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

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

Date: **June 2, 2006**

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

Introduction

The Civil Rules Advisory Committee met in Washington, D.C., on May 22-23, 2006. Draft minutes of the meeting are attached.

Part I of this report presents action items. Subpart A recommends approval for adoption of two sets of proposals. The first is Civil Rule 5.2, the Civil Rules version of the E-Government Rules developed under direction by the Standing Committee Subcommittee on the E-Government Act. The second is the package of Style amendments — Style Rules 1-86; Style-Substance amendments to Rules 4(k), 9(h), 11(a),14(b),16(c)(1), 26(g)(1), 30(b), 31, 40, 71.1, and 78; Style Forms; and the Style versions of the amended rules on electronic discovery now pending in Congress and scheduled to take effect on December 1, 2006 (Rules 16, 26, 33, 34, 37, and 45).

Subpart I B recommends approval for publication of new Rule 62.1 on indicative rulings and amendments to Rules 13(f), 15(a)(amended pleadings), and 48 (jury polling). The recommendation is to publish these proposals — along with the modest amendment of Rule 8(c) approved for publication at the January meeting — at a later date, presumably August, 2007, when they can be included in a package with other proposals.

Part II of this report presents information items describing the projects that are being developed for further consideration.

I. Action Items

A. RULES RECOMMENDED FOR ADOPTION

1. Rule 5.2

The Committee recommends approval for adoption of new Rule 5.2:

PROPOSED AMENDMENT TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 5.2. Privacy Protection For Filings Made with the Court

(a)Redacted Filings. Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number, a party or nonparty making the filing may include only:

(1) the last four digits of the social-security number and taxpayer-identification number;

(2) the year of the individual's birth;

(3) the minor's initials; and

(4) the last four digits of the financial-account number.

(b) Exemptions from the Redaction Requirement. The redaction requirement does not apply to the following:

(1) a financial-account number that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;

(2) the record of an administrative or agency proceeding;

(3) the official record of a state-court proceeding;

(4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed;

(5) a filing covered by Rule 5.2(c) or (d); and

(6) a pro se filing in an action brought under 28 U.S.C. §§ 2241, 2254, or 2255.

(c) Limitations on Remote Access to Electronic Files; Social-Security Appeals and Immigration Cases. Unless the court orders otherwise, in an action for benefits under the Social Security Act, and in an action or proceeding relating to an order of removal, relief from removal, or immigration benefits or detention, access to an electronic file is authorized as follows:

(1) the parties and their attorneys may have remote electronic access to any part of the case file, including the administrative record;

(2) any other person may have electronic access to the full record at the courthouse, but may have remote electronic access only to:

(A) the docket maintained by the court; and

(B) an opinion, order, judgment, or other disposition of the court, but not any other part of the case file or the administrative record.

(d) Filings Made Under Seal. The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record.

(e) Protective Orders. For good cause, the court may by order in a case:

(1) require redaction of additional information; or

(2) limit or prohibit a nonparty's remote electronic access to a document filed with the court.

(f) Option for Additional Unredacted Filing Under Seal. A person making a redacted filing may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.

(g) Option for Filing a Reference List. A filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list must be filed under seal and may be amended as of right. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information.

(h) Waiver of Protection of Identifiers. A person waives the protection of Rule 5.2(a) as to the person's own information by filing it without redaction and not under seal.

Committee Note

The rule is adopted in compliance with section 205(c)(3) of the E-Government Act of 2002, Public Law 107-347. Section 205(c)(3) requires the Supreme Court to prescribe rules "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." The rule goes further than the E-Government Act in regulating paper filings even when they are not converted to electronic form. But the number of filings that remain in paper form is certain to diminish over time. Most districts scan paper filings into the electronic case file, where they become available to the public in the same way as documents initially filed in electronic form. It is electronic availability, not the form of the initial filing, that raises the privacy and security concerns addressed in the E-Government Act.

The rule is derived from and implements the policy adopted by the Judicial Conference in September 2001 to address the privacy concerns resulting from public access to electronic case files. *See* http://www.privacy.uscourts.gov/Policy.htm The Judicial Conference

policy is that documents in case files generally should be made available electronically to the same extent they are available at the courthouse, provided that certain "personal data identifiers" are not included in the public file.

While providing for the public filing of some information, such as the last four digits of an account number, the rule does not intend to establish a presumption that this information never could or should be protected. For example, it may well be necessary in individual cases to prevent remote access by nonparties to any part of an account number or social security number. It may also be necessary to protect information not covered by the redaction requirement — such as driver's license numbers and alien registration numbers — in a particular case. In such cases, the party may seek protection under subdivision (d) or (e). Moreover, the Rule does not affect the protection available under other rules, such as Civil Rules 16 and 26(c), or under other sources of protective authority.

Parties must remember that any personal information not otherwise protected by sealing or redaction will be made available over the internet. Counsel should notify clients of this fact so that an informed decision may be made on what information is to be included in a document filed with the court.

The clerk is not required to review documents filed with the court for compliance with this rule. The responsibility to redact filings rests with counsel and the parties.

Subdivision (c) provides for limited public access in Social Security cases and immigration cases. Those actions are entitled to special treatment due to the prevalence of sensitive information and the volume of filings. Remote electronic access by non-parties is limited to the docket and the written dispositions of the court unless the court orders otherwise. The rule contemplates, however, that non-parties can obtain full access to the case file at the courthouse, including access through the court's public computer terminal.

Subdivision (d) reflects the interplay between redaction and filing under seal. It does not limit or expand the judicially developed

rules that govern sealing. But it does reflect the possibility that redaction may provide an alternative to sealing.

Subdivision (e) provides that the court can by order in a particular case for good cause require more extensive redaction than otherwise required by the Rule. Nothing in this subdivision is intended to affect the limitations on sealing that are otherwise applicable to the court.

Subdivision (f) allows a party who makes a redacted filing to file an unredacted document under seal. This provision is derived from section 205(c)(3)(iv)of the E-Government Act.

Subdivision (g) allows parties to file a register of redacted information. This provision is derived from section 205(c)(3)(v) of the E-Government Act, as amended in 2004. In accordance with the E-Government Act, subdivision (g) refers to "redacted" information. The term "redacted" is intended to govern a filing that is prepared with abbreviated identifiers in the first instance, as well as a filing in which a personal identifier is edited after its preparation.

Subdivision (h) allows a party to waive the protections of the rule as to its own personal information by filing it unsealed and in unredacted form. A party may wish to waive the protection if it determines that the costs of redaction outweigh the benefits to privacy. If a party files an unredacted identifier by mistake, it may seek relief from the court.

Trial exhibits are subject to the redaction requirements of Rule 5.2 to the extent they are filed with the court. Trial exhibits that are not initially filed with the court must be redacted in accordance with the rule if and when they are filed as part of an appeal or for other reasons.

FEDERAL RULES OF CIVIL PROCEDURE

Rule as Published

The changes made from Rule 5.2 as published are shown by overstriking and underlining.

Rule 5.2. Privacy Protection For Filings Made with the Court

(a) Redacted Filings. Unless the court orders otherwise, in an electronic or paper ~~made~~ filing with the court that ~~includes~~ contains an individual's social-security number, ~~or an individual's~~ taxpayer-identification number, or birth date, the ~~a~~ name of an individual ~~person~~ known to be a minor, or a financial-account number, a party or nonparty making the filing may include only:

(1) the last four digits of the social-security number and taxpayer-identification number;

(2) the ~~minor's initials~~ year of the individual's birth;

(3) the minor's initials ~~the year of birth~~; and

(4) the last four digits of the financial-account number.

(b) Exemptions from the Redaction Requirement. The redaction requirement ~~of Rule 5.2(a)~~ does not apply to the following:

(1) ~~in a forfeiture proceeding,~~ a financial-account number that identifies the property allegedly ~~to be~~ subject to forfeiture in a forfeiture proceeding;

(2) the record of an administrative or agency proceeding;

(3) the official record of a state-court proceeding;

(4) the record of a court or tribunal ~~whose decision is being reviewed~~, if that record was not subject to ~~Rule 5.2(a)~~ the redaction requirement when originally filed;

(5) a filing covered by Rule 5.2(c) or (d); and

(6) a pro se filing ~~made~~ in an action brought under 28 U.S.C. §§ 2241, 2254, or 2255.

(c) Limitations on Remote Access to Electronic Files; Social-Security Appeals and Immigration Cases. Unless the court orders otherwise, in an action for benefits under the Social Security Act, and in an action or proceeding relating to an order of removal, relief from removal, or immigration

benefits or detention, access to an electronic file is authorized as follows:

(1) the parties and their attorneys may have remote electronic access to any part of the case file, including the administrative record;

(2) any other person may have electronic access to the full record at the courthouse, but may have remote electronic access only to:

(A) the docket maintained by the court; and

(B) an opinion, order, judgment, or other disposition of the court, but not any other part of the case file or the administrative record.

(d) Filings Made Under Seal. The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record.

(e) Protective Orders. ~~If necessary to protect private or sensitive information that is not otherwise protected under Rule 5.2(a), a~~ For good cause, the court may by order in a case:

(1) require redaction of additional information; or

(2) limit or prohibit a nonparty's remote electronic access ~~by a nonparty~~ to a document filed with the court.

(f) Option for Additional Unredacted Filing Under Seal. A ~~party~~ person making a redacted filing ~~under Rule 5.2(a)~~ may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.

(g) Option for Filing a Reference List. A filing that contains redacted information ~~redacted under Rule 5.2(a)~~ may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item ~~of redacted information~~ listed. The ~~reference~~ list must be filed under seal and may be amended as of right. Any reference in the case to an listed identifier ~~in the reference list~~ will be construed to refer to the corresponding item of information.

(h) Waiver of Protection of Identifiers. A ~~party~~ person waives the protection of Rule 5.2(a) as to the ~~party's~~ person's own information ~~to the extent that the party files such~~

~~information~~ by filing it without redaction and not under seal

~~and without redaction~~.

Committee Note

The Committee Note was amended only in the paragraph discussing subdivision (e): * * *

Subdivision (e) provides that the court can by order in a particular case for good cause require more extensive redaction than otherwise required by the Rule~~, where necessary to protect against disclosure to non-parties of sensitive or private information~~. Nothing in this subdivision is intended to affect the limitations on sealing that are otherwise applicable to the court.

Changes Made After Publication and Comment

The changes made after publication were made in conjunction with the E-Government Act Subcommittee and the other Advisory Committees.

As published, subdivision (b)(6) exempted from redaction all filings in habeas corpus proceedings under 28 U.S.C. §§ 2241, 2254, or 2255. The exemption is revised to apply only to pro se filings. A petitioner represented by counsel, and respondents represented by counsel, must redact under Rule 5.2(a).

Subdivision (e) was published with a standard for protective orders, referring to a need to protect private or sensitive information not otherwise protected by Rule 5.2(a). This standard has been replaced by a general reference to "good cause."

Discussion

Rule 5.2 was developed under the direction of the Standing Committee Subcommittee on the E-Government Act and in conjunction with the development of parallel rules by the Appellate, Bankruptcy, and Criminal Rules Committees. Many of the choices reflected in the rule are dictated by the Act. The basic approach is further framed by policies recommended by the Committee on Court Administration and Case Management and adopted by the Judicial Conference. The policy

is that in most circumstances everyone in the world should have direct access by electronic means to electronically maintained court records under the same rules that apply to in-person access to paper files at the courthouse.

Further discussion is provided by the Report of the E-Government Act Committee.

Summary of Comments

Jack E. Horsley, Esq., 05-CV-006: Suggests adding a new paragraph (5) to Rule 5.2(a) to require redaction of "the employee number if the person is a state or federal employee." [This could be made parallel to other identification numbers by adding "the last four digits of the employee number"; that formulation might suggest including this element as part of paragraph (1).]

Federal Magistrate Judges Assn., 05-CV-024: Supports the published draft, but urges incorporation in rule text of two sentences from the Committee Note: "The responsibility to redact filings rests with counsel and the parties. The clerk is not required to review each filing for compliance with this rule." Experience shows that if this warning is buried in the Committee Note "an expectation may arise that the court, through the clerk, will review documents for compliance with this rule."

Judicial Conference Committee on Court Administration and Case Management, 05-CV-025: **(1)** Rule 5.2(b)(4) should be amended to exempt from redaction: "the record of a court or tribunal whose decision ~~is being reviewed~~ becomes part of the record * * *." The discussion focuses on the parallel language in the Bankruptcy Rule. A Bankruptcy Court does not "review" any other court, but frequently has occasion to consider a record of proceedings in another court. The same thing is true of district courts. **(2)** Supports the limit on public remote electronic access "to the bulk of documents in immigration cases." But the Rule 5.2(c) limit on remote public access to records in immigration proceedings should be relaxed to permit "all other persons" to have remote electronic access to "the initiating documents (e.g., opinions issued by the Bureau of Immigration Appeals and Immigration Judges) * * *." The party filing the appeal from the prior decision should be required to redact the initiating document. (Under 5.2(b)(4) these things are not redacted. The comment does not reveal whether the general public has remote electronic access to the originals.)

David J. Piell, Esq., 05-CV-026: Simply deleting the first five digits of social-security and tax-identification numbers provides little protection; most large organizations use the last four digits to identify individuals, and many public records data warehousers provide the first five digits in their reports. (The idea seems to be that a court filing that identifies a person by name and also provides the last four digits leads down an easy path to getting the first five digits.) The answer is to enhance the CM/ECF system to generate an automatic reference list. Each case file would have a protected page that sets out each protected item and assigns it a reference number. Only attorneys of record and the judge assigned to the case would have access to the protected page, and the system would identify each person who had access to enable identification of anyone who misuses the information.

Peter A. Winn, Esq., 05-CV-027: This long comment is made by an Assistant United States Attorney who teaches privacy law and has written on access to online court records, 79 Wash.L.Rev. 307 (2004). There is high praise for the proposed rules as implementing the E-Government Act's mandate in light of the capabilities of the PACER system. The PACER system "was not designed with the competing goals of facilitating access and protecting privacy in mind. * * * [I]t contains very few privacy enhancing technologies — e.g., software programs which can automatically identify and flag sensitive information such as social security numbers, or programs which permit the easy and effective redaction of sensitive information in pleadings." "To make up for the lack of privacy enhancing technologies, the proposed rules make attorneys the front line in the protection of sensitive information in judicial filings. * * * Unfortunately, while attorneys may be in a good position to decide what information of their clients is in need of protection, they may not be quite

as attuned to the need to protect the sensitive personal information of others * * *. [G]iven the PACER technology, there appears to be little choice in the matter."

It is important that the rule recognizes the opportunity to redact information in addition to that listed. Examples include not only driver's license and alien registration numbers, but such matters as individual health identification numbers and physician identification numbers.

There are good reasons to attempt to create an intermediate form of "online" access to court records in some circumstances, such as the social-security and immigration cases identified in Rule 5.2(c). Administrative appeals in Medicare claims and personal injury actions with large amounts of health records also are suitable for this treatment. But it is misguided to provide for full electronic access "at the courthouse" as Rule 5.2(c) would do. This "merely imposes a system of 'contrived inconvenience.' The proposed rule does not protect sensitive information in court records from a 'cottage' industry of copyists, who travel from courthouse to courthouse, selling the information from court files to third parties without restriction — a cottage industry that already appears to be thriving. The 'at the courthouse' rule also discriminates against people who may reside farther away from the courthouse * * *." There is a much simpler way to create an intermediate level of access. Existing PACER technology would support a rule that allows remote electronic access by any interested member of the public "upon request, after notice to the parties." PACER can automatically send notice to the parties. There would be a protected interval during which any party could object. If no party objects, full remote access would be allowed. If a party objects, the matter could be briefed and decided. As compared to access at the courthouse without notice, the parties would know the identity of anyone requesting access, and could respond accordingly — requests from researchers, for example, might not be opposed, while a request from a potential stalker would be.

This change could be accomplished by rewriting Rule 5.2(c) to authorize access to an electronic file: "all other persons may have electronic access to the full record ~~at the courthouse~~ as ordered by the court or as provided by local rule, ~~but~~ and also may have remote electronic access ~~only~~ to: * * *."

National Court Reporters Assn., 05-CV-028: This comment "seeks to ensure that members of the court family will not be adversely affected by these new requirements to redact information." The Committee Note statement that the responsibility for redaction rests on counsel and the parties should be expanded and incorporated in rule language:

> (b) *Responsibility for Redacted Filings.* The responsibility for identifying the personal information to be redacted in filings made with the courts rests solely with counsel and the parties. Clerks are not required to review documents filed with the courts for compliance with this rule. Nothing in this rule is intended to create a private right of action against court reporters or transcribers for any failure to redact the required information or for any errors associated with such redaction.

Public Citizen Litigation Group, 05-CV-029: This extensive comment is difficult to summarize briefly. This attempt is designed to help recall the major points, not all of the supporting arguments.

Subdivision (c). The central suggestion at the end is that remote nonparty access should be permitted as to all but the administrative record in social security cases; there is some ambiguity, but the suggestion may be that even the administrative record should be available for remote nonparty access in immigration cases.

At the end of the comment another suggestion is made. Rule 5.2(c) should not apply to "filings in the court of appeals." Apparently this means materials created for the court of appeals, not things filed in the district court. These materials, even the appendix, are less likely to contain private

information, and public access is critical to support public understanding of the appellate disposition. At a minimum, appellate briefs and potentially dispositive motions should be available to the world by remote electronic access.

Beginning with social security cases, it is recognized that the administrative files generally are kept confidential at the agency level. Continued restriction on electronic access after filing in court is appropriate, and will not change present practice under Judicial Conference policy on public access to electronic case files. Redaction in other court papers — or a case-specific limit on remote nonparty access — can be accomplished by court order for information not already subject to subdivision (a); requiring a court order protects the public and enables parties to protect against identity theft and invasions of privacy "in cases that truly raise such concerns."

Immigration cases are different. Current policy provides no limit on remote nonparty access. The files "often do not involve the detailed financial and health documentation that is regularly part of the agency record in Social Security cases. Particular cases, of course, might warrant greater protection." Barring access "would shield problems at the agency level from the public eye * * *. Courts have recognized serious problems in the agency adjudication of immigration cases * * *." Remote public access will serve interests of reporters based in distant cities, of academics conducting research, and lawyers and pro se litigants who use filings in other cases as models in their own. Access to the filings, further, is often necessary to understand the court disposition that is available for nonparty remote access.

The broad reach of subdivision (c) as proposed cannot be justified by the volume of filings. The rule contemplates public electronic access at the courthouse; availability over the internet will not impose significant added burdens. The government would have to redact subdivision (a) information from its filings, but the burden would not be great in light of subdivision (b)'s exemption of administrative records from redaction.

It is pointed out that proposed Rule 5.2(b)(5) exempts from redaction all filings covered by 5.2(c) — the result is that the private information in social security and immigration proceedings would be fully available from paper files and electronic access at the courthouse. Apart from the direct irony, the result would be that data brokers have an added incentive to retrieve the information at the courthouse — the resale price will increase because of the disadvantage of individual inquiry at the courthouse.

Finally, the provision in subdivision (c)(2) that the public may have electronic access to the full record at the courthouse may imply that there is no public access to the paper record. This would bar all public access to information that is held only in paper form.

Subdivision (d). This subdivision "appears to grant the courts a general authority to seal any filing for any reason." That is contrary to the carefully developed rules that govern sealing practice. The Committee Note disclaiming this result "does not have the force of law, * * * and the text of the rule itself appears to suggest the opposite." Subdivision (d) "is unnecessary and should be stricken." If not stricken, it should open: "When authorized by law * * *."

Subdivision (e). In general, "We support proposed subdivision (e), which authorizes the court to issue protective orders requiring redaction of additional information or to limit remote electronic access to filings." But it goes too far to protect "sensitive" information. Public access should be restricted only to protect a legitimate trade secret, a recognized privilege, or matter required by statute to be maintained in confidence. The rule also "should specify that the court is required to consider the public interest prior to restricting access to filings." Rule 5.2(e) should be revised:

If necessary to protect private ~~or sensitive~~ information that is not otherwise protected under Rule 5.2(a), and only where the interest in privacy outweighs the public interest in openness, a ~~the~~ court may by order in a case limit or prohibit * * * ."

Electronic Privacy Information Center, 05-CV-030: "Instead of being citizens' window into government activities, public records are giving the government, law enforcement, and data brokers a window into our daily lives." Data companies are seeking legislative exemptions that would free them from consumer protections so long as the information they sell is in a public record; they "are banking on the courts to pour information into the public record so that it can be sold without privacy safeguards." **(1)** Courts first should minimize the private information they collect. **(2)** Paper records must be protected in addition to electronic records; Rule 5.2(c) should be revised to prevent data aggregators from gathering electronic records at the courthouse or scanning paper records. Indeed, commercial data brokers employ hundreds of stringers who hand-copy sensitive personal information. **(3)** The Committee should consider adopting limits on the uses that can be made of information obtained from court records. **(4)** "Unique identifiers" should be reduced beyond the redactions required by 5.2(a). Different institutions follow different redaction policies. Some, for example, delete the last four digits of social security numbers; data from such a source can be combined with the last four digits in a court record to reconstruct the full number. Home addresses, telephone numbers, and mother's maiden names also should be redacted; the credit industry is using these numbers to authenticate individuals for new accounts, creating a risk of identity theft. **(5)** The PACER system should limit bulk downloads.

United States Department of Justice, 05-CV-031: The Committee should continue to monitor implementation of Rule 5.2 for several reasons. Subsections (d) through (g) provide flexibility to protect information not specifically addressed; it will be important to determine whether this is the most effective means of protecting such information as medical records or confidential business plans. Additional exemptions may be needed for money laundering cases that require that proceeds be traced through a complex chain of transactions.

Trial exhibits not filed in the district court present a problem. Rule 5.2(b)(4) could be read to mean that because the unfiled exhibit was not subject to redaction in the district court, it is not subject to redaction when included in an appellate appendix. But the Committee Note states redaction is required. "The Rule should be made clear as to the treatment of such materials. Further, differing redaction requirements at two levels of court review have the potential to cause confusion and mistake." At the least, continuing monitoring is required.

The language of Rule 5.2(b)(1) should be rearranged: "~~in a forfeiture proceeding,~~ a financial account number that identifies the property alleged to be subject to forfeiture in a forfeiture proceeding." This will clarify that redaction is not required when issues relating to property subject to forfeiture arise "in related cases that may implicate the identified assets. In addition, the changes would clarify that the exemptions apply to forfeiture seizure warrant applications and warrants, which often are used to take forfeitable property into custody before the commencement of any 'forfeiture proceeding.'"

Reporters Committee for Freedom of the Press, 05-CV-032:"Remote access enables the news media to discover and report important stories. Electronic court records, in particular, are of tremendous value to reporters because they can be mass-analyzed to detect systemic needs." (Examples are given of major stories based on computer analysis of massive volumes of court records — 800,000 criminal cases were examined for an article that found, for example, that white defendants had a 50% better chance than blacks to receive a plea agreement that erases felony convictions from their records; 3,000,000 state and federal computer records, including court records, were analyzed to show that more than 1,700 people had been killed accidentally due to mistakes by nurses burdened by cost-cutting measures; and so on.) Remote access also improves accuracy.

Rule 5.2(a). Years of birth and minors' names should not be redacted. This information is used to correctly identify the subjects of news stories. In addition, there should be a provision recognizing that members of the public may move to unseal the unredacted version of a pleading; the standard should be stated — for example, that the public interest in access outweighs the asserted privacy interest.

Rule 5.2(c). Remote electronic access should be as extensive as that available at the courthouse. The purpose for seeking access does not matter. This best accommodates established First Amendment and common-law rights of access. The public's capacity to monitor the justice system is enhanced. The proposed rule seems to reflect the theory of "practical obscurity" that values the impediments to access that arise from time, cost, and distance. But this theory is inapposite. The practically obscure information will be gathered by private companies, used by businesses, and even compiled in commercial electronic databases. Any real need to protect truly sensitive information can be served by a protective order. Immigration cases illustrate the value of public access — analysis of electronic court records to monitor immigration decisions is particularly important because immigration courts rarely issue published opinions explaining their decisions. Social security appeals are a like example. New York and Maryland have liberal electronic access policies and "have not suffered any adverse results." "The threat of severe criminal penalties, combined with aggressive law enforcement, is the best means of discouraging identity theft."

Rule 5.2(d). This provision for sealed filings should specify the standards for sealing, "for example, by requiring specific findings on the record and giving the public an opportunity to be heard on the issue and by requiring a showing of good cause that the party would otherwise suffer an undue burden." There also should be a provision recognizing public standing to move to unseal or dissolve a protective order "when the public's interest in the information outweighs the asserted interest in privacy."

National Association of Criminal Defense Lawyers, 05-CV-033: The comment on Criminal Rule 49.1 is extended to Civil Rule 5.2(b)(6). There should not be an exemption from "the salutary operation of" the rule for habeas corpus or § 2255 proceedings. The argument that many petitioners proceed pro se and should not face redaction burdens is offset by the fact that many petitioners are represented. Conversely, some criminal defendants are not represented and must comply with redaction requirements. Instead of an exemption, there should be a statement that pro se petitioners are encouraged to abide by redaction requirements but are not required to do so.

Hon. William G. Young, 05-CV-034: Several observations:

(1) Residential street addresses "ought to be eliminated in all cases unless the presiding judge otherwise orders." To have different rules for civil and criminal cases will confuse court personnel and the bar. The criminal defendant addresses will appear in the inevitable post-conviction proceedings anyway (this observation seems to overlook the 5.2(b)(6) exemption). The fear of identity theft applies in both civil and criminal actions; do we want to admit, by distinguishing criminal actions, that they involve special fears of violence against witnesses and jurors?

