trustworthiness, particularly in view of the nonapplicability of the rule if dealings with the property have been inconsistent with the document. The age of the document is of no significance, though in practical application the document will most often be an ancient one. See Uniform Rule 63(29), Comment.

Similar provisions are contained in Uniform Rule 63(29); California Evidence Code §1330; Kansas Code of Civil Procedure §60–460(aa); New Jersey Evidence Rule 63(29).

Exception (16). Authenticating a document as ancient, essentially in the pattern of the common law, as provided in Rule 901(b)(8), leaves open as a separate question the admissibility of assertive statements contained therein as against a hearsay objection. 7 Wigmore §2145a. Wigmore further states that the ancient document technique of authentication is universally conceded to apply to all sorts of documents, including letters, records, contracts, maps, and certificates, in addition to title documents, citing numerous decisions. *Id.* §2145. Since most of these items are significant evidentially only insofar as they are assertive, their admission in evidence must be as a hearsay exception. But see 5 *id.* §1573, p. 429, referring to recitals in ancient deeds as a ''limited'' hearsay exception. The former position is believed to be the correct one in reason and authority. As pointed out in McCormick §298, danger of mistake is minimized by authentication requirements, and age affords assurance that the writing antedates the present controversy. See *Dallas County v. Commercial Union Assurance Co.*, 286 F.2d 388 (5th Cir. 1961), upholding admissibility of 58-year-old newspaper story. Cf. Morgan, Basic Problems of Evidence 364 (1962), but see *id.* 254.

For a similar provision, but with the added requirement that ''the statement has since generally been acted upon as true by persons having an interest in the matter,'' see California Evidence Code §1331.

Exception (17). Ample authority at common law supported the admission in evidence of items falling in this category. While Wigmore's text is narrowly oriented to lists, etc., prepared for the use of a trade or profession, 6 Wigmore §1702, authorities are cited which include other kinds of publications, for example, newspaper market reports, telephone directories, and city directories. *Id.* §§1702–1706. The basis of trustworthiness is general reliance by the public or by a particular segment of it, and the motivation of the compiler to foster reliance by being accurate.

For similar provisions, see Uniform Rule 63(30); California Evidence Code §1340; Kansas Code of Civil Procedure §60–460(bb); New Jersey Evidence Rule 63(30). Uniform Commercial Code §2–724 provides for admissibility in evidence of ''reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of such [established commodity] market.''

Exception (18). The writers have generally favored the admissibility of learned treatises, McCormick §296, p. 621; Morgan, Basic Problems of Evidence 366 (1962); 6 Wigmore §1692, with the support of occasional decisions and rules, *City of Dothan v. Hardy*, 237 Ala. 603, 188 So. 264 (1939); *Lewandowski v. Preferred Risk Mut. Ins. Co.*, 33 Wis.2d 69, 146 N.W.2d 505 (1966), 66 Mich.L.Rev. 183 (1967); Uniform Rule 63(31); Kansas Code of Civil Procedure §60–460(ce), but the great weight of authority has been that learned treatises are not admissible as substantive evidence though usable in the cross-examination of experts. The foundation of the minority view is that the hearsay objection must be regarded as unimpressive when directed against treatises since a high standard of accuracy is engendered by various factors: the treatise is written primarily and impartially for professionals, subject to scrutiny and exposure for inaccuracy, with the reputation of the writer at stake. 6 Wigmore §1692. Sound as this position may be with respect to trustworthiness, there is, nevertheless, an additional difficulty in the likelihood that the treatise will be misunderstood and misapplied without expert assistance and supervision. This difficulty is recognized in the cases demonstrating unwillingness to sustain findings relative to disability on the basis of judicially noticed medical texts. *Ross v. Gardner*, 365 F.2d 554 (6th Cir. 1966); *Sayers v. Gardner*, 380 F.2d 940 (6th Cir. 1967); *Colwell v. Gardner*, 386 F.2d 56 (6th Cir. 1967); *Glendenning v. Ribicoff*, 213 F.Supp. 301 (W.D.Mo. 1962); *Cook v. Celebrezze*, 217 F.Supp. 366 (W.D.Mo. 1963); *Sosna v. Celebrezze*, 234 F.Supp. 289 (E.D.Pa. 1964); and see *McDaniel v. Celebrezze*, 331 F.2d 426 (4th Cir. 1964). The rule avoids the danger of misunderstanding and misapplication by limiting the use of treatises as substantive evidence to situations in which an expert is on the stand and available to explain and assist in the application of the treatise if declared. The limitation upon receiving the publication itself physically in evidence, contained in the last sentence, is designed to further this policy.

The relevance of the use of treatises on cross-examination is evident. This use of treatises has been the subject of varied views. The most restrictive position is that the witness must have stated expressly on direct his reliance upon the treatise. A slightly more liberal approach still insists upon reliance but allows it to be developed on cross-examination. Further relaxation dispenses with reliance but requires recognition as an authority by the witness, developable on cross-examination. The greatest liberality is found in decisions allowing use of the treatise on cross-examination when its status as an authority is established by any means. Annot., 60 A.L.R.2d 77. The exception is hinged upon this last position, which is that of the Supreme Court, *Reilly v. Pinkus*, 338 U.S. 269, 70 S.Ct. 110, 94 L.Ed. 63 (1949), and of recent well considered state court decisions, *City of St. Petersburg v. Ferguson*, 193 So.2d 648 (Fla.App. 1967), cert. denied Fla., 201 So.2d 556; *Darling v. Charleston Memorial Community Hospital*, 33 Ill.2d 326, 211 N.E.2d 253 (1965); *Dabroe v. Rhodes Co.*, 64 Wash.2d 431, 392 P.2d 317 (1964).

In *Reilly v. Pinkus, supra*, the Court pointed out that testing of professional knowledge was incomplete without exploration of the witness' knowledge of and attitude toward established treatises in the field. The process works equally well in reverse and furnishes the basis of the rule.

The rule does not require that the witness rely upon or recognize the treatise as authoritative, thus avoiding the possibility that the expert may at the outset block cross-examination by refusing to concede reliance or authoritativeness. *Dabroe v. Rhodes Co., supra.* Moreover, the rule avoids the unreality of admitting evidence for the purpose of impeachment only, with an instruction to the jury not to consider it otherwise. The parallel to the treatment of prior inconsistent statements will be apparent. See Rules 6130(b) and 801(d)(1).

Exceptions (19), (20), and (21). Trustworthiness in reputation evidence is found ''when the topic is such that the facts are likely to have been inquired about and that persons having personal knowledge have disclosed facts which have thus been discussed in the community; and thus the community's conclusion, if any has been formed, is likely to be a trustworthy one.'' 5 Wigmore §1580, p. 444, and see also §1583. On this common foundation, reputation as to land boundaries, customs, general history, character, and marriage have come to be regarded as admissible. The breadth of the underlying principle suggests the formulation of an equally broad exception, but tradition has in fact been much narrower and more particularized, and this is the pattern of these exceptions in the rule.

Exception [paragraph] (19) is concerned with matters of personal and family history. Marriage is universally conceded to be a proper subject of proof by evidence of reputation in the community. 5 Wigmore §1602. As to such items as legitimacy, relationship, adoption, birth, and death, the decisions are divided. *Id.* §1605. All seem to be susceptible to being the subject of well founded repute. The ''world'' in which the reputation may exist may be family, associates, or community. This world

has proved capable of expanding with changing times from the single uncomplicated neighborhood, in which all activities take place, to the multiple and unrelated worlds of work, religious affiliation, and social activity, in each of which a reputation may be generated. *People v. Reeves*, 360 Ill. 55, 195 N.E. 443 (1935); *State v. Axilrod*, 248 Minn. 204, 79 N.W.2d 677 (1956); Mass.Stat. 1947, c. 410, M.G.L.A. c. 233 §21A; 5 Wigmore §1616. The family has often served as the point of beginning for allowing community reputation. 5 Wigmore §1488. For comparable provisions see Uniform Rule 63(26), (27)(c); California Evidence Code §§1313, 1314; Kansas Code of Civil Procedure §60–460(x), (y)(3); New Jersey Evidence Rule 63(26), (27)(c).

The first portion of Exception [paragraph] (20) is based upon the general admissibility of evidence of reputation as to land boundaries and land customs, expanded in this country to include private as well as public boundaries. McCormick §299, p. 625. The reputation is required to antedate the controversy, though not to be ancient. The second portion is likewise supported by authority, *id.*, and is designed to facilitate proof of events when judicial notice is not available The historical character of the subject matter dispenses with any need that the reputation antedate the controversy with respect to which it is offered. For similar provisions see Uniform Rule 63(27)(a), (b); California Evidence Code §§1320–1322; Kansas Code of Civil Procedure §60–460(y), (1), (2); New Jersey Evidence Rule 63(27)(a), (b).

Exception [paragraph] (21) recognizes the traditional acceptance of reputation evidence as a means of proving human character. McCormick §§44, 158. The exception deals only with the hearsay aspect of this kind of evidence. Limitations upon admissibility based on other grounds will be found in Rules 404, relevancy of character evidence generally, and 608, character of witness. The exception is in effect a reiteration, in the context of hearsay, of Rule 405(a). Similar provisions are contained in Uniform Rule 63(28); California Evidence Code §1324; Kansas Code of Civil Procedure §60–460(z); New Jersey Evidence Rule 63(28).

Exception (22). When the status of a former judgment is under consideration in subsequent litigation, three possibilities must be noted: (1) the former judgment is conclusive under the doctrine of res judicata, either as a bar or a collateral estoppel; or (2) it is admissible in evidence for what it is worth; or (3) it may be of no effect at all. The first situation does not involve any problem of evidence except in the way that principles of substantive law generally bear upon the relevancy and materiality of evidence. The rule does not deal with the substantive effect of the judgment as a bar or collateral estoppel. When, however, the doctrine of res judicata does not apply to make the judgment either a bar or a collateral estoppel, a choice is presented between the second and third alternatives. The rule adopts the second for judgments of criminal conviction of felony grade. This is the direction of the decisions, Annot., 18 A.L.R.2d 1287, 1299, which manifest an increasing reluctance to reject *in toto* the validity of the law's factfinding processes outside the confines of res judicata and collateral estoppel. While this may leave a jury with the evidence of conviction but without means to evaluate it, as suggested by Judge Hinton, Note 27 Ill.L.Rev. 195 (1932), it seems safe to assume that the jury will give it substantial effect unless defendant offers a satisfactory explanation, a possibility not foreclosed by the provision. But see *North River Ins. Co. v. Militello*, 104 Colo. 28, 88 P.2d 567 (1939), in which the jury found for plaintiff on a fire policy despite the introduction of his conviction for arson. For supporting federal decisions see Clark, J., in *New York & Cuba Mail S.S. Co. v. Continental Cas. Co.*, 117 F.2d 404, 411 (2d Cir. 1941); *Connecticut Fire Ins. Co. v. Farrara*, 277 F.2d 388 (8th Cir. 1960).

Practical considerations require exclusion of convictions of minor offenses, not became the administration of justice in its lower echelons must be inferior, but because motivation to defend at this level is often minimal or nonexistent. *Cope v. Goble*, 39 Cal.App.2d 448, 103 P.2d 598 (1940); *Jones v. Talbot*, 87 Idaho 498, 394 P.2d 316 (1964); *Warren v. Marsh*, 215 Minn. 615, 11 N.W.2d 528 (1943); Annot., 18 A.L.R.2d 1287, 1295–1297; 16 Brooklyn L.Rev. 286 (1950); 50 Colum.L.Rev. 529 (1950); 35 Cornell L.Q. 872 (1950). Hence the rule includes only convictions of felony grade, measured by federal standards.

Judgments of conviction based upon pleas of *nolo contendere* are not included. This position is consistent with the treatment of *nolo* pleas in Rule 410 and the authorities cited in the Advisory Committee's Note in support thereof.

While these rules do not in general purport to resolve constitutional issues, they have in general been drafted with a view to avoiding collision with constitutional principles. Consequently the exception does not include evidence of the conviction of a third person, offered against the accused in a criminal prosecution to prove any fact essential to sustain the judgment of conviction. A contrary position would seem clearly to violate the right of confrontation. *Kirby v. United States*, 174 U.S. 47, 19 S.Ct. 574, 43 L.Ed. 890 (1899), error to convict of possessing stolen postage stamps with the only evidence of theft being the record of conviction of the thieves The situation is to be distinguished from cases in which conviction of another person is an element of the crime, e.g. 15 U.S.C. §902(d), interstate shipment of firearms to a known convicted felon, and, as specifically provided, from impeachment.

For comparable provisions see Uniform Rule 63(20); California Evidence Code §1300; Kansas Code of Civil Procedure §60–460(r); New Jersey Evidence Rule 63(20).

Exception (23). A hearsay exception in this area was originally justified on the ground that verdicts were evidence of reputation. As trial by jury graduated from the category of neighborhood inquests, this theory lost its validity. It was never valid as to chancery decrees. Nevertheless the rule persisted, though the judges and writers shifted ground and began saying that the judgment or decree was as good evidence as reputation. See *City of London v. Clerke*, Carth. 181, 90 Eng.Rep. 710 (K.B. 1691); *Neill v. Duke of Devonshire*, 8 App.Cas. 135 (1882). The shift appears to be correct, since the process of inquiry, sifting, and scrutiny which is relied upon to render reputation reliable is present in perhaps greater measure in the process of litigation. While this might suggest a broader area of application, the affinity to reputation is strong, and paragraph [paragraph] (23) goes no further, not even including character.

The leading case in the *United States, Patterson v. Gaines*, 47 U.S. (6 How.) 550, 599, 12 L.Ed. 553 (1847), follows in the pattern of the English decisions, mentioning as illustrative matters thus provable: manorial rights, public rights of way, immemorial custom, disputed boundary, and pedigree. More recent recognition of the principle is found in *Grant Bros. Construction Co. v. United States*, 232 U.S. 647, 34 S.Ct. 452, 58 L.Ed. 776 (1914), in action for penalties under Alien Contract Labor Law, decision of board of inquiry of Immigration Service admissible to prove alienage of laborers, as a matter of pedigree; *United States v. Mid-Continent Petroleum Corp.*, 67 F.2d 37 (10th Cir. 1933), records of commission enrolling Indians admissible on pedigree; *Jung Yen Loy v. Cahill*, 81 F.2d 809 (9th Cir. 1936), board decisions as to citizenship of plaintiff's father admissible in proceeding for declaration of citizenship. *Contra*, In re Estate of Cunha, 49 Haw. 273, 414 P.2d 925 (1966).

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 93–650

Rule 803(3) was approved in the form submitted by the Court to Congress. However, the Committee intends that the Rule be construed to limit the doctrine of *Mutual Life Insurance Co. v. Hillmon*, 145 U.S. 285, 295–300 (1892), so as to render statements of intent by a declarant admissible only to prove his future conduct, not the future conduct of another person.

After giving particular attention to the question of physical examination made solely to enable a physician to testify, the Committee approved Rule 803(4) as sub-

mitted to Congress, with the understanding that it is not intended in any way to adversely affect present privilege rules or those subsequently adopted.

Rule 803(5) as submitted by the Court permitted the reading into evidence of a memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify accurately and fully, ''shown to have been made when the matter was fresh in his memory and to reflect that knowledge correctly.'' The Committee amended this Rule to add the words ''or adopted by the witness'' after the phrase ''shown to have been made'', a treatment consistent with the definition of ''statement'' in the Jencks Act, 18 U.S.C. 3500. Moreover, it is the Committee's understanding that a memorandum or report, although barred under this Rule, would nonetheless be admissible if it came within another hearsay exception. This last stated principle is deemed applicable to all the hearsay rules.

Rule 803(6) as submitted by the Court permitted a record made ''in the course of a regularly conducted activity'' to be admissible in certain circumstances. The Committee believed there were insufficient guarantees of reliability in records made in the course of activities falling outside the scope of ''business'' activities as that term is broadly defined in 28 U.S.C. 1732. Moreover, the Committee concluded that the additional requirement of Section 1732 that it must have been the regular practice of a business to make the record is a necessary further assurance of its trustworthiness. The Committee accordingly amended the Rule to incorporate these limitations.