(2) The Committee Note observation about trial exhibits has "the potential for a great deal of mischief." In D.Mass. trial exhibits "are never docketed and only the list of exhibits appear[s] in the district court records." To require redaction of exhibits that are in the custody of the deputy courtroom clerk and not available to the public would slow the trial and introduce confusion to jury deliberations. The lawyers will not want to do the redaction — but who else could? Above all, the Committee Note should not suggest that the public has some sort of entitlement to every trial exhibit. The Committee Note should be revised to say that trial exhibits should be redacted "whenever docketed as part of the court record."

(3) The Rule 5.2(f) option for additional unredacted filing under seal is mandated by a statute secured by the Department of Justice, but it "is a disaster for the courts." Litigants routinely seek confidentiality for things that should not be confidential, such as sealed settlement agreements. They can achieve confidentiality under the rule by including some scrap of redactable information in a filing and then "exercise the 'option' to make [the] entire filing under seal." (This comment reads the rule to mean that the redacted version placed in the public file can not only exclude the information that must be redacted but can also exclude anything the filing party regards as "confidential." The recommendation is that the rule should provide that the court "need not consult any unredacted paper document until there is on file in the court public electronic record a full counterpart document omitting only the data required to be redacted by civil rule 5.2(a) or criminal rule 49.1(a)." The recommendation reflects the intended operation of the rule: a party can redact information that Rule 5.2(a) does not require to be redacted only by obtaining a court order for additional redaction. A party can file under seal only by obtaining a court order — and Rule 5.2 does not expand the grounds for ordering a seal.)

Comments on Other E-Government Rules

05-CR-001, Bruce Berg: Mr. Berg is a consultant to the screening industry. He recommends that the Judicial Conference Policy should be changed to read: "Because the basic method for differentiating people with the same name is the Date of Birth and/or the SSN, the electronic record shall include these elements (at a minimum in the abbreviated form), and will be displayed in the electronic access (Pacer)."

05-CR-008 (also 05-BK-003, 05-AP-001), National Assn. of Professional Background Screeners: (This comment includes a submission by Shay D. Stautz, and the written form of testimony presented at a hearing before the Standing Committee by Mike Sankey): Background screening companies protect the interests of employers and applicants for employment, as well as landlords and prospective tenants, by searching for criminal records. Many people with the same or similar names are born in the same year. The full date of birth is needed to save extensive alternative inquiries into court records that will impose heavy burdens on court clerks. Criminal Rule 49.1(a)(3) should be revised to provide that the filing "may include only * * * (3) the year of birth for minors; and the day, month, and year of birth for adults * * *."

2. The Style Project

The Committee recommends that the Standing Committee approve for adoption each part of the Style Project. There are four parts: Rules 1-86; the minor, technical changes published on the separate Style-Substance track; the Civil Forms; and style revisions for the rules that were approved and are scheduled to become effective in December 2006, before the effective date of the Style Rules.

The Style Rules 1-86 were published in February 2005, along with the minor technical amendments of several rules. The Style Forms were published in August 2005. New Rule 5.1, the amendments of Civil Rule 50, and the e-discovery amendments now pending in Congress and scheduled to take effect on December 1, 2006, were published in August 2004, before the Style Rules were published. Although drafting conformed to Style Project conventions, these proposals amended the present rules and could not be fully integrated with the corresponding Style Rules. Any attempt to publish proposed Rule 5.1, Rule 50, and the e-discovery amendments in the full context of the Style Rules would have been both premature and confusing. The style revisions of Rules 5.1 and 50(b) are included in Style Rules 1-86. For clarity, the style revisions of the e-discovery amendments, Rules 16, 26, 33, 34, 37, and 45 are set out in a separate section.

These materials begin with a brief introduction that provides an overview of the Style Project and summarizes work since the public comment period ended. The materials then set out the proposed changes to Rules 1-86; the proposed minor, technical changes to Rules 4, 9, 11, 14, 16, 26, 30, 31, 40, 71.1, and 78; the proposed changes to the Civil Forms; and the proposed changes to the electronic discovery amendments, Rules 16, 26, 33, 34, 37, and 45. A third section sets out the Rules as published and displays and discusses the changes recommended. A fourth section includes charts listing recurring "global" issues and renumbered subdivisions, revised to take into account the changes made since publication, and a memorandum addressing one area raised in the comment period. The final section summarizes the public comments.

Introduction

The Style Revision of the Civil Rules has accomplished its goal of clarifying and simplifying the rules, making them easier to use and understand, without changing substantive meaning. The amount of work, effort, and expertise required to achieve this goal is nothing short of remarkable. As this Committee knows well, each stage of the Style Project has presented many drafting choices and delicate drafting decisions. The cumulative results of those decisions are presented with a request that this Committee transmit the Style Rules to the Judicial Conference with a recommendation for approval. This introduction highlights certain aspects of the work on the Style Project since publication and summarizes the achievement it represents.

A. Rule 1 Note Language

The Committee recommends providing a summary of the drafting guidelines and principles used throughout the Style Project, to assist the bench and bar in using the amended rules and to underscore the intent to change only style, not substance. The most effective and convenient means to provide such a summary is in the Note to Rule 1. The Committee has approved Rule 1 Note language describing the general drafting guidelines and principles that apply to all the Style Rules, including formatting changes; removing inconsistent or inherently ambiguous words; minimizing the use of redundant "intensifiers" and cross-references; and removing outdated or redundant words. The Note language also explains that rule numbers remain unchanged and the reason for the few changes in some subdivisions. The Note also identifies the Style-Substance changes. The intent is to provide a readily accessible and brief guide to the changes made throughout the Style Project.

B. Addressing the Relationship to Other Laws

Public comment on the Style Project included an expression of concern that the style amendments to the Civil Rules may "supersede" conflicting provisions in statutes in effect when the amendments are enacted. The supersession provision of the Rules Enabling Act, Section 2072(b), provides that laws that conflict with an Enabling Act rule "shall be of no further force or effect after such rule[] [has] taken effect." The concern expressed is that although conflicts between the Civil Rules and other laws are admittedly rare, adopting the Style Rules will generate arguments that all provisions in every Civil Rule have "taken effect" on the date the Style Rules were enacted – anticipated to be December 1, 2007 – making them supersede any inconsistent statute enacted before that date. The theory is that priority in time between a Civil Rule and a conflicting law is measured by the date when a Style Rule "takes effect." For example, the provisions of the Private Securities Litigation Act that took effect in 1995 and superseded inconsistent provisions of the Civil Rules in effect before 1995 would in turn be superseded by the new effective date of the same Civil Rules on December 1, 2007.

The Advisory Committee believes that this concern lacks foundation. The Style Projects are not intended to affect supersession relationships. To the contrary, they are intended to carry forward the "substantive" meaning of the Rules without change. The Appellate Rules were restyled without any expression of concern on this score. The Criminal Rules were restyled without any expression of general concern. The Committee Note to Criminal Rule 48(b) recognizes that the pre-Style version had been followed by the Speedy Trial Act, which was inconsistent in important respects. The Note states that "[i]n re-promulgating Rule 48(b), the Committee intends no change in the relationship between that rule and the Speedy Trial Act." This approach confirms the conclusion that Enabling Act Rules can be restyled without affecting supersession relationships to other laws. Looking back to an earlier style project, no hint of supersession was raised when the Civil Rules were revised in 1987 to adopt gender-neutral language. After careful review, the Advisory Committee has concluded that similarly, the concern about supersession does not present a problem for the Civil Rules Style Project.

At the same time, just as it is important for the Style Project to state explicitly and clearly that the amendments are intended to be stylistic only, it is also useful to state explicitly and clearly that the relationship between the Civil Rules and existing laws is unchanged. The Committee recommends a statement in Rule 86, which addresses the "effective dates" of rule amendments, to make explicit the relationship between the Style Amendments and existing statutes and to foreclose any supersession argument. The proposed Rule takes into account new Rule 5.2, which is also expected to take effect on December 1, 2007 and, unlike the Style Rules, takes effect on that date for the purpose of analyzing supersession effects. Rule 5.2 must be kept on the same schedule as the corresponding E-Government Act provisions in the Appellate, Bankruptcy, and Criminal Rules. The supersession effect of Rule 5.2 is properly measured from December 1, 2007. Proposed Rule 86(b) accommodates this by identifying the Style Rules taking effect on December 1, 2007.

A memorandum included in these agenda materials explains in greater detail why the concern about supersession does not present a problem for the Civil Rules Style Project and examines alternative ways to convey the intent to leave the relationship between the Rules and existing laws unchanged. Finally, an appendix to this memorandum provides further research supporting the Supreme Court's authority to improve the expression of the rules, without changing substantive meaning or supersession consequences, within the Rules Enabling Act.

C. The Style Amendments to Rule Amendments Scheduled to take Effect on December 1, 2006

During the extended work on the Style Project, the Judicial Conference and the Supreme Court approved new Rule 5.1, amended Rule 50, and the proposed electronic discovery amendments. If Congress does nothing to disapprove them, these amendments will become effective on December 1, 2006. Although these proposals used many of the Style Project drafting guidelines and principles, to avoid confusion, they were published and approved as amendments to the existing rules. Minor revisions are required to make them fully consistent with the Style Project. The revisions have been approved by the Standing Committee Style Subcommittee and by the Advisory Committee. As noted, the style revisions to Rules 5.1 and 50 are included in Style Rules 1-86. For clarity, the revisions to Rules 16, 26, 33, 34, 37, and 45 are set out in a separate section of these agenda materials.

D. The Accomplishment of the Style Project

It is fitting that as we recommend the approval of the Style Amendments, we acknowledge the benefits of this work and thank those who inspired it, persisted in it, and accomplished it.

The Style Projects began in 1992 with Judge Robert E. Keeton and his vision of revising all the rules to make them clearer and easier to understand. Judge Keeton, with the late Professor Charles Alan Wright, persuaded the rules committees to undertake the work, although it is safe to say that they did not – and could not – appreciate the extent of the undertaking. Bryan A. Garner, a nationally recognized legal-writing scholar, prepared a first draft of the Civil Rules and also prepared drafting guidelines to serve as a common set of style preferences and conventions. Judge Sam C. Pointer, then chair of the Civil Rules Committee, refined that draft. The project was put aside for a time until Judge Anthony J. Scirica, then chair of the Standing Committee, and Judge David F. Levi, then chair of the Civil Rules Committee, resumed the work.

Judge J. Garvan Murtha was appointed chair of the Standing Committee's Style Subcommittee and Judge Thomas W. Thrash, Jr. and Dean Mary Kay Kane were appointed as members. They worked tirelessly to review and analyze the implications of every proposed Style change. Their work required countless meetings and conference calls and hundreds of drafts. This project could not have been completed without them.

Throughout the Style Project, the Civil Rules Advisory Committee has relied heavily on the expertise of three law professors with unparalleled knowledge of procedural law. The Committee's reporter, Professor Edward H. Cooper of the University of Michigan Law School, and the Committee's special reporters, Professor Richard L. Marcus of Hastings College of Law and Professor Thomas D. Rowe, Jr., of Duke Law School, analyzed every significant change in the rules, researched caselaw, and proposed drafting alternatives. Professor Cooper was the central point for decisions, over and over and over again and, with Professor Rowe and Professor Marcus, provided the research, expertise, and judgment that gave us a reliable basis for many drafting decisions.

This project was uniquely dependent on excellent staff support. Peter G. McCabe, Standing Committee Secretary and Assistant Director, proved the necessary administrative support, even borrowing staff from other parts of his divisions that were already understaffed. John K. Rabiej, Chief of the Rules Committee Support Office, coordinated the work among the various subcommittees and committees, kept us all on the schedule necessary for timely completion, and on top of that work, provided invaluable insight and suggestions on many difficult drafting issues. Jeffrey A. Hennemuth, Robert P. Deyling, James Ishida, and Jeffrey Barr faithfully recorded and tracked the flow and exchange of suggestions, reactions, drafts, and redrafts, documenting every significant step in the process and often suggesting drafting refinements. Judith W. Krivit, Anne P. Rustin, and Gale Mitchell of Peter McCabe's staff provided valuable administrative help.

Professor R. Joseph Kimble of the Thomas Cooley Law School is recognized nationally as a leading scholar and expert in legal writing. His passion for good legal writing is well reflected in his work on this project. Professor Kimble devoted endless hours over several years, drafting alternatives and refinements, reorganizing entire sections of rules, and agonizing over specific words and phrases to achieve clarity, consistency, and simplicity. Joseph F. Spaniol, Jr., consultant to the Style Subcommittee, ably assisted Professor Kimble, bringing a wealth of experience to the project from his years as the Administrative Office's Deputy Director and United States Supreme Court Clerk. One of the pleasures of this project was the opportunity to work with these esteemed professionals.

Those who provided public comment also deserve our thanks. In particular, Professor Stephen Burbank and Gregory Joseph, Esq., and the members of the committee they assembled to scrutinize the published rules, provided an invaluable service, taking the time to give us detailed and thoughtful reactions that in turn allowed us to improve the rules even more.

The members of the Rules Advisory Committee and the Standing Committee, from 2003 to today, selflessly devoted many hours undertaking the unglamourous but crucial review of innumerable drafts. Judge Paul J. Kelly, Jr. and Judge Thomas B. Russell were appointed as chairs of Civil Rules Subcommittees and worked diligently to organize the subcommittees' work and bring it to the full Advisory Committee. All the members of the Advisory Committee reviewed countless documents, emails, and footnotes and patiently worked through the details of sometimes difficult drafting decisions.

Most of all, the members of the Rules Advisory Committee and the Standing Committee understood the value of this project and remained committed to it. The success of the restyled Appellate and Criminal Rules prove the value of this work. The age, length, and complexity of the Civil Rules make the benefits of restyling even more valuable and important. This project is a wonderful use of the Rules Committees and the Rules Enabling Act. Had we not done this work, the rules would have become progressively more difficult to understand and use and more removed from practice. The irony is that if we did our work well – and we have – the new rules will seamlessly take the place of the old. The best sign of our success may be that in a few years, the bench and bar will have forgotten that there ever was a Style Project.

THE STYLE RULES AND FORMS RECOMMENDED FOR APPROVAL

Style Rules 1-86

Style Rules 1-86 are recommended for approval for adoption as follows:

I. SCOPE OF RULES — ONE FORM OF ACTION[1] **Rule 1. Scope and Purpose of Rules**	**TITLE I. SCOPE OF RULES; FORM OF ACTION** **Rule 1. Scope and Purpose**
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.	These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.

COMMITTEE NOTE

The language of Rule 1 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The merger of law, equity, and admiralty practice is complete. There is no need to carry forward the phrases that initially accomplished the merger.

The former reference to "suits of a civil nature" is changed to the more modern "civil actions and proceedings." This change does not affect such questions as whether the Civil Rules apply to summary proceedings created by statute. See *SEC v. McCarthy*, 322 F.3d 650 (9th Cir. 2003); see also *New Hampshire Fire Ins. Co. v. Scanlon*, 362 U.S. 404 (1960).

The Style Project

The Civil Rules are the third set of the rules to be restyled. The restyled Rules of Appellate Procedure took effect in 1998. The restyled Rules of Criminal Procedure took effect in 2002. The restyled Rules of Civil Procedure apply the same general drafting guidelines and principles used in restyling the Appellate and Criminal Rules.

1. General Guidelines

Guidance in drafting, usage, and style was provided by Bryan Garner, Guidelines for Drafting and Editing Court Rules, Administrative Office of the United States Courts (1996) and Bryan Garner, Dictionary of Modern Legal Usage (2d ed. 1995).

2. Formatting Changes

Many of the changes in the restyled Civil Rules result from using format to achieve clearer presentation. The rules are broken down into constituent parts, using progressively indented subparagraphs with headings and substituting vertical for horizontal lists. "Hanging indents" are avoided. These formatting changes make the structure of the rules graphic and make the restyled rules easier to read and understand even when the words are not changed. Rule 14(a) illustrates the benefits of formatting changes.

3. Changes to Reduce Inconsistent, Ambiguous, Redundant, Repetitive, or Archaic Words

The restyled rules reduce the use of inconsistent terms that say the same thing in different ways. Because different words are presumed to have different meanings, such inconsistencies can result in confusion. The restyled rules reduce inconsistencies by using the same words to express the same meaning. For example, consistent expression is achieved without affecting meaning by the changes from "infant" in many rules to "minor" in all rules; from "upon motion

[1] Rules in effect on December 1, 2004.

or on its own initiative" in Rule 4(m) and variations in many other rules to "on motion or on its own"; and from "deemed" to "considered" in Rules 5(c), 12(e), and elsewhere. Some variations of expression have been carried forward when the context made that appropriate. As an example, "stipulate," "agree," and "consent" appear throughout the rules, and "written" qualifies these words in some places but not others. The number of variations has been reduced, but at times the former words were carried forward. None of the changes, when made, alters the rule's meaning.

The restyled rules minimize the use of inherently ambiguous words. For example, the word "shall" can mean "must," "may," or something else, depending on context. The potential for confusion is exacerbated by the fact that "shall" is no longer generally used in spoken or clearly written English. The restyled rules replace "shall" with "must," "may," or "should," depending on which one the context and established interpretation make correct in each rule.

The restyled rules minimize the use of redundant "intensifiers." These are expressions that attempt to add emphasis, but instead state the obvious and create negative implications for other rules. "The court in its discretion may" becomes "the court may"; "unless the order expressly directs otherwise" becomes "unless the court orders otherwise." The absence of intensifiers in the restyled rules does not change their substantive meaning. For example, the absence of the word "reasonable" to describe the written notice of foreign law required in Rule 44.1 does not mean that "unreasonable" notice is permitted.

The restyled rules also remove words and concepts that are outdated or redundant. The reference to "at law or in equity" in Rule 1 has become redundant with the merger of law and equity. Outdated words and concepts include the reference to "demurrers, pleas, and exceptions" in Rule 7(c); the reference to "mesne" process in Rule 77(c); and the reference in Rule 81(f) to a now-abolished official position.

The restyled rules remove a number of redundant cross-references. For example, Rule 8(b) states that a general denial is subject to the obligations of Rule 11, but all pleadings are subject to Rule 11. Removing such cross-references does not defeat application of the formerly cross-referenced rule.

4. Rule Numbers

The restyled rules keep the same rule numbers to minimize the effect on research. Subdivisions have been rearranged within some rules to achieve greater clarity and simplicity. The only change that moves one part of a rule to another is the transfer of former Rule 25(d)(2) to Rule 17(d). The restyled rules include a comparison chart to make it easy to identify transfers of provisions between subdivisions and redesignations of some subdivisions.

5. Other Changes

The style changes to the rules are intended to make no changes in substantive meaning. A very small number of minor technical amendments that arguably do change meaning were approved separately from the restyled rules, but become effective at the same time. An example is adding "e-mail address" to the information that must be included in pleadings. These minor changes occur in Rules 4(k), 9(h), 11(a), 14(b), 16(c)(1), 26(g)(1), 30(b), 31, 40, 71.1, and 78.

Rule 2. One Form of Action	Rule 2. One Form of Action
There shall be one form of action to be known as "civil action".	There is one form of action — the civil action.

COMMITTEE NOTE

The language of Rule 2 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.

II. COMMENCEMENT OF ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS **Rule 3. Commencement of Action**	TITLE II. COMMENCING AN ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS **Rule 3. Commencing an Action**
A civil action is commenced by filing a complaint with the court.	A civil action is commenced by filing a complaint with the court.

COMMITTEE NOTE

The caption of Rule 3 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 4. Summons	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.	**(a) Contents; Amendments.** **(1)** ***Contents.*** A summons must: **(A)** name the court and the parties; **(B)** be directed to the defendant; **(C)** state the name and address of the plaintiff's attorney or — if unrepresented — of the plaintiff; **(D)** state the time within which the defendant must appear and defend; **(E)** notify the defendant that a failure to appear and defend will result in a default judgment against the defendant for the relief demanded in the complaint; **(F)** be signed by the clerk; and **(G)** bear the court's seal. **(2)** ***Amendments.*** The court may permit 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.	**(b) Issuance.** On or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is properly completed, the clerk must sign, seal, and issue it to the plaintiff for service on the defendant. A summons — or a copy of a summons that is addressed to multiple defendants — must 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.	**(c) Service.** **(1)** ***In General.*** A summons must be served with a copy of the complaint. The plaintiff is responsible for having the summons and complaint served within the time allowed by Rule 4(m) and must furnish the necessary copies to the person who makes service. **(2)** ***By Whom.*** Any person who is at least 18 years old and not a party may serve a summons and complaint. **(3)** ***By a Marshal or Someone Specially Appointed.*** At the plaintiff's request, the court may order that service be made by a United States marshal or deputy marshal or by a person specially appointed by the court. The court must so order if the plaintiff is authorized to proceed in forma pauperis under 28 U.S.C. §1915 or 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.

(d) Waiving Service.

(1) ***Requesting a Waiver.*** An individual, corporation, or association that is subject to service under Rule 4(e), (f), or (h) has a duty to avoid unnecessary expenses of serving the summons. The plaintiff may notify such a defendant that an action has been commenced and request that the defendant waive service of a summons. The notice and request must:

(A) be in writing and be addressed:

(i) to the individual defendant; or

(ii) for a defendant subject to service under Rule 4(h), to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process;

(B) name the court where the complaint was filed;

(C) be accompanied by a copy of the complaint, two copies of a waiver form, and a prepaid means for returning the form;

(D) inform the defendant, using text prescribed in Form 5, of the consequences of waiving and not waiving service;

(E) state the date when the request is sent;

(F) give the defendant a reasonable time of at least 30 days after the request was sent — or at least 60 days if sent to the defendant outside any judicial district of the United States — to return the waiver; and

(G) be sent by first-class mail or other reliable means.

(2) ***Failure to Waive.*** If a defendant located within the United States fails, without good cause, to sign and return a waiver requested by a plaintiff located within the United States, the court must impose on the defendant:

(A) the expenses later incurred in making service; and

(B) the reasonable expenses, including attorney's fees, of any motion required to collect those service expenses.

(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.	**(3)** ***Time to Answer After a Waiver.*** A defendant who, before being served with process, timely returns a waiver need not serve an answer to the complaint until 60 days after the request was sent — or until 90 days after it was sent to the defendant outside any judicial district of the United States. **(4)** ***Results of Filing a Waiver.*** When the plaintiff files a waiver, proof of service is not required and these rules apply as if a summons and complaint had been served at the time of filing the waiver. **(5)** ***Jurisdiction and Venue Not Waived.*** Waiving service of a summons does not waive any objection to personal jurisdiction or to venue.
(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.	**(e) Serving an Individual Within a Judicial District of the United States.** Unless federal law provides otherwise, an individual — other than a minor, an incompetent person, or a person whose waiver has been filed — may be served in a judicial district of the United States by: **(1)** following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or **(2)** doing any of the following: **(A)** delivering a copy of the summons and of the complaint to the individual personally; **(B)** leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or **(C)** delivering a copy of each 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.	**(f) Serving an Individual in a Foreign Country.** Unless federal law provides otherwise, an individual — other than a minor, an incompetent person, or a person whose waiver has been filed — may be served at a place not within any judicial district of the United States: **(1)** by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents; **(2)** if there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice: **(A)** as prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction; **(B)** as the foreign authority directs in response to a letter rogatory or letter of request; or **(C)** unless prohibited by the foreign country's law, by: **(i)** delivering a copy of the summons and of the complaint to the individual personally; or **(ii)** using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt; or **(3)** by other means not prohibited by international agreement, as the court orders.
(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.	**(g) Serving a Minor or an Incompetent Person.** A minor or an incompetent person in a judicial district of the United States must be served by following state law for serving a summons or like process on such a defendant in an action brought in the courts of general jurisdiction of the state where service is made. A minor or an incompetent person who is not within any judicial district of the United States must be served in the manner prescribed by Rule 4(f)(2)(A), (f)(2)(B), or (f)(3).

(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.	**(h) Serving a Corporation, Partnership, or Association.** Unless federal law provides otherwise or the defendant's waiver has been filed, a domestic or foreign corporation, or a partnership or other unincorporated association that is subject to suit under a common name, must be served: **(1)** in a judicial district of the United States: **(A)** in the manner prescribed by Rule 4(e)(1) for serving an individual; or **(B)** by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process and — if the agent is one authorized by statute and the statute so requires — by also mailing a copy of each to the defendant; or **(2)** at a place not within any judicial district of the United States, in any manner prescribed by Rule 4(f) for serving an individual, except personal delivery under (f)(2)(C)(i).

(i) Serving the United States and 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.

(i) Serving the United States and Its Agencies, Corporations, Officers, or Employees.

(1) ***United States.*** To serve the United States, a party must:

(A) (i) deliver a copy of the summons and of the complaint to the United States attorney for the district where the action is brought — or to an assistant United States attorney or clerical employee whom the United States attorney designates in a writing filed with the court clerk — or

(ii) send a copy of each by registered or certified mail to the civil-process clerk at the United States attorney's office;

(B) send a copy of each by registered or certified mail to the Attorney General of the United States at Washington, D.C.; and

(C) if the action challenges an order of a nonparty agency or officer of the United States, send a copy of each by registered or certified mail to the agency or officer.

(2) ***Agency; Corporation; Officer or Employee Sued in an Official Capacity.*** To serve a United States agency or corporation, or a United States officer or employee sued only in an official capacity, a party must serve the United States and also send a copy of the summons and of the complaint by registered or certified mail to the agency, corporation, officer, or employee.

(3) ***Officer or Employee Sued Individually.*** To serve a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf (whether or not the officer or employee is also sued in an official capacity), a party must serve the United States and also serve the officer or employee under Rule 4(e), (f), or (g).

(4) ***Extending Time.*** The court must allow a party a reasonable time to cure its failure to:

(A) serve a person required to be served under Rule 4(i)(2), if the party has served either the United States attorney or the Attorney General of the United States; or

(B) serve the United States under Rule 4(i)(3), if the party has served the United States officer or employee.

(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.	**(j) Serving a Foreign, State, or Local Government.** **(1)** ***Foreign State.*** A foreign state or its political subdivision, agency, or instrumentality must be served in accordance with 28 U.S.C. § 1608. **(2)** ***State or Local Government.*** A state, a municipal corporation, or any other state-created governmental organization that is subject to suit must be served by: **(A)** delivering a copy of the summons and of the complaint to its chief executive officer; or **(B)** serving a copy of each in the manner prescribed by that state's law for serving a summons or like process on such a 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.	**(k) Territorial Limits of Effective Service.** **(1)** ***In General.*** Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant: **(A)** who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located; **(B)** who is a party joined under Rule 14 or 19 and is served within a judicial district of the United States and not more than 100 miles from where the summons was issued; **(C)** who is subject to federal interpleader jurisdiction under 28 U.S.C. § 1335; or **(D)** when authorized by a federal statute. **(2)** ***Federal Claim Outside State-Court Jurisdiction.*** For a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if: **(A)** the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and **(B)** exercising jurisdiction is consistent with the United States Constitution and laws.

(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.	**(l) Proving Service.** **(1)** ***Affidavit Required.*** Unless service is waived, proof of service must be made to the court. Except for service by a United States marshal or deputy marshal, proof must be by the server's affidavit. **(2)** ***Service Outside the United States.*** Service not within any judicial district of the United States must be proved as follows: **(A)** if made under Rule 4(f)(1), as provided in the applicable treaty or convention; or **(B)** if made under Rule 4(f)(2) or (f)(3), by a receipt signed by the addressee, or by other evidence satisfying the court that the summons and complaint were delivered to the addressee. **(3)** ***Validity of Service; Amending Proof.*** Failure to prove service does not affect the validity of service. The court may permit 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).	**(m) Time Limit for Service.** If a defendant is not served within 120 days after the complaint is filed, the court — on motion or on its own after notice to the plaintiff — must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(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.	**(n) Asserting Jurisdiction over Property or Assets.** **(1)** ***Federal Law.*** The court may assert jurisdiction over property if authorized by a federal statute. Notice to claimants of the property must be given as provided in the statute or by serving a summons under this rule. **(2)** ***State Law.*** On a showing that personal jurisdiction over a defendant cannot be obtained in the district where the action is brought by reasonable efforts to serve a summons under this rule, the court may assert jurisdiction over the defendant's assets found in the district. Jurisdiction is acquired by seizing the assets under the circumstances and in the manner provided by state law in that district.

COMMITTEE NOTE

The language of Rule 4 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 4(d)(1)(C) corrects an inadvertent error in former Rule 4(d)(2)(G). The defendant needs two copies of the waiver form, not an extra copy of the notice and request.

Rule 4(g) changes "infant" to "minor." "Infant" in the present rule means "minor." Modern word usage suggests that "minor" will better maintain the intended meaning. The same change from "infant" to "minor" is made throughout the rules. In addition, subdivision (f)(3) is added to the description of methods of service that the court may order; the addition ensures the evident intent that the court not order service by means prohibited by international agreement.

Rule 4(i)(4) corrects a misleading reference to "the plaintiff" in former Rule 4(i)(3). A party other than a plaintiff may need a reasonable time to effect service. Rule 4(i)(4) properly covers any party.

Former Rule 4(j)(2) refers to service upon an "other governmental organization subject to suit." This is changed to "any other state-created governmental organization that is subject to suit." The change entrenches the meaning indicated by the caption ("Serving a Foreign, State, or Local Government"), and the invocation of state law. It excludes any risk that this rule might be read to govern service on a federal agency, or other entities not created by state law.

Rule 4.1. Service of Other Process	Rule 4.1. Serving Other Process
(a) Generally. Process other than a summons as provided in Rule 4 or subpoena as provided in Rule 45 shall be served by a United States marshal, a deputy United States marshal, or a person specially appointed for that purpose, who shall make proof of service as provided in Rule 4(l). The process may be served anywhere within the territorial limits of the state in which the district court is located, and, when authorized by a statute of the United States, beyond the territorial limits of that state.	**(a) In General.** Process — other than a summons under Rule 4 or a subpoena under Rule 45 — must be served by a United States marshal or deputy marshal or by a person specially appointed for that purpose. It may be served anywhere within the territorial limits of the state where the district court is located and, if authorized by a federal statute, beyond those limits. Proof of service must be made under Rule 4(l).
(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.	**(b) Enforcing Orders: Committing for Civil Contempt.** An order committing a person for civil contempt of a decree or injunction issued to enforce federal law may be served and enforced in any district. Any other order in a civil-contempt proceeding may be served only in the state where the issuing court is located or elsewhere in the United States within 100 miles from where the order was issued.

COMMITTEE NOTE

The language of Rule 4.1 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 5. Serving and Filing Pleadings and Other Papers	Rule 5. Serving and Filing 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.	**(a) Service: When Required.** **(1)** ***In General.*** Unless these rules provide otherwise, each of the following papers must be served on every party: **(A)** an order stating that service is required; **(B)** a pleading filed after the original complaint, unless the court orders otherwise under Rule 5(c) because there are numerous defendants; **(C)** a discovery paper required to be served on a party, unless the court orders otherwise; **(D)** a written motion, except one that may be heard ex parte; and **(E)** a written notice, appearance, demand, or offer of judgment, or any similar paper. **(2)** ***If a Party Fails to Appear.*** No service is required on a party who is in default for failing to appear. But a pleading that asserts a new claim for relief against such a party must be served on that party under Rule 4. **(3)** ***Seizing Property.*** If an action is begun by seizing property and no person is or need be named as a defendant, any service required before the filing of an appearance, answer, or claim must be made on the person who had custody or possession of the property when it was seized.

(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.	**(b) Service: How Made.** **(1)** ***Serving an Attorney.*** If a party is represented by an attorney, service under this rule must be made on the attorney unless the court orders service on the party. **(2)** ***Service in General.*** A paper is served under this rule by: **(A)** handing it to the person; **(B)** leaving it: **(i)** at the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or **(ii)** if the person has no office or the office is closed, at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there; **(C)** mailing it to the person's last known address — in which event service is complete upon mailing; **(D)** leaving it with the court clerk if the person has no known address; **(E)** sending it by electronic means if the person consented in writing — in which event service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served; or **(F)** delivering it by any other means that the person consented to in writing — in which event service is complete when the person making service delivers it to the agency designated to make delivery. **(3)** ***Using Court Facilities.*** If a local rule so authorizes, a party may use the court's transmission facilities to make service under Rule 5(b)(2)(E).
(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.	**(c) Serving Numerous Defendants.** **(1)** ***In General.*** If an action involves an unusually large number of defendants, the court may, on motion or on its own, order that: **(A)** defendants' pleadings and replies to them need not be served on other defendants; **(B)** any crossclaim, counterclaim, avoidance, or affirmative defense in those pleadings and replies to them will be treated as denied or avoided by all other parties; and **(C)** filing any such pleading and serving it on the plaintiff constitutes notice of the pleading to all parties. **(2)** ***Notifying Parties.*** A copy of every such order must be served on the parties 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 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 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.	**(d) Filing.** **(1)** ***Required Filings; Certificate of Service.*** Any paper after the complaint that is required to be served — together with a certificate of service — must be filed 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: depositions, interrogatories, requests for documents or tangible things or to permit entry onto land, and requests for admission. **(2)** ***How Filing Is Made — In General.*** A paper is filed by delivering it: **(A)** to the clerk; or **(B)** to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk. **(3)** ***Electronic Filing, Signing, or Verification.*** A court may, by local rule, allow papers to be filed, signed, or verified by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. A local rule may require electronic filing only if reasonable exceptions are allowed. A paper filed electronically in compliance with a local rule is a written paper for purposes of these rules. **(4)** ***Acceptance by the Clerk.*** The clerk must not refuse to file a paper solely because it is not in the form prescribed by these rules or by a local rule or practice.

COMMITTEE NOTE

The language of Rule 5 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 5(a)(1)(E) omits the former reference to a designation of record on appeal. Appellate Rule 10 is a self-contained provision for the record on appeal, and provides for service.

Former Rule 5(b)(2)(D) literally provided that a local rule may authorize use of the court's transmission facilities to make service by non-electronic means agreed to by the parties. That was not intended. Rule 5(b)(3) restores the intended meaning — court transmission facilities can be used only for service by electronic means.

Rule 5(d)(2)(B) provides that "a" judge may accept a paper for filing, replacing the reference in former Rule 5(e) to "the" judge. Some courts do not assign a designated judge to each case, and it may be important to have another judge accept a paper for filing even when a case is on the individual docket of a particular judge. The ministerial acts of accepting the paper, noting the time, and transmitting the paper to the court clerk do not interfere with the assigned judge's authority over the action.

Rule 5.1. Constitutional Challenge to a Statute — Notice, Certification, and Intervention	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.	**(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 the parties do not include the United States, one of its agencies, or one of its officers or employees in an official capacity; or **(B)** a state statute is questioned and the parties do not include the state, one of its agencies, or one of its officers or employees in an official capacity; and **(2)** serve the notice and paper on the Attorney General of the United States if a federal statute is questioned — or on the state attorney general if a state statute is questioned — 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 appropriate attorney general that a statute has been questioned. **(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 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.

COMMITTEE NOTE

The language of Rule 5.1 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 6. Time	Rule 6. Computing and Extending Time; Time for Motion Papers
(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.	**(a) Computing Time.** The following rules apply in computing any time period specified in these rules or in any local rule, court order, or statute: **(1)** ***Day of the Event Excluded.*** Exclude the day of the act, event, or default that begins the period. **(2)** ***Exclusions from Brief Periods.*** Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days. **(3)** ***Last Day.*** 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 weather or other conditions make the clerk's office inaccessible. When the last day is excluded, the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible. **(4)** ***"Legal Holiday" Defined.*** As used in these rules, "legal holiday" means: **(A)** the day set aside by statute for observing 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, or Christmas Day; and **(B)** any other day declared a holiday by the President, Congress, or the state where the district court is located.
(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.	**(b) Extending Time.** **(1)** ***In General.*** When an act may or must be done within a specified time, the court may, for good cause, extend the time: **(A)** with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or **(B)** on motion made after the time has expired if the party failed to act because of excusable neglect. **(2)** ***Exceptions.*** A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b), except as those rules allow.

(c) [Rescinded].	
(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.	**(c) Motions, Notices of Hearing, and Affidavits.** **(1)** ***In General.*** A written motion and notice of the hearing must be served at least 5 days before the time specified for the hearing, with the following exceptions: **(A)** when the motion may be heard ex parte; **(B)** when these rules set a different time; or **(C)** when a court order — which a party may, for good cause, apply for ex parte — sets a different time. **(2)** ***Supporting Affidavit.*** Any affidavit supporting a motion must be served with the motion. Except as Rule 59(c) provides otherwise, any opposing affidavit must be served at least 1 day before the hearing, unless the court permits service at another time.
(e) Additional Time After Service Under Rule 5(b)(2)(B), (C), or (D). Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party under Rule 5(b)(2)(B), (C), or (D), 3 days shall be added to the prescribed period.	**(d) Additional Time After Certain Kinds of Service.** When a party may or must act within a specified time after service and service is made under Rule 5(b)(2)(C), (D), (E), or (F), 3 days are added to the period.

COMMITTEE NOTE

The language of Rule 6 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.

III. PLEADINGS AND MOTIONS Rule 7. Pleadings Allowed; Form of Motions	TITLE III. PLEADINGS AND MOTIONS Rule 7. Pleadings Allowed; Form of Motions and Other Papers
(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.	**(a) Pleadings.** Only these pleadings are allowed: **(1)** a complaint; **(2)** an answer to a complaint; **(3)** an answer to a counterclaim designated as a counterclaim; **(4)** an answer to a crossclaim; **(5)** a third-party complaint; **(6)** an answer to a third-party complaint; and **(7)** if the court orders one, a reply to an 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.	**(b) Motions and Other Papers.** **(1)** ***In General.*** A request for a court order must be made by motion. The motion must: **(A)** be in writing unless made during a hearing or trial; **(B)** state with particularity the grounds for seeking the order; and **(C)** state the relief sought. **(2)** ***Form.*** The rules governing captions and other matters of form in pleadings apply to motions and other papers.
(c) Demurrers, Pleas, Etc., Abolished. Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used.	[Current Rule 7(c) is deleted.]

COMMITTEE NOTE

The language of Rule 7 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 7(a) stated that "there shall be * * * an answer to a cross-claim, if the answer contains a cross-claim * * *." Former Rule 12(a)(2) provided more generally that "[a] party served with a pleading stating a cross-claim against that party shall serve an answer thereto * * *." New Rule 7(a) corrects this inconsistency by providing for an answer to a crossclaim.

For the first time, Rule 7(a)(7) expressly authorizes the court to order a reply to a counterclaim answer. A reply may be as useful in this setting as a reply to an answer, a third-party answer, or a crossclaim answer.

Former Rule 7(b)(1) stated that the writing requirement is fulfilled if the motion is stated

in a written notice of hearing. This statement was deleted as redundant because a single written document can satisfy the writing requirements both for a motion and for a Rule 6(c)(1) notice.

The cross-reference to Rule 11 in former Rule 7(b)(3) is deleted as redundant. Rule 11 applies by its own terms. The force and application of Rule 11 are not diminished by the deletion.

Former Rule 7(c) is deleted because it has done its work. If a motion or pleading is described as a demurrer, plea, or exception for insufficiency, the court will treat the paper as if properly captioned.

Rule 7.1. Disclosure Statement	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.	**(a) Who Must File; Contents.** A nongovernmental corporate party must file two copies of a disclosure statement that: **(1)** identifies any parent corporation and any publicly held corporation owning 10% or more of its stock; or **(2)** 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.	**(b) Time to File; Supplemental Filing.** A party must: **(1)** file the disclosure statement with its first appearance, pleading, petition, motion, response, or other request addressed to the court; and **(2)** promptly file a supplemental statement if any required information changes.

COMMITTEE NOTE

The language of Rule 7.1 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 8. General Rules of Pleading	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.	**(a) Claim for Relief.** A pleading that states a claim for relief must contain: **(1)** a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support; **(2)** a short and plain statement of the claim showing that the pleader is entitled to relief; and **(3)** a demand for the relief sought, which may include relief in the alternative or different types of relief.
(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.	**(b) Defenses; Admissions and Denials.** **(1)** ***In General.*** In responding to a pleading, a party must: **(A)** state in short and plain terms its defenses to each claim asserted against it; and **(B)** admit or deny the allegations asserted against it by an opposing party. **(2)** ***Denials — Responding to the Substance.*** A denial must fairly respond to the substance of the allegation. **(3)** ***General and Specific Denials.*** A party that intends in good faith to deny all the allegations of a pleading — including the jurisdictional grounds — may do so by a general denial. A party that does not intend to deny all the allegations must either specifically deny designated allegations or generally deny all except those specifically admitted. **(4)** ***Denying Part of an Allegation.*** A party that intends in good faith to deny only part of an allegation must admit the part that is true and deny the rest. **(5)** ***Lacking Knowledge or Information.*** A party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, and the statement has the effect of a denial. **(6)** ***Effect of Failing to Deny.*** An allegation — other than one relating to the amount of damages — is admitted if a responsive pleading is required and the allegation is not denied. If a responsive pleading is not required, an allegation is considered denied or avoided.

(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.	**(c) Affirmative Defenses.** **(1)** ***In General.*** In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including: • 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; and • waiver. **(2)** ***Mistaken Designation***. If a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so.
(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.	[Current Rule 8(d) has become restyled Rule 8(b)(6).]

(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.	**(d) Pleading to Be Concise and Direct; Alternative Statements; Inconsistency.** **(1)** ***In General.*** Each allegation must be simple, concise, and direct. No technical form is required. **(2)** ***Alternative Statements of a Claim or Defense.*** A party may set out two or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient. **(3)** ***Inconsistent Claims or Defenses.*** A party may state as many separate claims or defenses as it has, regardless of consistency.
(f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice.	**(e) Construing Pleadings.** Pleadings must be construed so as to do justice.

COMMITTEE NOTE

The language of Rule 8 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The former Rule 8(b) and 8(e) cross-references to Rule 11 are deleted as redundant. Rule 11 applies by its own terms. The force and application of Rule 11 are not diminished by the deletion.

Former Rule 8(b) required a pleader denying part of an averment to "specify so much of it as is true and material and * * * deny only the remainder." "[A]nd material" is deleted to avoid the implication that it is proper to deny something that the pleader believes to be true but not material.

Deletion of former Rule 8(e)(2)'s "whether based on legal, equitable, or maritime grounds" reflects the parallel deletions in Rule 1 and elsewhere. Merger is now successfully accomplished.

Rule 9. Pleading Special Matters	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.	**(a) Capacity or Authority to Sue; Legal Existence.** **(1)** ***In General.*** Except when required to show that the court has jurisdiction, a pleading need not allege: **(A)** a party's capacity to sue or be sued; **(B)** a party's authority to sue or be sued in a representative capacity; or **(C)** the legal existence of an organized association of persons that is made a party. **(2)** ***Raising Those Issues.*** To raise any of those issues, a party must do so by a specific denial, which must state any supporting facts that are peculiarly within the party'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.	**(b) Fraud or Mistake; Conditions of Mind.** In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged 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.	**(c) Conditions Precedent.** In pleading conditions precedent, it suffices to allege generally that all conditions precedent have occurred or been performed. But when denying that a condition precedent has occurred or been performed, a party must do so 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.	**(d) Official Document or Act.** In pleading an official document or official act, it suffices to allege that the document was legally issued or the act legally done.
(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.	**(e) Judgment.** In pleading a judgment or decision of a domestic or foreign court, a judicial or quasi-judicial tribunal, or a board or officer, it suffices to plead the judgment or decision without 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.	**(f) Time and Place.** An allegation of time or place is material when testing the sufficiency of a pleading.
(g) Special Damage. When items of special damage are claimed, they shall be specifically stated.	**(g) Special Damages.** If an item of special damage is claimed, it must 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), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims. 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).	**(h) Admiralty or Maritime Claim.** **(1)** ***How Designated.*** If a claim for relief is within the admiralty or maritime jurisdiction and also within the court's subject-matter jurisdiction on some other ground, the pleading may designate the claim as an admiralty or maritime claim for purposes of Rules 14(c), 38(e), and 82 and the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions. A claim cognizable only in the admiralty or maritime jurisdiction is an admiralty or maritime claim for those purposes, whether or not so designated. **(2)** ***Amending a Designation.*** Rule 15 governs amending a pleading to add or withdraw a designation. **(3)** ***Designation for Appeal.*** A case that includes an admiralty or maritime claim within this subdivision (h) is an admiralty case within 28 U.S.C. § 1292(a)(3).

COMMITTEE NOTE

The language of Rule 9 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 10. Form of Pleadings	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.	**(a) Caption; Names of Parties.** Every pleading must have a caption with the court's name, a title, a file number, and a Rule 7(a) designation. The title of the complaint must name all the parties; the title of other pleadings, after naming the first party on each side, may refer generally to 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.	**(b) Paragraphs; Separate Statements.** A party must state its claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances. A later pleading may refer by number to a paragraph in an earlier pleading. If doing so would promote clarity, each claim founded on a separate transaction or occurrence — and each defense other than a denial — must be stated in a separate count or defense.
(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.	**(c) Adoption by Reference; Exhibits.** A statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion. A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes.

COMMITTEE NOTE

The language of Rule 10 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 11. Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions	Rule 11. Signing Pleadings, Motions, and Other Papers; Representations to the 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.	**(a) Signature.** Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name — or by a party personally if the party is unrepresented. The paper must state the signer's address and telephone number, if any. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.
(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.	**(b) Representations to the Court.** By presenting to the court a pleading, written motion, or other paper — whether by signing, filing, submitting, or later advocating it — an attorney or unrepresented party certifies 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, cause unnecessary delay, or needlessly increase the cost of litigation; **(2)** the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law; **(3)** the factual contentions have evidentiary support or, if specifically so identified, will likely 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 belief or a lack of information.

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How Initiated.

(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(c) Sanctions.

(1) ***In General.*** If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

(2) ***Motion for Sanctions.*** A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion.

(3) ***On the Court's Initiative.*** On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b).

(4) ***Nature of a Sanction.*** A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; 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 part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.

(5) ***Limitations on Monetary Sanctions.*** The court must not impose a monetary sanction:

(A) against a represented party for violating Rule 11(b)(2); or

(B) on its own, unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(6) ***Requirements for an Order.*** An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

(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.	**(d) Inapplicability to Discovery.** This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.

COMMITTEE NOTE

The language of Rule 11 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 12. Defenses and Objections — When and How Presented — By Pleading or Motion — Motion for Judgment on the Pleadings	Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing
(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.	**(a) Time to Serve a Responsive Pleading.** **(1)** ***In General.*** Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows: **(A)** A defendant must serve an answer: **(i)** within 20 days after being served with the summons and complaint; or **(ii)** if it has timely waived service under Rule 4(d), within 60 days after the request for a waiver was sent, or within 90 days after it was sent to the defendant outside any judicial district of the United States. **(B)** A party must serve an answer to a counterclaim or crossclaim within 20 days after being served with the pleading that states the counterclaim or crossclaim. **(C)** A party must serve a reply to an answer within 20 days after being served with an order to reply, unless the order specifies a different time. **(2)** ***United States and Its Agencies, Officers, or Employees Sued in an Official Capacity.*** The United States, a United States agency, or a United States officer or employee sued only in an official capacity must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the United States attorney. **(3)** ***United States Officers or Employees Sued in an Individual Capacity.*** A United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf must serve an answer to a complaint, counterclaim, or crossclaim 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.	**(4)** ***Effect of a Motion.*** Unless the court sets a different time, serving a motion under this rule alters these periods as follows: **(A)** if the court denies the motion or postpones its disposition until trial, the responsive pleading must 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 must be served within 10 days after the more definite statement is served.

(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.	**(b) How to Present Defenses.** Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion: **(1)** lack of subject-matter jurisdiction; **(2)** lack of personal jurisdiction; **(3)** improper venue; **(4)** insufficient process; **(5)** insufficient service of process; **(6)** failure to state a claim upon which relief can be granted; and **(7)** failure to join a party under Rule 19. A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.
(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.	**(c) Motion for Judgment on the Pleadings.** After the pleadings are closed — but early enough not to delay trial — a party may move for judgment on the pleadings.
	(d) Result of Presenting Matters Outside the Pleadings. If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

(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.	[Current Rule 12(d) has become restyled Rule 12(i).]
(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.	**(e) Motion for a More Definite Statement.** A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 10 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.
(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.	**(f) Motion to Strike.** The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act: **(1)** on its own; or **(2)** on motion made by a party either before responding to the pleading or, if a response is not allowed, within 20 days after being served with the pleading.
(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.	**(g) Joining Motions.** **(1)** ***Right to Join.*** A motion under this rule may be joined with any other motion allowed by this rule. **(2)** ***Limitation on Further Motions.*** Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

(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.	**(h) Waiving and Preserving Certain Defenses.** **(1)** ***When Some Are Waived.*** A party waives any defense listed in Rule 12(b)(2)-(5) by: **(A)** omitting it from a motion in the circumstances described in Rule 12(g)(2); or **(B)** failing to either: **(i)** make it by motion under this rule; or **(ii)** include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course. **(2)** ***When to Raise Others.*** Failure to state a claim upon which relief can be granted, to join a person required by Rule 19(b), or to state a legal defense to a claim may be raised: **(A)** in any pleading allowed or ordered under Rule 7(a); **(B)** by a motion under Rule 12(c); or **(C)** at trial. **(3)** ***Lack of Subject-Matter Jurisdiction.*** If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.
	(i) Hearing Before Trial. If a party so moves, any defense listed in Rule 12(b)(1)-(7) — whether made in a pleading or by motion — and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial.

COMMITTEE NOTE

The language of Rule 12 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 12(a)(4)(A) referred to an order that postpones disposition of a motion "until the trial on the merits." Rule 12(a)(4) now refers to postponing disposition "until trial." The new expression avoids the ambiguity that inheres in "trial on the merits," which may become confusing when there is a separate trial of a single issue or another event different from a single all-encompassing trial.

Rule 13. Counterclaim and Cross-Claim	Rule 13. Counterclaim and Crossclaim
(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.	**(a) Compulsory Counterclaim.** **(1)** ***In General.*** A pleading must state as a counterclaim any claim that — at the time of its service — the pleader has against an opposing party if the claim: **(A)** arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and **(B)** does not require adding another party over whom the court cannot acquire jurisdiction. **(2)** ***Exceptions.*** The pleader need not state the claim if: **(A)** when the action was commenced, the claim was the subject of another pending action; or **(B)** the opposing party sued on its claim by attachment or other process that did not establish personal jurisdiction over the pleader on that claim, and the pleader does not assert any counterclaim under this rule.
(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.	**(b) Permissive Counterclaim.** A pleading may state as a counterclaim against an opposing party any claim that is not compulsory.
(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.	**(c) Relief Sought in a Counterclaim.** A counterclaim need not diminish or defeat the recovery sought by the opposing party. It may request relief that exceeds in amount or differs in kind from the relief sought by 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.	**(d) Counterclaim Against the United States.** These rules do not expand the right to assert a counterclaim — or to claim a credit — against the United States or a United States officer or agency.
(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.	**(e) Counterclaim Maturing or Acquired After Pleading.** The court may permit a party to file a supplemental pleading asserting a counterclaim that matured or was acquired by the party after serving an earlier 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.	**(f) Omitted Counterclaim.** The court may permit a party to amend a pleading to add a counterclaim if it was omitted through oversight, inadvertence, or excusable neglect or if justice so requires.

(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.	**(g) Crossclaim Against a Coparty.** A pleading may state as a crossclaim any claim by one party against a coparty if the claim arises out of the transaction or occurrence that is the subject matter of the original action or of a counterclaim, or if the claim relates to any property that is the subject matter of the original action. The crossclaim may include a claim that the coparty is or may be liable to the crossclaimant for all or part of a claim asserted in the action against the crossclaimant.
(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.	**(h) Joining Additional Parties.** Rules 19 and 20 govern the addition of a person as a party to a counterclaim or crossclaim.
(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.	**(i) Separate Trials; Separate Judgments.** If the court orders separate trials under Rule 42(b), it may enter judgment on a counterclaim or crossclaim under Rule 54(b) when it has jurisdiction to do so, even if the opposing party's claims have been dismissed or otherwise resolved.