Rule 803(7) as submitted by the Court concerned the *absence* of entry in the records of a ''regularly conducted activity.'' The Committee amended this Rule to conform with its action with respect to Rule 803(6).

The Committee approved Rule 803(8) without substantive change from the form in which it was submitted by the Court. The Committee intends that the phrase ''factual findings'' be strictly construed and that evaluations or opinions contained in public reports shall not be admissible under this Rule.

The Committee approved this Rule in the form submitted by the Court, intending that the phrase ''Statements of fact concerning personal or family history'' be read to include the specific types of such statements enumerated in Rule 803(11).

NOTES OF COMMITTEE ON THE JUDICIARY, SENATE REPORT NO. 93–1277

The House approved this rule as it was submitted by the Supreme Court ''with the understanding that it is not intended in any way to adversely affect present privilege rules.'' We also approve this rule, and we would point out with respect to the question of its relation to privileges, it must be read in conjunction with rule 35 of the Federal Rules of Civil Procedure which provides that whenever the physical or mental condition of a party (plaintiff or defendant) is in controversy, the court may require him to submit to an examination by a physician. It is these examinations which will normally be admitted under this exception.

Rule 803(5) as submitted by the Court permitted the reading into evidence of a memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify accurately and fully, ''shown to have been made when the matter was fresh in his memory and to reflect that knowledge correctly.'' The House amended the rule to add the words ''or adopted by the witness'' after the phrase ''shown to have been made,'' language parallel to the Jencks Act [18 U.S.C. § 3500].

The committee accepts the House amendment with the understanding and belief that it was not intended to narrow the scope of applicability of the rule. In fact, we understand it to clarify the rule's applicability to a memorandum adopted by the witness as well as one made by him. While the rule as submitted by the Court was silent on the question of who made the memorandum, we view the House amendment as a helpful clarification, noting, however, that the Advisory Committee's note to this rule suggests that the important thing is the accuracy of the memorandum rather than who made it.

The committee does not view the House amendment as precluding admissibility in situations in which multiple participants were involved.

When the verifying witness has not prepared the report, but merely examined it and found it accurate, he has adopted the report, and it is therefore admissible. The rule should also be interpreted to cover other situations involving multiple participants, e.g., employer dictating to secretary, secretary making memorandum at direction of employer, or information being passed along a chain of persons, as in *Curtis v. Bradley* [65 Conn. 99, 31 Atl. 591 (1894); see, also *Rathbun v. Brancatella*, 93 N.J.L. 222, 107 Atl. 279 (1919); see, also McCormick on Evidence, § 303 (2d ed. 1972)].

The committee also accepts the understanding of the House that a memorandum or report, although barred under rule, would nonetheless be admissible if it came within another hearsay exception. We consider this principle to be applicable to all the hearsay rules.

Rule 803(6) as submitted by the Supreme Court permitted a record made in the course of a regularly conducted activity to be admissible in certain circumstances. This rule constituted a broadening of the traditional business records hearsay exception which has been long advocated by scholars and judges active in the law of evidence

The House felt there were insufficient guarantees of reliability of records not within a broadly defined business records exception. We disagree. Even under the House definition of ''business'' including profession, occupation, and ''calling of every kind,'' the records of many regularly conducted activities will, or may be, excluded from evidence. Under the principle of ejusdem generis, the intent of ''calling of every kind'' would seem to be related to work-related endeavors—e.g., butcher, baker, artist, etc.

Thus, it appears that the records of many institutions or groups might not be admissible under the House amendments. For example, schools, churches, and hospitals will not normally be considered businesses within the definition. Yet, these are groups which keep financial and other records on a regular basis in a manner similar to business enterprises. We believe these records are of equivalent trustworthiness and should be admitted into evidence.

Three states, which have recently codified their evidence rules, have adopted the Supreme Court version of rule 803(6), providing for admission of memoranda of a ''regularly conducted activity.'' None adopted the words ''business activity'' used in the House amendment. [See Nev. Rev. Stats. § 15.135; N. Mex. Stats. (1973 Supp.) § 20–4–803(6); West's Wis. Stats. Anno. (1973 Supp.) § 908.03(6).]

Therefore, the committee deleted the word ''business'' as it appears before the word ''activity''. The last sentence then is unnecessary and was also deleted.

It is the understanding of the committee that the use of the phrase ''person with knowledge'' is not intended to imply that the party seeking to introduce the memorandum, report, record, or data compilation must be able to produce, or even identify, the specific individual upon whose first-hand knowledge the memorandum, report, record or data compilation was based. A sufficient foundation for the introduction of such evidence will be laid if the party seeking to introduce the evidence is able to show that it was the regular practice of the activity to base such memorandums, reports, records, or data compilations upon a transmission from a person with knowledge, e.g., in the case of the content of a shipment of goods, upon a report from the company's receiving agent or in the case of a computer printout, upon a report from the company's computer programer or one who has knowledge of the particular record system. In short, the scope of the phrase ''person with knowledge'' is meant to be coter-

minous with the custodian of the evidence or other qualified witness. The committee believes this represents the desired rule in light of the complex nature of modern business organizations.

The House approved rule 803(8), as submitted by the Supreme Court, with one substantive change. It excluded from the hearsay exception reports containing matters observed by police officers and other law enforcement personnel in criminal cases. Ostensibly, the reason for this exclusion is that observations by police officers at the scene of the crime or the apprehension of the defendant are not as reliable as observations by public officials in other cases because of the adversarial nature of the confrontation between the police and the defendant in criminal cases.

The committee accepts the House's decision to exclude such recorded observations where the police officer is available to testify in court about his observation. However, where he is unavailable as unavailability is defined in rule 804(a)(4) and (a)(5), the report should be admitted as the best available evidence. Accordingly, the committee has amended rule 803(8) to refer to the provision of [proposed] rule 804(b)(5) [deleted], which allows the admission of such reports, records or other statements where the police officer or other law enforcement officer is unavailable because of death, then existing physical or mental illness or infirmity, or not being successfully subject to legal process.

The House Judiciary Committee report contained a statement of intent that ''the phrase 'factual findings' in subdivision (c) be strictly construed and that evaluations or opinions contained in public reports shall not be admissible under this rule.'' The committee takes strong exception to this limiting understanding of the application of the rule. We do not think it reflects an understanding of the intended operation of the rule as explained in the Advisory Committee notes to this subsection. The Advisory Committee notes on subsection (c) of this subdivision point out that various kinds of evaluative reports are now admissible under Federal statutes. 7 U.S.C. §78, findings of Secretary of Agriculture prima facie evidence of true grade of grain; 42 U.S.C. §269(b), bill of health by appropriate official prima facie evidence of vessel's sanitary history and condition and compliance with regulations. These statutory exceptions to the hearsay rule are preserved. Rule 802. The willingness of Congress to recognize these and other such evaluative reports provides a helpful guide in determining the kind of reports which are intended to be admissible under this rule. We think the restrictive interpretation of the House overlooks the fact that while the Advisory Committee assumes admissibility in the first instance of evaluative reports, they are not admissible if, as the rule states, ''the sources of information or other circumstances indicate lack of trustworthiness.''

The Advisory Committee explains the factors to be considered:

* * * * *

> Factors which may be assistance in passing upon the admissibility of evaluative reports include: (1) the timeliness of the investigation, McCormick, Can the Courts Make Wider Use of Reports of Official Investigations? 42 Iowa L.Rev. 363 (1957); (2) the special skill or experience of the official, id.; (3) whether a hearing was held and the level at which conducted, *Franklin v. Skelly Oil Co.*, 141 F.2d 568 (19th Cir. 1944); (4) possible motivation problems suggested by *Palmer v. Hoffman*, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943). Others no doubt could be added.

* * * * *

The committee concludes that the language of the rule together with the explanation provided by the Advisory Committee furnish sufficient guidance on the admissibility of evaluative reports.

The proposed Rules of Evidence submitted to Congress contained identical provisions in rules 803 and 804 (which set forth the various hearsay exceptions), admitting any hearsay statement not specifically covered by any of the stated exceptions, if the hearsay statement was found to have ''comparable circumstantial guarantees of trustworthiness.'' The House deleted these provisions (proposed rules 803(24) and 804(b)(6)[(5)]) as injecting ''too much uncertainty'' into the law of evidence and impairing the ability of practitioners to prepare for trial. The House felt that rule 102, which directs the courts to construe the Rules of Evidence so as to promote growth and development, would permit sufficient flexibility to admit hearsay evidence in appropriate cases under various factual situations that might arise.

We disagree with the total rejection of a residual hearsay exception. While we view rule 102 as being intended to provide for a broader construction and interpretation of these rules, we feel that, without a separate residual provision, the specifically enumerated exceptions could become tortured beyond any reasonable circumstances which they were intended to include (even if broadly construed). Moreover, these exceptions, while they reflect the most typical and well recognized exceptions to the hearsay rule, may not encompass every situation in which the reliability and appropriateness of a particular piece of hearsay evidence make clear that it should be heard and considered by the trier of fact.

The committee believes that there are certain exceptional circumstances where evidence which is found by a court to have guarantees of trust worthiness equivalent to or exceeding the guarantees reflected by the presently listed exceptions, and to have a high degree of prolativeness and necessity could properly be admissible.

The case of *Dallas County v. Commercial Union Assoc. Co., Ltd.*, 286 F.2d 388 (5th Cir. 1961) illustrates the point. The issue in that case was whether the tower of the county courthouse collapsed because it was struck by lightning (covered by insurance) or because of structural weakness and deterioration of the structure (not covered). Investigation of the structure revealed the presence of charcoal and charred timbers. In order to show that lightning may not have been the cause of the charring, the insurer offered a copy of a local newspaper published over 50 years earlier containing an unsigned article describing a fire in the courthouse while it was under construction. The Court found that the newspaper did not qualify for admission as a business record or an ancient document and did not fit within any other recognized hearsay exception. The court concluded, however, that the article was trustworthy because it was inconceivable that a newspaper reporter in a small town would report a fire in the courthouse if none had occurred. *See also United States v. Barbati*, 284 F. Supp. 409 (E.D.N.Y. 1968).

Because exceptional cases like the *Dallas County* case may arise in the future, the committee has decided to reinstate a residual exception for rules 803 and 804(b).

The committee, however, also agrees with those supporters of the House version who felt that an overly broad residual hearsay exception could emasculate the hearsay rule and the recognized exceptions or vitiate the rationale behind codification of the rules.

Therefore, the committee has adopted a residual exception for rules 803 and 804(b) of much narrower scope and applicability than the Supreme Court version. In order to qualify for admission, a hearsay statement not falling within one of the recognized exceptions would have to satisfy at least four conditions. First, it must have ''equivalent circumstantial guarantees of trustworthiness.'' Second, it must be offered as evidence of a material fact. Third, the court must determine that the statement ''is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts.'' This requirement is intended to insure that only statements which have high probative value and necessity may qualify for admission under the residual exceptions. Fourth, the court must determine that ''the gen-

eral purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.''

It is intended that the residual hearsay exceptions will be used very rarely, an only in exceptional circumstances. The committee does not intend to establish a broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions contained in rules 803 and 804(b). The residual exceptions are not meant to authorize major judicial revisions of the hearsay rule, including its present exceptions. Such major revisions are best accomplished by legislative action. It is intended that in any case in which evidence is sought to be admitted under these subsections, the trial judge will exercise no less care, reflection and caution than the courts did under the common law in establishing the now-recognized exceptions to the hearsay rule.

In order to establish a well-defined jurisprudence, the special facts and circumstances which, in the court's judgment, indicates that the statement has a sufficiently high degree of trustworthiness and necessity to justify its admission should be stated on the record. It is expected that the court will give the opposing party a full and adequate opportunity to contest the admission of any statement sought to be introduced under these subsections.

NOTES OF CONFERENCE COMMITTEE, HOUSE REPORT NO. 93–1597

Rule 803 defines when hearsay statements are admissible in evidence even though the declarant is available as a witness. The Senate amendments make three changes in this rule.

The House bill provides in subsection (6) that records of a regularly conducted ''business'' activity qualify for admission into evidence as an exception to the hearsay rule. ''Business'' is defined as including ''business, profession, occupation and calling of every kind.'' The Senate amendment drops the requirement that the records be those of a ''business'' activity and eliminates the definition of ''business.'' The Senate amendment provides that records are admissible if they are records of a regularly conducted ''activity.''

The Conference adopts the House provision that the records must be those of a regularly conducted ''business'' activity. The Conferees changed the definition of ''business'' contained in the House provision in order to make it clear that the records of institutions and associations like schools, churches and hospitals are admissible under this provision. The records of public schools and hospitals are also covered by Rule 803(8), which deals with public records and reports.

The Senate amendment adds language, not contained in the House bill, that refers to another rule that was added by the Senate in another amendment ([proposed] Rule 804(b)(5)—Criminal law enforcement records and reports [deleted]).

In view of its action on [proposed] Rule 804(b)(5) (Criminal law enforcement records and reports) [deleted], the Conference does not adopt the Senate amendment and restores the bill to the House version.

The Senate amendment adds a new subsection, (24), which makes admissible a hearsay statement not specifically covered by any of the previous twenty-three subsections, if the statement has equivalent circumstantial guarantees of trustworthiness and if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

The House bill eliminated a similar, but broader, provision because of the conviction that such a provision injected too much uncertainty into the law of evidence regarding hearsay and impaired the ability of a litigant to prepare adequately for trial.

The Conference adopts the Senate amendment with an amendment that provides that a party intending to request the court to use a statement under this provision must notify any adverse party of this intention as well as of the particulars of the statement, including the name and address of the declarant. This notice must be given sufficiently in advance of the trial or hearing to provide any adverse party with a fair opportunity to prepare to contest the use of the statement.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1997 AMENDMENT

The contents of Rule 803(24) and Rule 804(b)(5) have been combined and transferred to a new Rule 807. This was done to facilitate additions to Rules 803 and 804. No change in meaning is intended.

GAP Report on Rule 803. The words ''Transferred to Rule 807'' were substituted for ''Abrogated.''

COMMITTEE NOTES ON RULES—2000 AMENDMENT

The amendment provides that the foundation requirements of Rule 803(6) can be satisfied under certain circumstances without the expense and inconvenience of producing time-consuming foundation witnesses. Under current law, courts have generally required foundation witnesses to testify. *See, e.g., Tongil Co., Ltd. v. Hyundai Merchant Marine Corp.*, 968 F.2d 999 (9th Cir. 1992) (reversing a judgment based on business records where a qualified person filed an affidavit but did not testify). Protections are provided by the authentication requirements of Rule 902(11) for domestic records, Rule 902(12) for foreign records in civil cases, and 18 U.S.C. §3505 for foreign records in criminal cases.

GAP Report—Proposed Amendment to Rule 803(6). The Committee made no changes to the published draft of the proposed amendment to Evidence Rule 803(6).

AMENDMENT BY PUBLIC LAW

1975—Exception (23). Pub. L. 94–149 inserted a comma immediately after ''family'' in catchline.

Rule 804. Hearsay Exceptions; Declarant Unavailable

(a) DEFINITION OF UNAVAILABILITY. ''Unavailability as a witness'' includes situations in which the declarant—

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

(b) HEARSAY EXCEPTIONS. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) *Former Testimony*. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) *Statement Under Belief of Impending Death*. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

(3) *Statement Against Interest*. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) *Statement of Personal or Family History*. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

[(5) *Other Exceptions.] [Transferred to Rule 807]*

(6) *Forfeiture by Wrongdoing*. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1942; Pub. L. 94–149, §1(12), (13), Dec. 12, 1975, 89 Stat. 806; Mar. 2, 1987, eff. Oct. 1, 1987; Pub. L. 100–690, title VII, §7075(b), Nov. 18, 1988, 102 Stat. 4405; Apr. 11, 1997, eff. Dec. 1, 1997.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

As to firsthand knowledge on the part of hearsay declarants, see the introductory portion of the Advisory Committee's Note to Rule 803.