COMMITTEE NOTE

The language of Rule 13 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The meaning of former Rule 13(b) is better expressed by deleting "not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim." Both as a matter of intended meaning and current practice, a party may state as a permissive counterclaim a claim that does grow out of the same transaction or occurrence as an opposing party's claim even though one of the exceptions in Rule 13(a) means the claim is not a compulsory counterclaim.

Rule 14. Third–Party Practice	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)(b)(i) in the property arrested.	**(a) When a Defending Party May Bring in a Third Party.** **(1)** ***Timing of the Summons and Complaint.*** A defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it. But the third-party plaintiff must, by motion, obtain the court's leave if it files the third-party complaint more than 10 days after serving its original answer. **(2)** ***Third-Party Defendant's Claims and Defenses.*** The person served with the summons and third-party complaint — the "third-party defendant": **(A)** must assert any defense against the third-party plaintiff's claim under Rule 12; **(B)** must assert any counterclaim against the third-party plaintiff under Rule 13(a), and may assert any counterclaim against the third-party plaintiff under Rule 13(b) or any crossclaim against another third-party defendant under Rule 13(g); **(C)** may assert against the plaintiff any defense that the third-party plaintiff has to the plaintiff's claim; and **(D)** may also assert against the 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. **(3)** ***Plaintiff's Claims Against a Third-Party Defendant.*** The plaintiff may assert against the third-party defendant any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The third-party defendant must then assert any defense under Rule 12 and any counterclaim under Rule 13(a), and may assert any counterclaim under Rule 13(b) or any crossclaim under Rule 13(g). **(4)** ***Motion to Strike, Sever, or Try Separately.*** Any party may move to strike the third-party claim, to sever it, or to try it separately. **(5)** ***Third-Party Defendant's Claim Against a Nonparty.*** A third-party defendant may proceed under this rule against a nonparty who is or may be liable to the third-party defendant for all or part of any claim against it. **(6)** ***Third-Party Complaint In Rem.*** If it is within the admiralty or maritime jurisdiction, a third-party complaint may be in rem. In that event, a reference in this rule to the "summons" includes the warrant of arrest, and a reference to the defendant or third-party plaintiff includes, when appropriate, a person who asserts a right under Supplemental Rule C(6)(a)(i) 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.	**(b) When a Plaintiff May Bring in a Third Party.** When a counterclaim is asserted against a plaintiff, the plaintiff may bring in a third party if this rule would allow 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)(b)(i), 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.	**(c) Admiralty or Maritime Claim.** **(1)** ***Scope of Impleader.*** If a plaintiff asserts an admiralty or maritime claim under Rule 9(h), the defendant or a person who asserts a right under Supplemental Rule C(6)(a)(i) may, as a third-party plaintiff, bring in a third-party defendant who may be wholly or partly liable — either to the plaintiff or to the third-party plaintiff — for remedy over, contribution, or otherwise on account of the same transaction, occurrence, or series of transactions or occurrences. **(2)** ***Defending Against a Demand for Judgment for the Plaintiff.*** The third-party plaintiff may demand judgment in the plaintiff's favor against the third-party defendant. In that event, the third-party defendant must defend under Rule 12 against the plaintiff's claim as well as the third-party plaintiff's claim; and the action proceeds as if the plaintiff had sued both the third-party defendant and the third-party plaintiff.

COMMITTEE NOTE

The language of Rule 14 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 14 twice refers to counterclaims under Rule 13. In each case, the operation of Rule 13(a) depends on the state of the action at the time the pleading is filed. If plaintiff and third-party defendant have become opposing parties because one has made a claim for relief against the other, Rule 13(a) requires assertion of any counterclaim that grows out of the transaction or occurrence that is the subject matter of that claim. Rules 14(a)(2)(B) and (a)(3) reflect the distinction between compulsory and permissive counterclaims.

Rule 15. Amended and Supplemental Pleadings	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.	**(a) Amendments Before Trial.** **(1)** ***Amending as a Matter of Course.*** A party may amend its pleading once as a matter of course: **(A)** before being served with a responsive pleading; or **(B)** within 20 days after serving the pleading if a responsive pleading is not allowed and the action is not yet on the trial calendar. **(2)** ***Other Amendments.*** In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires. **(3)** ***Time to Respond.*** Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 10 days after service of the amended pleading, whichever is later.
(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.	**(b) Amendments During and After Trial.** **(1)** ***Based on an Objection at Trial.*** If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings to be amended. The court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits. The court may grant a continuance to enable the objecting party to meet the evidence. **(2)** ***For Issues Tried by Consent.*** When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move — at any time, even after judgment — to amend the pleadings to conform them to the evidence and to raise an unpleaded issue.–But failure to amend does not affect the result of the trial of that issue.

(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.	**(c) Relation Back of Amendments.** **(1)** ***When an Amendment Relates Back.*** An amendment to a pleading relates back to the date of the original pleading when: **(A)** the law that provides the applicable statute of limitations allows relation back; **(B)** the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out — or attempted to be set out — in the original pleading; or **(C)** the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment: **(i)** received such notice of the action that it will not be prejudiced in defending on the merits; and **(ii)** knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity. **(2)** ***Notice to the United States.*** When the United States or a United States officer or agency is added as a defendant by amendment, the notice requirements of Rule 15(c)(1)(C)(i) and (ii) are satisfied if, during the stated period, process was delivered or mailed to the United States attorney or the United States attorney's designee, to the Attorney General of the United States, or to the officer or agency.
(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.	**(d) Supplemental Pleadings.** On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense. The court may order that the opposing party plead to the supplemental pleading within a specified time.

COMMITTEE NOTE

The language of Rule 15 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 15(c)(3)(A) called for notice of the "institution" of the action. Rule 15(c)(1)(C)(i) omits the reference to "institution" as potentially confusing. What counts is that the party to be brought in have notice of the existence of the action, whether or not the notice includes details as to its "institution."

Rule 16. Pretrial Conferences; Scheduling; Management	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.	**(a) Purposes of a Pretrial Conference**. In any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as: **(1)** expediting 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 settlement.

(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) the date or dates for conferences before trial, a final pretrial conference, and trial; and

(6) 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.

(b) Scheduling.

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

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

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

(2) ***Time to Issue.*** The judge must issue the scheduling order as soon as practicable, but in any event within the earlier of 120 days after any defendant has been served with the complaint or 90 days after any defendant has appeared.

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

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

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

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

(ii) modify the extent of discovery;

(iii) set dates for pretrial conferences and for trial; and

(iv) include other appropriate matters.

(4) ***Modifying a Schedule.*** A schedule may be modified only for good cause and with the judge's consent.

(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;	**(c) Attendance and Matters for Consideration at a Pretrial Conference.** **(1)** ***Attendance.*** A represented party must authorize at least one of its attorneys to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a pretrial conference. If appropriate, the court may require that a party or its representative be present or reasonably available by telephone to consider possible settlement. **(2)** ***Matters for Consideration.*** At any pretrial conference, the court may consider and take appropriate action on the following matters: **(A)** formulating and simplifying the issues, and eliminating frivolous claims or defenses; **(B)** amending the pleadings if necessary or desirable; **(C)** obtaining admissions and stipulations about facts and documents to avoid unnecessary proof, and ruling in advance on the admissibility of evidence; **(D)** avoiding unnecessary proof and cumulative evidence, and limiting the use of testimony under Federal Rule of Evidence 702; **(E)** determining the appropriateness and timing of summary adjudication under Rule 56; **(F)** controlling and scheduling discovery, including orders affecting disclosures and discovery under 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;	**(G)** identifying witnesses and documents, scheduling the filing and exchange of any pretrial briefs, and setting dates for further conferences and for trial;
(8) the advisability of referring matters to a magistrate judge or master;	**(H)** referring matters to a magistrate judge or a master;
(9) settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule;	**(I)** settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule;
(10) the form and substance of the pretrial order;	**(J)** determining the form and content of the pretrial order;
(11) the disposition of pending motions;	**(K)** disposing 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;	**(L)** 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;	**(M)** ordering a separate trial under Rule 42(b) of a claim, counterclaim, crossclaim, third-party claim, or particular issue;
(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);	**(N)** ordering the presentation of evidence early in the trial on a manageable issue that might, 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	**(O)** establishing a reasonable limit on the time allowed to present evidence; and
(16) such other matters as may facilitate the just, speedy, and inexpensive disposition of the action.	**(P)** facilitating in other ways 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.	**(d) Pretrial Orders.** After any conference under this rule, the court should issue an order reciting the action taken. This order controls the course of the action unless the court modifies it.
(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.	**(e) Final Pretrial Conference and Orders.** The court may hold a final pretrial conference to formulate a trial plan, including a plan to facilitate the admission of evidence. The conference must be held as close to the start of trial as is reasonable, and must be attended by at least one attorney who will conduct the trial for each party and by any unrepresented party. The court may modify the order issued after a final pretrial conference 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.	**(f) Sanctions.** **(1)** ***In General.*** On motion or on its own, the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)-(vii), if a party or its attorney: **(A)** fails to appear at a scheduling or other pretrial conference; **(B)** is substantially unprepared to participate — or does not participate in good faith — in the conference; or **(C)** fails to obey a scheduling or other pretrial order. **(2)** ***Imposing Fees and Costs.*** Instead of or in addition to any other sanction, the court must order the party, its attorney, or both to pay the reasonable expenses — including attorney's fees — incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust.

COMMITTEE NOTE

The language of Rule 16 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.

IV. PARTIES Rule 17. Parties Plaintiff and Defendant; Capacity	TITLE IV. PARTIES Rule 17. Plaintiff and Defendant; Capacity; Public Officers
(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.	**(a) Real Party in Interest.** **(1)** ***Designation in General.*** An action must be prosecuted in the name of the real party in interest. The following may sue in their own names without joining the person for whose benefit the action is brought: **(A)** an executor; **(B)** an administrator; **(C)** a guardian; **(D)** a bailee; **(E)** a trustee of an express trust; **(F)** a party with whom or in whose name a contract has been made for another's benefit; and **(G)** a party authorized by statute. **(2)** ***Action in the Name of the United States for Another's Use or Benefit.*** When a federal statute so provides, an action for another's use or benefit must be brought in the name of the United States. **(3)** ***Joinder of the Real Party in Interest.*** The court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action. After ratification, joinder, or substitution, the action proceeds as if it had been originally commenced by 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).	**(b) Capacity to Sue or Be Sued.** Capacity to sue or be sued is determined as follows: **(1)** for an individual who is not acting in a representative capacity, by the law of the individual's domicile; **(2)** for a corporation, by the law under which it was organized; and **(3)** for all other parties, by the law of the state where the court is located, except that: **(A)** a partnership or other unincorporated association with no such capacity under that state's law may sue or be sued in its common name to enforce a substantive right existing under the United States Constitution or laws; and **(B)** 28 U.S.C. §§ 754 and 959(a) govern the capacity of a receiver appointed by a United States court to sue or be sued in a United States court.
(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.	**(c) Minor or Incompetent Person.** **(1)** ***With a Representative.*** The following representatives may sue or defend on behalf of a minor or an incompetent person: **(A)** a general guardian; **(B)** a committee; **(C)** a conservator; or **(D)** a like fiduciary. **(2)** ***Without a Representative.*** A minor or an incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court must appoint a guardian ad litem — or issue another appropriate order — to protect a minor or incompetent person who is unrepresented in an action.
	(d) Public Officer's Title and Name. A public officer who sues or is sued in an official capacity may be designated by official title rather than by name, but the court may order that the officer's name be added.

COMMITTEE NOTE

The language of Rule 17 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 17(d) incorporates the provisions of former Rule 25(d)(2), which fit better with Rule 17.

Rule 18. Joinder of Claims and Remedies	Rule 18. Joinder of Claims
(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.	**(a) In General.** A party asserting a claim, counterclaim, crossclaim, or third-party claim may join, as independent or alternative claims, as many claims as it 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 conveyance fraudulent as to that plaintiff, without first having obtained a judgment establishing the claim for money.	**(b) Joinder of Contingent Claims.** A party may join two claims even though one of them is contingent on the disposition of the other; but the court may grant relief only in accordance with the parties' relative substantive rights. In particular, a plaintiff may state a claim for money and a claim to set aside a conveyance that is fraudulent as to that plaintiff, without first obtaining a judgment for the money.

COMMITTEE NOTE

The language of Rule 18 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.

Modification of the obscure former reference to a claim "heretofore cognizable only after another claim has been prosecuted to a conclusion" avoids any uncertainty whether Rule 18(b)'s meaning is fixed by retrospective inquiry from some particular date.

Rule 19. Joinder of Persons Needed for Just Adjudication	Rule 19. Required Joinder of Parties
(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.	**(a) Persons Required to Be Joined if Feasible.** **(1)** ***Required Party.*** A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if: **(A)** in that person's absence, the court cannot accord complete relief among existing parties; or **(B)** that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: **(i)** as a practical matter impair or impede the person's ability to protect the interest; or **(ii)** leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest. **(2)** ***Joinder by Court Order.*** If a person has not been joined as required, the court must order that the person be made a party. A person who refuses to join as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff. **(3)** ***Venue.*** If a joined party objects to venue and the joinder would make venue improper, the court must dismiss that party.
(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.	**(b) When Joinder Is Not Feasible.** If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include: **(1)** the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties; **(2)** the extent to which any prejudice could be lessened or avoided by: **(A)** protective provisions in the judgment; **(B)** shaping the relief; or **(C)** other measures; **(3)** whether a judgment rendered in the person's absence would be adequate; and **(4)** whether the plaintiff would have an adequate remedy if the action were 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.	**(c) Pleading the Reasons for Nonjoinder.** When asserting a claim for relief, a party must state: **(1)** the name, if known, of any person who is required to be joined if feasible but is not joined; and **(2)** the reasons for not joining that person.
(d) Exception of Class Actions. This rule is subject to the provisions of Rule 23.	**(d) Exception for Class Actions.** This rule is subject to Rule 23.

COMMITTEE NOTE

The language of Rule 19 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 19(b) described the conclusion that an action should be dismissed for inability to join a Rule 19(a) party by carrying forward traditional terminology: "the absent person being thus regarded as indispensable." "Indispensable" was used only to express a conclusion reached by applying the tests of Rule 19(b). It has been discarded as redundant.

Rule 20. Permissive Joinder of Parties	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.	**(a) Persons Who May Join or Be Joined.** **(1)** ***Plaintiffs.*** Persons may join in one action as plaintiffs if: **(A)** they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and **(B)** any question of law or fact common to all plaintiffs will arise in the action. **(2)** ***Defendants.*** Persons — as well as a vessel, cargo, or other property subject to admiralty process in rem — may be joined in one action as defendants if: **(A)** any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and **(B)** any question of law or fact common to all defendants will arise in the action. **(3)** ***Extent of Relief.*** Neither a plaintiff nor a defendant need be interested in obtaining or defending against all the relief demanded. The court may grant judgment to one or more plaintiffs according to their rights, and against one or more defendants according to their 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.	**(b) Protective Measures.** The court may issue orders — including an order for separate trials — to protect a party against embarrassment, delay, expense, or other prejudice that arises from including a person against whom the party asserts no claim and who asserts no claim against the party.

COMMITTEE NOTE

The language of Rule 20 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 21. Misjoinder and Non-Joinder of Parties	Rule 21. Misjoinder and Nonjoinder 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.	Misjoinder of parties is not a ground for dismissing an action. On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party.

COMMITTEE NOTE

The language of Rule 21 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 22. Interpleader	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.	**(a) Grounds.** **(1)** ***By a Plaintiff.*** Persons with claims that may expose a plaintiff to double or multiple liability may be joined as defendants and required to interplead. Joinder for interpleader is proper even though: **(A)** the claims of the several claimants, or the titles on which their claims depend, lack a common origin or are adverse and independent rather than identical; or **(B)** the plaintiff denies liability in whole or in part to any or all of the claimants. **(2)** ***By a Defendant.*** A defendant exposed to similar liability may seek interpleader through a crossclaim or counterclaim. **(b) Relation to Other Rules and Statutes.** This rule supplements — and does not limit — the joinder of parties allowed by Rule 20. The remedy this rule provides is in addition to — and does not supersede or limit — the remedy provided by 28 U.S.C. §§ 1335, 1397, and 2361. An action under those statutes must be conducted under these rules.

COMMITTEE NOTE

The language of Rule 22 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 23. Class Actions	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.	**(a) Prerequisites.** One or more members of a class may sue or be sued as representative parties on behalf of all members 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.	**(b) Types of Class Actions.** A class action may be maintained if Rule 23(a) is satisfied and if: **(1)** prosecuting separate actions by or against individual class members would create a risk of: **(A)** inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or **(B)** adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests; **(2)** the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or **(3)** the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include: **(A)** the class members' interests in individually controlling the prosecution or defense of separate actions; **(B)** the extent and nature of any litigation concerning the controversy already begun by or against class members; **(C)** the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and **(D)** the likely difficulties in managing 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).

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) ***Certification Order.***

(A) *Time to Issue.* At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) *Defining the Class; Appointing Class Counsel.* An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) *Altering or Amending the Order.* An order that grants or denies class certification may be altered or amended before final judgment.

(2) ***Notice.***

(A) *For (b)(1) or (b)(2) Classes.* For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on 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.	**(3)** ***Judgment.*** Whether or not favorable to the class, the judgment in a class action must: **(A)** for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and **(B)** for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members. **(4)** ***Particular Issues.*** When appropriate, an action may be brought or maintained as a class action with respect to particular issues. **(5)** ***Subclasses.*** When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.
(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.	**(d) Conducting the Action.** **(1)** ***In General.*** In conducting an action under this rule, the court may issue orders that: **(A)** determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument; **(B)** require — to protect class members and fairly conduct the action — giving appropriate notice to some or all class members of: **(i)** any step in the action; **(ii)** the proposed extent of the judgment; or **(iii)** the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action; **(C)** impose conditions on the representative parties or on intervenors; **(D)** require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or **(E)** deal with similar procedural matters. **(2)** ***Combining and Amending Orders.*** An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(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.

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified 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.

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection 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.	**(f) Appeals.** A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 10 days after the order is entered. 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.	**(g) Class Counsel.** **(1)** ***Appointing Class Counsel.*** Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court: **(A)** must consider: **(i)** the work counsel has done in identifying or investigating potential claims in the action; **(ii)** counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; **(iii)** counsel's knowledge of the applicable law; and **(iv)** the resources that counsel will commit to representing the class; **(B)** may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class; **(C)** may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs; **(D)** may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and **(E)** 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).	**(2)** ***Standard for Appointing Class Counsel.*** When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class. **(3)** ***Interim Counsel.*** The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action. **(4)** ***Duty of Class Counsel.*** Class counsel must fairly and adequately represent the interests of the class.

(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).	**(h) Attorney's Fees and Nontaxable Costs.** In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply: **(1)** A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. 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)** A class member, or a party from whom payment is sought, may object to the motion. **(3)** The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a). **(4)** The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

COMMITTEE NOTE

The language of Rule 23 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.

Amended Rule 23(d)(2) carries forward the provisions of former Rule 23(d) that recognize two separate propositions. First, a Rule 23(d) order may be combined with a pretrial order under Rule 16. Second, the standard for amending the Rule 23(d) order continues to be the more open-ended standard for amending Rule 23(d) orders, not the more exacting standard for amending Rule 16 orders.

As part of the general restyling, intensifiers that provide emphasis but add no meaning are consistently deleted. Amended Rule 23(f) omits as redundant the explicit reference to court of appeals discretion in deciding whether to permit an interlocutory appeal. The omission does not in any way limit the unfettered discretion established by the original rule.

Rule 23.1. Derivative Actions by Shareholders	Rule 23.1. Derivative Actions
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.	**(a) Prerequisites.** This rule applies when one or more shareholders or members of a corporation or an unincorporated association bring a derivative action to enforce a right that the corporation or association may properly assert but has failed to enforce. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of shareholders or members who are similarly situated in enforcing the right of the corporation or association. **(b) Pleading Requirements.** The complaint must be verified and must: **(1)** allege that the plaintiff was a shareholder or member at the time of the transaction complained of, or that the plaintiff's share or membership later devolved on it by operation of law; **(2)** allege that the action is not a collusive one to confer jurisdiction that the court would otherwise lack; and **(3)** state with particularity: **(A)** any effort by the plaintiff to obtain the desired action from the directors or comparable authority and, if necessary, from the shareholders or members; and **(B)** the reasons for not obtaining the action or not making the effort. **(c) Settlement, Dismissal, and Compromise.** A derivative action may be settled, voluntarily dismissed, or compromised only with the court's approval. Notice of a proposed settlement, voluntary dismissal, or compromise must be given to shareholders or members in the manner that the court orders.

COMMITTEE NOTE

The language of Rule 23.1 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 23.2. Actions Relating to Unincorporated Associations	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).	This rule applies to an action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties. The action may be maintained only if it appears that those parties will fairly and adequately protect the interests of the association and its members. In conducting the action, the court may issue any appropriate orders corresponding with those in Rule 23(d), and the procedure for settlement, voluntary dismissal, or compromise must correspond with the procedure in Rule 23(e).

COMMITTEE NOTE

The language of Rule 23.2 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 24. Intervention	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.	**(a) Intervention of Right.** On timely motion, the court must permit anyone to intervene who: **(1)** is given an unconditional right to intervene by a federal statute; or **(2)** claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.
(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.	**(b) Permissive Intervention.** **(1)** ***In General.*** On timely motion, the court may permit anyone to intervene who: **(A)** is given a conditional right to intervene by a federal statute; or **(B)** has a claim or defense that shares with the main action a common question of law or fact. **(2)** ***By a Government Officer or Agency.*** On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on: **(A)** a statute or executive order administered by the officer or agency; or **(B)** any regulation, order, requirement, or agreement issued or made under the statute or executive order. **(3)** ***Delay or Prejudice.*** In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

(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. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action in which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C., § 2403. When the constitutionality of any statute of a State affecting the public interest is drawn in question in any action in which that State or any agency, officer, or employee thereof is not a party, the court shall notify the attorney general of the State as provided in Title 28, U.S.C. § 2403. A party challenging the constitutionality of legislation should call the attention of the court to its consequential duty, but failure to do so is not a waiver of any constitutional right otherwise timely asserted.	**(c) Procedure.** **(1)** ***Notice and Pleading Required.*** A motion to intervene must be served on the parties as provided in Rule 5. The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought. **(2)** ***Challenge to a Statute; Court's Duty.*** When the constitutionality of a statute affecting the public interest is questioned in any action, the court must, as provided in 28 U.S.C. § 2403, notify: **(A)** the Attorney General of the United States, if a federal statute is challenged and neither the United States nor any of its officers, agencies, or employees is a party; and **(B)** the Attorney General of the state, if a state statute is challenged and neither the state nor any of its officers, agencies, or employees is a party. **(3)** ***Party's Responsibility.*** A party challenging the constitutionality of a statute should call the court's attention to its duty under Rule 24(c)(2), but failing to do so does not waive any constitutional right otherwise timely asserted.

COMMITTEE NOTE

The language of Rule 24 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The former rule stated that the same procedure is followed when a United States statute gives a right to intervene. This statement is deleted because it added nothing.

Rule 25. Substitution of Parties	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.	**(a) Death.** **(1)** ***Substitution if the Claim Is Not Extinguished.*** If a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representative. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed. **(2)** ***Continuation Among the Remaining Parties.*** After a party's death, if the right sought to be enforced survives only to or against the remaining parties, the action does not abate, but proceeds in favor of or against the remaining parties. The death should be noted on the record. **(3)** ***Service.*** A motion to substitute, together with a notice of hearing, must be served on the parties as provided in Rule 5 and on nonparties as provided in Rule 4. A statement noting death must be served in the same manner. Service may be made in any judicial district.
(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.	**(b) Incompetency.** If a party becomes incompetent, the court may, on motion, permit the action to be continued by or against the party's representative. The motion must be served as provided in Rule 25(a)(3).
(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.	**(c) Transfer of Interest.** If an interest is transferred, the action may be continued by or against the original party unless the court, on motion, orders the transferee to be substituted in the action or joined with the original party. The motion must be served as provided in Rule 25(a)(3).

(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.	**(d) Public Officers; Death or Separation from Office.** An action does not abate when a public officer who is a party in an official capacity dies, resigns, or otherwise ceases to hold office while the action is pending. The officer's successor is automatically substituted as a party. Later proceedings should be in the substituted party's name, but any misnomer not affecting the parties' substantial rights must be disregarded. The court may order substitution at any time, but the absence of such an order does not affect the substitution. [Current Rule 25(d)(2) has become restyled Rule 17(d).]

COMMITTEE NOTE

The language of Rule 25 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 25(d)(2) is transferred to become Rule 17(d) because it deals with designation of a public officer, not substitution.