Subdivision (a). The definition of unavailability implements the division of hearsay exceptions into two categories by Rules 803 and 804(b).

At common law the unavailability requirement was evolved in connection with particular hearsay exceptions rather than along general lines. For example, see the separate explication of unavailability in relation to former testimony, declarations against interest, and statements of pedigree, separately developed in McCormick §§234, 257, and 297. However, no reason is apparent for making distinctions as to what satisfies unavailability for the different exceptions. The treatment in the rule is therefore uniform although differences in the range of process for witnesses between civil and criminal cases will lead to a less exacting requirement under item (5). See Rule 45(e) of the Federal Rules of Civil Procedure and Rule 17(e) of the Federal Rules of Criminal Procedure.

Five instances of unavailability are specified:

(1) Substantial authority supports the position that exercise of a claim of privilege by the declarant satisfies the requirement of unavailability (usually in connection with former testimony). *Wyatt v. State*, 35 Ala.App. 147, 46 So.2d 837 (1950); *State v. Stewart*, 85 Kan. 404, 116 P. 489 (1911); Annot., 45 A.L.R.2d 1354; Uniform Rule 62(7)(a); California Evidence Code §240(a)(1); Kansas Code of Civil Procedure §60–459(g) (1). A ruling by the judge is required, which clearly implies that an actual claim of privilege must be made.

(2) A witness is rendered unavailable if he simply refuses to testify concerning the subject matter of his statement despite judicial pressures to do so, a position supported by similar considerations of practicality. *Johnson v. People*, 152 Colo. 586, 384 P.2d 454 (1963); *People v. Pickett*, 339 Mich. 294, 63 N.W.2d 681, 45 A.L.R.2d 1341 (1954). *Contra, Pleau v. State*, 255 Wis. 362, 38 N.W.2d 496 (1949).

(3) The position that a claimed lack of memory by the witness of the subject matter of his statement constitutes unavailability likewise finds support in the cases, though not without dissent. McCormick §234, p. 494. If the claim is successful, the practical effect is to put the testimony beyond reach, as in the other instances. In this instance, however, it will be noted that the lack of memory must be established by the testimony of the witness himself, which clearly contemplates his production and subjection to cross-examination.

(4) Death and infirmity find general recognition as ground. McCormick §§234, 257, 297; Uniform Rule 62(7)(c); California Evidence Code §240(a)(3); Kansas Code of Civil Procedure §60–459(g)(3); New Jersey Evidence Rule 62(6)(c). See also the provisions on use of depositions in Rule 32(a)(3) of the Federal Rules of Civil Procedure and Rule 15(e) of the Federal Rules of Criminal Procedure.

(5) Absence from the hearing coupled with inability to compel attendance by process or other reasonable means also satisfies the requirement. McCormick §234; Uniform Rule 62(7)(d) and (e); California Evidence Code §240(a)(4) and (5); Kansas Code of Civil Procedure §60–459(g)(4) and (5); New Jersey Rule 62(6)(b) and (d). See the discussion of procuring attendance of witnesses who are nonresidents or in custody in *Barber v. Page*, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968).

If the conditions otherwise constituting unavailability result from the procurement or wrongdoing of the proponent of the statement, the requirement is not satisfied. The rule contains no requirement that an attempt be made to take the deposition of a declarant.

Subdivision (b). Rule 803 *supra*, is based upon the assumption that a hearsay statement falling within one of its exceptions possesses qualities which justify the conclusion that whether the declarant is available or unavailable is not a relevant factor in determining admissibility. The instant rule proceeds upon a different theory: hearsay which admittedly is not equal in quality to testimony of the declarant on the stand may nevertheless be admitted if the declarant is unavailable and if his statement meets a specified standard. The rule expresses preferences: testimony given on the stand in person is preferred over hearsay, and hearsay, if of the specified quality, is preferred over complete loss of the evidence of the declarant. The exceptions evolved at common law with respect to declarations of unavailable declarants furnish the basis for the exceptions enumerated in the proposal. The term ''unavailable'' is defined in subdivision (a).

Exception (1). Former testimony does not rely upon some set of circumstances to substitute for oath and cross-examination, since both oath and opportunity to

cross-examine were present in fact. The only missing one of the ideal conditions for the giving of testimony is the presence of trier and opponent (''demeanor evidence''). This is lacking with all hearsay exceptions. Hence it may be argued that former testimony is the strongest hearsay and should be included under Rule 803, *supra*. However, opportunity to observe demeanor is what in a large measure confers depth and meaning upon oath and cross-examination. Thus in cases under Rule 803 demeanor lacks the significance which it possesses with respect to testimony. In any event, the tradition, founded in experience, uniformly favors production of the witness if he is available. The exception indicates continuation of the policy. This preference for the presence of the witness is apparent also in rules and statutes on the use of depositions, which deal with substantially the same problem.

Under the exception, the testimony may be offered (1) against the party *against* whom it was previously offered or (2) against the party *by* whom it was previously offered. In each instance the question resolves itself into whether fairness allows imposing, upon the party against whom now offered, the handling of the witness on the earlier occasion. (1) If the party against whom now offered is the one against whom the testimony was offered previously, no unfairness is apparent in requiring him to accept his own prior conduct of cross-examination or decision not to cross-examine. Only demeanor has been lost, and that is inherent in the situation. (2) If the party against whom now offered is the one *by* whom the testimony was offered previously, a satisfactory answer becomes somewhat more difficult. One possibility is to proceed somewhat along the line of an adoptive admission, i.e. by offering the testimony proponent in effect adopts it. However, this theory savors of discarded concepts of witnesses' belonging to a party, of litigants' ability to pick and choose witnesses, and of vouching for one's own witnesses. Cf. McCormick §246, pp. 526–527; 4 Wigmore §1075. A more direct and acceptable approach is simply to recognize direct and redirect examination of one's own witness as the equivalent of cross-examining an opponent's witness. Falknor, Former Testimony and the Uniform Rules: A Comment, 38 N.Y.U.L.Rev. 651, n. 1 (1963); McCormick §231, p. 483. See also 5 Wigmore §1389. Allowable techniques for dealing with hostile, doublecrossing, forgetful, and mentally deficient witnesses leave no substance to a claim that one could not adequately develop his own witness at the former hearing. An even less appealing argument is presented when failure to develop fully was the result of a deliberate choice.

The common law did not limit the admissibility of former testimony to that given in an earlier trial of the same case, although it did require identity of issues as a means of insuring that the former handling of the witness was the equivalent of what would now be done if the opportunity were presented. Modern decisions reduce the requirement to ''substantial'' identity. McCormick §233. Since identity of issues is significant only in that it bears on motive and interest in developing fully the testimony of the witness, expressing the matter in the latter terms is preferable. *Id*. Testimony given at a preliminary hearing was held in *California v. Green*, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970), to satisfy confrontation requirements in this respect.

As a further assurance of fairness in thrusting upon a party the prior handling of the witness, the common law also insisted upon identity of parties, deviating only to the extent of allowing substitution of successors in a narrowly construed privity. Mutuality as an aspect of identity is now generally discredited, and the requirement of identity of the offering party disappears except as it might affect motive to develop the testimony. Falknor, *supra*, at 652; McCormick §232, pp. 487–488. The question remains whether strict identity, or privity, should continue as a requirement with respect to the party against whom offered. The rule departs to the extent of allowing substitution of one with the right and opportunity to develop the testimony with similar motive and interest. This position is supported by modern decisions. McCormick §232, pp. 489–490; 5 Wigmore §1388.

Provisions of the same tenor will be found in Uniform Rule 63(3)(b); California Evidence Code §§1290–1292; Kansas Code of Civil Procedure §60–460(c)(2); New Jersey Evidence Rule 63(3). Unlike the rule, the latter three provide either that former testimony is not admissible if the right of confrontation is denied or that it is not admissible if the accused was not a party to the prior hearing. The genesis of these limitations is a caveat in Uniform Rule 63(3) Comment that use of former testimony against an accused may violate his right of confrontation. *Mattox v. United States*, 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895), held that the right was not violated by the Government's use, on a retrial of the same case, of testimony given at the first trial by two witnesses since deceased. The decision leaves open the questions (1) whether direct and redirect are equivalent to cross-examination for purposes of confrontation, (2) whether testimony given in a different proceeding is acceptable, and (3) whether the accused must himself have been a party to the earlier proceeding or whether a similarly situated person will serve the purpose. Professor Falknor concluded that, if a dying declaration untested by cross-examination is constitutionally admissible, former testimony tested by the cross-examination of one similarly situated does not offend against confrontation. Falknor, *supra*, at 659–660. The constitutional acceptability of dying declarations has often been conceded. *Mattox v. United States*, 156 U.S. 237, 243, 15 S.Ct. 337, 39 L.Ed. 409 (1895); *Kirby v. United States*, 174 U.S. 47, 61, 19 S.Ct. 574, 43 L.Ed. 890 (1899); *Pointer v. Texas*, 380 U.S. 400, 407, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

Exception (2). The exception is the familiar dying declaration of the common law, expanded somewhat beyond its traditionally narrow limits. While the original religious justification for the exception may have lost its conviction for some persons over the years, it can scarcely be doubted that powerful psychological pressures are present. See 5 Wigmore §1443 and the classic statement of Chief Baron Eyre in *Rex v. Woodcock*, 1 Leach 500, 502, 168 Eng.Rep. 352, 353 (K.B. 1789).

The common law required that the statement be that of the victim, offered in a prosecution for criminal homicide. Thus declarations by victims in prosecutions for other crimes, e.g. a declaration by a rape victim who dies in childbirth, and all declarations in civil cases were outside the scope of the exception. An occasional statute has removed these restrictions, as in Colo.R.S. §52–1–20, or has expanded the area of offenses to include abortions, 5 Wigmore §1432, p. 224, n. 4. Kansas by decision extended the exception to civil cases. *Thurston v. Fritz*, 91 Kan. 468, 138 P. 625 (1914). While the common law exception no doubt originated as a result of the exceptional need for the evidence in homicide cases, the theory of admissibility applies equally in civil cases and in prosecutions for crimes other than homicide. The same considerations suggest abandonment of the limitation to circumstances attending the event in question, yet when the statement deals with matters other than the supposed death, its influence is believed to be sufficiently attenuated to justify the limitation. Unavailability is not limited to death. See subdivision (a) of this rule. Any problem as to declarations phrased in terms of opinion is laid at rest by Rule 701, and continuation of a requirement of first-hand knowledge is assured by Rule 602.

Comparable provisions are found in Uniform Rule 63 (5); California Evidence Code §1242; Kansas Code of Civil Procedure §60–460(e); New Jersey Evidence Rule 63(5).

Exception (3). The circumstantial guaranty of reliability for declarations against interest is the assumption that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true. *Hileman v. Northwest Engineering Co.*, 346 F.2d 668 (6th Cir. 1965). If the statement is that of a party, offered by his opponent, it comes in as an admission, Rule 803(d)(2), and there is no occasion to inquire

whether it is against interest, this not being a condition precedent to admissibility of admissions by opponents.

The common law required that the interest declared against be pecuniary or proprietary but within this limitation demonstrated striking ingenuity in discovering an against-interest aspect. *Higham v. Ridgeway*, 10 East 109, 103 Eng.Rep. 717 (K.B. 1808); *Reg. v. Overseers of Birmingham*, 1 B. & S. 763, 121 Eng.Rep. 897 (Q.B. 1861); McCormick, §256, p. 551, nn. 2 and 3.

The exception discards the common law limitation and expands to the full logical limit. One result is to remove doubt as to the admissibility of declarations tending to establish a tort liability against the declarant or to extinguish one which might be asserted by him, in accordance with the trend of the decisions in this country. McCormick §254, pp. 548–549. Another is to allow statements tending to expose declarant to hatred, ridicule, or disgrace, the motivation here being considered to be as strong as when financial interests are at stake. McCormick §255, p. 551. And finally, exposure to criminal liability satisfies the against-interest requirement. The refusal of the common law to concede the adequacy of a penal interest was no doubt indefensible in logic, see the dissent of Mr. Justice Holmes in *Donnelly v. United States*, 228 U.S. 243, 33 S.Ct. 449, 57 L.Ed. 820 (1913), but one senses in the decisions a distrust of evidence of confessions by third persons offered to exculpate the accused arising from suspicions of fabrication either of the fact of the making of the confession or in its contents, enhanced in either instance by the required unavailability of the declarant. Nevertheless, an increasing amount of decisional law recognizes exposure to punishment for crime as a sufficient stake. *People v. Spriggs*, 60 Cal.2d 868, 36 Cal.Rptr. 841, 389 P.2d 377 (1964); *Sutter v. Easterly*, 354 Mo. 282, 189 S.W.2d 284 (1945); *Band's Refuse Removal, Inc. v. Fairlawn Borough*, 62 N.J.Super. 552, 163 A.2d 465 (1960); *Newberry v. Commonwealth*, 191 Va. 445, 61 S.E.2d 318 (1950); Annot., 162 A.L.R. 446. The requirement of corroboration is included in the rule in order to effect an accommodation between these competing considerations. When the statement is offered by the accused by way of exculpation, the resulting situation is not adapted to control by rulings as to the weight of the evidence and, hence the provision is cast in terms of a requirement preliminary to admissibility. Cf. Rule 406(a). The requirement of corroboration should be construed in such a manner as to effectuate its purpose of circumventing fabrication.

Ordinarily the third-party confession is thought of in terms of exculpating the accused, but this is by no means always or necessarily the case: it may include statements implicating him, and under the general theory of declarations against interest they would be admissible as related statements. *Douglas v. Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965), and *Bruton v. United States*, 389 U.S. 818, 88 S.Ct. 126, 19 L.Ed.2d 70 (1968), both involved confessions by codefendants which implicated the accused. While the confession was not actually offered in evidence in *Douglas*, the procedure followed effectively put it before the jury, which the Court ruled to be error. Whether the confession might have been admissible as a declaration against penal interest was not considered or discussed. *Bruton* assumed the inadmissibility, as against the accused, of the implicating confession of his codefendant, and centered upon the question of the effectiveness of a limiting instruction. These decisions, however, by no means require that all statements implicating another person be excluded from the category of declarations against interest. Whether a statement is in fact against interest must be determined from the circumstances of each case. Thus a statement admitting guilt and implicating another person, made while in custody, may well be motivated by a desire to curry favor with the authorities and hence fail to qualify as against interest. See the dissenting opinion of Mr. Justice White in *Bruton*. On the other hand, the same words spoken under different circumstances, *e.g.*, to an acquaintance, would have no difficulty in qualifying. The rule does not purport to deal with questions of the right of confrontation.

The balancing of self-serving against dissenting aspects of a declaration is discussed in McCormick §256.

For comparable provisions, see Uniform Rule 63(10): California Evidence Code §1230; Kansas Code of Civil Procedure §60–460(j); New Jersey Evidence Rule 63(10).

Exception (4). The general common law requirement that a declaration in this area must have been made *ante litem motam* has been dropped, as bearing more appropriately on weight than admissibility. See 5 Wigmore §1483. Item (i)[(A)] specifically disclaims any need of firsthand knowledge respecting declarant's own personal history. In some instances it is self-evident (marriage) and in others impossible and traditionally not required (date of birth). Item (ii)[(B)] deals with declarations concerning the history of another person. As at common law, declarant is qualified if related by blood or marriage. 5 Wigmore §1489. In addition, and contrary to the common law, declarant qualifies by virtue of intimate association with the family. *Id.*, §1487. The requirement sometimes encountered that when the subject of the statement is the relationship between two other persons the declarant must qualify as to both is omitted. Relationship is reciprocal. *Id.*, §1491.

For comparable provisions, see Uniform Rule 63 (23), (24), (25); California Evidence Code §§1310, 1311; Kansas Code of Civil Procedure §60–460(u), (v), (w); New Jersey Evidence Rules 63(23), 63(24), 63(25).