V. DEPOSITIONS AND DISCOVERY **Rule 26. General Provisions Governing Discovery; Duty of Disclosure**	TITLE V. DISCLOSURES AND DISCOVERY **Rule 26. Duty to Disclose; General Provisions Governing Discovery**
(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, data compilations, 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;	**(a) Required Disclosures.** **(1)** *Initial Disclosure.* **(A)** *In General.* Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties: **(i)** the name and, if known, the address and telephone number of each individual likely to have discoverable information — along with the subjects of that information — that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment; **(ii)** a copy — or a description by category and location — of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be 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.	**(iii)** a computation of each category of damages claimed by the disclosing party — who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and **(iv)** for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment 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 petition for habeas corpus or other proceeding to challenge a criminal conviction or sentence; (iii) an action brought without counsel by a person in custody of the United States, a state, or a state subdivision; (iv) an action to enforce or quash an administrative summons or subpoena; (v) an action by the United States to recover benefit payments; (vi) an action by the United States to collect on a student loan guaranteed by the United States; (vii) a proceeding ancillary to proceedings in other courts; and (viii) an action to enforce an arbitration award.	**(B)** *Proceedings Exempt from Initial Disclosure.* The following proceedings are exempt from initial disclosure: **(i)** an action for review on an administrative record; **(ii)** a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence; **(iii)** an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision; **(iv)** an action to enforce or quash an administrative summons or subpoena; **(v)** an action by the United States to recover benefit payments; **(vi)** an action by the United States to collect on a student loan guaranteed by the United States; **(vii)** a proceeding ancillary to a proceeding in another court; and **(viii)** 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 sufficieney of another party's disclosures or because another party has not made its disclosures.	**(C)** *Time for Initial Disclosures — In General.* A party must make the initial disclosures at or within 14 days after the parties' 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 this action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure. **(D)** *Time for Initial Disclosures — For Parties Served or Joined Later.* A party that is first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order. **(E)** *Basis for Initial Disclosure; Unacceptable Excuses.* A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated 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.	**(2)** ***Disclosure of Expert Testimony.*** **(A)** *In General.* In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705. **(B)** *Written Report.* Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report — prepared and signed by the witness — if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain: **(i)** a complete statement of all opinions the witness will express and the basis and reasons for them; **(ii)** the data or other information considered by the witness in forming them; **(iii)** any exhibits that will be used to summarize or support them; **(iv)** the witness's qualifications, including a list of all publications authored in the previous ten years; **(v)** a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and **(vi)** a statement of the compensation to be paid for the study and testimony in the case.
(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).	**(C)** *Time to Disclose Expert Testimony.* A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made: **(i)** at least 90 days before the date set for trial or for the case to be ready for trial; or **(ii)** if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B), within 30 days after the other party's disclosure. **(D)** *Supplementing the Disclosure.* The parties must supplement these disclosures when required under Rule 26(e).

(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.	**(3)** ***Pretrial Disclosures.*** **(A)** *In General.* In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment: **(i)** the name and, if not previously provided, the address and telephone number of each witness — separately identifying those the party expects to present and those it may call if the need arises; **(ii)** the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and **(iii)** an identification of each document or other exhibit, including summaries of other evidence — separately identifying those items the party expects to offer and those it may offer if the need arises. **(B)** *Time for Pretrial Disclosures; Objections.* Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made — except for one under Federal Rule of Evidence 402 or 403 — is 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.	**(4)** ***Form of Disclosures.*** Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served. [Current Rule 26(a)(5) is deleted.]

(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).	**(b) Discovery Scope and Limits.** **(1)** ***Scope in General.*** Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense — including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know 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)(B).
(2) Limitations. 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. 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).	**(2)** ***Limitations on Frequency and Extent.*** **(A)** *When Permitted.* By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36. **(B)** *When Required.* The court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that: **(i)** the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; **(ii)** the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or **(iii)** the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues. **(C)** *On Motion or the Court's Own Initiative.* The court may act on motion or on its own after reasonable notice.

(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 contemporancously recorded.

(3) ***Trial Preparation: Materials.***

(A) *Documents and Tangible Things.* Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) *Protection Against Disclosure.* If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(C) *Previous Statement.* Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording — or a transcription of it — that recites substantially verbatim the person's oral statement.

(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 reasonable 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.	**(4)** ***Trial Preparation: Experts.*** **(A)** *Expert Who May Testify.* A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided. **(B)** *Expert Employed Only for Trial Preparation.* Ordinarily, a party may not, by interrogatories or 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 to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only: **(i)** as provided in Rule 35(b); or **(ii)** on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means. **(C)** *Payment.* Unless manifest injustice would result, the court must require that the party seeking discovery: **(i)** pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (B); and **(ii)** for discovery under (B), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.
(5) Claims of Privilege or Protection of Trial Preparation Materials. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.	**(5)** ***Claiming Privilege or Protecting Trial-Preparation Materials.*** When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must: **(A)** expressly make the claim; and **(B)** describe the nature of the documents, communications, or tangible things not produced or disclosed — and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(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;	**(c) Protective Orders.** **(1)** ***In General.*** A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending — or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include 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. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: **(A)** forbidding the disclosure or discovery; **(B)** specifying terms, including time and place, for the disclosure or discovery; **(C)** prescribing a discovery method other than the one selected by the party seeking discovery; **(D)** forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery 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.	**(E)** designating the persons who may be present while the discovery is conducted; **(F)** requiring that a deposition be sealed and opened only on court order; **(G)** requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and **(H)** requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs. **(2)** ***Ordering Discovery.*** If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery. **(3)** ***Awarding Expenses.*** Rule 37(a)(5) applies to the award of expenses.

(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.	**(d) Timing and Sequence of Discovery.** **(1)** ***Timing.*** A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order. **(2)** ***Sequence.*** Unless, on motion, the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice: **(A)** methods of discovery may be used in any sequence; and **(B)** discovery by one party does not require any other party to delay its 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.	**(e) Supplementing Disclosures and Responses.** **(1)** ***In General.*** A party who has made a disclosure under Rule 26(a) — or who has responded to an interrogatory, request for production, or request for admission — must supplement or correct its disclosure or response: **(A)** in a timely manner if the party learns that in some material respect the disclosure or response 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; or **(B)** as ordered by the court.
(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.	**(2)** ***Expert Witness.*** For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

(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 possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by Rule 26(a)(1), 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) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(4) 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.

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

(1) ***Conference Timing.*** Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable — and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b).

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

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

(A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;

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

(C) 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

(D) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

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

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

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

(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.

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

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

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

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

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

(2) ***Failure to Sign.*** Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.

(3) ***Sanction for Improper Certification.*** If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

COMMITTEE NOTE

The language of Rule 26 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout

the rules. These changes are intended to be stylistic only.

Former Rule 26(a)(5) served as an index of the discovery methods provided by later rules. It was deleted as redundant. Deletion does not affect the right to pursue discovery in addition to disclosure.

Former Rule 26(b)(1) began with a general statement of the scope of discovery that appeared to function as a preface to each of the five numbered paragraphs that followed. This preface has been shifted to the text of paragraph (1) because it does not accurately reflect the limits embodied in paragraphs (2), (3), or (4), and because paragraph (5) does not address the scope of discovery.

The reference to discovery of "books" in former Rule 26(b)(1) was deleted to achieve consistent expression throughout the discovery rules. Books remain a proper subject of discovery.

Amended Rule 26(b)(3) states that a party may obtain a copy of the party's own previous statement "on request." Former Rule 26(b)(3) expressly made the request procedure available to a nonparty witness, but did not describe the procedure to be used by a party. This apparent gap is closed by adopting the request procedure, which ensures that a party need not invoke Rule 34 to obtain a copy of the party's own statement.

Rule 26(e) stated the duty to supplement or correct a disclosure or discovery response "to include information thereafter acquired." This apparent limit is not reflected in practice; parties recognize the duty to supplement or correct by providing information that was not originally provided although it was available at the time of the initial disclosure or response. These words are deleted to reflect the actual meaning of the present rule.

Former Rule 26(e) used different phrases to describe the time to supplement or correct a disclosure or discovery response. Disclosures were to be supplemented "at appropriate intervals." A prior discovery response must be "seasonably * * * amend[ed]." The fine distinction between these phrases has not been observed in practice. Amended Rule 26(e)(1)(A) uses the same phrase for disclosures and discovery responses. The party must supplement or correct "in a timely manner."

Former Rule 26(g)(1) did not call for striking an unsigned disclosure. The omission was an obvious drafting oversight. Amended Rule 26(g)(2) includes disclosures in the list of matters that the court must strike unless a signature is provided "promptly * * * after being called to the attorney's or party's attention."

Former Rule 26(b)(2)(A) referred to a "good faith" argument to extend existing law. Amended Rule 26(b)(1)(B)(i) changes this reference to a "nonfrivolous" argument to achieve consistency with Rule 11(b)(2).

Rule 27. Depositions before Action or Pending Appeal	Rule 27. Depositions to Perpetuate Testimony
(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.	**(a) Before an Action Is Filed.** **(1)** ***Petition.*** A person who wants to perpetuate testimony about any matter cognizable in a United States court may file a verified petition in the district court for the district where any expected adverse party resides. The petition must ask for an order authorizing the petitioner to depose the named persons in order to perpetuate their testimony. The petition must be titled in the petitioner's name and must show: **(A)** that the petitioner expects to be a party to an action cognizable in a United States court but cannot presently bring it or cause it to be brought; **(B)** the subject matter of the expected action and the petitioner's interest; **(C)** the facts that the petitioner wants to establish by the proposed testimony and the reasons to perpetuate it; **(D)** the names or a description of the persons whom the petitioner expects to be adverse parties and their addresses, so far as known; and **(E)** the name, address, and expected substance of the testimony of each deponent.

(2) Notice and Service. The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least 20 days before the date of hearing the notice shall be served either within or without the district or state in the manner provided in Rule 4(d) for service of summons; but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided in Rule 4(d), an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the deponent. If any expected adverse party is a minor or incompetent the provisions of Rule 17(c) apply.	**(2)** ***Notice and Service.*** At least 20 days before the hearing date, the petitioner must serve each expected adverse party with a copy of the petition and a notice stating the time and place of the hearing. The notice may be served either inside or outside the district or state in the manner provided in Rule 4. If that service cannot be made with reasonable diligence on an expected adverse party, the court may order service by publication or otherwise. The court must appoint an attorney to represent persons not served in the manner provided in Rule 4 and to cross-examine the deponent if an unserved person is not otherwise represented. If any expected adverse party is a minor or is incompetent, Rule 17(c) applies.
(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).	**(3)** ***Order and Examination.*** If satisfied that perpetuating the testimony may prevent a failure or delay of justice, the court must issue an order that designates or describes the persons whose depositions may be taken, specifies the subject matter of the examinations, and states whether the depositions will be taken orally or by written interrogatories. The depositions may then be taken under these rules, and the court may issue orders like those authorized by Rules 34 and 35. A reference in these rules to the court where an action is pending means, for purposes of this rule, the court where the petition for the deposition was filed. **(4)** ***Using the Deposition.*** A deposition to perpetuate testimony may be used under Rule 32(a) in any later-filed district-court action involving the same subject matter if the deposition either was taken under these rules or, although not so taken, would be admissible in evidence in the courts of the state where it was taken.

(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.	**(b) Pending Appeal.** **(1)** ***In General.*** The court where a judgment has been rendered may, if an appeal has been taken or may still be taken, permit a party to depose witnesses to perpetuate their testimony for use in the event of further proceedings in that court. **(2)** ***Motion.*** The party who wants to perpetuate testimony may move for leave to take the depositions, on the same notice and service as if the action were pending in the district court. The motion must show: **(A)** the name, address, and expected substance of the testimony of each deponent; and **(B)** the reasons for perpetuating the testimony. **(3)** ***Court Order.*** If the court finds that perpetuating the testimony may prevent a failure or delay of justice, the court may permit the depositions to be taken and may issue orders like those authorized by Rules 34 and 35. The depositions may be taken and used as any other deposition taken in a pending district-court action.
(c) Perpetuation by Action. This rule does not limit the power of a court to entertain an action to perpetuate testimony.	**(c) Perpetuation by an Action.** This rule does not limit a court's power to entertain an action to perpetuate testimony.

COMMITTEE NOTE

The language of Rule 27 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 28. Persons Before Whom Depositions May Be Taken	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.	**(a) Within the United States.** **(1)** ***In General.*** Within the United States or a territory or insular possession subject to United States jurisdiction, a deposition must be taken before: **(A)** an officer authorized to administer oaths either by federal law or by the law in the place of examination; or **(B)** a person appointed by the court where the action is pending to administer oaths and take testimony. **(2)** ***Definition of "Officer."*** The term "officer" in Rules 30, 31, and 32 includes a person appointed by the court under this rule or designated by the parties under Rule 29(a).
(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.	**(b) In a Foreign Country.** **(1)** ***In General.*** A deposition may be taken in a foreign country: **(A)** under an applicable treaty or convention; **(B)** under a letter of request, whether or not captioned a "letter rogatory"; **(C)** on notice, before a person authorized to administer oaths either by federal law or by the law in the place of examination; or **(D)** before a person commissioned by the court to administer any necessary oath and take testimony. **(2)** ***Issuing a Letter of Request or a Commission.*** A letter of request, a commission, or both may be issued: **(A)** on appropriate terms after an application and notice of it; and **(B)** without a showing that taking the deposition in another manner is impracticable or inconvenient. **(3)** ***Form of a Request, Notice, or Commission.*** When a letter of request or any other device is used according to a treaty or convention, it must be captioned in the form prescribed by that treaty or convention. A letter of request may be addressed "To the Appropriate Authority in [name of country]." A deposition notice or a commission must designate by name or descriptive title the person before whom the deposition is to be taken. **(4)** ***Letter of Request — Admitting Evidence.*** 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.

(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.	**(c) Disqualification.** A deposition must not be taken before a person who is any party's relative, employee, or attorney; who is related to or employed by any party's attorney; or who is financially interested in the action.

COMMITTEE NOTE

The language of Rule 28 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 29. Stipulations Regarding Discovery Procedure	Rule 29. Stipulations About 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.	Unless the court orders otherwise, the parties may stipulate that: **(a)** a deposition may be taken before any person, at any time or place, on any notice, and in the manner specified — in which event it may be used in the same way as any other deposition; and **(b)** other procedures governing or limiting discovery be modified — but a stipulation extending the time for any form of discovery must have court approval if it would interfere with the time set for completing discovery, for hearing a motion, or for trial.

COMMITTEE NOTE

The language of Rule 29 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 30. Depositions Upon Oral Examination	Rule 30. Depositions by 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.	**(a) When a Deposition May Be Taken.** **(1)** ***Without Leave.*** A party may, by oral questions, depose any person, including a party, without leave of court except as provided in Rule 30(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45. **(2)** ***With Leave.*** A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(2): **(A)** if the parties have not stipulated to the deposition and: **(i)** the deposition would result in more than 10 depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants; **(ii)** the deponent has already been deposed in the case; or **(iii)** the party seeks to take the deposition before the time specified in Rule 26(d), unless the party certifies in the notice, with supporting facts, that the deponent is expected to leave the United States and be unavailable for examination in this country after that time; or **(B)** if the deponent is confined in prison.
(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.	**(b) Notice of the Deposition; Other Formal Requirements.** **(1)** ***Notice in General.*** A party who wants to depose a person by oral questions must give reasonable written notice to every other party. The notice must state the time and place of the deposition and, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs. **(2)** ***Producing Documents.*** If a subpoena duces tecum is to be served on the deponent, the materials designated for production, as set out in the subpoena, must be listed in the notice or in an attachment. The notice to a party deponent may be accompanied by a request under Rule 34 to produce documents and tangible things at the deposition.

(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.	**(3)** ***Method of Recording.*** **(A)** *Method Stated in the Notice.* The party who notices the deposition must state in the notice the method for recording the testimony. Unless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The noticing party bears the recording costs. Any party may arrange to transcribe a deposition that was taken nonstenographically. **(B)** *Additional Method.* With prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice. That party bears the expense of the additional record or transcript unless the court orders otherwise. **(4)** ***By Remote Means.*** The parties may stipulate — or the court may on motion order — that a deposition be taken by telephone or other remote means. For the purpose of this rule and Rules 28(a), 37(a)(2), and 37(b)(1), the deposition takes place where the deponent answers the questions.
(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.	**(5)** ***Officer's Duties.*** **(A)** *Before the Deposition.* Unless the parties stipulate otherwise, a deposition must be conducted before an officer appointed or designated under Rule 28. The officer must begin the deposition with an on-the-record statement that includes: **(i)** the officer's name and business address; **(ii)** the date, time, and place of the deposition; **(iii)** the deponent's name; **(iv)** the officer's administration of the oath or affirmation to the deponent; and **(v)** the identity of all persons present. **(B)** *Conducting the Deposition; Avoiding Distortion.* If the deposition is recorded nonstenographically, the officer must repeat the items in Rule 30(b)(5)(A)(i)-(iii) at the beginning of each unit of the recording medium. The deponent's and attorneys' appearance or demeanor must not be distorted through recording techniques. **(C)** *After the Deposition.* At the end of a deposition, the officer must state on the record that the deposition is complete and must set out any stipulations made by the attorneys about custody of the transcript or recording and of the exhibits, or about any other pertinent matters.

(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 non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. 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.	**(6)** ***Notice or Subpoena Directed to an Organization.*** In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, or a governmental agency and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.
(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.	**(c) Examination and Cross-Examination; Record of the Examination; Objections; Written Questions.** **(1)** ***Examination and Cross-Examination.*** The examination and cross-examination of a deponent proceed as they would at trial under the Federal Rules of Evidence, except Rules 103 and 615. After putting the deponent under oath or affirmation, the officer must record the testimony by the method designated under Rule 30(b)(3)(A). The testimony must be recorded by the officer personally or by a person acting in the presence and under the direction of the officer. **(2)** ***Objections.*** An objection at the time of the examination — whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition — must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3). **(3)** ***Participating Through Written Questions.*** Instead of participating in the oral examination, a party may serve written questions in a sealed envelope on the party noticing the deposition, who must deliver them to the officer. The officer must ask the deponent those questions 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.	**(d) Duration; Sanction; Motion to Terminate or Limit.** **(1)** ***Duration.*** Unless otherwise stipulated or ordered by the court, a deposition is limited to 1 day of 7 hours. The court must allow additional time consistent with Rule 26(b)(2) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination. **(2)** ***Sanction.*** The court may impose an appropriate sanction — including the reasonable expenses and attorney's fees incurred by any party — on a person who impedes, delays, or frustrates the fair examination of the deponent.
(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.	**(3)** ***Motion to Terminate or Limit.*** **(A)** *Grounds.* At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. The motion may be filed in the court where the action is pending or the deposition is being taken. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order. **(B)** *Order.* The court may order that the deposition be terminated or may limit its scope and manner as provided in Rule 26(c). If terminated, the deposition may be resumed only by order of the court where the action is pending. **(C)** *Award of Expenses.* Rule 37(a)(5) applies to the award of expenses.

(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.	**(e) Review by the Witness; Changes.** **(1)** ***Review; Statement of Changes.*** On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which: **(A)** to review the transcript or recording; and **(B)** if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them. **(2)** ***Changes Indicated in the Officer's Certificate.*** The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

(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.	**(f) Certification and Delivery; Exhibits; Copies of the Transcript or Recording; Filing.** **(1)** ***Certification and Delivery.*** The officer must certify in writing that the witness was duly sworn and that the deposition accurately records the witness's testimony. The certificate must accompany the record of the deposition. Unless the court orders otherwise, the officer must seal the deposition in an envelope or package bearing the title of the action and marked "Deposition of [witness's name]" and must promptly send it to the attorney who arranged for the transcript or recording. The attorney must store it under conditions that will protect it against loss, destruction, tampering, or deterioration. **(2)** ***Documents and Tangible Things.*** **(A)** *Originals and Copies.* Documents and tangible things produced for inspection during a deposition must, on a party's request, be marked for identification and attached to the deposition. Any party may inspect and copy them. But if the person who produced them wants to keep the originals, the person may: **(i)** offer copies to be marked, attached to the deposition, and then used as originals — after giving all parties a fair opportunity to verify the copies by comparing them with the originals; or **(ii)** give all parties a fair opportunity to inspect and copy the originals after they are marked — in which event the originals may be used as if attached to the deposition. **(B)** *Order Regarding the Originals.* Any party may move for an order that the originals be attached to the deposition 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.	**(3)** ***Copies of the Transcript or Recording.*** Unless otherwise stipulated or ordered by the court, the officer must retain the stenographic notes of a deposition taken stenographically or a copy of the recording of a deposition taken by another method. When paid reasonable charges, the officer must furnish a copy of the transcript or recording to any party or the deponent. **(4)** ***Notice of Filing.*** A party who files the deposition must promptly notify all other parties of the filing.

(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.	**(g) Failure to Attend a Deposition or Serve a Subpoena; Expenses.** A party who, expecting a deposition to be taken, attends in person or by an attorney may recover reasonable expenses for attending, including attorney's fees, if the noticing party failed to: **(1)** attend and proceed with the deposition; or **(2)** serve a subpoena on a nonparty deponent, who consequently did not attend.

COMMITTEE NOTE

The language of Rule 30 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 31. Depositions Upon Written Questions	Rule 31. Depositions by 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).	**(a) When a Deposition May Be Taken.** **(1)** ***Without Leave.*** A party may, by written questions, depose any person, including a party, without leave of court except as provided in Rule 31(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45. **(2)** ***With Leave.*** A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(2): **(A)** if the parties have not stipulated to the deposition and: **(i)** the deposition would result in more than 10 depositions being taken under this rule or Rule 30 by the plaintiffs, or by the defendants, or by the third-party defendants; **(ii)** the deponent has already been deposed in the case; or **(iii)** the party seeks to take a deposition before the time specified in Rule 26(d); or **(B)** if the deponent is confined in prison.
(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.	**(3)** ***Service; Required Notice.*** A party who wants to depose a person by written questions must serve them on every other party, with a notice stating, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs. The notice must also state the name or descriptive title and the address of the officer before whom the deposition will be taken. **(4)** ***Questions Directed to an Organization.*** A public or private corporation, a partnership, an association, or a governmental agency may be deposed by written questions in accordance with Rule 30(b)(6). **(5)** ***Questions from Other Parties.*** Any questions to the deponent from other parties must be served on all parties as follows: cross-questions, within 14 days after being served with the notice and direct questions; redirect questions, within 7 days after being served with cross-questions; and recross-questions, within 7 days after being served with redirect questions. The court may, for good cause, extend or shorten these times.

(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.	**(b) Delivery to the Officer; Officer's Duties.** The party who noticed the deposition must deliver to the officer a copy of all the questions served and of the notice. The officer must promptly proceed in the manner provided in Rule 30(c), (e), and (f) to: **(1)** take the deponent's testimony in response to the questions; **(2)** prepare and certify the deposition; and **(3)** send it to the party, attaching a copy of the questions and of the notice.
(c) Notice of Filing. When the deposition is filed the party taking it shall promptly give notice thereof to all other parties.	**(c) Notice of Filing.** A party who files the deposition must promptly notify all other parties of the filing.

COMMITTEE NOTE

The language of Rule 31 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 32. Use of Depositions in Court Proceedings	Rule 32. Using 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:	**(a) Using Depositions.** **(1)** ***In General.*** At a hearing or trial, all or part of a deposition may be used against a party on these conditions: **(A)** the party was present or represented at the taking of the deposition or had reasonable notice of it; **(B)** it is used to the extent it would be admissible under the Federal Rules of Evidence if the deponent were present and testifying; and **(C)** the use is allowed by Rule 32(a)(2) through (8).
(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.	**(2)** ***Impeachment and Other Uses.*** Any party may use a deposition to contradict or impeach the testimony given by the deponent as a witness, or for any other purpose allowed by the Federal Rules of Evidence. **(3)** ***Deposition of Party, Agent, or Designee.*** An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4).
(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.	**(4)** ***Unavailable Witness.*** A party may use for any purpose the deposition of a witness, whether or not a party, if the court finds: **(A)** that the witness is dead; **(B)** that the witness is more than 100 miles from the place of hearing or trial or is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition; **(C)** that the witness cannot attend or testify because of age, illness, infirmity, or imprisonment; **(D)** that the party offering the deposition could not procure the witness's attendance by subpoena; or **(E)** on motion and notice, that exceptional circumstances make it desirable — in the interest of justice and with due regard to the importance of live testimony in open court — to permit 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.	**(5)** ***Limitations on Use.*** **(A)** *Deposition Taken on Short Notice.* A deposition must not be used against a party who, having received less than 11 days' notice of the deposition, promptly moved for a protective order under Rule 26(c)(1)(B) requesting that it not be taken or be taken at a different time or place — and this motion was still pending when the deposition was taken. **(B)** *Unavailable Deponent; Party Could Not Obtain an Attorney.* A deposition taken without leave of court under the unavailability provision of Rule 30(a)(2)(A)(iii) must not be used against a party who shows that, when served with the notice, it could not, despite diligent efforts, obtain an attorney to represent it at the deposition.
(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.	**(6)** ***Using Part of a Deposition.*** If a party offers in evidence only part of a deposition, an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part introduced, and any party may itself introduce any other parts. **(7)** ***Substituting a Party.*** Substituting a party under Rule 25 does not affect the right to use a deposition previously taken. **(8)** ***Deposition Taken in an Earlier Action.*** A deposition lawfully taken and, if required, filed in any federal- or state-court action may be used in a later action involving the same subject matter between the same parties, or their representatives or successors in interest, to the same extent as if taken in the later action. A deposition previously taken may also be used as allowed 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.	**(b) Objections to Admissibility.** Subject to Rules 28(b) and 32(d)(3), an objection may be made at a hearing or trial to the admission of any deposition testimony that would be inadmissible if the witness were 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.	**(c) Form of Presentation.** Unless the court orders otherwise, a party must provide a transcript of any deposition testimony the party offers, but may provide the court with the testimony in nontranscript form as well. On any party's request, deposition testimony offered in a jury trial for any purpose other than impeachment must be presented in nontranscript 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 disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) As to Taking of Deposition.

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

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

(d) Waiver of Objections.

(1) ***To the Notice.*** An objection to an error or irregularity in a deposition notice is waived unless promptly served in writing on the party giving the notice.

(2) ***To the Officer's Qualification.*** An objection based on disqualification of the officer before whom a deposition is to be taken is waived if not made:

(A) before the deposition begins; or

(B) promptly after the basis for disqualification becomes known or, with reasonable diligence, could have been known.

(3) ***To the Taking of the Deposition.***

(A) *Objection to Competence, Relevance, or Materiality.* An objection to a deponent's competence — or to the competence, relevance, or materiality of testimony — is not waived by a failure to make the objection before or during the deposition, unless the ground for it might have been corrected at that time.

(B) *Objection to an Error or Irregularity.* An objection to an error or irregularity at an oral examination is waived if:

(i) it relates to the manner of taking the deposition, the form of a question or answer, the oath or affirmation, a party's conduct, or other matters that might have been corrected at that time; and

(ii) it is not timely made during 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.	**(C)** *Objection to a Written Question.* An objection to the form of a written question under Rule 31 is waived if not served in writing on the party submitting the question within the time for serving responsive questions or, if the question is a recross-question, within 5 days after being served with it.
(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.	**(4)** ***To Completing and Returning the Deposition.*** An objection to how the officer transcribed the testimony — or prepared, signed, certified, sealed, endorsed, sent, or otherwise dealt with the deposition — is waived unless a motion to suppress is made promptly after the error or irregularity becomes known or, with reasonable diligence, could have been known.

COMMITTEE NOTE

The language of Rule 32 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 32(a) applied "[a]t the trial or upon the hearing of a motion or an interlocutory proceeding." The amended rule describes the same events as "a hearing or trial."

The final paragraph of former Rule 32(a) allowed use in a later action of a deposition "lawfully taken and duly filed in the former action." Because of the 2000 amendment of Rule 5(d), many depositions are not filed. Amended Rule 32(a)(8) reflects this change by excluding use of an unfiled deposition only if filing was required in the former action.

Rule 33. Interrogatories to Parties	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).	**(a) In General.** **(1)** ***Number.*** Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts. Leave to serve additional interrogatories may be granted to the extent consistent with Rule 26(b)(2). **(2)** ***Scope.*** An interrogatory may relate to any matter that may be inquired into under Rule 26(b). An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time.
(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.	**(b) Answers and Objections.** **(1)** ***Responding Party.*** The interrogatories must be answered: **(A)** by the party to whom they are directed; or **(B)** if that party is a public or private corporation, a partnership, an association, or a governmental agency, by any officer or agent, who must furnish the information available to the party. **(2)** ***Time to Respond.*** The responding party must serve its answers and any objections within 30 days after being served with the interrogatories. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court. **(3)** ***Answering Each Interrogatory.*** Each interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath. **(4)** ***Objections.*** The grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure. **(5)** ***Signature.*** The person who makes the answers must sign them, and the attorney who objects must sign any objections.

(c) Scope; Use at Trial. Interrogatories may relate to any matters which can be inquired into under Rule 26(b)(1), and the answers may be used to the extent permitted by the rules of evidence. An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time.	**(c) Use.** An answer to an interrogatory may be used to the extent allowed by the Federal Rules of Evidence.
(d) Option to Produce Business Records. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.	**(d) Option to Produce Business Records.** If the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records, and if the burden of deriving or ascertaining the answer will be substantially the same for either party, the responding party may answer by: **(1)** specifying the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could; and **(2)** giving the interrogating party a reasonable opportunity to examine and audit the records and to make copies, compilations, abstracts, or summaries.

COMMITTEE NOTE

The language of Rule 33 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The final sentence of former Rule 33(a) was a redundant cross-reference to the discovery moratorium provisions of Rule 26(d). Rule 26(d) is now familiar, obviating any need to carry forward the redundant cross-reference.

Former Rule 33(b)(5) was a redundant reminder of Rule 37(a) procedure that is omitted as no longer useful.

Former Rule 33(c) stated that an interrogatory "is not necessarily objectionable merely because an answer * * * involves an opinion or contention * * *." "[I]s not necessarily" seemed to imply that the interrogatory might be objectionable merely for this reason. This implication has been ignored in practice. Opinion and contention interrogatories are used routinely. Amended Rule 33(a)(2) embodies the current meaning of Rule 33 by omitting "necessarily."

Rule 34. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes	Rule 34. Producing Documents and Tangible Things, or Entering onto 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 and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).	**(a) In General.** A party may serve on any other party a request within the scope of Rule 26(b): **(1)** to produce and permit the requesting party or its representative to inspect and copy the following items in the responding party's possession, custody, or control: **(A)** any designated documents — including writings, drawings, graphs, charts, photographs, recordings, and other data compilations from which information can be obtained either directly or after the responding party translates them into a reasonably usable form; or **(B)** any tangible things — and to test or sample these things; or **(2)** to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.
(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. 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, in which event the reasons for the objection shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested. A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.	**(b) Procedure.** **(1)** ***Contents of the Request.*** The request must: **(A)** describe with reasonable particularity each item or category of items to be inspected; and **(B)** specify a reasonable time, place, and manner for the inspection and for performing the related acts. **(2)** ***Responses and Objections.*** **(A)** *Time to Respond.* The party to whom the request is directed must respond in writing within 30 days after being served. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court. **(B)** *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection to the request, including the reasons. **(C)** *Objections.* An objection to part of a request must specify the part and permit inspection of the rest. **(D)** *Producing the Documents.* A party producing documents for inspection must produce them as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request.

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

COMMITTEE NOTE

The language of Rule 34 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The final sentence in the first paragraph of former Rule 34(b) was a redundant cross-reference to the discovery moratorium provisions of Rule 26(d). Rule 26(d) is now familiar, obviating any need to carry forward the redundant cross-reference.

The redundant reminder of Rule 37(a) procedure in the second paragraph of former Rule 34(b) is omitted as no longer useful.

Rule 35. Physical and Mental Examinations of Persons	Rule 35. Physical and Mental Examinations
(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.	**(a) Order for an Examination.** **(1)** ***In General.*** The court where the action is pending may order a party whose mental or physical condition — including blood group — is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. The court has the same authority to order a party to produce for examination a person who is in its custody or under its legal control. **(2)** ***Motion and Notice; Contents of the Order.*** The order: **(A)** may be made only on motion for good cause and on notice to all parties and the person to be examined; and **(B)** must specify the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it.
(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 findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that the party is unable to obtain it.	**(b) Examiner's Report.** **(1)** ***Request by the Party or Person Examined.*** The party who moved for the examination must, on request, deliver to the requester a copy of the examiner's report, together with like reports of all earlier examinations of the same condition. The request may be made by the party against whom the examination order was issued or by the person examined. **(2)** ***Contents.*** The examiner's report must be in writing and must set out in detail the examiner's findings, including diagnoses, conclusions, and the results of any tests. **(3)** ***Request by the Moving Party.*** After delivering the reports, the party who moved for the examination may request — and is entitled to receive — from the party against whom the examination order was issued like reports of all earlier or later examinations of the same condition. But those reports need not be delivered by the party with custody or control of the person examined if the party shows that it could not obtain them.

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.	**(4)** ***Waiver of Privilege.*** By requesting and obtaining the examiner's report, or by deposing the examiner, the party examined waives any privilege it may have — in that action or any other action involving the same controversy — concerning testimony about all examinations of the same condition. **(5)** ***Failure to Deliver a Report.*** The court on motion may order — on just terms — that a party deliver the report of an examination. If the report is not provided, the court may exclude the examiner's testimony at trial. **(6)** ***Scope.*** This subdivision (b) applies also to an examination made by the parties' agreement, unless the agreement states otherwise. This subdivision does not preclude obtaining an examiner's report or deposing an examiner under other rules.

COMMITTEE NOTE

The language of Rule 35 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 36. Requests for Admission	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.	**(a) Scope and Procedure.** **(1)** ***Scope.*** A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(1) relating to: **(A)** facts, the application of law to fact, or opinions about either; and **(B)** the genuineness of any described documents. **(2)** ***Form; Copy of a Document.*** Each matter must be separately stated. A request to admit the genuineness of a document must be accompanied by a copy of the document unless it is, or has been, otherwise furnished or made available for inspection and copying. **(3)** ***Time to Respond; Effect of Not Responding.*** A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney. A shorter or longer time for responding may be stipulated to under Rule 29 or be ordered by the court. **(4)** ***Answer.*** If a matter is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it. A denial must fairly respond to the substance of the matter; and when good faith requires that a party qualify an answer or deny only a part of a matter, the answer must specify the part admitted and qualify or deny the rest. The answering party may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny.
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.	**(5)** ***Objections.*** The grounds for objecting to a request must be stated. A party must not object solely on the ground that the request presents a genuine issue for trial. **(6)** ***Motion Regarding the Sufficiency of an Answer or Objection.*** The requesting party may move to determine the sufficiency of an answer or objection. Unless the court finds an objection justified, it must order that an answer be served. On finding that an answer does not comply with this rule, the court may order either that the matter is admitted or that an amended answer be served. The court may defer its final decision until a pretrial conference or a specified time before trial. Rule 37(a)(5) applies to an award of expenses.

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

COMMITTEE NOTE

The language of Rule 36 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The final sentence of the first paragraph of former Rule 36(a) was a redundant cross-reference to the discovery moratorium provisions of Rule 26(d). Rule 26(d) is now familiar, obviating any need to carry forward the redundant cross-reference. The redundant reminder of Rule 37(c) in the second paragraph was likewise omitted.

Rule 37. Failure to Make Disclosure or Cooperate in Discovery; Sanctions	Rule 37. Failure to Make Disclosures or to 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.	**(a) Motion for an Order Compelling Disclosure or Discovery.** **(1)** ***In General.*** On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. 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 disclosure or discovery in an effort to obtain it without court action. **(2)** ***Appropriate Court.*** A motion for an order to a party must be made in the court where the action is pending. A motion for an order to a nonparty must be made in the court where the discovery is or will be taken. **(3)** ***Specific Motions.*** **(A)** *To Compel Disclosure.* 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.
(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.	**(B)** *To Compel a Discovery Response.* A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if: **(i)** a deponent fails to answer a question asked under Rule 30 or 31; **(ii)** a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a)(4); **(iii)** a party fails to answer an interrogatory submitted under Rule 33; or **(iv)** a party fails to respond that inspection will be permitted — or fails to permit inspection — as requested under Rule 34. **(C)** *Related to a Deposition.* When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order. **(4)** ***Evasive or Incomplete Disclosure, Answer, or Response.*** For purposes of this subdivision (a), an evasive or incomplete disclosure, answer, or response must 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.

(5) ***Payment of Expenses; Protective Orders.***

(A) *If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing).* If the motion is granted — or if the disclosure or requested discovery is provided after the motion was filed — the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if:

(i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;

(ii) the opposing party's nondisclosure, response, or objection was substantially justified; or

(iii) other circumstances make an award of expenses unjust.

(B) *If the Motion Is Denied.* If the motion is denied, the court may issue any protective order authorized under Rule 26(c) and must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.

(C) *If the Motion Is Granted in Part and Denied in Part.* If the motion is granted in part and denied in part, the court may issue any protective order authorized under Rule 26(c) and may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion.

(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;	**(b) Failure to Comply with a Court Order.** **(1)** ***Sanctions in the District Where the Deposition Is Taken.*** If the court where the discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court. **(2)** ***Sanctions in the District Where the Action Is Pending.*** **(A)** *For Not Obeying a Discovery Order.* If a party or a party's officer, director, or managing agent — or a witness designated under Rule 30(b)(6) or 31(a)(4) — fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following: **(i)** directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims; **(ii)** prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence; **(iii)** striking pleadings in whole or in part; **(iv)** staying further proceedings until the order is obeyed; **(v)** dismissing the action or proceeding in whole or in part; **(vi)** rendering a default judgment against the disobedient party; or **(vii)** treating as contempt of court the failure to obey any order 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.	**(B)** *For Not Producing a Person for Examination.* If a party fails to comply with an order under Rule 35(a) requiring it to produce another person for examination, the court may issue any of the orders listed in Rule 37(b)(2)(A)(i)-(vi), unless the disobedient party shows that it cannot produce the other person. **(C)** *Payment of Expenses.* Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or 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.

(c) Failure to Disclose, to Supplement an Earlier Response, or to Admit.

(1) ***Failure to Disclose or Supplement.*** If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

(A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;

(B) may inform the jury of the party's failure; and

(C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).

(2) ***Failure to Admit.*** If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. The court must so order unless:

(A) the request was held objectionable under Rule 36(a);

(B) the admission sought was of no substantial importance;

(C) the party failing to admit had a reasonable ground to believe that it 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.	**(d) Party's Failure to Attend Its Own Deposition, Serve Answers to Interrogatories, or Respond to a Request for Inspection.** **(1)** ***In General.*** **(A)** *Motion; Grounds for Sanctions.* The court where the action is pending may, on motion, order sanctions if: **(i)** a party or a party's officer, director, or managing agent — or a person designated under Rule 30(b)(6) or 31(a)(4) — fails, after being served with proper notice, to appear for that person's deposition; or **(ii)** a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response. **(B)** *Certification.* A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action.
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).	**(2)** ***Unacceptable Excuse for Failing to Act.*** A failure described in Rule 37(d)(1)(A) is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c). **(3)** ***Types of Sanctions.*** Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)-(vi). Instead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.
(e) [Abrogated.]	
(f) [Repealed.]	

(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.	**(e) Failure to Participate in Framing a Discovery Plan.** If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f), the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

COMMITTEE NOTE

The language of Rule 37 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.

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

COMMITTEE NOTE

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

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

COMMITTEE NOTE

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

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

COMMITTEE NOTE

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

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

(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.	**(b) Involuntary Dismissal; Effect.** If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule — except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19 — operates as an adjudication on the merits.
(c) Dismissal of Counterclaim, Cross-Claim, or Third-Party Claim. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (1) of subdivision (a) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.	**(c) Dismissing a Counterclaim, Crossclaim, or Third-Party Claim.** This rule applies to a dismissal of any counterclaim, crossclaim, or third-party claim. A claimant's voluntary dismissal under Rule 41(a)(1)(A)(i) must be made: **(1)** before a responsive pleading is served; or **(2)** if there is no responsive pleading, before evidence is introduced at a hearing or trial.
(d) Costs of Previously-Dismissed Action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.	**(d) Costs of a Previously Dismissed Action.** If a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant, the court: **(1)** may order the plaintiff to pay all or part of the costs of that previous action; and **(2)** may stay the proceedings until the plaintiff has complied.

COMMITTEE NOTE

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

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

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

COMMITTEE NOTE

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

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

COMMITTEE NOTE

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

Rule 44. Proof of Official Record	Rule 44. Proving an Official Record
(a) Authentication. **(1) Domestic.** An official record kept within the United States, or any state, district, or commonwealth, or within a territory subject to the administrative or judicial jurisdiction of the United States, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by the officer's deputy, and accompanied by a certificate that such officer has the custody. The certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of the officer's office.	**(a) Means of Proving.** **(1)** ***Domestic Record.*** Each of the following evidences an official record — or an entry in it — that is otherwise admissible and is kept within the United States, any state, district, or commonwealth, or any territory subject to the administrative or judicial jurisdiction of the United States: **(A)** an official publication of the record; or **(B)** a copy attested by the officer with legal custody of the record — or by the officer's deputy — and accompanied by a certificate that the officer has custody. The certificate must be made under seal: **(i)** by a judge of a court of record in the district or political subdivision where the record is kept; or **(ii)** by any public officer with a seal of office and with official duties in the district or political subdivision where the record is kept.
(2) Foreign. A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof; or a copy thereof, attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position (i) of the attesting person, or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation.	**(2)** ***Foreign Record.*** **(A)** *In General.* Each of the following evidences a foreign official record — or an entry in it — that is otherwise admissible: **(i)** an official publication of the record; or **(ii)** the record — or a copy — that is attested by an authorized person and is accompanied either by a final certification of genuineness or by a certification under a treaty or convention to which the United States and the country where the record is located are parties.

A final certification may be made by a secretary of embassy or legation, consul general, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (i) admit an attested copy without final certification or (ii) permit the foreign official record to be evidenced by an attested summary with or without a final certification. The final certification is unnecessary if the record and the attestation are certified as provided in a treaty or convention to which the United States and the foreign country in which the official record is located are parties.	**(B)** *Final Certification of Genuineness.* A final certification must certify the genuineness of the signature and official position of the attester or of any foreign official whose certificate of genuineness relates to the attestation or is in a chain of certificates of genuineness relating to the attestation. A final certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States. **(C)** *Other Means of Proof.* If all parties have had a reasonable opportunity to investigate a foreign record's authenticity and accuracy, the court may, for good cause, either: **(i)** admit an attested copy without final certification; or **(ii)** permit the record to be evidenced by an attested summary with or without a final certification.
(b) Lack of Record. A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement, authenticated as provided in subdivision (a)(1) of this rule in the case of a domestic record, or complying with the requirements of subdivision (a)(2) of this rule for a summary in the case of a foreign record, is admissible as evidence that the records contain no such record or entry.	**(b) Lack of a Record.** A written statement that a diligent search of designated records revealed no record or entry of a specified tenor is admissible as evidence that the records contain no such record or entry. For domestic records, the statement must be authenticated under Rule 44(a)(1). For foreign records, the statement must comply with (a)(2)(C)(ii).
(c) Other Proof. This rule does not prevent the proof of official records or of entry or lack of entry therein by any other method authorized by law.	**(c) Other Proof.** A party may prove an official record — or an entry or lack of an entry in it — by any other method authorized by law.

COMMITTEE NOTE

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

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

COMMITTEE NOTE

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

Rule 45. Subpoena	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 and copying of designated books, documents 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 may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately.	**(a) In General.** **(1)** ***Form and Contents.*** **(A)** *Requirements — In General.* Every subpoena must: **(i)** state the court from which it issued; **(ii)** state the title of the action, the court in which it is pending, and its civil-action number; **(iii)** command each person to whom it is directed to do the following at a specified time and place: attend and testify; produce and permit the inspection and copying of designated documents or tangible things in that person's possession, custody, or control; or permit the inspection of premises; and **(iv)** set out the text of Rule 45(c) and (d). **(B)** *Command to Attend a Deposition — Notice of the Recording Method.* A subpoena commanding attendance at a deposition must state the method for recording the testimony. **(C)** *Command to Produce Materials or Permit Inspection.* A command to produce documents or tangible things or to permit the inspection of premises may be included in a subpoena commanding attendance at a deposition, hearing, or trial, or may be set out in a separate subpoena.
(2) A subpoena commanding attendance at a trial or hearing shall issue from the court for the district in which the hearing or trial is to be held. A subpoena for attendance at a deposition shall issue from the court for the district designated by the notice of deposition as the district in which the deposition is to be taken. If separate from a subpoena commanding the attendance of a person, a subpoena for production or inspection shall issue from the court for the district in which the production or inspection is to be made.	**(2)** ***Issued from Which Court.*** A subpoena must issue as follows: **(A)** for attendance at a hearing or trial, from the court for the district where the hearing or trial is to be held; **(B)** for attendance at a deposition, from the court for the district where the deposition is to be taken; and **(C)** for production or inspection, if separate from a subpoena commanding a person's attendance, from the court for the district where the production or inspection is to be made.

(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.	**(3)** ***Issued by Whom.*** The clerk must issue a subpoena, signed but otherwise in blank, to a party who requests it. That party must complete it before service. An attorney also may issue and sign a subpoena as an officer of: **(A)** a court in which the attorney is authorized to practice; or **(B)** a court for a district where a deposition is to be taken or production is to be made, if the attorney is authorized to practice in the court where the action is pending.
(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).	**(b) Service.** **(1)** ***By Whom; Tendering Fees; Serving a Copy of Certain Subpoenas.*** Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies. If the subpoena commands the production of documents or tangible things or the inspection of premises before trial, then before it is served, a notice must be served on each party.

(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, or inspection 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, or inspection 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.	**(2)** ***Service in the United States.*** Subject to Rule 45(c)(3)(A)(ii), a subpoena may be served at any place: **(A)** within the district of the issuing court; **(B)** outside that district but within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection; **(C)** within the state of the issuing court if a state statute or court rule allows service at that place of a subpoena issued by a state court of general jurisdiction sitting in the place specified for the deposition, hearing, trial, production, or inspection; or **(D)** that the court authorizes on motion and for good cause, if a federal statute so provides. **(3)** ***Service in a Foreign Country.*** 28 U.S.C. § 1783 governs issuing and serving a subpoena directed to a United States national or resident who is in a foreign country. **(4)** ***Proof of Service.*** Proving service, when necessary, requires filing with the issuing court a statement showing the date and manner of service and the names of the persons served. The statement must be certified by the server.
(c) 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.	**(c) Protecting a Person Subject to a Subpoena.** **(1)** ***Avoiding Undue Burden or Expense; Sanctions.*** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply.

(2)(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial. **(B)** Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court 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. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.	**(2)** ***Command to Produce Materials or Permit Inspection.*** **(A)** *Appearance Not Required.* A person commanded to produce documents or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial. **(B)** *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting or copying any or all of the materials or to inspecting the premises. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply: **(i)** At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production, inspection, or copying. **(ii)** Inspection and copying may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.
(3)(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, or **(iii)** requires disclosure of privileged or other protected matter and no exception or waiver applies, or **(iv)** subjects a person to undue burden.	**(3)** ***Quashing or Modifying a Subpoena.*** **(A)** *When Required.* On timely motion, the issuing court must quash or modify a subpoena that: **(i)** fails to allow a reasonable time to comply; **(ii)** requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person — except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held; **(iii)** requires disclosure of privileged or other protected matter, if no exception or waiver applies; or **(iv)** subjects a person to undue burden.

(B) 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.	**(B)** *When Permitted.* To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires: **(i)** disclosing a trade secret or other confidential research, development, or commercial information; **(ii)** disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or **(iii)** a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial. **(C)** *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party: **(i)** shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and **(ii)** ensures that the subpoenaed person will be reasonably compensated.
(d) Duties in Responding to Subpoena. **(1)** A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand. **(2)** When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.	**(d) Duties in Responding to a Subpoena.** **(1)** ***Producing Documents.*** A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand. **(2)** ***Claiming Privilege or Protection.*** A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must: **(A)** expressly make the claim; and **(B)** describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(e) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued. An adequate cause for failure to obey exists when a subpoena purports to require a non-party to attend or produce at a place not within the limits provided by clause (ii) of subparagraph (c)(3)(A).	**(e) Contempt.** The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

COMMITTEE NOTE

The language of Rule 45 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The reference to discovery of "books" in former Rule 45(a)(1)(C) was deleted to achieve consistent expression throughout the discovery rules. Books remain a proper subject of discovery.

Former Rule 45(b)(1) required "prior notice" to each party of any commanded production of documents and things or inspection of premises. Courts have agreed that notice must be given "prior" to the return date, and have tended to converge on an interpretation that requires notice to the parties before the subpoena is served on the person commanded to produce or permit inspection. That interpretation is adopted in amended Rule 45(b)(1) to give clear notice of general present practice.

The language of former Rule 45(d)(2) addressing the manner of asserting privilege is replaced by adopting the wording of Rule 26(b)(5). The same meaning is better expressed in the same words.

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

COMMITTEE NOTE

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

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

COMMITTEE NOTE

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

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

COMMITTEE NOTE

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

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

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

COMMITTEE NOTE

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

Rule 50. Judgment as a Matter of Law in Jury Trials; Alternative Motion for New Trial; Conditional Rulings	Rule 50. Judgment as a Matter of Law in a Jury Trial; Related Motion for a New Trial; Conditional Ruling
(a) Judgment as a Matter of Law. **(1)** If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue. **(2)** Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.	**(a) Judgment as a Matter of Law.** **(1)** ***In General.*** If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may: **(A)** 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 Motion for Judgment After Trial; Alternative Motion for New Trial. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment—and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may: **(1)** if a verdict was returned: **(A)** allow the judgment to stand, **(B)** order a new trial, or **(C)** direct entry of judgment as a matter of law; or **(2)** if no verdict was returned: **(A)** order a new trial, or **(B)** direct entry of judgment as a matter of law.	**(b) Renewing the Motion After Trial; Alternative Motion for a New Trial.** If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. 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 file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may: **(1)** allow judgment on the verdict, if the jury returned a verdict; **(2)** order a new trial; or **(3)** direct the entry of judgment as a matter of law.

(c) Granting Renewed Motion for Judgment as a Matter of Law; Conditional Rulings; New Trial Motion. **(1)** If the renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court. **(2)** Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered shall be filed no later than 10 days after entry of the judgment.	**(c) Granting the Renewed Motion; Conditional Ruling on a Motion for a New Trial.** **(1)** ***In General.*** If the court grants a renewed motion for judgment as a matter of law, it must also conditionally rule on any motion for a new trial by determining whether a new trial should be granted if the judgment is later vacated or reversed. The court must state the grounds for conditionally granting or denying the motion for a new trial. **(2)** ***Effect of a Conditional Ruling.*** Conditionally granting the motion for a new trial does not affect the judgment's finality; if the judgment is reversed, the new trial must proceed unless the appellate court orders otherwise. If the motion for a new trial is conditionally denied, the appellee may assert error in that denial; if the judgment is reversed, the case must proceed as the appellate court orders. **(d) Time for a Losing Party's New-Trial Motion.** Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered must be filed no later than 10 days after the entry of the judgment.
(d) Same: Denial of Motion for Judgment as a Matter of Law. If the motion for judgment as a matter of law is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.	**(e) Denying the Motion for Judgment as a Matter of Law; Reversal on Appeal.** If the court denies the motion for judgment as a matter of law, the prevailing party may, as appellee, assert grounds entitling it to a new trial should the appellate court conclude that the trial court erred in denying the motion. If the appellate court reverses the judgment, it may order a new trial, direct the trial court to determine whether a new trial should be granted, or direct the entry of judgment.