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 93–650

Rule 804(a)(3) was approved in the form submitted by the Court. However, the Committee intends no change in existing federal law under which the court may choose to disbelieve the declarant's testimony as to his lack of memory. See *United States v. Insana*, 423 F.2d 1165, 1169–1170 (2nd Cir.), cert. denied, 400 U.S. 841 (1970).

Rule 804(a)(5) as submitted to the Congress provided, as one type of situation in which a declarant would be deemed ''unavailable'', that he be ''absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means.'' The Committee amended the Rule to insert after the word ''attendance'' the parenthetical expression ''(or, in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony)''. The amendment is designed primarily to require that an attempt be made to depose a witness (as well as to seek his attendance) as a precondition to the witness being deemed unavailable. The Committee, however, recognized the propriety of an exception to this additional requirement when it is the declarant's former testimony that is sought to be admitted under subdivision (b)(1).

Rule 804(b)(1) as submitted by the Court allowed prior testimony of an unavailable witness to be admissible if the party against whom it is offered or a person ''with motive and interest similar'' to his had an opportunity to examine the witness. The Committee considered that it is generally unfair to impose upon the party against whom the hearsay evidence is being offered responsibility for the manner in which the witness was previously handled by another party. The sole exception to this, in the Committee's view, is when a party's predecessor in interest in a civil action or proceeding had an opportunity and similar motive to examine the witness. The Committee amended the Rule to reflect these policy determinations.

Rule 804(b)(3) as submitted by the Court (now Rule 804(b)(2) in the bill) proposed to expand the traditional scope of the dying declaration exception (i.e. a statement of the victim in a homicide case as to the cause or circumstances of his believed imminent death) to allow such statements in all criminal and civil cases. The Committee did not consider dying declarations as among the most reliable forms of hearsay. Consequently, it amended the provision to limit their admissibility in criminal cases to homicide prosecutions,

where exceptional need for the evidence is present. This is existing law. At the same time, the Committee approved the expansion to civil actions and proceedings where the stakes do not involve possible imprisonment, although noting that this could lead to forum shopping in some instances.

Rule 804(b)(4) as submitted by the Court (now Rule 804(b)(3) in the bill) provided as follows:

> *Statement against interest.*—A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest or so far tended to subject him to civil or criminal liability or to render invalid a claim by him against another or to make him an object of hatred, ridicule, or disgrace, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to exculpate the accused is not admissible unless corroborated.

The Committee determined to retain the traditional hearsay exception for statements against pecuniary or proprietary interest. However, it deemed the Court's additional references to statements tending to subject a declarant to civil liability or to render invalid a claim by him against another to be redundant as included within the scope of the reference to statements against pecuniary or proprietary interest. See *Gichner v. Antonio Triano Tile and Marble Co.*, 410 F.2d 238 (D.C. Cir. 1968). Those additional references were accordingly deleted.

The Court's Rule also proposed to expand the hearsay limitation from its present federal limitation to include statements subjecting the declarant to criminal liability and statements tending to make him an object of hatred, ridicule, or disgrace. The Committee eliminated the latter category from the subdivision as lacking sufficient guarantees of reliability. See *United States v. Dovico*, 380 F.2d 325, 327nn.2,4 (2nd Cir.), cert. denied, 389 U.S. 944 (1967). As for statements against penal interest, the Committee shared the view of the Court that some such statements do possess adequate assurances of reliability and should be admissible. It believed, however, as did the Court, that statements of this type tending to exculpate the accused are more suspect and so should have their admissibility conditioned upon some further provision insuring trustworthiness. The proposal in the Court Rule to add a requirement of simple corroboration was, however, deemed ineffective to accomplish this purpose since the accused's own testimony might suffice while not necessarily increasing the reliability of the hearsay statement. The Committee settled upon the language ''unless corroborating circumstances clearly indicate the trustworthiness of the statement'' as affording a proper standard and degree of discretion. It was contemplated that the result in such cases as *Donnelly v. United States*, 228 U.S. 243 (1912), where the circumstances plainly indicated reliability, would be changed. The Committee also added to the Rule the final sentence from the 1971 Advisory Committee draft, designed to codify the doctrine of *Bruton v. United States*, 391 U.S. 123 (1968). The Committee does not intend to affect the existing exception to the *Bruton* principle where the codefendant takes the stand and is subject to cross-examination, but believed there was no need to make specific provision for this situation in the Rule, since in that even the declarant would not be ''unavailable''.

NOTES OF COMMITTEE ON THE JUDICIARY, SENATE REPORT NO. 93–1277

Subdivision (a) of rule 804 as submitted by the Supreme Court defined the conditions under which a witness was considered to be unavailable. It was amended in the House.

The purpose of the amendment, according to the report of the House Committee on the Judiciary, is ''primarily to require that an attempt be made to depose a witness (as well as to seek his attendance) as a precondition to the witness being unavailable.''

Under the House amendment, before a witness is declared unavailable, a party must try to depose a witness (declarant) with respect to dying declarations, declarations against interest, and declarations of pedigree. None of these situations would seem to warrant this needless, impractical and highly restrictive complication. A good case can be made for eliminating the unavailability requirement entirely for declarations against interest cases. [Uniform rule 63(10); Kan. Stat. Anno. 60–460(j); 2A N.J. Stats. Anno. 84–63(10).]

In dying declaration cases, the declarant will usually, though not necessarily, be deceased at the time of trial. Pedigree statements which are admittedly and necessarily based largely on word of mouth are not greatly fortified by a deposition requirement.

Depositions are expensive and time-consuming. In any event, deposition procedures are available to those who wish to resort to them. Moreover, the deposition procedures of the Civil Rules and Criminal Rules are only imperfectly adapted to implementing the amendment. No purpose is served unless the deposition, if taken, may be used in evidence. Under Civil Rule (a)(3) and Criminal Rule 15(e), a deposition, though taken, may not be admissible, and under Criminal Rule 15(a) substantial obstacles exist in the way of even taking a deposition.

For these reasons, the committee deleted the House amendment.

The committee understands that the rule as to unavailability, as explained by the Advisory Committee ''contains no requirement that an attempt be made to take the deposition of a declarant.'' In reflecting the committee's judgment, the statement is accurate insofar as it goes. Where, however, the proponent of the statement, with knowledge of the existence of the statement, fails to confront the declarant with the statement at the taking of the deposition, then the proponent should not, in fairness, be permitted to treat the declarant as ''unavailable'' simply because the declarant was not amendable to process compelling his attendance at trial. The committee does not consider it necessary to amend the rule to this effect because such a situation abuses, not conforms to, the rule. Fairness would preclude a person from introducing a hearsay statement on a particular issue if the person taking the deposition was aware of the issue at the time of the deposition but failed to depose the unavailable witness on that issue.

Former testimony.—Rule 804(b)(1) as submitted by the Court allowed prior testimony of an unavailable witness to be admissible if the party against whom it is offered or a person ''with motive and interest similar'' to his had an opportunity to examine the witness.

The House amended the rule to apply only to a party's predecessor in interest. Although the committee recognizes considerable merit to the rule submitted by the Supreme Court, a position which has been advocated by many scholars and judges, we have concluded that the difference between the two versions is not great and we accept the House amendment.

The rule defines those statements which are considered to be against interest and thus of sufficient trustworthiness to be admissible even though hearsay. With regard to the type of interest declared against, the version submitted by the Supreme Court included inter alia, statements tending to subject a declarant to civil liability or to invalidate a claim by him against another. The House struck these provisions as redundant. In view of the conflicting case law construing pecuniary or proprietary interests narrowly so as to exclude, e.g., tort cases, this deletion could be misconstrued.

Three States which have recently codified their rules of evidence have followed the Supreme Court's version of this rule, i.e., that a statement is against interest if it tends to subject a declarant to civil liability. [Nev. Rev. Stats. §51.345; N. Mex. Stats. (1973 supp.) §20–4–804(4); West's Wis. Stats. Anno. (1973 supp.) §908.045(4).]

The committee believes that the reference to statements tending to subject a person to civil liability constitutes a desirable clarification of the scope of the

rule. Therefore, we have reinstated the Supreme Court language on this matter.

The Court rule also proposed to expand the hearsay limitation from its present federal limitation to include statements subjecting the declarant to statements tending to make him an object of hatred, ridicule, or disgrace. The House eliminated the latter category from the subdivision as lacking sufficient guarantees of reliability. Although there is considerable support for the admissibility of such statements (all three of the State rules referred to supra, would admit such statements), we accept the deletion by the House.

The House amended this exception to add a sentence making inadmissible a statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both himself and the accused. The sentence was added to codify the constitutional principle announced in *Bruton v. United States*, 391 U.S. 123 (1968). *Bruton* held that the admission of the extrajudicial hearsay statement of one codefendant inculpating a second codefendant violated the confrontation clause of the sixth amendment.

The committee decided to delete this provision because the basic approach of the rules is to avoid codifying, or attempting to codify, constitutional evidentiary principles, such as the fifth amendment's right against self-incrimination and, here, the sixth amendment's right of confrontation. Codification of a constitutional principle is unnecessary and, where the principle is under development, often unwise. Furthermore, the House provision does not appear to recognize the exceptions to the *Bruton* rule, e.g. where the codefendant takes the stand and is subject to cross examination; where the accused confessed, see *United States v. Mancusi*, 404 F.2d 296 (2d Cir. 1968), cert. denied 397 U.S. 942 (1907); where the accused was placed at the scene of the crime, see *United States v. Zelker*, 452 F.2d 1009 (2d Cir. 1971). For these reasons, the committee decided to delete this provision.

Note to Subdivision (b)(5). See Note to Paragraph (24), Notes of Committee on the Judiciary, Senate Report No. 93–1277, set out as a note under rule 803 of these rules.

NOTES OF CONFERENCE COMMITTEE, HOUSE REPORT NO. 93–1597

Rule 804 defines what hearsay statements are admissible in evidence if the declarant is unavailable as a witness. The Senate amendments make four changes in the rule.

Subsection (a) defines the term ''unavailability as a witness''. The House bill provides in subsection (a)(5) that the party who desires to use the statement must be unable to procure the declarant's attendance by process or other reasonable means. In the case of dying declarations, statements against interest and statements of personal or family history, the House bill requires that the proponent must also be unable to procure the declarant's *testimony* (such as by deposition or interrogatories) by process or other reasonable means. The Senate amendment eliminates this latter provision.

The Conference adopts the provision contained in the House bill.

The Senate amendment to subsection (b)(3) provides that a statement is against interest and not excluded by the hearsay rule when the declarant is unavailable as a witness, if the statement tends to subject a person to civil or criminal liability or renders invalid a claim by him against another. The House bill did not refer specifically to civil liability and to rendering invalid a claim against another. The Senate amendment also deletes from the House bill the provision that subsection (b)(3) does not apply to a statement or confession, made by a codefendant or another, which implicates the accused and the person who made the statement, when that statement or confession is offered against the accused in a criminal case.

The Conference adopts the Senate amendment. The Conferees intend to include within the purview of this rule, statements subjecting a person to civil liability and statements rendering claims invalid. The Conferees agree to delete the provision regarding statements by a codefendant, thereby reflecting the general approach in the Rules of Evidence to avoid attempting to codify constitutional evidentiary principles.

The Senate amendment adds a new subsection, (b)(6) [now (b)(5)], which makes admissible a hearsay statement not specifically covered by any of the five previous subsections, if the statement has equivalent circumstantial guarantees of trustworthiness and if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

The House bill eliminated a similar, but broader, provision because of the conviction that such a provision injected too much uncertainty into the law of evidence regarding hearsay and impaired the ability of a litigant to prepare adequately for trial.

The Conference adopts the Senate amendment with an amendment that renumbers this subsection and provides that a party intending to request the court to use a statement under this provision must notify any adverse party of this intention as well as of the particulars of the statement, including the name and address of the declarant. This notice must be given sufficiently in advance of the trial or hearing to provide any adverse party with a fair opportunity to prepare the contest the use of the statement.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1997 AMENDMENT

Subdivision (b)(5). The contents of Rule 803(24) and Rule 804(b)(5) have been combined and transferred to a new Rule 807. This was done to facilitate additions to Rules 803 and 804. No change in meaning is intended.

Subdivision (b)(6). Rule 804(b)(6) has been added to provide that a party forfeits the right to object on hearsay grounds to the admission of a declarant's prior statement when the party's deliberate wrongdoing or acquiescence therein procured the unavailability of the declarant as a witness. This recognizes the need for a prophylactic rule to deal with abhorrent behavior ''which strikes at the heart of the system of justice itself.'' *United States v. Mastrangelo*, 693 F.2d 269, 273 (2d Cir. 1982), *cert. denied*, 467 U.S. 1204 (1984). The wrongdoing need not consist of a criminal act. The rule applies to all parties, including the government.

Every circuit that has resolved the question has recognized the principle of forfeiture by misconduct, although the tests for determining whether there is a forfeiture have varied. *See, e.g., United States v. Aguiar*, 975 F.2d 45, 47 (2d Cir. 1992); *United States v. Potamitis*, 739 F.2d 784, 789 (2d Cir.), *cert. denied*, 469 U.S. 918 (1984); *Steele v. Taylor*, 684 F.2d 1193, 1199 (6th Cir. 1982), *cert. denied*, 460 U.S. 1053 (1983); *United States v. Balano*, 618 F.2d 624, 629 (10th Cir. 1979), *cert. denied*, 449 U.S. 840 (1980); *United States v. Carlson*, 547 F.2d 1346, 1358–59 (8th Cir.), *cert. denied*, 431 U.S. 914 (1977). The foregoing cases apply a preponderance of the evidence standard. *Contra United States v. Thevis*, 665 F.2d 616, 631 (5th Cir.) (clear and convincing standard), CERT. DENIED, 459 U.S. 825 (1982). The usual Rule 104(a) preponderance of the evidence standard has been adopted in light of the behavior the new Rule 804(b)(6) seeks to discourage.

GAP Report on Rule 804(b)(5). The words ''Transferred to Rule 807'' were substituted for ''Abrogated.''

GAP Report on Rule 804(b)(6). The title of the rule was changed to ''Forfeiture by wrongdoing.'' The word ''who'' in line 24 was changed to ''that'' to indicate that

the rule is potentially applicable against the government. Two sentences were added to the first paragraph of the committee note to clarify that the wrongdoing need not be criminal in nature, and to indicate the rule's potential applicability to the government. The word ''forfeiture'' was substituted for ''waiver'' in the note.

AMENDMENT BY PUBLIC LAW

1988—Subd. (a)(5). Pub. L. 100–690 substituted ''subdivision'' for ''subdivisions''.

1975—Pub. L. 94–149, §1(12), substituted a semicolon for the colon in catchline.

Subd. (b)(3). Pub. L. 94–149, §1(13), substituted ''admissible'' for ''admissable''.

Rule 805. Hearsay Within Hearsay

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1943.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

On principle it scarcely seems open to doubt that the hearsay rule should not call for exclusion of a hearsay statement which includes a further hearsay statement when both conform to the requirements of a hearsay exception. Thus a hospital record might contain an entry of the patient's age based on information furnished by his wife. The hospital record would qualify as a regular entry except that the person who furnished the information was not acting in the routine of the business. However, her statement independently qualifies as a statement of pedigree (if she is unavailable) or as a statement made for purposes of diagnosis or treatment, and hence each link in the chain falls under sufficient assurances. Or, further to illustrate, a dying declaration may incorporate a declaration against interest by another declarant. See McCormick §290, p. 611.

Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1943; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 11, 1997, eff. Dec. 1, 1997.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The declarant of a hearsay statement which is admitted in evidence is in effect a witness. His credibility should in fairness be subject to impeachment and support as though he had in fact testified. See Rules 608 and 609. There are however, some special aspects of the impeaching of a hearsay declarant which require consideration. These special aspects center upon impeachment by inconsistent statement, arise from factual differences which exist between the use of hearsay and an actual witness and also between various kinds of hearsay, and involve the question of applying to declarants the general rule disallowing evidence of an inconsistent statement to impeach a witness unless he is afforded an opportunity to deny or explain. See Rule 613(b).

The principle difference between using hearsay and an actual witness is that the inconsistent statement will in the case of the witness almost inevitably of necessity in the nature of things be a *prior* statement, which it is entirely possible and feasible to call to his attention, while in the case of hearsay the inconsistent statement may well be a *subsequent* one, which practically precludes calling it to the attention of the declarant. The result of insisting upon observation of this impossible requirement in the hearsay situation is to deny the opponent, already barred from cross-examination, any benefit of this important technique of impeachment. The writers favor allowing the subsequent statement. McCormick §37, p. 69; 3 Wigmore §1033. The cases, however, are divided. Cases allowing the impeachment include *People v. Collup*, 27 Cal.2d 829, 167 P.2d 714 (1946); *People v. Rosoto*, 58 Cal.2d 304, 23 Cal.Rptr. 779, 373 P.2d 867 (1962); *Carver v. United States*, 164 U.S. 694, 17 S.Ct. 228, 41 L.Ed. 602 (1897). *Contra*, *Mattox v. United States*, 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895); *People v. Hines*, 284 N.Y. 93, 29 N.E.2d 483 (1940). The force of *Mattox*, where the hearsay was the former testimony of a deceased witness and the denial of use of a subsequent inconsistent statement was upheld, is much diminished by *Carver*, where the hearsay was a dying declaration and denial of use of a subsequent inconsistent statement resulted in reversal. The difference in the particular brand of hearsay seems unimportant when the inconsistent statement is a *subsequent* one. True, the opponent is not totally deprived of cross-examination when the hearsay is former testimony or a deposition but he is deprived of cross-examining on the statement or along lines suggested by it. Mr. Justice Shiras, with two justices joining him, dissented vigorously in *Mattox*.

When the impeaching statement was made *prior* to the hearsay statement, differences in the kinds of hearsay appear which arguably may justify differences in treatment. If the hearsay consisted of a simple statement by the witness, e.g. a dying declaration or a declaration against interest, the feasibility of affording him an opportunity to deny or explain encounters the same practical impossibility as where the statement is a subsequent one, just discussed, although here the impossibility arises from the total absence of anything resembling a hearing at which the matter could be put to him. The courts by a large majority have ruled in favor of allowing the statement to be used under these circumstances. McCormick §37, p. 69; 3 Wigmore §1033. If, however, the hearsay consists of former testimony or a deposition, the possibility of calling the prior statement to the attention of the witness or deponent is not ruled out, since the opportunity to cross-examine was available. It might thus be concluded that with former testimony or depositions the conventional foundation should be insisted upon. Most of the cases involve depositions, and Wigmore describes them as divided. 3 Wigmore §1031. Deposition procedures at best are cumbersome and expensive, and to require the laying of the foundation may impose an undue burden. Under the federal practice, there is no way of knowing with certainty at the time of taking a deposition whether it is merely for discovery or will ultimately end up in evidence. With respect to both former testimony and depositions the possibility exists that knowledge of the statement might not be acquired until after the time of the cross-examination. Moreover, the expanded admissibility of former testimony and depositions under Rule 804(b)(1) calls for a correspondingly expanded approach to impeachment. The rule dispenses with the requirement in all hearsay situations, which is readily administered and best calculated to lead to fair results.

Notice should be taken that Rule 26(f) of the Federal Rules of Civil Procedure, as originally submitted by the Advisory Committee, ended with the following:

''* * * and, without having first called them to the deponent's attention, may show statements contradictory thereto made at any time by the deponent.''

This language did not appear in the rule as promulgated in December, 1937. See 4 Moore's Federal Practice ¶¶26.01[9], 26.35 (2d ed. 1967). In 1951, Nebraska adopted a provision strongly resembling the one stricken from the federal rule:

''Any party may impeach any adverse deponent by self-contradiction without having laid foundation for such impeachment at the time such deposition was taken.'' R.S.Neb. §25–1267.07.

For similar provisions, see Uniform Rule 65; California Evidence Code §1202; Kansas Code of Civil Procedure §60–462; New Jersey Evidence Rule 65.

The provision for cross-examination of a declarant upon his hearsay statement is a corollary of general principles of cross-examination. A similar provision is found in California Evidence Code §1203.

NOTES OF COMMITTEE ON THE JUDICIARY, SENATE REPORT NO. 93–1277

Rule 906, as passed by the House and as proposed by the Supreme Court provides that whenever a hearsay statement is admitted, the credibility of the declarant of the statement may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if the declarant had testified as a witness. Rule 801 defines what is a hearsay statement. While statements by a person authorized by a party-opponent to make a statement concerning the subject, by the party-opponent's agent or by a coconspirator of a party—see rule 801(d)(2)(c), (d) and (e)—are traditionally defined as exceptions to the hearsay rule, rule 801 defines such admission by a party-opponent as statements which are not hearsay. Consequently, rule 806 by referring exclusively to the admission of hearsay statements, does not appear to allow the credibility of the declarant to be attacked when the declarant is a coconspirator, agent or authorized spokesman. The committee is of the view that such statements should open the declarant to attacks on his credibility. Indeed, the reason such statements are excluded from the operation of rule 806 is likely attributable to the drafting technique used to codify the hearsay rule, viz some statements, instead of being referred to as exceptions to the hearsay rule, are defined as statements which are not hearsay. The phrase ''or a statement defined in rule 801(d)(2)(c), (d) and (e)'' is added to the rule in order to subject the declarant of such statements, like the declarant of hearsay statements, to attacks on his credibility. [The committee considered it unnecessary to include statements contained in rule 801(d)(2)(A) and (B)—the statement by the party-opponent himself or the statement of which he has manifested his adoption—because the credibility of the party-opponent is always subject to an attack on his credibility].

NOTES OF CONFERENCE COMMITTEE, HOUSE REPORT NO. 93–1597

The Senate amendment permits an attack upon the credibility of the declarant of a statement if the statement is one by a person authorized by a party-opponent to make a statement concerning the subject, one by an agent of a party-opponent, or one by a coconspirator of the party-opponent, as these statements are defined in Rules 801(d)(2)(C), (D) and (E). The House bill has no such provision.

The Conference adopts the Senate amendment. The Senate amendment conforms the rule to present practice.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1997 AMENDMENT

The amendment is technical. No substantive change is intended.

GAP Report. Restylization changes in the rule were eliminated.

Rule 807. Residual Exception

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

(Added Apr. 11, 1997, eff. Dec. 1, 1997.)

NOTES OF ADVISORY COMMITTEE ON RULES

The contents of Rule 803(24) and Rule 804(b)(5) have been combined and transferred to a new Rule 807. This was done to facilitate additions to Rules 803 and 804. No change in meaning is intended.

GAP Report on Rule 807. Restylization changes were eliminated.

ARTICLE IX. AUTHENTICATION AND IDENTIFICATION

Rule 901. Requirement of Authentication or Identification

(a) GENERAL PROVISION. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) ILLUSTRATIONS. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) *Testimony of Witness With Knowledge*. Testimony that a matter is what it is claimed to be.

(2) *Nonexpert Opinion on Handwriting*. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) *Comparison by Trier or Expert Witness*. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) *Distinctive Characteristics and the Like*. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) *Voice Identification*. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) *Telephone Conversations*. Telephone conversations, by evidence that a call was made

to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) *Public Records or Reports.* Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) *Ancient Documents or Data Compilation.* Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

(9) *Process or System.* Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) *Methods Provided by Statute or Rule.* Any method of authentication or identification provided by Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1943.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

Subdivision (a). Authentication and identification represent a special aspect of relevancy. Michael and Adler, Real Proof, 5 Vand.L.Rev. 344, 362 (1952); McCormick §§179, 185; Morgan, Basic Problems of Evidence 378. (1962). Thus a telephone conversation may be irrelevant because on an unrelated topic or because the speaker is not identified. The latter aspect is the one here involved. Wigmore describes the need for authentication as ''an inherent logical necessity.'' 7 Wigmore §2129, p. 564.

This requirement of showing authenticity or identity fails in the category of relevancy dependent upon fulfillment of a condition of fact and is governed by the procedure set forth in Rule 104(b).

The common law approach to authentication of documents has been criticized as an ''attitude of agnosticism,'' McCormick, Cases on Evidence 388, n. 4 (3rd ed. 1956), as one which ''departs sharply from men's customs in ordinary affairs,'' and as presenting only a slight obstacle to the introduction of forgeries in comparison to the time and expense devoted to proving genuine writings which correctly show their origin on their face, McCormick §185, pp. 395, 396. Today, such available procedures as requests to admit and pretrial conference afford the means of eliminating much of the need for authentication or identification. Also, significant inroads upon the traditional insistence on authentication and identification have been made by accepting as at least prima facie genuine items of the kind treated in Rule 902, *infra*. However, the need for suitable methods of proof still remains, since criminal cases pose their own obstacles to the use of preliminary procedures, unforeseen contingencies may arise, and cases of genuine controversy will still occur.

Subdivision (b). The treatment of authentication and identification draws largely upon the experience embodied in the common law and in statutes to furnish illustrative applications of the general principle set forth in subdivision (a). The examples are not intended as an exclusive enumeration of allowable methods but are meant to guide and suggest, leaving room for growth and development in this area of the law.

The examples relate for the most part to documents, with some attention given to voice communications and computer print-outs. As Wigmore noted, no special rules have been developed for authenticating chattels. Wigmore, Code of Evidence §2086 (3rd ed. 1942).

It should be observed that compliance with requirements of authentication or identification by no means assures admission of an item into evidence, as other bars, hearsay for example, may remain.

Example (1). Example (1) contemplates a broad spectrum ranging from testimony of a witness who was present at the signing of a document to testimony establishing narcotics as taken from an accused and accounting for custody through the period until trial, including laboratory analysis. See California Evidence Code §1413, eyewitness to signing.

Example (2). Example (2) states conventional doctrine as to lay identification of handwriting, which recognizes that a sufficient familiarity with the handwriting of another person may be acquired by seeing him write, by exchanging correspondence, or by other means, to afford a basis for identifying it on subsequent occasions. McCormick §189. See also California Evidence Code §1416. Testimony based upon familiarity acquired for purposes of the litigation is reserved to the expert under the example which follows.

Example (3). The history of common law restrictions upon the technique of proving or disproving the genuineness of a disputed specimen of handwriting through comparison with a genuine specimen, by either the testimony of expert witnesses or direct viewing by the triers themselves, is detailed in 7 Wigmore §§1991–1994. In breaking away, the English Common Law Procedure Act of 1854, 17 and 18 Viet., c. 125, §27, cautiously allowed expert or trier to use exemplars ''proved to the satisfaction of the judge to be genuine'' for purposes of comparison. The language found its way into numerous statutes in this country, e.g., California Evidence Code §§1417, 1418. While explainable as a measure of prudence in the process of breaking with precedent in the handwriting situation, the reservation to the judge of the question of the genuineness of exemplars and the imposition of an unusually high standard of persuasion are at variance with the general treatment of relevancy which depends upon fulfillment of a condition of fact. Rule 104(b). No similar attitude is found in other comparison situations, e.g., ballistics comparison by jury, as in *Evans v. Commonwealth*, 230 Ky. 411, 19 S.W.2d 1091 (1929), or by experts, Annot. 26 A.L.R.2d 892, and no reason appears for its continued existence in handwriting cases. Consequently Example (3) sets no higher standard for handwriting specimens and treats all comparison situations alike, to be governed by Rule 104(b). This approach is consistent with 28 U.S.C. §1731: ''The admitted or proved handwriting of any person shall be admissible, for purposes of comparison, to determine genuineness of other handwriting attributed to such person.''

Precedent supports the acceptance of visual comparison as sufficiently satisfying preliminary authentication requirements for admission in evidence. *Brandon v. Collins*, 267 F.2d 731 (2d Cir. 1959); *Wausau Sulphate Fibre Co. v. Commissioner of Internal Revenue*, 61 F.2d 879 (7th Cir. 1932); *Desimone v. United States*, 227 F.2d 864 (9th Cir. 1955).

Example (4). The characteristics of the offered item itself, considered in the light of circumstances, afford authentication techniques in great variety. Thus a document or telephone conversation may be shown to have emanated from a particular person by virtue of its disclosing knowledge of facts known peculiarly to him; *Globe Automatic Sprinkler Co. v. Braniff*, 89 Okl. 105, 214 P. 127 (1923); California Evidence Code §1421; similarly, a letter may be authenticated by content and circumstances indicating it was in reply to a duly authenticated one. McCormick §192; California Evidence Code §1420. Language patterns may indicate authenticity or its opposite. *Magnuson v. State*, 187 Wis. 122, 203 N.W. 749

(1925); Arens and Meadow, Psycholinguistics and the Confession Dilemma, 56 Colum.L.Rev. 19 (1956).

Example (5). Since aural voice identification is not a subject of expert testimony, the requisite familiarity may be acquired either before or after the particular speaking which is the subject of the identification, in this respect resembling visual identification of a person rather than identification of handwriting. Cf. Example (2), *supra*, *People v. Nichols*, 378 Ill. 487, 38 N.E.2d 766 (1942); *McGuire v. State*, 200 Md. 601, 92 A.2d 582 (1952); *State v. McGee*, 336 Mo. 1082, 83 S.W.2d 98 (1935).

Example (6). The cases are in agreement that a mere assertion of his identity by a person talking on the telephone is not sufficient evidence of the authenticity of the conversation and that additional evidence of his identity is required. The additional evidence need not fall in any set pattern. Thus the content of his statements or the reply technique, under Example (4), *supra*, or voice identification under Example (5), may furnish the necessary foundation. Outgoing calls made by the witness involve additional factors bearing upon authenticity. The calling of a number assigned by the telephone company reasonably supports the assumption that the listing is correct and that the number is the one reached. If the number is that of a place of business, the mass of authority allows an ensuing conversation if it relates to business reasonably transacted over the telephone, on the theory that the maintenance of the telephone connection is an invitation to do business without further identification. *Matton v. Hoover Co.*, 350 Mo. 506, 166 S.W.2d 557 (1942); *City of Pawhuska v. Crutchfield*, 147 Okl. 4. 293 P. 1095 (1930); *Zurich General Acc. & Liability Ins. Co. v. Baum*, 159 Va. 404, 165 S.E. 518 (1932). Otherwise, some additional circumstance of identification of the speaker is required. The authorities divide on the question whether the self-identifying statement of the person answering suffices. Example (6) answers in the affirmative on the assumption that usual conduct respecting telephone calls furnish adequate assurances of regularity, bearing in mind that the entire matter is open to exploration before the trier of fact. In general, see McCormick §193; 7 Wigmore §2155; Annot., 71 A.L.R. 5, 105 id. 326.

Example (7). Public records are regularly authenticated by proof of custody, without more. McCormick §191; 7 Wigmore §§2158, 2159. The example extends the principle to include data stored in computers and similar methods, of which increasing use in the public records area may be expected. See California Evidence Code §§1532, 1600.

Example (8). The familiar ancient document rule of the common law is extended to include data stored electronically or by other similar means. Since the importance of appearance diminishes in this situation, the importance of custody or place where found increases correspondingly. This expansion is necessary in view of the widespread use of methods of storing data in forms other than conventional written records.

Any time period selected is bound to be arbitrary. The common law period of 30 years is here reduced to 20 years, with some shift of emphasis from the probable unavailability of witnesses to the unlikeliness of a still viable fraud after the lapse of time. The shorter period is specified in the English Evidence Act of 1938, 1 & 2 Geo. 6, c. 28, and in Oregon R.S. 1963, §41.360(34). See also the numerous statutes prescribing periods of less than 30 years in the case of recorded documents. 7 Wigmore §2143.

The application of Example (8) is not subject to any limitation to title documents or to any requirement that possession, in the case of a title document, has been consistent with the document. See McCormick §190.