COMMITTEE NOTE

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

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

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

Rule 51. Instructions to Jury; Objections; Preserving a Claim of Error	Rule 51. Instructions to the Jury; Objections; Preserving a Claim of Error
(a) Requests. **(1)** A party may, at the close of the evidence or at an earlier reasonable time that the court directs, file and furnish to every other party written requests that the court instruct the jury on the law as set forth in the requests. **(2)** After the close of the evidence, a party may: **(A)** file requests for instructions on issues that could not reasonably have been anticipated at an earlier time for requests set under Rule 51(a)(1), and **(B)** with the court's permission file untimely requests for instructions on any issue.	**(a) Requests.** **(1)** ***Before or at the Close of the Evidence.*** At the close of the evidence or at any earlier reasonable time that the court orders, a party may file and furnish to every other party written requests for the jury instructions it wants the court to give. **(2)** ***After the Close of the Evidence.*** After the close of the evidence, a party may: **(A)** file requests for instructions on issues that could not reasonably have been anticipated by an earlier time that the court set for requests; and **(B)** with the court's permission, file untimely requests for instructions on any issue.
(b) Instructions. The court: **(1)** must inform the parties of its proposed instructions and proposed action on the requests before instructing the jury and before final jury arguments; **(2)** must give the parties an opportunity to object on the record and out of the jury's hearing to the proposed instructions and actions on requests before the instructions and arguments are delivered; and **(3)** may instruct the jury at any time after trial begins and before the jury is discharged.	**(b) Instructions.** The court: **(1)** must inform the parties of its proposed instructions and proposed action on the requests before instructing the jury and before final jury arguments; **(2)** must give the parties an opportunity to object on the record and out of the jury's hearing before the instructions and arguments are delivered; and **(3)** may instruct the jury at any time before the jury is discharged.
(c) Objections. **(1)** A party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds of the objection. **(2)** An objection is timely if: **(A)** a party that has been informed of an instruction or action on a request before the jury is instructed and before final jury arguments, as provided by Rule 51(b)(1), objects at the opportunity for objection required by Rule 51(b)(2); or **(B)** a party that has not been informed of an instruction or action on a request before the time for objection provided under Rule 51(b)(2) objects promptly after learning that the instruction or request will be, or has been, given or refused.	**(c) Objections.** **(1)** ***How to Make.*** A party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds for the objection. **(2)** ***When to Make.*** An objection is timely if: **(A)** a party objects at the opportunity provided under Rule 51(b)(2); or **(B)** a party was not informed of an instruction or action on a request before that opportunity to object, and the party objects promptly after learning that the instruction or request will be, or has been, given or refused.

(d) Assigning Error; Plain Error. **(1)** A party may assign as error: **(A)** an error in an instruction actually given if that party made a proper objection under Rule 51(c), or **(B)** a failure to give an instruction if that party made a proper request under Rule 51(a), and — unless the court made a definitive ruling on the record rejecting the request — also made a proper objection under Rule 51(c). **(2)** A court may consider a plain error in the instructions affecting substantial rights that has not been preserved as required by Rule 51(d)(1)(A) or (B).	**(d) Assigning Error; Plain Error.** **(1)** ***Assigning Error.*** A party may assign as error: **(A)** an error in an instruction actually given, if that party properly objected; or **(B)** a failure to give an instruction, if that party properly requested it and — unless the court rejected the request in a definitive ruling on the record — also properly objected. **(2)** ***Plain Error.*** A court may consider a plain error in the instructions that has not been preserved as required by Rule 51(d)(1) if the error affects substantial rights.

COMMITTEE NOTE

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

Rule 52. Findings by the Court; Judgment on Partial Findings	Rule 52. Findings and Conclusions 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.	**(a) Findings and Conclusions.** **(1)** ***In General.*** In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately. The findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court. Judgment must be entered under Rule 58. **(2)** ***For an Interlocutory Injunction.*** In granting or refusing an interlocutory injunction, the court must similarly state the findings and conclusions that support its action. **(3)** ***For a Motion.*** The court is not required to state findings or conclusions when ruling on a motion under Rule 12 or 56 or, unless these rules provide otherwise, on any other motion. **(4)** ***Effect of a Master's Findings.*** A master's findings, to the extent adopted by the court, must be considered the court's findings. **(5)** ***Questioning the Evidentiary Support.*** A party may later question the sufficiency of the evidence supporting the findings, whether or not the party requested findings, objected to them, moved to amend them, or moved for partial findings. **(6)** ***Setting Aside the Findings.*** Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.
(b) Amendment. On a party's motion filed no later than 10 days after entry of judgment, the court may amend its findings — or make additional findings — and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59. When findings of fact are made in actions tried without a jury, the sufficiency of the evidence supporting the findings may be later questioned whether or not in the district court the party raising the question objected to the findings, moved to amend them, or moved for partial findings.	**(b) Amended or Additional Findings.** On a party's motion filed no later than 10 days after the entry of judgment, the court may amend its findings — or make additional findings — and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59.
(c) Judgment on Partial Findings. If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence. Such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule.	**(c) Judgment on Partial Findings.** If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue. The court may, however, decline to render any judgment until the close of the evidence. A judgment on partial findings must be supported by findings of fact and conclusions of law as required by Rule 52(a).

COMMITTEE NOTE

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

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

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

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

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

(b) Order Appointing Master. **(1) Notice.** The court must give the parties notice and an opportunity to be heard before appointing a master. A party may suggest candidates for appointment. **(2) Contents.** The order appointing a master must direct the master to proceed with all reasonable diligence and must state: **(A)** the master's duties, including any investigation or enforcement duties, and any limits on the master's authority under Rule 53(c); **(B)** the circumstances — if any — in which the master may communicate ex parte with the court or a party; **(C)** the nature of the materials to be preserved and filed as the record of the master's activities; **(D)** the time limits, method of filing the record, other procedures, and standards for reviewing the master's orders, findings, and recommendations; and **(E)** the basis, terms, and procedure for fixing the master's compensation under Rule 53(h). **(3) Entry of Order.** The court may enter the order appointing a master only after the master has filed an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. § 455 and, if a ground for disqualification is disclosed, after the parties have consented with the court's approval to waive the disqualification. **(4) Amendment.** The order appointing a master may be amended at any time after notice to the parties, and an opportunity to be heard.	**(b) Order Appointing a Master.** **(1)** ***Notice.*** Before appointing a master, the court must give the parties notice and an opportunity to be heard. Any party may suggest candidates for appointment. **(2)** ***Contents.*** The appointing order 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(g). **(3)** ***Issuing.*** The court may issue the order only after: **(A)** the master files an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. § 455; and **(B)** if a ground is disclosed, the parties, with the court's approval, waive the disqualification. **(4)** ***Amending.*** The order may be amended at any time after notice to the parties and an opportunity to be heard.
(c) Master's Authority. Unless the appointing order expressly directs otherwise, a master has authority to regulate all proceedings and take all appropriate measures to perform fairly and efficiently the assigned duties. The master may by order impose upon a party any noncontempt sanction provided by Rule 37 or 45, and may recommend a contempt sanction against a party and sanctions against a nonparty.	**(c) Master's Authority.** **(1)** ***In General.*** Unless the appointing order directs otherwise, a master may: **(A)** regulate all proceedings; **(B)** take all appropriate measures to perform the assigned duties fairly and efficiently; and **(C)** if conducting an evidentiary hearing, exercise the appointing court's power to compel, take, and record evidence. **(2)** ***Sanctions.*** The master may by order impose on a party any noncontempt sanction provided by Rule 37 or 45, and may recommend a contempt sanction against a party and sanctions against a nonparty.
(d) Evidentiary Hearings. Unless the appointing order expressly directs otherwise, a master conducting an evidentiary hearing may exercise the power of the appointing court to compel, take, and record evidence.	

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

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

COMMITTEE NOTE

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

VII. JUDGMENT Rule 54. Judgments; Costs	TITLE VII. JUDGMENT Rule 54. Judgment; Costs
(a) Definition; Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.	**(a) Definition; Form.** "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment should not include recitals of pleadings, a master's report, or a record of prior proceedings.
(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.	**(b) Judgment on Multiple Claims or Involving Multiple Parties.** When an action presents more than one claim for relief — whether as a claim, counterclaim, crossclaim, or third-party claim — or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.
(c) Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings.	**(c) Demand for Judgment; Relief to Be Granted.** A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings. Every other final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.

(d) Costs; Attorneys' Fees.

(1) Costs Other than Attorneys' Fees. Except when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Such costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

(2) Attorneys' Fees.

(A) Claims for attorneys' fees and related nontaxable expenses shall be made by motion unless the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial.

(B) Unless otherwise provided by statute or order of the court, the motion must be filed no later than 14 days after entry of judgment; must specify the judgment and the statute, rule, or other grounds entitling the moving party to the award; and must state the amount or provide a fair estimate of the amount sought. If directed by the court, the motion shall also disclose the terms of any agreement with respect to fees to be paid for the services for which claim is made.

(d) Costs; Attorney's Fees.

(1) ***Costs Other Than Attorney's Fees.*** Unless a federal statute, these rules, or a court order provides otherwise, costs — other than attorney's fees — should be allowed to the prevailing party. But costs against the United States, its officers, and its agencies may be imposed only to the extent allowed by law. The clerk may tax costs on 1 day's notice. On motion served within the next 5 days, the court may review the clerk's action.

(2) ***Attorney's Fees.***

(A) *Claim to Be by Motion.* A claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages.

(B) *Timing and Contents of the Motion.* Unless a statute or a court order provides otherwise, the motion must:

(i) be filed no later than 14 days after the entry of judgment;

(ii) specify the judgment and the statute, rule, or other grounds entitling the movant to the award;

(iii) state the amount sought or provide a fair estimate of it; and

(iv) disclose, if the court so orders, the terms of any agreement about fees for the services for which the claim is made.

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

COMMITTEE NOTE

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

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

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

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

(c) Setting Aside Default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).	**(c) Setting Aside a Default or a Default Judgment.** The court may set aside an entry of default for good cause, and it may set aside a default judgment under Rule 60(b).
(d) Plaintiffs, Counterclaimants, Cross-Claimants. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).	[Current Rule 55(d) is deleted.]
(e) Judgment Against the United States. No judgment by default shall be entered against the United States or an officer or agency thereof unless the claimant establishes a claim or right to relief by evidence satisfactory to the court.	**(d) Judgment Against the United States.** A default judgment may be entered against the United States, its officers, or its agencies only if the claimant establishes a claim or right to relief by evidence that satisfies the court.

COMMITTEE NOTE

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

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

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

Rule 56. Summary Judgment	Rule 56. Summary Judgment
(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.	**(a) By a Claiming Party.** A party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim. The motion may be filed at any time after: **(1)** 20 days have passed from commencement of the action; or **(2)** the opposing party serves a motion for summary judgment.
(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.	**(b) By a Defending Party.** A party against whom relief is sought may move at any time, with or without supporting affidavits, for summary judgment on all or part of the claim.
(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.	**(c) Serving the Motion; Proceedings.** The motion must be served at least 10 days before the day set for the hearing. An opposing party may serve opposing affidavits before the hearing day. The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

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

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

COMMITTEE NOTE

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

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

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

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

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

COMMITTEE NOTE

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

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

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

COMMITTEE NOTE

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

Rule 59. New Trials; Amendment of Judgments	Rule 59. New Trial; Altering or Amending a Judgment
(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.	**(a) In General.** **(1)** ***Grounds for New Trial.*** The court may, on motion, grant a new trial on all or some of the issues — and to any party — as follows: **(A)** after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court; or **(B)** after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court. **(2)** ***Further Action After a Nonjury Trial.*** After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct 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.	**(b) Time to File a Motion for a New Trial.** A motion for a new trial must be filed no later than 10 days after the entry of judgment.
(c) Time for Serving Affidavits. When a motion for new trial is based on affidavits, they shall be filed with the motion. The opposing party has 10 days after service to file opposing affidavits, but that period may be extended for up to 20 days, either by the court for good cause or by the parties' written stipulation. The court may permit reply affidavits.	**(c) Time to Serve Affidavits.** When a motion for a new trial is based on affidavits, they must be filed with the motion. The opposing party has 10 days after being served 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' 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.	**(d) New Trial on the Court's Initiative or for Reasons Not in the Motion.** No later than 10 days after the entry of judgment, the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. In either event, the court must specify the reasons in its order.
(e) Motion to Alter or Amend a Judgment. Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment.	**(e) Motion to Alter or Amend a Judgment.** A motion to alter or amend a judgment must be filed no later than 10 days after the entry of the judgment.

COMMITTEE NOTE

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

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

The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation.	**(c) Timing and Effect of the Motion.** **(1)** ***Timing.*** A motion under Rule 60(b) must be made within a reasonable time — and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding. **(2)** ***Effect on Finality.*** The motion does not affect the judgment's finality or suspend its operation.
This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court.	**(d) Other Powers to Grant Relief.** This rule does not limit a court's power to: **(1)** entertain an independent action to relieve a party from a judgment, order, or proceeding; **(2)** grant relief under 28 U.S.C. § 1655 to a defendant who was not personally notified of the action; or **(3)** set aside a judgment for fraud on the court.
Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.	**(e) Bills and Writs Abolished.** The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.

COMMITTEE NOTE

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

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

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

COMMITTEE NOTE

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

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

(e) Stay in Favor of the United States or Agency Thereof. When an appeal is taken by the United States or an officer or agency thereof or by direction of any department of the Government of the United States and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant.	**(e) Stay Without Bond on an Appeal by the United States, Its Officers, or Its Agencies.** The court must not require a bond, obligation, or other security from the appellant when granting a stay on an appeal by the United States, its officers, or its agencies or on an appeal directed by a department of the federal government.
(f) Stay According to State Law. In any state in which a judgment is a lien upon the property of the judgment debtor and in which the judgment debtor is entitled to a stay of execution, a judgment debtor is entitled, in the district court held therein, to such stay as would be accorded the judgment debtor had the action been maintained in the courts of that state.	**(f) Stay in Favor of a Judgment Debtor Under State Law.** If a judgment is a lien on the judgment debtor's property under the law of the state where the court is located, the judgment debtor is entitled to the same stay of execution the state court would give.
(g) Power of Appellate Court Not Limited. The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.	**(g) Appellate Court's Power Not Limited.** This rule does not limit the power of the appellate court or one of its judges or justices: **(1)** to stay proceedings — or suspend, modify, restore, or grant an injunction — while an appeal is pending; or **(2)** to issue an order to preserve the status quo or the effectiveness of the judgment to be entered.
(h) Stay of Judgment as to Multiple Claims or Multiple Parties. When a court has ordered a final judgment under the conditions stated in Rule 54(b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.	**(h) Stay with Multiple Claims or Parties.** A court may stay the enforcement of a final judgment entered under Rule 54(b) until it enters a later judgment or judgments, and may prescribe terms necessary to secure the benefit of the stayed judgment for the party in whose favor it was entered.

COMMITTEE NOTE

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

The final sentence of former Rule 62(a) referred to Rule 62(c). It is deleted as an unnecessary. Rule 62(c) governs of its own force.

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

COMMITTEE NOTE

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

VIII. PROVISIONAL AND FINAL REMEDIES Rule 64. Seizure of Person or Property	TITLE VIII. PROVISIONAL AND FINAL REMEDIES Rule 64. Seizing a 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.	(a) **Remedies Under State Law — In General.** At the commencement of and throughout an action, every remedy is available that, under the law of the state where the court is located, provides for seizing a person or property to secure satisfaction of the potential judgment. But a federal statute governs to the extent it applies.
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.	(b) **Specific Kinds of Remedies.** The remedies available under this rule include the following — however designated and regardless of whether state procedure requires an independent action: • arrest; • attachment; • garnishment; • replevin; • sequestration; and • other corresponding or equivalent remedies.

COMMITTEE NOTE

The language of Rule 64 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 64 stated that the Civil Rules govern an action in which any remedy available under Rule 64(a) is used. The Rules were said to govern from the time the action is commenced if filed in federal court, and from the time of removal if removed from state court. These provisions are deleted as redundant. Rule 1 establishes that the Civil Rules apply to all actions in a district court, and Rule 81(c)(1) adds reassurance that the Civil Rules apply to a removed action "after it is removed."

Rule 65. Injunctions	Rule 65. Injunctions and Restraining Orders
(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.	**(a) Preliminary Injunction.** **(1)** ***Notice.*** The court may issue a preliminary injunction only on notice to the adverse party. **(2)** ***Consolidating the Hearing with the Trial on the Merits.*** Before or after beginning the hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing. Even when consolidation is not ordered, evidence that is received on the motion and that would be admissible at trial becomes part of the trial record and need not be repeated at trial. But the court must preserve any party's right to a jury trial.
(b) Temporary Restraining Order; Notice; Hearing; Duration. A temporary restraining order may be granted without written or oral notice to the adverse party or 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.	**(b) Temporary Restraining Order.** **(1)** ***Issuing Without Notice.*** The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if: **(A)** specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and **(B)** the movant's attorney certifies in writing any efforts made to give notice and the reasons why it 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.	**(2)** ***Contents; Expiration.*** Every temporary restraining order issued without notice must state the date and hour it was issued; describe the injury and state why it is irreparable; state why the order was issued without notice; and be promptly filed in the clerk's office and entered in the record. The order expires at the time after entry — not to exceed 10 days — that the court sets, unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension. The reasons for an extension must be entered in the 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.	(3) ***Expediting the Preliminary-Injunction Hearing.*** If the order is issued without notice, the motion for a preliminary injunction must be set for hearing at the earliest possible time, taking precedence over all other matters except hearings on older matters of the same character. At the hearing, the party who obtained the order must proceed with the motion; if the party does not, the court must dissolve the order. (4) ***Motion to Dissolve.*** On 2 days' notice to the party who obtained the order without notice — or on shorter notice set by the court — the adverse party may appear and move to dissolve or modify the order. The court must then hear and decide the motion as promptly as justice requires.
(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.	(c) **Security.** The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. The United States, its officers, and its agencies are not required to give security.

(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.	**(d) Contents and Scope of Every Injunction and Restraining Order.** **(1)** ***Contents.*** Every order granting an injunction and every restraining order must: **(A)** state the reasons why it issued; **(B)** state its terms specifically; and **(C)** describe in reasonable detail — and not by referring to the complaint or other document — the act or acts restrained or required. **(2)** ***Persons Bound.*** The order binds only the following who receive actual notice of it by personal service or otherwise: **(A)** the parties; **(B)** the parties' officers, agents, servants, employees, and attorneys; and **(C)** other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).
(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.	**(e) Other Laws Not Modified.** These rules do not modify the following: **(1)** any federal statute relating to temporary restraining orders or preliminary injunctions in actions affecting employer and employee; **(2)** 28 U.S.C. § 2361, which relates to preliminary injunctions in actions of interpleader or in the nature of interpleader; or **(3)** 28 U.S.C. § 2284, which relates to actions that must be heard and decided by a three-judge district court.
(f) Copyright Impoundment. This rule applies to copyright impoundment proceedings.	**(f) Copyright Impoundment.** This rule applies to copyright-impoundment proceedings.

COMMITTEE NOTE

The language of Rule 65 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The final sentence of former Rule 65(c) referred to Rule 65.1. It is deleted as unnecessary. Rule 65.1 governs of its own force.

Rule 65(d)(2) clarifies two ambiguities in former Rule 65(d). The former rule was adapted from former 28 U.S.C. § 363, but omitted a comma that made clear the common doctrine that a party must have actual notice of an injunction in order to be bound by it. Amended Rule 65(d) restores the meaning of the earlier statute, and also makes clear the proposition that an injunction can be enforced against a person who acts in concert with a party's officer, agent, servant, employee, or attorney.

Rule 65.1. Security: Proceedings Against Sureties	Rule 65.1. Proceedings Against a Surety
Whenever these rules, including the Supplemental Rules for Certain Admiralty and Maritime Claims, 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.	Whenever these rules (including the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions) require or allow a party to give security, and security is given through a bond or other undertaking with one or more sureties, each surety submits to the court's jurisdiction and irrevocably appoints the court clerk as its agent for receiving service of any papers that affect its liability on the bond or undertaking. The surety's liability may be enforced on motion without an independent action. The motion and any notice that the court orders may be served on the court clerk, who must promptly mail a copy of each to every surety whose address is known.

COMMITTEE NOTE

The language of Rule 65.1 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 66. Receivers Appointed by Federal Courts	Rule 66. Receivers
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.	These rules govern an action in which the appointment of a receiver is sought or a receiver sues or is sued. But the practice in administering an estate by a receiver or a similar court-appointed officer must accord with the historical practice in federal courts or with a local rule. An action in which a receiver has been appointed may be dismissed only by court order.

COMMITTEE NOTE

The language of Rule 66 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 67. Deposit in Court	Rule 67. Deposit into 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.	(a) **Depositing Property.** If any part of the relief sought is a money judgment or the disposition of a sum of money or some other deliverable thing, a party — on notice to every other party and by leave of court — may deposit with the court all or part of the money or thing, whether or not that party claims any of it. The depositing party must deliver to the clerk a copy of the order permitting deposit.
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; 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.	(b) **Investing and Withdrawing Funds.** Money paid into court under this rule must be deposited and withdrawn in accordance with 28 U.S.C. §§ 2041 and 2042 and any like statute. The money must be deposited in an interest-bearing account or invested in a court-approved, interest-bearing instrument.

COMMITTEE NOTE

The language of Rule 67 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 68. Offer of Judgment	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.	**(a) Making an Offer; Judgment on an Accepted Offer.** More than 10 days before the trial begins, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 10 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment. **(b) Unaccepted Offer.** An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs. **(c) Offer After Liability Is Determined.** When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be served within a reasonable time — but at least 10 days — before a hearing to determine the extent of liability. **(d) Paying Costs After an Unaccepted Offer.** If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.

COMMITTEE NOTE

The language of Rule 68 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 69. Execution	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.	**(a) In General.** (1) ***Money Judgment; Applicable Procedure.*** A money judgment is enforced by a writ of execution, unless the court directs otherwise. The procedure on execution — and in proceedings supplementary to and in aid of judgment or execution — must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies. (2) ***Obtaining Discovery.*** In aid of the judgment or execution, the judgment creditor or a successor in interest whose interest appears of record may obtain discovery from any person — including the judgment debtor — as provided in these rules or by the procedure of the state where the court is located.
(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.	**(b) Against Certain Public Officers.** When a judgment has been entered against a revenue officer in the circumstances stated in 28 U.S.C. § 2006, or against an officer of Congress in the circumstances stated in 2 U.S.C. § 118, the judgment must be satisfied as those statutes provide.

COMMITTEE NOTE

The language of Rule 69 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.

Amended Rule 69(b) incorporates directly the provisions of 2 U.S.C. § 118 and 28 U.S.C. § 2006, deleting the incomplete statement in former Rule 69(b) of the circumstances in which execution does not issue against an officer.

Rule 70. Judgment for Specific Acts; Vesting Title	Rule 70. Enforcing a Judgment for a Specific Act
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.	**(a) Party's Failure to Act; Ordering Another to Act.** If a judgment requires a party to convey land, to deliver a deed or other document, or to perform any other specific act and the party fails to comply within the time specified, the court may order the act to be done — at the disobedient party's expense — by another person appointed by the court. When done, the act has the same effect as if done by the party. **(b) Vesting Title.** If the real or personal property is within the district, the court — instead of ordering a conveyance — may enter a judgment divesting any party's title and vesting it in others. That judgment has the effect of a legally executed conveyance. **(c) Obtaining a Writ of Attachment or Sequestration.** On application by a party entitled to performance of an act, the clerk must issue a writ of attachment or sequestration against the disobedient party's property to compel obedience. **(d) Obtaining a Writ of Execution or Assistance.** On application by a party who obtains a judgment or order for possession, the clerk must issue a writ of execution or assistance. **(e) Holding in Contempt.** The court may also hold the disobedient party in contempt.

COMMITTEE NOTE

The language of Rule 70 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 71. Process in Behalf of and Against Persons Not Parties	Rule 71. Enforcing Relief For or Against a Nonparty
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.	When an order grants relief for a nonparty or may be enforced against a nonparty, the procedure for enforcing the order is the same as for a party.

COMMITTEE NOTE

The language of Rule 71 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.

IX. SPECIAL PROCEEDINGS Rule 71A. Condemnation of Property	TITLE IX. SPECIAL PROCEEDINGS Rule 71.1. Condemning Real or Personal 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.	**(a) Applicability of Other Rules.** These rules govern proceedings to condemn real and personal property by eminent domain, except as this rule provides otherwise.
(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.	**(b) Joinder of Properties.** The plaintiff may join separate pieces of property in a single action, no matter whether they are owned by the same persons or 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."	**(c) Complaint.** **(1)** ***Caption.*** The complaint must contain a caption as provided in Rule 10(a). The plaintiff must, however, name as defendants both the property — designated generally by kind, quantity, and location — and at least one owner of some part of or interest in the property. **(2)** ***Contents.*** The complaint must contain a short and plain statement of the following: **(A)** the authority for the taking; **(B)** the uses for which the property is to be taken; **(C)** a description sufficient to identify the property; **(D)** the interests to be acquired; and **(E)** for each piece of property, a designation of each defendant who has been joined as an owner or owner of an interest in it. **(3)** ***Parties.*** When the action commences, the plaintiff need join as defendants only those persons who have or claim an interest in the property and whose names are then known. But before any hearing on compensation, the plaintiff must add as defendants all those persons who have or claim an interest and whose names have become known or can be found by a reasonably diligent search of the records, considering both the property's character and value and the interests to be acquired. 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.	**(4)** ***Procedure.*** Notice must be served on all defendants as provided in Rule 71.1(d), whether they were named as defendants when the action commenced or were added later. A defendant may answer as provided in Rule 71.1(e). The court, meanwhile, may order any distribution of a deposit that the facts warrant. **(5)** ***Filing; Additional Copies.*** In addition to filing the complaint, the plaintiff must give the clerk at least one copy for the defendants' use and additional copies at the request of the clerk or 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.	**(d) Process.** **(1)** ***Delivering Notice to the Clerk.*** On filing a complaint, the plaintiff must promptly deliver to the clerk joint or several notices directed to the named defendants. When adding defendants, the plaintiff must deliver to the clerk additional notices directed to the new defendants.
(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 constitutes 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.	**(2)** ***Contents of the Notice.*** **(A)** *Main Contents.* Each notice must name the court, the title of the action, and the defendant to whom it is directed. It must describe the property sufficiently to identify it, but need not describe any property other than that to be taken from the named defendant. The notice must also state: **(i)** that the action is to condemn property; **(ii)** the interest to be taken; **(iii)** the authority for the taking; **(iv)** the uses for which the property is to be taken; **(v)** that the defendant may serve an answer on the plaintiff's attorney within 20 days after being served with the notice; and **(vi)** that the failure to so serve an answer constitutes consent to the taking and to the court's authority to proceed with the action and fix the compensation. **(B)** *Conclusion.* The notice must conclude with the name of the plaintiff's attorney and an address within the district in which the action is brought where the attorney may be served.