Example (9). Example (9) is designed for situations in which the accuracy of a result is dependent upon a process or system which produces it. X-rays afford a familiar instance. Among more recent developments is the computer, as to which see *Transport Indemnity Co. v. Seib*, 178 Neb. 253, 132 N.W.2d 871 (1965); *State v. Veres*, 7 Ariz.App. 117, 436 P.2d 629 (1968); *Merrick v. United States Rubber Co.*, 7 Ariz.App. 433, 440 P.2d 314 (1968); Freed, Computer Print-Outs as Evidence, 16 Am.Jur. Proof of Facts 273; Symposium, Law and Computers in the Mid-Sixties, ALI-ABA (1966); 37 Albany L.Rev. 61 (1967). Example (9) does not, of course, foreclose taking judicial notice of the accuracy of the process or system.

Example (10). The example makes clear that methods of authentication provided by Act of Congress and by the Rules of Civil and Criminal Procedure or by Bankruptcy Rules are not intended to be superseded. Illustrative are the provisions for authentication of official records in Civil Procedure Rule 44 and Criminal Procedure Rule 27, for authentication of records of proceedings by court reporters in 28 U.S.C. §753(b) and Civil Procedure Rule 80(c), and for authentication of depositions in Civil Procedure Rule 30(f).

Rule 902. Self-authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) *Domestic Public Documents Under Seal*. A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) *Domestic Public Documents Not Under Seal*. A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) *Foreign Public Documents*. A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of an 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 official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) *Certified Copies of Public Records*. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations

in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.

(5) *Official Publications*. Books, pamphlets, or other publications purporting to be issued by public authority.

(6) *Newspapers and Periodicals*. Printed materials purporting to be newspapers or periodicals.

(7) *Trade Inscriptions and the Like*. Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) *Acknowledged Documents*. Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) *Commercial Paper and Related Documents*. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) *Presumptions Under Acts of Congress*. Any signature, document, or other matter declared by Act of Congress to be presumptively or prima facie genuine or authentic.

(11) *Certified Domestic Records of Regularly Conducted Activity*. The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record—

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

(12) *Certified Foreign Records of Regularly Conducted Activity*. In a civil case, the original or a duplicate of a foreign record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration by its custodian or other qualified person certifying that the record—

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

The declaration must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1944; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 25, 1988, eff. Nov. 1, 1988; Apr. 17, 2000, eff. Dec. 1, 2000.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

Case law and statutes have, over the years, developed a substantial body of instances in which authenticity is taken as sufficiently established for purposes of admissibility without extrinsic evidence to that effect, sometimes for reasons of policy but perhaps more often because practical considerations reduce the possibility of unauthenticity to a very small dimension. The present rule collects and incorporates these situations, in some instances expanding them to occupy a larger area which their underlying considerations justify. In no instance is the opposite party foreclosed from disputing authenticity.

Paragraph (1). The acceptance of documents bearing a public seal and signature, most often encountered in practice in the form of acknowledgments or certificates authenticating copies of public records, is actually of broad application. Whether theoretically based in whole or in part upon judicial notice, the practical underlying considerations are that forgery is a crime and detection is fairly easy and certain. 7 Wigmore §2161, p. 638; California Evidence Code §1452. More than 50 provisions for judicial notice of official seals are contained in the United States Code.

Paragraph (2). While statutes are found which raise a presumption of genuineness of purported official signatures in the absence of an official seal, 7 Wigmore §2167; California Evidence Code §1453, the greater ease of effecting a forgery under these circumstances is apparent. Hence this paragraph of the rule calls for authentication by an officer who has a seal. Notarial acts by members of the armed forces and other special situations are covered in paragraph (10).

Paragraph (3) provides a method for extending the presumption of authenticity to foreign official documents by a procedure of certification. It is derived from Rule 44(a)(2) of the Rules of Civil Procedure but is broader in applying to public documents rather than being limited to public records.

Paragraph (4). The common law and innumerable statutes have recognized the procedure of authenticating copies of public records by certificate. The certificate qualifies as a public document, receivable as authentic when in conformity with paragraph (1), (2), or (3). Rule 44(a) of the Rules of Civil Procedure and Rule 27 of the Rules of Criminal Procedure have provided authentication procedures of this nature for both domestic and foreign public records. It will be observed that the certification procedure here provided extends only to public records, reports, and recorded documents, all including data compilations, and does not apply to public documents generally. Hence documents provable when presented in original form under paragraphs (1), (2), or (3) may not be provable by certified copy under paragraph (4).

Paragraph (5). Dispensing with preliminary proof of the genuineness of purportedly official publications, most commonly encountered in connection with statutes, court reports, rules, and regulations, has been greatly enlarged by statutes and decisions. 5 Wigmore §1684. Paragraph (5), it will be noted, does not confer

admissibility upon all official publications; it merely provides a means whereby their authenticity may be taken as established for purposes of admissibility. Rule 44(a) of the Rules of Civil Procedure has been to the same effect.

Paragraph (6). The likelihood of forgery of newspapers or periodicals is slight indeed. Hence no danger is apparent in receiving them. Establishing the authenticity of the publication may, of course, leave still open questions of authority and responsibility for items therein contained. See 7 Wigmore §2150. Cf. 39 U.S.C. §4005(b), public advertisement prima facie evidence of agency of person named, in postal fraud order proceeding; Canadian Uniform Evidence Act, Draft of 1936, printed copy of newspaper prima facie evidence that notices or advertisements were authorized.

Paragraph (7). Several factors justify dispensing with preliminary proof of genuineness of commercial and mercantile labels and the like. The risk of forgery is minimal. Trademark infringement involves serious penalties. Great efforts are devoted to inducing the public to buy in reliance on brand names, and substantial protection is given them. Hence the fairness of this treatment finds recognition in the cases. *Curtiss Candy Co. v. Johnson*, 163 Miss. 426, 141 So. 762 (1932), Baby Ruth candy bar; *Doyle v. Continental Baking Co.*, 262 Mass. 516, 160 N.E. 325 (1928), loaf of bread; *Weiner v. Mager & Throne, Inc.*, 167 Misc. 338, 3 N.Y.S.2d 918 (1938), same. And see W.Va.Code 1966, §47–3–5, trade-mark on bottle prima facie evidence of ownership. *Contra, Keegan v. Green Giant Co.*, 150 Me. 283, 110 A.2d 599 (1954); *Murphy v. Campbell Soup Co.*, 62 F.2d 564 (1st Cir. 1933). Cattle brands have received similar acceptance in the western states. Rev.Code Mont.1947, §46–606; *State v. Wolfley*, 75 Kan. 406, 89 P. 1046 (1907); Annot., 11 L.R.A. (N.S.) 87. Inscriptions on trains and vehicles are held to be prima facie evidence of ownership or control. *Pittsburgh, Ft. W. & C. Ry. v. Callaghan*, 157 Ill. 406, 41 N.E. 909 (1895); 9 Wigmore §2510a. See also the provision of 19 U.S.C. §1615(2) that marks, labels, brands, or stamps indicating foreign origin are prima facie evidence of foreign origin of merchandise.

Paragraph (8). In virtually every state, acknowledged title documents are receivable in evidence without further proof. Statutes are collected in 5 Wigmore §1676. If this authentication suffices for documents of the importance of those affecting titles, logic scarcely permits denying this method when other kinds of documents are involved. Instances of broadly inclusive statutes are California Evidence Code §1451 and N.Y.CPLR 4538, McKinney's Consol. Laws 1963.

Paragraph (9). Issues of the authenticity of commercial paper in federal courts will usually arise in diversity cases, will involve an element of a cause of action or defense, and with respect to presumptions and burden of proof will be controlled by *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). Rule 302, *supra*. There may, however, be questions of authenticity involving lesser segments of a case or the case may be one governed by federal common law. *Clearfield Trust Co. v. United States*, 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838 (1943). Cf. *United States v. Yazell*, 382 U.S. 341, 86 S.Ct. 500, 15 L.Ed.2d 404 (1966). In these situations, resort to the useful authentication provisions of the Uniform Commercial Code is provided for. While the phrasing is in terms of ''general commercial law,'' in order to avoid the potential complication inherent in borrowing local statutes, today one would have difficulty in determining the general commercial law without referring to the Code. See *Williams v. Walker-Thomas-Furniture Co.*, 121 U.S.App.D.C. 315, 350 F.2d 445 (1965). Pertinent Code provisions are sections 1–202, 3–307, and 3–510, dealing with third-party documents, signatures on negotiable instruments, protests, and statements of dishonor.

Paragraph (10). The paragraph continues in effect dispensations with preliminary proof of genuineness provided in various Acts of Congress. See, for example, 10 U.S.C. §936, signature, without seal, together with title, prima facie evidence of authenticity of acts of certain military personnel who are given notarial power; 15 U.S.C. §77f(a), signature on SEC registration presumed genuine; 26 U.S.C. §6064, signature to tax return prima facie genuine.

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Rule 902(8) as submitted by the Court referred to certificates of acknowledgment ''under the hand and seal of'' a notary public or other officer authorized by law to take acknowledgments. The Committee amended the Rule to eliminate the requirement, believed to be inconsistent with the law in some States, that a notary public must affix a seal to a document acknowledged before him. As amended the Rule merely requires that the document be executed in the manner prescribed by State law.

The Committee approved Rule 902(9) as submitted by the Court. With respect to the meaning of the phrase ''general commercial law'', the Committee intends that the Uniform Commercial Code, which has been adopted in virtually every State, will be followed generally, but that federal commercial law will apply where federal commercial paper is involved. See *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943). Further, in those instances in which the issues are governed by *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), State law will apply irrespective of whether it is the Uniform Commercial Code.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1988 AMENDMENT

These two sentences were inadvertently eliminated from the 1987 amendments. The amendment is technical. No substantive change is intended.

COMMITTEE NOTES ON RULES—2000 AMENDMENT

The amendment adds two new paragraphs to the rule on self-authentication. It sets forth a procedure by which parties can authenticate certain records of regularly conducted activity, other than through the testimony of a foundation witness. See the amendment to Rule 803(6). 18 U.S.C. §3505 currently provides a means for certifying foreign records of regularly conducted activity in criminal cases, and this amendment is intended to establish a similar procedure for domestic records, and for foreign records offered in civil cases.

A declaration that satisfies 28 U.S.C. §1746 would satisfy the declaration requirement of Rule 902(11), as would any comparable certification under oath.

The notice requirement in Rules 902(11) and (12) is intended to give the opponent of the evidence a full opportunity to test the adequacy of the foundation set forth in the declaration.

GAP Report—Proposed Amendment to Rule 902. The Committee made the following changes to the published draft of the proposed amendment to Evidence Rule 902:

1. Minor stylistic changes were made in the text, in accordance with suggestions of the Style Subcommittee of the Standing Committee on Rules of Practice and Procedure.

2. The phrase ''in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority'' was added to proposed Rule 902(11), to provide consistency with Evidence Rule 902(4). The Committee Note was amended to accord with this textual change.

3. Minor stylistic changes were made in the text to provide a uniform construction of the terms ''declaration'' and ''certifying.''

4. The notice provisions in the text were revised to clarify that the proponent must make both the declaration and the underlying record available for inspection.

TERMINATION OF TRUST TERRITORY OF THE PACIFIC ISLANDS

For termination of Trust Territory of the Pacific Islands, see note set out preceding section 1681 of Title 48, Territories and Insular Possessions.

Rule 903. Subscribing Witness' Testimony Unnecessary

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1945.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The common law required that attesting witnesses be produced or accounted for. Today the requirement has generally been abolished except with respect to documents which must be attested to be valid, e.g. wills in some states. McCormick §188. Uniform Rule 71; California Evidence Code §1411; Kansas Code of Civil Procedure §60–468; New Jersey Evidence Rule 71; New York CPLR Rule 4537.

ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

Rule 1001. Definitions

For purposes of this article the following definitions are applicable:

(1) *Writings and Recordings.* ''Writings'' and ''recordings'' consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) *Photographs.* ''Photographs'' include still photographs, X-ray films, video tapes, and motion pictures.

(3) *Original.* An ''original'' of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An ''original'' of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an ''original''.

(4) *Duplicate.* A ''duplicate'' is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1945.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

In an earlier day, when discovery and other related procedures were strictly limited, the misleading named ''best evidence rule'' afforded substantial guarantees against inaccuracies and fraud by its insistence upon production of original documents. The great enlargement of the scope of discovery and related procedures in recent times has measurably reduced the need for the rule. Nevertheless important areas of usefulness persist: discovery of documents outside the jurisdiction may require substantial outlay of time and money; the unanticipated document may not practically be discoverable; criminal cases have built-in limitations on discovery. Cleary and Strong, The Best Evidence Rule: An Evaluation in Context, 51 Iowa L.Rev. 825 (1966).

Paragraph (1). Traditionally the rule requiring the original centered upon accumulations of data and expressions affecting legal relations set forth in words and figures. This meant that the rule was one essentially related to writings. Present day techniques have expanded methods of storing data, yet the essential form which the information ultimately assumes for usable purposes is words and figures. Hence the considerations underlying the rule dictate its expansion to include computers, photographic systems, and other modern developments.

Paragraph (3). In most instances, what is an original will be self-evident and further refinement will be unnecessary. However, in some instances particularized definition is required. A carbon copy of a contract executed in duplicate becomes an original, as does a sales ticket carbon copy given to a customer. While strictly speaking the original of a photograph might be thought to be only the negative, practicality and common usage require that any print from the negative be regarded as an original. Similarly, practicality and usage confer the status of original upon any computer printout. *Transport Indemnity Co. v. Seib*, 178 Neb. 253, 132 N.W.2d 871 (1965).

Paragraph (4). The definition describes ''copies'' produced by methods possessing an accuracy which virtually eliminates the possibility of error. Copies thus produced are given the status of originals in large measure by Rule 1003, *infra*. Copies subsequently produced manually, whether handwritten or typed, are not within the definition. It should be noted that what is an original for some purposes may be a duplicate for others. Thus a bank's microfilm record of checks cleared is the original as a record. However, a print offered as a copy of a check whose contents are in controversy is a duplicate. This result is substantially consistent with 28 U.S.C. §1732(b). Compare 26 U.S.C. §7513(c), giving full status as originals to photographic reproductions of tax returns and other documents, made by authority of the Secretary of the Treasury, and 44 U.S.C. §399(a), giving original status to photographic copies in the National Archives.

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The Committee amended this Rule expressly to include ''video tapes'' in the definition of ''photographs.''

Rule 1002. Requirement of Original

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1946.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The rule is the familiar one requiring production of the original of a document to prove its contents, expanded to include writings, recordings, and photographs, as defined in Rule 1001(1) and (2), *supra*.

Application of the rule requires a resolution of the question whether contents are sought to be proved. Thus an event may be proved by nondocumentary evidence, even though a written record of it was made. If, however, the event is sought to be proved by the written record, the rule applies. For example, payment may be proved without producing the written receipt which was given. Earnings may be proved without producing books of account in which they are entered. McCormick §198; 4 Wigmore §1245. Nor does the rule apply to testimony that books or records have been examined and found not to contain any reference to a designated matter.

The assumption should not be made that the rule will come into operation on every occasion when use is made of a photograph in evidence. On the contrary, the

rule will seldom apply to ordinary photographs. In most instances a party *wishes* to introduce the item and the question raised is the propriety of receiving it in evidence. Cases in which an offer is made of the testimony of a witness as to what he saw in a photograph or motion picture, without producing the same, are most unusual. The usual course is for a witness on the stand to identify the photograph or motion picture as a correct representation of events which he saw or of a scene with which he is familiar. In fact he adopts the picture as his testimony, or, in common parlance, uses the picture to illustrate his testimony. Under these circumstances, no effort is made to prove the contents of the picture, and the rule is inapplicable. Paradis, The Celluloid Witness, 37 U.Colo.L. Rev. 235, 249–251 (1965).

On occasion, however, situations arise in which contents are sought to be proved. Copyright, defamation, and invasion of privacy by photograph or motion picture falls in this category. Similarly as to situations in which the picture is offered as having independent probative value, e.g. automatic photograph of bank robber. See *People v. Doggett*, 83 Cal.App.2d 405, 188 P.2d 792 (1948) photograph of defendants engaged in indecent act; Mouser and Philbin, Photographic Evidence—Is There a Recognized Basis for Admissibility? 8 Hastings L.J. 310 (1957). The most commonly encountered of this latter group is of course, the X-ray, with substantial authority calling for production of the original. *Daniels v. Iowa City*, 191 Iowa 811, 183 N.W. 415 (1921); *Cellamare v. Third Acc. Transit Corp.*, 273 App.Div. 260, 77 N.Y.S.2d 91 (1948); *Patrick & Tilman v. Matkin*, 154 Okl. 232, 7 P.2d 414 (1932); *Mendoza v. Rivera*, 78 P.R.R. 569 (1955)

It should be noted, however, that Rule 703, supra, allows an expert to give an opinion based on matters not in evidence, and the present rule must be read as being limited accordingly in its application. Hospital records which may be admitted as business records under Rule 803(6) commonly contain reports interpreting X-rays by the staff radiologist, who qualifies as an expert, and these reports need not be excluded from the records by the instant rule.

The reference to Acts of Congress is made in view of such statutory provisions as 26 U.S.C. §7513, photographic reproductions of tax returns and documents, made by authority of the Secretary of the Treasury, treated as originals, and 44 U.S.C. §399(a), photographic copies in National Archives treated as originals.

Rule 1003. Admissibility of Duplicates

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1946.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

When the only concern is with getting the words or other contents before the court with accuracy and precision, then a counterpart serves equally as well as the original, if the counterpart is the product of a method which insures accuracy and genuineness. By definition in Rule 1001(4), *supra*, a ''duplicate'' possesses this character.

Therefore, if no genuine issue exists as to authenticity and no other reason exists for requiring the original, a duplicate is admissible under the rule. This position finds support in the decisions, *Myrick v. United States*, 332 F.2d 279 (5th Cir. 1964), no error in admitting photostatic copies of checks instead of original microfilm in absence of suggestion to trial judge that photostats were incorrect; *Johns v. United States*, 323 F.2d 421 (5th Cir. 1963), not error to admit concededly accurate tape recording made from original wire recording; *Sauget v. Johnston*, 315 F.2d 816 (9th Cir. 1963), not error to admit copy of agreement when opponent had original and did not on appeal claim any discrepancy. Other reasons for requiring the original may be present when only a part of the original is reproduced and the remainder is needed for cross-examination or may disclose matters qualifying the part offered or otherwise useful to the opposing party. *United States v. Alexander*, 326 F.2d 736 (4th Cir. 1964). And see *Toho Bussan Kaisha, Ltd. v. American President Lines, Ltd.*, 265 F.2d 418, 76 A.L.R.2d 1344 (2d Cir. 1959).

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The Committee approved this Rule in the form submitted by the Court, with the expectation that the courts would be liberal in deciding that a ''genuine question is raised as to the authenticity of the original.''

Rule 1004. Admissibility of Other Evidence of Contents

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if—

(1) *Originals Lost or Destroyed*. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) *Original Not Obtainable*. No original can be obtained by any available judicial process or procedure; or

(3) *Original in Possession of Opponent*. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or

(4) *Collateral Matters*. The writing, recording, or photograph is not closely related to a controlling issue.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1946; Mar. 2, 1987, eff. Oct. 1, 1987.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

Basically the rule requiring the production of the original as proof of contents has developed as a rule of preference: if failure to produce the original is satisfactory explained, secondary evidence is admissible. The instant rule specifies the circumstances under which production of the original is excused.

The rule recognizes no ''degrees'' of secondary evidence. While strict logic might call for extending the principle of preference beyond simply preferring the original, the formulation of a hierarchy of preferences and a procedure for making it effective is believed to involve unwarranted complexities. Most, if not all, that would be accomplished by an extended scheme of preferences will, in any event, be achieved through the normal motivation of a party to present the most convincing evidence possible and the arguments and procedures available to his opponent if he does not. Compare McCormick §207.

Paragraph (1). Loss or destruction of the original, unless due to bad faith of the proponent, is a satisfactory explanation of nonproduction. McCormick §201.

Paragraph (2). When the original is in the possession of a third person, inability to procure it from him by resort to process or other judicial procedure is sufficient explanation of nonproduction. Judicial procedure includes subpoena duces tecum as an incident to the taking of a deposition in another jurisdiction. No further showing is required. See McCormick §202.

Paragraph (3). A party who has an original in his control has no need for the protection of the rule if put on notice that proof of contents will be made. He can ward off secondary evidence by offering the original. The notice procedure here provided is not to be confused with

orders to produce or other discovery procedures, as the purpose of the procedure under this rule is to afford the opposite party an opportunity to produce the original, not to compel him to do so. McCormick §203.

Paragraph (4). While difficult to define with precision, situations arise in which no good purpose is served by production of the original. Examples are the newspaper in an action for the price of publishing defendant's advertisement, *Foster-Holcomb Investment Co. v. Little Rock Publishing Co.*, 151 Ark. 449, 236 S.W. 597 (1922), and the streetcar transfer of plaintiff claiming status as a passenger, *Chicago City Ry. Co. v. Carroll*, 206 Ill. 318, 68 N.E. 1087 (1903). Numerous cases are collected in McCormick §200, p. 412, n. 1.

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The Committee approved Rule 1004(1) in the form submitted to Congress. However, the Committee intends that loss or destruction of an original by another person at the instigation of the proponent should be considered as tantamount to loss or destruction in bad faith by the proponent himself.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

Rule 1005. Public Records

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1946.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

Public records call for somewhat different treatment. Removing them from their usual place of keeping would be attended by serious inconvenience to the public and to the custodian. As a consequence judicial decisions and statutes commonly hold that no explanation need be given for failure to produce the original of a public record. McCormick §204; 4 Wigmore §§1215–1228. This blanket dispensation from producing or accounting for the original would open the door to the introduction of every kind of secondary evidence of contents of public records were it not for the preference given certified or compared copies. Recognition of degrees of secondary evidence in this situation is an appropriate *quid pro quo* for not applying the requirement of producing the original.

The provisions of 28 U.S.C. §1733(b) apply only to departments or agencies of the United States. The rule, however, applies to public records generally and is comparable in scope in this respect to Rule 44(a) of the Rules of Civil Procedure.

Rule 1006. Summaries

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1946.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The admission of summaries of voluminous books, records, or documents offers the only practicable means of making their contents available to judge and jury. The rule recognizes this practice, with appropriate safeguards. 4 Wigmore §1230.

Rule 1007. Testimony or Written Admission of Party

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the nonproduction of the original.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1947; Mar. 2, 1987, eff. Oct. 1, 1987.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

While the parent case, *Slatterie v. Pooley*, 6 M. & W. 664, 151 Eng. Rep. 579 (Exch. 1840), allows proof of contents by evidence of an oral admission by the party against whom offered, without accounting for nonproduction of the original, the risk of inaccuracy is substantial and the decision is at odds with the purpose of the rule giving preference to the original. See 4 Wigmore §1255. The instant rule follows Professor McCormick's suggestion of limiting this use of admissions to those made in the course of giving testimony or in writing. McCormick §208, p. 424. The limitation, of course, does not call for excluding evidence of an oral admission when nonproduction of the original has been accounted for and secondary evidence generally has become admissible. Rule 1004, *supra*.

A similar provision is contained in New Jersey Evidence Rule 70(1)(h).

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendment is technical. No substantive change is intended.

Rule 1008. Functions of Court and Jury

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1947.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

Most preliminary questions of fact in connection with applying the rule preferring the original as evidence of contents are for the judge, under the general principles announced in Rule 104, *supra*. Thus, the question whether the loss of the originals has been established, or of the fulfillment of other conditions specified in Rule 1004, *supra*, is for the judge. However, questions may arise which go beyond the mere administration of the rule preferring the original and into the merits of the controversy. For example, plaintiff offers secondary evidence of the contents of an alleged contract, after first introducing evidence of loss of the original, and defendant counters with evidence that no such contract was ever executed. If the judge decides

that the contract was never executed and excludes the secondary evidence, the case is at an end without ever going to the jury on a central issue. Levin, Authentication and Content of Writings, 10 Rutgers L.Rev. 632, 644 (1956). The latter portion of the instant rule is designed to insure treatment of these situations as raising jury questions. The decision is not one for uncontrolled discretion of the jury but is subject to the control exercised generally by the judge over jury determinations. See Rule 104(b), *supra*.

For similar provisions, see Uniform Rule 70(2); Kansas Code of Civil Procedure §60–467(b); New Jersey Evidence Rule 70(2), (3).

ARTICLE XI. MISCELLANEOUS RULES

Rule 1101. Applicability of Rules

(a) COURTS AND JUDGES. These rules apply to the United States district courts, the District Court of Guam, the District Court of the Virgin Islands, the District Court for the Northern Mariana Islands, the United States courts of appeals, the United States Claims Court, and to United States bankruptcy judges and United States magistrate judges, in the actions, cases, and proceedings and to the extent hereinafter set forth. The terms ''judge'' and ''court'' in these rules include United States bankruptcy judges and United States magistrate judges.

(b) PROCEEDINGS GENERALLY. These rules apply generally to civil actions and proceedings, including admiralty and maritime cases, to criminal cases and proceedings, to contempt proceedings except those in which the court may act summarily, and to proceedings and cases under title 11, United States Code.

(c) RULE OF PRIVILEGE. The rule with respect to privileges applies at all stages of all actions, cases, and proceedings.

(d) RULES INAPPLICABLE. The rules (other than with respect to privileges) do not apply in the following situations:

(1) *Preliminary Questions of Fact*. The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104.

(2) *Grand Jury*. Proceedings before grand juries.

(3) *Miscellaneous Proceedings*. Proceedings for extradition or rendition; preliminary examinations in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

(e) RULES APPLICABLE IN PART. In the following proceedings these rules apply to the extent that matters of evidence are not provided for in the statutes which govern procedure therein or in other rules prescribed by the Supreme Court pursuant to statutory authority: the trial of misdemeanors and other petty offenses before United States magistrate judges; review of agency actions when the facts are subject to trial de novo under section 706(2)(F) of title 5, United States Code; review of orders of the Secretary of Agriculture under section 2 of the Act entitled ''An Act to authorize association of producers of agricultural products'' approved February 18, 1922 (7 U.S.C. 292), and under sections 6 and 7(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499f, 499g(c)); naturalization and revocation of naturalization under sections 310–318 of the Immigration and Nationality Act (8 U.S.C. 1421–1429); prize proceedings in admiralty under sections 7651–7681 of title 10, United States Code; review of orders of the Secretary of the Interior under section 2 of the Act entitled ''An Act authorizing associations of producers of aquatic products'' approved June 25, 1934 (15 U.S.C. 522); review of orders of petroleum control boards under section 5 of the Act entitled ''An Act to regulate interstate and foreign commerce in petroleum and its products by prohibiting the shipment in such commerce of petroleum and its products produced in violation of State law, and for other purposes'', approved February 22, 1935 (15 U.S.C. 715d); actions for fines, penalties, or forfeitures under part V of title IV of the Tariff Act of 1930 (19 U.S.C. 1581–1624), or under the Anti-Smuggling Act (19 U.S.C. 1701–1711); criminal libel for condemnation, exclusion of imports, or other proceedings under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301–392); disputes between seamen under sections 4079, 4080, and 4081 of the Revised Statutes (22 U.S.C. 256–258); habeas corpus under sections 2241–2254 of title 28, United States Code; motions to vacate, set aside or correct sentence under section 2255 of title 28, United States Code; actions for penalties for refusal to transport destitute seamen under section 4578 of the Revised Statutes (46 U.S.C. 679);[1] actions against the United States under the Act entitled ''An Act authorizing suits against the United States in admiralty for damage caused by and salvage service rendered to public vessels belonging to the United States, and for other purposes'', approved March 3, 1925 (46 U.S.C. 781–790),[1] as implemented by section 7730 of title 10, United States Code.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1947; Pub. L. 94–149, §1(14), Dec. 12, 1975, 89 Stat. 806; Pub. L. 95–598, title II, §§251, 252, Nov. 6, 1978, 92 Stat. 2673; Pub. L. 97–164, title I, §142, Apr. 2, 1982, 96 Stat. 45; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 25, 1988, eff. Nov. 1, 1988; Pub. L. 100–690, title VII, §7075(c), Nov. 18, 1988, 102 Stat. 4405; Apr. 22, 1993, eff. Dec. 1, 1993.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

Subdivision (a). The various enabling acts contain differences in phraseology in their descriptions of the courts over which the Supreme Court's power to make rules of practice and procedure extends. The act concerning civil actions, as amended in 1966, refers to ''the district courts * * * of the United States in civil actions, including admiralty and maritime cases. * * *'' 28 U.S.C. §2072, Pub. L. 89–773, §1, 80 Stat. 1323. The bankruptcy authorization is for rules of practice and procedure ''under the Bankruptcy Act.'' 28 U.S.C. §2075, Pub. L. 88–623, §1, 78 Stat. 1001. The Bankruptcy Act in turn creates bankruptcy courts of ''the United States district courts and the district courts of the Territories and possessions to which this title is or may hereafter be applicable.'' 11 U.S.C. §§1(10), 11(a). The provision as to criminal rules up to and including verdicts applies to ''criminal cases and proceedings to punish for criminal contempt of court in the United States district courts, in the district courts for the districts of the Canal Zone and Virgin Islands, in the Supreme Court of Puerto Rico, and in proceedings before United States magistrates.'' 18 U.S.C. §3771.

[1] See References in Text note below.

These various provisions do not in terms describe the same courts. In congressional usage the phrase ''district courts of the United States,'' without further qualification, traditionally has included the district courts established by Congress in the states under Article III of the Constitution, which are ''constitutional'' courts, and has not included the territorial courts created under Article IV, Section 3, Clause 2, which are ''legislative'' courts. *Hornbuckle v. Toombs*, 85 U.S. 648, 21 L.Ed. 966 (1873). However, any doubt as to the inclusion of the District Court for the District of Columbia in the phrase is laid at rest by the provisions of the Judicial Code constituting the judicial districts, 28 U.S.C. §81 et seq. creating district courts therein, *Id*. §132, and specifically providing that the term ''district court of the United States'' means the courts so constituted. *Id*. §451. The District of Columbia is included. *Id*. §88. Moreover, when these provisions were enacted, reference to the District of Columbia was deleted from the original civil rules enabling act. 28 U.S.C. §2072. Likewise Puerto Rico is made a district, with a district court, and included in the term. *Id*. §119. The question is simply one of the extent of the authority conferred by Congress. With respect to civil rules it seems clearly to include the district courts in the states, the District Court for the District of Columbia, and the District Court for the District of Puerto Rico.

The bankruptcy coverage is broader. The bankruptcy courts include ''the United States district courts,'' which includes those enumerated above. Bankruptcy courts also include ''the district courts of the Territories and possessions to which this title is or may hereafter be applicable.'' 11 U.S.C. §§1(10), 11(a). These courts include the district courts of Guam and the Virgin Islands. 48 U.S.C. §§1424(b), 1615. Professor Moore points out that whether the District Court for the District of the Canal Zone is a court of bankruptcy ''is not free from doubt in view of the fact that no other statute expressly or inferentially provides for the applicability of the Bankruptcy Act in the Zone.'' He further observes that while there seems to be little doubt that the Zone is a territory or possession within the meaning of the Bankruptcy Act, 11 U.S.C. §1(10), it must be noted that the appendix to the Canal Zone Code of 1934 did not list the Act among the laws of the United States applicable to the Zone. 1 Moore's Collier on Bankruptcy ¶1.10, pp. 67, 72, n. 25 (14th ed. 1967). The Code of 1962 confers on the district court jurisdiction of:

''(4) actions and proceedings involving laws of the United States applicable to the Canal Zone; and

''(5) other matters and proceedings wherein jurisdiction is conferred by this Code or any other law.'' Canal Zone Code, 1962, Title 3, §141.

Admiralty jurisdiction is expressly conferred. *Id*. §142. General powers are conferred on the district court, ''if the course of proceeding is not specifically prescribed by this Code, by the statute, or by applicable rule of the Supreme Court of the United States * * *'' *Id*. §279. Neither these provisions nor §1(10) of the Bankruptcy Act (''district courts of the Territories and possessions to which this title is or may hereafter be applicable'') furnishes a satisfactory answer as to the status of the District Court for the District of the Canal Zone as a court of bankruptcy. However, the fact is that this court exercises no bankruptcy jurisdiction in practice.

The criminal rules enabling act specifies United States district courts, district courts for the districts of the Canal Zone and the Virgin Islands, the Supreme Court of the Commonwealth of Puerto Rico, and proceedings before United States commissioners. Aside from the addition of commissioners, now magistrates, this scheme differs from the bankruptcy pattern in that it makes no mention of the District Court of Guam but by specific mention removes the Canal Zone from the doubtful list.

The further difference in including the Supreme Court of the Commonwealth of Puerto Rico seems not to be significant for present purposes, since the Supreme Court of the Commonwealth of Puerto Rico is an appellate court. The Rules of Criminal Procedure have not been made applicable to it, as being unneeded and inappropriate, Rule 54(a) of the Federal Rules of Criminal Procedure, and the same approach is indicated with respect to rules of evidence.

If one were to stop at this point and frame a rule governing the applicability of the proposed rules of evidence in terms of the authority conferred by the three enabling acts, an irregular pattern would emerge as follows:

Civil actions, including admiralty and maritime cases—district courts in the states, District of Columbia, and Puerto Rico.

Bankruptcy—same as civil actions, plus Guam and Virgin Islands.

Criminal cases—same as civil actions, plus Canal Zone and Virgin Islands (but not Guam).

This irregular pattern need not, however, be accepted. Originally the Advisory Committee on the Rules of Civil Procedure took the position that, although the phrase ''district courts of the United States'' did not include territorial courts, provisions in the organic laws of Puerto Rico and Hawaii would make the rules applicable to the district courts thereof, though this would not be so as to Alaska, the Virgin Islands, or the Canal Zone, whose organic acts contained no corresponding provisions. At the suggestion of the Court, however, the Advisory Committee struck from its notes a statement to the above effect. 2 Moore's Federal Practice ¶1.07 (2nd ed. 1967); 1 Barron and Holtzoff, Federal Practice and Procedure §121 (Wright ed. 1960). Congress thereafter by various enactments provided that the rules and future amendments thereto should apply to the district courts of Hawaii, 53 Stat. 841 (1939), Puerto Rico, 54 Stat. 22 (1940), Alaska, 63 Stat. 445 (1949), Guam, 64 Stat. 384–390 (1950), and the Virgin Islands, 68 Stat. 497, 507 (1954). The original enabling act for rules of criminal procedure specifically mentioned the district courts of the Canal Zone and the Virgin Islands. The Commonwealth of Puerto Rico was blanketed in by creating its court a ''district court of the United States'' as previously described. Although Guam is not mentioned in either the enabling act or in the expanded definition of ''district court of the United States,'' the Supreme Court in 1956 amended Rule 54(a) to state that the Rules of Criminal Procedure are applicable in Guam. The Court took this step following the enactment of legislation by Congress in 1950 that rules theretofore or thereafter promulgated by the Court in civil cases, admiralty, criminal cases and bankruptcy should apply to the District Court of Guam, 48 U.S.C. §1424(b), and two Ninth Circuit decisions upholding the applicability of the Rules of Criminal Procedure to Guam. *Pugh v. United States*, 212 F.2d 761 (9th Cir. 1954); *Hatchett v. Guam*, 212 F.2d 767 (9th Cir. 1954); Orfield, The Scope of the Federal Rules of Criminal Procedure, 38 U. of Det.L.J. 173, 187 (1960).

From this history, the reasonable conclusion is that Congressional enactment of a provision that rules and future amendments shall apply in the courts of a territory or possession is the equivalent of mention in an enabling act and that a rule on scope and applicability may properly be drafted accordingly. Therefore the pattern set by Rule 54 of the Federal Rules of Criminal Procedure is here followed.

The substitution of magistrates in lieu of commissioners is made in pursuance of the Federal Magistrates Act, P.L. 90–578, approved October 17, 1968, 82 Stat. 1107.

Subdivision (b) is a combination of the language of the enabling acts, *supra*, with respect to the kinds of proceedings in which the making of rules is authorized. It is subject to the qualifications expressed in the subdivisions which follow.

Subdivision (c), singling out the rules of privilege for special treatment, is made necessary by the limited applicability of the remaining rules.

Subdivision (d). The rule is not intended as an expression as to when due process or other constitutional provisions may require an evidentiary hearing. Paragraph

(1) restates, for convenience, the provisions of the second sentence of Rule 104(a), *supra*. See Advisory Committee's Note to that rule.

(2) While some states have statutory requirements that indictments be based on ''legal evidence,'' and there is some case law to the effect that the rules of evidence apply to grand jury proceedings, 1 Wigmore §4(5), the Supreme Court has not accepted this view. In *Costello v. United States*, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1965), the Court refused to allow an indictment to be attacked, for either constitutional or policy reasons, on the ground that only hearsay evidence was presented.

''It would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules. Neither justice nor the concept of a fair trial requires such a change.'' *Id*. at 364. The rule as drafted does not deal with the evidence required to support an indictment.

(3) The rule exempts preliminary examinations in criminal cases. Authority as to the applicability of the rules of evidence to preliminary examinations has been meagre and conflicting. Goldstein, The State and the Accused: Balance of Advantage in Criminal Procedure, 69 Yale L.J. 1149, 1168, n. 53 (1960); Comment, Preliminary Hearings on Indictable Offenses in Philadelphia, 106 U. of Pa.L.Rev. 589, 592–593 (1958). Hearsay testimony is, however, customarily received in such examinations. Thus in a Dyer Act case, for example, an affidavit may properly be used in a preliminary examination to prove ownership of the stolen vehicle, thus saving the victim of the crime the hardship of having to travel twice to a distant district for the sole purpose of testifying as to ownership. It is believed that the extent of the applicability of the Rules of Evidence to preliminary examinations should be appropriately dealt with by the Federal Rules of Criminal Procedure which regulate those proceedings.

Extradition and rendition proceedings are governed in detail by statute. 18 U.S.C. §§3181–3195. They are essentially administrative in character. Traditionally the rules of evidence have not applied. 1 Wigmore §4(6). Extradition proceedings are accepted from the operation of the Rules of Criminal Procedure. Rule 54(b)(5) of Federal Rules of Criminal Procedure.

The rules of evidence have not been regarded as applicable to sentencing or probation proceedings, where great reliance is placed upon the presentence investigation and report. Rule 32(c) of the Federal Rules of Criminal Procedure requires a presentence investigation and report in every case unless the court otherwise directs. In *Williams v. New York*, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949), in which the judge overruled a jury recommendation of life imprisonment and imposed a death sentence, the Court said that due process does not require confrontation or cross-examination in sentencing or passing on probation, and that the judge has broad discretion as to the sources and types of information relied upon. Compare the recommendation that the substance of all derogatory information be disclosed to the defendant, in A.B.A. Project on Minimum Standards for Criminal Justice, Sentencing Alternatives and Procedures §4.4, Tentative Draft (1967, Sobeloff, Chm.). Williams was adhered to in *Specht v. Patterson*, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967), but not extended to a proceeding under the Colorado Sex Offenders Act, which was said to be a new charge leading in effect to punishment, more like the recidivist statutes where opportunity must be given to be heard on the habitual criminal issue.

Warrants for arrest, criminal summonses, and search warrants are issued upon complaint or affidavit showing probable cause. Rules 4(a) and 41(c) of the Federal Rules of Criminal Procedure. The nature of the proceedings makes application of the formal rules of evidence inappropriate and impracticable.

Criminal contempts are punishable summarily if the judge certifies that he saw or heard the contempt and that it was committed in the presence of the court. Rule 42(a) of the Federal Rules of Criminal Procedure. The circumstances which preclude application of the rules of evidence in this situation are not present, however, in other cases of criminal contempt.

Proceedings with respect to release on bail or otherwise do not call for application of the rules of evidence. The governing statute specifically provides:

''Information stated in, or offered in connection with, any order entered pursuant to this section need not conform to the rules pertaining to the admissibility of evidence in a court of law.'' 18 U.S.C.A. §3146(f). This provision is consistent with the type of inquiry contemplated in A.B.A. Project on Minimum Standards for Criminal Justice, Standards Relating to Pretrial Release, §4.5(b), (c), p. 16 (1968). The references to the weight of the evidence against the accused, in Rule 46(a)(1), (c) of the Federal Rules of Criminal Procedure and in 18 U.S.C.A. §3146(b), as a factor to be considered, clearly do not have in view evidence introduced at a hearing.

The rule does not exempt habeas corpus proceedings. The Supreme Court held in *Walker v. Johnston*, 312 U.S. 275, 61 S.Ct. 574, 85 L.Ed. 830 (1941), that the practice of disposing of matters of fact on affidavit, which prevailed in some circuits, did not ''satisfy the command of the statute that the judge shall proceed 'to determine the facts of the case, by hearing the testimony and arguments.' '' This view accords with the emphasis in *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), upon trial-type proceedings, *Id*. 311, 83 S.Ct. 745, with demeanor evidence as a significant factor, *Id*. 322, 83 S.Ct. 745, in applications by state prisoners aggrieved by unconstitutional detentions. Hence subdivision (e) applies the rules to habeas corpus proceedings to the extent not inconsistent with the statute.

Subdivision (e). In a substantial number of special proceedings, *ad hoc* evaluation has resulted in the promulgation of particularized evidentiary provisions, by Act of Congress or by rule adopted by the Supreme Court. Well adapted to the particular proceedings, though not apt candidates for inclusion in a set of general rules, they are left undisturbed. Otherwise, however, the rules of evidence are applicable to the proceedings enumerated in the subdivision.

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 93–650

Subdivision (a) as submitted to the Congress, in stating the courts and judges to which the Rules of Evidence apply, omitted the Court of Claims and commissioners of that Court. At the request of the Court of Claims, the Committee amended the Rule to include the Court and its commissioners within the purview of the Rules.

Subdivision (b) was amended merely to substitute positive law citations for those which were not.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

Subdivision (a) is amended to delete the reference to the District Court for the District of the Canal Zone, which no longer exists, and to add the District Court for the Northern Mariana Islands. The United States bankruptcy judges are added to conform the subdivision with Rule 1101(b) and Bankruptcy Rule 9017.

NOTES OF ADVISORY COMMITTEE ON RULES—1988 AMENDMENT

The amendments are technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1993 AMENDMENT

This revision is made to conform the rule to changes in terminology made by Rule 58 of the Federal Rules of Criminal Procedure and to the changes in the title of United States magistrates made by the Judicial Improvements Act of 1990.

REFERENCES IN TEXT

The Tariff Act of 1930, referred to in subd. (e), is act June 17, 1930, ch. 497, 46 Stat. 590, as amended, which is

classified principally to chapter 4 (§1202 et seq.) of Title 19, Customs Duties. Part V of title IV of the Tariff Act of 1930 enacted part V (§1581 et seq.) of subtitle III of chapter 4 of Title 19. For complete classification of this Act to the Code, see section 1654 of Title 19 and Tables.

The Anti-Smuggling Act (19 U.S.C. 1701–1711), referred to in subd. (e), is act Aug. 5, 1935, ch. 438, 49 Stat. 517, as amended, which is classified principally to chapter 5 (§1701 et seq.) of Title 19. For complete classification of this Act to the Code, see section 1711 of Title 19 and Tables.

The Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301–392), referred to in subd. (e), is act June 25, 1938, ch. 675, 52 Stat. 1040, as amended, which is classified generally to chapter 9 (§301 et seq.) of Title 21, Food and Drugs. For complete classification of this Act to the Code, see section 301 of Title 21 and Tables.

Section 4578 of the Revised Statutes (46 U.S.C. 679), referred to in subd. (e), was repealed and reenacted as section 11104(b)–(d) of Title 46, Shipping, by Pub. L. 98–89, §§1, 2(a), 4(b), Aug. 26, 1983, 97 Stat. 500.

''An Act authorizing suits against the United States in admiralty for damage caused by and salvage service rendered to public vessels belonging to the United States, and for other purposes'', approved March 3, 1925 (46 U.S.C. 781–790), commonly known as the ''Public Vessels Act'', referred to in subd. (e), is act Mar. 3, 1925, ch. 428, 43 Stat. 1112, as amended, which was classified generally to chapter 22 (§§781 to 790) of former Title 46, Appendix, Shipping, and was repealed and restated in chapter 311 of Title 46, Shipping, by Pub. L. 109–304, §§6(c), 19, Oct. 6, 2006, 120 Stat. 1509, 1710. Section 31101 of Title 46 provides that chapter 311 of Title 46 may be cited as the Public Vessels Act. For disposition of sections of former Title 46, Appendix, to Title 46, see Disposition Table preceding section 101 of Title 46.

AMENDMENT BY PUBLIC LAW

1988—Subd. (a). Pub. L. 100–690, §7075(c)(1), which directed amendment of subd. (a) by striking ''Rules'' and inserting ''rules'', could not be executed because of the intervening amendment by the Court by order dated Apr. 25, 1988, eff. Nov. 1, 1988.

Pub. L. 100–690, §7075(c)(2), substituted ''courts of appeals'' for ''Courts of Appeals''.

1982—Subd. (a). Pub. L. 97–164 substituted ''United States Claims Court'' for ''Court of Claims'' and struck out ''and commissioners of the Court of Claims'' after ''these rules include United States magistrates''.

1978—Subd. (a). Pub. L. 95–598, §252, directed the amendment of this subd. by adding ''the United States bankruptcy courts,'' after ''the United States district courts,'', which amendment did not become effective pursuant to section 402(b) of Pub. L. 95–598, as amended, set out as an Effective Date note preceding section 101 of Title 11, Bankruptcy.

Pub. L. 95–598, §251(a), struck out '', referees in bankruptcy,'' after ''United States magistrates''.

Subd. (b). Pub. L. 95–598, §251(b), substituted ''title 11, United States Code'' for ''the Bankruptcy Act''.

1975—Subd. (e). Pub. L. 94–149 substituted ''admiralty'' for ''admirality''.

CHANGE OF NAME

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

EFFECTIVE DATE OF 1978 AMENDMENT

Amendment of subds. (a) and (b) of this rule by section 251 of Pub. L. 95–598 effective Oct. 1, 1979, see section 402(c) of Pub. L. 95–598, set out as an Effective Dates note preceding section 101 of the Appendix to Title 11, Bankruptcy. For Bankruptcy Jurisdiction and procedure during transition period, see note preceding section 1471 of this title.

EFFECTIVE DATE OF 1982 AMENDMENT

Amendment by Pub. L. 97–164 effective Oct. 1, 1982, see section 402 of Pub. L. 97–164, set out as a note under section 171 of this title.

Rule 1102. Amendments

Amendments to the Federal Rules of Evidence may be made as provided in section 2072 of title 28 of the United States Code.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1948; Apr. 30, 1991, eff. Dec. 1, 1991.)

NOTES OF ADVISORY COMMITTEE ON RULES—1991 AMENDMENT

The amendment is technical. No substantive change is intended.

Rule 1103. Title

These rules may be known and cited as the Federal Rules of Evidence.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1948.)

SHORT TITLE OF 1978 AMENDMENT

Pub. L. 95–540, §1, Oct. 28, 1978, 92 Stat. 2046, provided: ''That this Act [enacting rule 412 of these rules and a provision set out as a note under rule 412 of these rules] may be cited as the 'Privacy Protection for Rape Victims Act of 1978'.''