(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."	**(3)** ***Serving the Notice.*** **(A)** *Personal Service.* When a defendant whose address is known resides within the United States or a territory subject to the administrative or judicial jurisdiction of the United States, personal service of the notice (without a copy of the complaint) must be made in accordance with Rule 4. **(B)** *Service by Publication.* **(i)** A defendant may be served by publication only when the plaintiff's attorney files a certificate stating that the attorney believes the defendant cannot be personally served, because after diligent inquiry within the state where the complaint is filed, the defendant's place of residence is still unknown or, if known, that it is beyond the territorial limits of personal service. Service is then made by publishing the notice — once a week for at least three successive weeks — in a newspaper published in the county where the property is located or, if there is no such newspaper, in a newspaper with general circulation where the property is located. Before the last publication, a copy of the notice must also be mailed to every defendant who cannot be personally served but whose place of residence is then known. Unknown owners may be served by publication in the same 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.	**(ii)** Service by publication is complete on the date of the last publication. The plaintiff's attorney must prove publication and mailing by a certificate, attach a printed copy of the published notice, and mark on the copy the newspaper's name and the dates of publication. **(4)** ***Effect of Delivery and Service.*** Delivering the notice to the clerk and serving it have the same effect as serving a summons under Rule 4. **(5)** ***Proof of Service; Amending the Proof or Notice.*** Rule 4(l) governs proof of service. The court may permit the proof or the notice to be amended.

(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.	(e) **Appearance or Answer.** (1) ***Notice of Appearance.*** A defendant that has no objection or defense to the taking of its property may serve a notice of appearance designating the property in which it claims an interest. The defendant must then be given notice of all later proceedings affecting the defendant. (2) ***Answer.*** A defendant that has an objection or defense to the taking must serve an answer within 20 days after being served with the notice. The answer must: **(A)** identify the property in which the defendant claims an interest; **(B)** state the nature and extent of the interest; and **(C)** state all the defendant's objections and defenses to the taking. (3) ***Waiver of Other Objections and Defenses; Evidence on Compensation.*** A defendant waives all objections and defenses not stated in its answer. No other pleading or motion asserting an additional objection or defense is allowed. But at the trial on compensation, a defendant — whether or not it has previously appeared or answered — may present evidence on the amount of compensation to be paid and may share in the award.
(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.	(f) **Amending Pleadings.** Without leave of court, the plaintiff may — as often as it wants — amend the complaint at any time before the trial on compensation. But no amendment may be made if it would result in a dismissal inconsistent with Rule 71.1(i)(1) or (2). The plaintiff need not serve a copy of an amendment, but must serve notice of the filing, as provided in Rule 5(b), on every affected party who has appeared and, as provided in Rule 71.1(d), on every affected party who has not appeared. In addition, the plaintiff must give the clerk at least one copy of each amendment for the defendants' use, and additional copies at the request of the clerk or a defendant. A defendant may appear or answer in the time and manner and with the same effect as provided in Rule 71.1(e).
(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.	(g) **Substituting Parties.** If a defendant dies, becomes incompetent, or transfers an interest after being joined, the court may, on motion and notice of hearing, order that the proper party be substituted. Service of the motion and notice on a nonparty must be made as provided in Rule 71.1(d)(3).

(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.	**(h) Trial of the Issues.** **(1)** ***Issues Other Than Compensation; Compensation.*** In an action involving eminent domain under federal law, the court tries all issues, including compensation, except when compensation must be determined: **(A)** by any tribunal specially constituted by a federal statute to determine compensation; or **(B)** if there is no such tribunal, by a jury when a party demands one within the time to answer or within any additional time the court sets, unless the court appoints a commission. **(2)** ***Appointing a Commission; Commission's Powers and Report.*** **(A)** *Reasons for Appointing.* If a party has demanded a jury, the court may instead appoint a three-person commission to determine compensation because of the character, location, or quantity of the property to be condemned or for other just reasons. **(B)** *Alternate Commissioners.* The court may appoint up to two additional persons to serve as alternate commissioners to hear the case and replace commissioners who, before a decision is filed, the court finds unable or disqualified to perform their duties. Once the commission renders its final decision, the court must discharge any alternate who has not replaced a commissioner.
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.	**(C)** *Examining the Prospective Commissioners.* Before making its appointments, the court must advise the parties of the identity and qualifications of each prospective commissioner and alternate, and may permit the parties to examine them. The parties may not suggest appointees, but for good cause may object to a prospective commissioner or alternate. **(D)** *Commission's Powers and Report.* A commission has the powers of a master under Rule 53(c). Its action and report are determined by a majority. Rule 53(d), (e), and (f) apply to its action and report.

(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.	**(i) Dismissal of the Action or a Defendant.** **(1)** ***Dismissing the Action.*** **(A)** ***By the Plaintiff.*** If no compensation hearing on a piece of property has begun, and if the plaintiff has not acquired title or a lesser interest or taken possession, the plaintiff may, without a court order, dismiss the action as to that property by filing a notice of dismissal briefly describing the property. **(B)** ***By Stipulation.*** Before a judgment is entered vesting the plaintiff with title or a lesser interest in or possession of property, the plaintiff and affected defendants may, without a court order, dismiss the action in whole or in part by filing a stipulation of dismissal. And if the parties so stipulate, the court may vacate a judgment already entered. **(C)** ***By Court Order.*** At any time before compensation has been determined and paid, the court may, after a motion and hearing, dismiss the action as to a piece of property. But if the plaintiff has already taken title, a lesser interest, or possession as to any part of it, the court must award compensation for the title, lesser interest, or possession taken. **(2)** ***Dismissing a Defendant.*** The court may at any time dismiss a defendant who was unnecessarily or improperly joined. **(3)** ***Effect.*** A dismissal is without prejudice unless otherwise stated in the notice, stipulation, or court order.
(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.	**(j) Deposit and Its Distribution.** **(1)** ***Deposit.*** The plaintiff must deposit with the court any money required by law as a condition to the exercise of eminent domain and may make a deposit when allowed by statute. **(2)** ***Distribution; Adjusting Distribution.*** After a deposit, the court and attorneys must expedite the proceedings so as to distribute the deposit and to determine and pay compensation. If the compensation finally awarded to a defendant exceeds the amount distributed to that defendant, the court must enter judgment against the plaintiff for the deficiency. If the compensation awarded to a defendant is less than the amount distributed to that defendant, the court must enter judgment against that defendant 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.	**(k) Condemnation Under a State's Power of Eminent Domain.** This rule governs an action involving eminent domain under state law. But if state law provides for trying an issue by jury — or for trying the issue of compensation by jury or commission or both — that law governs.
(l) Costs. Costs are not subject to Rule 54(d).	**(l) Costs.** Costs are not subject to Rule 54(d).

COMMITTEE NOTE

The language of Rule 71A has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 71A has been redesignated as Rule 71.1 to conform to the designations used for all other rules added within the original numbering system.

Rule 72. Magistrate Judges; Pretrial Orders	Rule 72. Magistrate Judges: Pretrial Order
(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.	**(a) Nondispositive Matters.** When a pretrial matter not dispositive of a party's claim or defense is referred to a magistrate judge to hear and decide, the magistrate judge must promptly conduct the required proceedings and, when appropriate, issue a written order stating the decision. A party may serve and file objections to the order within 10 days after being served with a copy. A party may not assign as error a defect in the order not timely objected to. The district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is 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.	**(b) Dispositive Motions and Prisoner Petitions.** **(1)** ***Findings and Recommendations.*** A magistrate judge must promptly conduct the required proceedings when assigned, without the parties' consent, to hear a pretrial matter dispositive of a claim or defense or a prisoner petition challenging the conditions of confinement. A record must be made of all evidentiary proceedings and may, at the magistrate judge's discretion, be made of any other proceedings. The magistrate judge must enter a recommended disposition, including, if appropriate, proposed findings of fact. The clerk must promptly mail a copy to each party. **(2)** ***Objections.*** 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. Unless the district judge orders otherwise, the objecting party must promptly arrange for transcribing the record, or whatever portions of it the parties agree to or the magistrate judge considers sufficient. **(3)** ***Resolving Objections.*** The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.

COMMITTEE NOTE

The language of Rule 72 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 73. Magistrate Judges; Trial by Consent and Appeal Options	Rule 73. Magistrate Judges: Trial by Consent; 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).	**(a) Trial by Consent.** When authorized under 28 U.S.C. § 636(c), a magistrate judge may, if all parties consent, conduct a civil action or proceeding, including a jury or nonjury trial. A record must be made in accordance with 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.	**(b) Consent Procedure.** **(1)** ***In General.*** When a magistrate judge has been designated to conduct civil actions or proceedings, the clerk must give the parties written notice of their opportunity to consent under 28 U.S.C. § 636(c). To signify their consent, the parties must jointly or separately file a statement consenting to the referral. A district judge or magistrate judge may be informed of a party's response to the clerk's notice only if all parties have consented to the referral. **(2)** ***Reminding the Parties About Consenting.*** A district judge, magistrate judge, or other court official may remind the parties of the magistrate judge's availability, but must also advise them that they are free to withhold consent without adverse substantive consequences. **(3)** ***Vacating a Referral.*** On its own for good cause — or when a party shows extraordinary circumstances — the district judge may vacate a referral to a magistrate judge under this rule.
(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.	**(c) Appealing a Judgment.** In accordance with 28 U.S.C. § 636(c)(3), an appeal from a judgment entered at a magistrate judge's direction may be taken to the court of appeals as would any other appeal from a district-court judgment.
(d) [Abrogated.]	

COMMITTEE NOTE

The language of Rule 73 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 74. [Abrogated.]	Rule 74.

COMMITTEE NOTE

Rule 74 was abrogated in 1997 to reflect repeal of the statute providing for appeal from a magistrate judge's judgment to the district court. The rule number is reserved for possible future use.

Rule 75. [Abrogated.]	Rule 75.

COMMITTEE NOTE

Rule 75 was abrogated in 1997 to reflect repeal of the statute providing for appeal from a magistrate judge's judgment to the district court. The rule number is reserved for possible future use.

Rule 76. [Abrogated.]	Rule 76.

COMMITTEE NOTE

Rule 76 was abrogated in 1997 to reflect repeal of the statute providing for appeal from a magistrate judge's judgment to the district court. The rule number is reserved for possible future use.

X. DISTRICT COURTS AND CLERKS Rule 77. District Courts and Clerks	TITLE X. DISTRICT COURTS AND CLERKS: CONDUCTING BUSINESS; ISSUING ORDERS Rule 77. Conducting Business; Clerk's Authority; Notice of an Order or Judgment
(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.	**(a) When Court Is Open.** Every district court is considered always open for filing any paper, issuing and returning process, making a motion, or entering an order.
(b) Trials and Hearings; Orders in Chambers. All trials upon the merits shall be conducted in open court and so far as convenient in a regular 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.	**(b) Place for Trial and Other Proceedings.** Every trial on the merits must be conducted in open court and, so far as convenient, in a regular courtroom. Any other act or proceeding may be done or conducted by a judge in chambers, without the attendance of the clerk or other court official, and anywhere inside or outside the district. But no hearing — other than one ex parte — may be conducted outside the district unless all the affected parties consent.

(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.	**(c) Clerk's Office Hours; Clerk's Orders.** **(1)** ***Hours.*** The clerk's office — with a clerk or deputy on duty — must be open during business hours every day except Saturdays, Sundays, and legal holidays. But a court may, by local rule or order, require that the office be open for specified hours on Saturday or a particular legal holiday other than one listed in Rule 6(a)(4)(A). **(2)** ***Orders.*** Subject to the court's power to suspend, alter, or rescind the clerk's action for good cause, the clerk may: **(A)** issue process; **(B)** enter a default; **(C)** enter a default judgment under Rule 55(b)(1); and **(D)** act on any other matter that does not require the court's action.
(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.	**(d) Serving Notice of an Order or Judgment.** **(1)** ***Service.*** Immediately after entering an order or judgment, the clerk must serve notice of the entry, as provided in Rule 5(b), on each party who is not in default for failing to appear. The clerk must record the service on the docket. A party also may serve notice of the entry as provided in Rule 5(b). **(2)** ***Time to Appeal Not Affected by Lack of Notice.*** Lack of notice of the entry does not affect the time for appeal or relieve — or authorize the court to relieve — a party for failing to appeal within the time allowed, except as allowed by Federal Rule of Appellate Procedure (4)(a).

COMMITTEE NOTE

The language of Rule 77 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 78. Motion Day	Rule 78. Hearing Motions; Advancing an Action
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.	**(a) Providing a Regular Schedule for Oral Hearings; Other Orders.** A court may establish regular times and places for oral hearings on motions. But at any time or place, on notice that the judge considers reasonable, the judge may issue an order to advance, conduct, and hear an action. **(b) Providing for Submission on Briefs.** By rule or order, the court may provide for submitting and determining motions on briefs, without oral hearings.

COMMITTEE NOTE

The language of Rule 78 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 79. Books and Records Kept by the Clerk and Entries Therein	Rule 79. Records Kept by the Clerk
(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.	**(a) Civil Docket.** **(1)** ***In General.*** The clerk must keep a record known as the "civil docket" in the form and manner prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States. The clerk must enter each civil action in the docket. Actions must be assigned consecutive file numbers, which must be noted in the docket where the first entry of the action is made. **(2)** ***Items to be Entered.*** The following items must be marked with the file number and entered chronologically in the docket: **(A)** papers filed with the clerk; **(B)** process issued, and proofs of service or other returns showing execution; and **(C)** appearances, orders, verdicts, and judgments. **(3)** ***Contents of Entries; Jury Trial Demanded.*** Each entry must briefly show the nature of the paper filed or writ issued, the substance of each proof of service or other return, and the substance and date of entry of each order and judgment. When a jury trial has been properly demanded or ordered, the clerk must enter the word "jury" in the docket.

(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.	**(b) Civil Judgments and Orders.** The clerk must keep a copy of every final judgment and appealable order; of every order affecting title to or a lien on real or personal property; and of any other order that the court directs to be kept. The clerk must keep these in the form and manner prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States.
(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."	**(c) Indexes; Calendars.** Under the court's direction, the clerk must: **(1)** keep indexes of the docket and of the judgments and orders described in Rule 79(b); and **(2)** prepare calendars of all actions ready for trial, distinguishing jury trials from nonjury trials.
(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.	**(d) Other Records.** The clerk must keep any other 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.

COMMITTEE NOTE

The language of Rule 79 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 80. Stenographer; Stenographic Report or Transcript as Evidence	Rule 80. Stenographic Transcript as Evidence
(a) [Abrogated.] **(b) [Abrogated.]** **(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.	If stenographically reported testimony at a hearing or trial is admissible in evidence at a later trial, the testimony may be proved by a transcript certified by the person who reported it.

COMMITTEE NOTE

The language of Rule 80 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.

XI. GENERAL PROVISIONS Rule 81. Applicability in General	TITLE XI. GENERAL PROVISIONS Rule 81. Applicability of the Rules in General; Removed Actions
(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.	**(a) Applicability to Particular Proceedings.** (1) ***Prize Proceedings.*** These rules do not apply to prize proceedings in admiralty governed by 10 U.S.C. §§ 7651–7681. (2) ***Bankruptcy.*** These rules apply to bankruptcy proceedings to the extent provided by the Federal Rules of Bankruptcy Procedure. (3) ***Citizenship.*** These rules apply to proceedings for admission to citizenship to the extent that the practice in those proceedings is not specified in federal statutes and has previously conformed to the practice in civil actions. The provisions of 8 U.S.C. § 1451 for service by publication and for answer apply in proceedings to cancel citizenship certificates. (4) ***Special Writs.*** These rules apply to proceedings for habeas corpus and for quo warranto to the extent that the practice in those proceedings: **(A)** is not specified in a federal statute, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Cases; and **(B)** has previously 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 district 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)** ***Proceedings Involving a Subpoena.*** These rules apply to proceedings to compel testimony or the production of documents through a subpoena issued by a United States officer or agency under a federal statute, except as otherwise provided by statute, by local rule, or by court order in the proceedings. **(6)** ***Other Proceedings.*** These rules, to the extent applicable, govern proceedings under the following laws, except as these laws provide other procedures: **(A)** 7 U.S.C. §§ 292, 499g(c), for reviewing an order of the Secretary of Agriculture; **(B)** 9 U.S.C., relating to arbitration; **(C)** 15 U.S.C. § 522, for reviewing an order of the Secretary of the Interior; **(D)** 15 U.S.C. § 715d(c), for reviewing an order denying a certificate of clearance; **(E)** 29 U.S.C. §§ 159, 160, for enforcing an order of the National Labor Relations Board; **(F)** 33 U.S.C. §§ 918, 921, for enforcing or reviewing a compensation order under the Longshore and Harbor Workers' Compensation Act; and **(G)** 45 U.S.C. § 159, for reviewing an arbitration award in a railway-labor dispute.
(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, ch. 477, Title III, c. 2, § 340 (66 Stat. 260), U.S.C., Title 8, § 1451, remain in effect. **(7) [Abrogated.]**	

(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.	**(b) Scire Facias and Mandamus.** The writs of scire facias and mandamus are abolished. Relief previously available through them may be obtained by appropriate action or motion under 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.	**(c) Removed Actions.** **(1)** ***Applicability.*** These rules apply to a civil action after it is removed from a state court.
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.	**(2)** ***Further Pleading.*** After removal, repleading is unnecessary unless the court orders it. A defendant who did not answer before removal must answer or present other defenses or objections under these rules within the longest of these periods: **(A)** 20 days after receiving — through service or otherwise — a copy of the initial pleading stating the claim for relief; **(B)** 20 days after being served with the summons for an initial pleading on file at the time of service; or **(C)** 5 days after the notice of removal is filed.
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.	**(3)** ***Demand for a Jury Trial.*** **(A)** *As Affected by State Law.* A party who, before removal, expressly demanded a jury trial in accordance with state law need not renew the demand after removal. If the state law did not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time. The court must so order at a party's request and may so order on its own. A party who fails to make a demand when so ordered waives a jury trial. **(B)** *Under Rule 38.* If all necessary pleadings have been served at the time of removal, a party entitled to a jury trial under Rule 38 must be given one if the party serves a demand within 10 days after: **(i)** it files a notice of removal; or **(ii)** it is served with a notice of removal filed by another party.

(d) [Abrogated.] **(e)** Law Applicable. Whenever in these rules the law of the state 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.	**(d) Law Applicable.** **(1)** ***State Law.*** When these rules refer to state law, the term "law" includes the state's statutes and the state's judicial decisions. **(2)** ***District of Columbia.*** The term "state" includes, where appropriate, the District of Columbia. When these rules provide for state law to apply, in the District Court for the District of Columbia: **(A)** the law applied in the District governs; and **(B)** the term "federal statute" includes any Act of Congress that applies locally to the District.
(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.	[Current Rule 81(f) is deleted.]

COMMITTEE NOTE

The language of Rule 81 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 81(c) has been revised to reflect the amendment of 28 U.S.C. § 1446(a) that changed the procedure for removal from a petition for removal to a notice of removal.

Former Rule 81(e), drafted before the decision in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), defined state law to include "the statutes of that state and the state judicial decisions construing them." The *Erie* decision reinterpreted the Rules of Decision Act, now 28 U.S.C. § 1652, recognizing that the "laws" of the states include the common law established by judicial decisions. Long-established practice reflects this understanding, looking to state common law as well as statutes and court rules when a Civil Rule directs use of state law. Amended Rule 81(d)(1) adheres to this practice, including all state judicial decisions, not only those that construe state statutes.

Former Rule 81(f) is deleted. The office of district director of internal revenue was abolished by restructuring under the Internal Revenue Service Restructuring and Reform Act of 1998, Pub.L. 105-206, July 22, 1998, 26 U.S.C. § 1 Note.

Rule 82. Jurisdiction and Venue Unaffected	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.	These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts. An admiralty or maritime claim under Rule 9(h) is not a civil action for purposes of 28 U.S.C. §§ 1391–1392.

COMMITTEE NOTE

The language of Rule 82 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 83. Rules by District Courts; Judge's Directives	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.	**(a) Local Rules.** **(1)** ***In General.*** After giving public notice and an opportunity for comment, a district court, acting by a majority of its district judges, may adopt and amend rules governing its practice. A local rule must be consistent with — but not duplicate — federal statutes and rules adopted under 28 U.S.C. §§ 2072 and 2075, and must 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 must, on their adoption, be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public. **(2)** ***Requirement of Form.*** A local rule imposing a requirement of form must not be enforced in a way that causes a party to lose any right because of a nonwillful failure to comply.
(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.	**(b) Procedure 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 the district's local rules. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

COMMITTEE NOTE

The language of Rule 83 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 84. Forms; Technical Amendments	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.	The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.

COMMITTEE NOTE

The language of Rule 84 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 85. Title	Rule 85. Title
These rules may be known and cited as the Federal Rules of Civil Procedure.	These rules may be cited as the Federal Rules of Civil Procedure.

COMMITTEE NOTE

The language of Rule 85 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 86. Effective Date	Rule 86. Effective Dates
(a) 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.	**(a) In General.** These rules and any amendments take effect at the time specified by the Supreme Court, subject to 28 U.S.C. § 2074. They govern: **(1)** proceedings in an action commenced after their effective date; and **(2)** proceedings after that date in an action then pending unless: **(A)** the Supreme Court specifies otherwise; or **(B)** the court determines that applying them in a particular action would be infeasible or work an injustice.
(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.	**(b) December 1, 2007 Amendments.** If any provision in Rules 1-5.1, 6-73, or 77-86 conflicts with another law, priority in time for the purpose of 28 U.S.C. § 2072(b) is not affected by the amendments taking effect on December 1, 2007.
(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.	

(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.	

COMMITTEE NOTE

The language of Rule 86 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The subdivisions that provided an incomplete list of the effective dates of the original Civil Rules and amendments made up to 1963 are deleted as no longer useful.

Rule 86(b) is added to clarify the relationship of amendments taking effect on December 1, 2007, to other laws for the purpose of applying the "supersession" clause in 28 U.S.C. § 2072(b). Section 2072(b) provides that a law in conflict with an Enabling Act Rule "shall be of no further force or effect after such rule[] ha[s] taken effect." The amendments that take effect on December 1, 2007, result from the general restyling of the Civil Rules and from a small number of technical revisions adopted on a parallel track. None of these amendments is intended to affect resolution of any conflict that might arise between a rule and another law. Rule 86(b) makes this intent explicit. Any conflict that arises should be resolved by looking to the date the specific conflicting rule provision first became effective.

Style-Substance Rules

"Style-Substance" Rules 4, 9, 11, 14, 16, 26, 30, 31, 40, 71.1, and 78 are recommended for approval for adoption as follows:

PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF CIVIL PROCEDURE
SEPARATE FROM STYLE REVISION PROJECT

Rule 4. Summons

* * * * *

(k) Territorial Limits of Effective Service.

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

* * * * *

(C) when authorized by a federal statute.

* * * * *

COMMITTEE NOTE

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

Rule 9. Pleading Special Matters

* * * * *

(h) Admiralty or Maritime Claim.

* * * * *

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

COMMITTEE NOTE

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

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

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

* * * * *

COMMITTEE NOTE

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

Rule 14. Third-Party Practice

* * * * *

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

* * * * *

COMMITTEE NOTE

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

Rule 16. Pretrial Conferences; Scheduling; Management

* * * * *

(c) Attendance and Matters for Consideration at a Pretrial Conference.

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

* * * * *

COMMITTEE NOTE

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

Rule 26. Duty to Disclose; General Provisions Governing Discovery

* * * * *

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

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

* * * * *

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

(i) consistent with these rules and warranted by existing law or a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

* * * * *

COMMITTEE NOTE

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

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

Rule 30. Depositions by Oral Examination

* * * * *

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

* * * * *

(3) Method of Recording.

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

* * * * *

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

* * * * *

COMMITTEE NOTE

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

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

Rule 31. Depositions by Written Questions

* * * * *

(c) Notice of Completion or Filing.

(1) Completion. The party who noticed the deposition must notify all other parties when it is completed.

(2) Filing. A party who files the deposition must promptly notify all other parties of the filing.

COMMITTEE NOTE

The party who noticed a deposition on written questions must notify all other parties when the deposition is completed, so that they may make use of the deposition. A deposition is completed when it is recorded and the deponent has either waived or exercised the right of review under Rule 30(e)(1).

Rule 40. Scheduling Cases for Trial

Each court must provide by rule for scheduling trials. The court must give priority to actions entitled to priority by a federal statute.

COMMITTEE NOTE

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

Rule 71.1. Condemning Real or Personal Property

* * * * *

(d) Process.

* * * * *

(2) Contents of the Notice.

(A) Main Contents. Each notice must name the court, the title of the action, and the defendant to whom it is directed. It must describe the property sufficiently to identify it, but need not describe any property other than that to be taken from the named defendant. The notice must also state:

(i) that the action is to condemn property;

(ii) the interest to be taken;

(iii) the authority for the taking;

(iv) the uses for which the property is to be taken;

(v) that the defendant may serve an answer on the plaintiff's attorney within 20 days after being served with the notice;

(vi) that the failure to so serve an answer constitutes consent to the taking and to the court's authority to proceed with the action and fix the compensation; and

(vii) that a defendant who does not serve an answer may file a notice of appearance.

(B) Conclusion. The notice must conclude with the name, telephone number, and e-mail address of the plaintiff's attorney, and an address within the district in which the action is brought where the attorney may be served.

* * * * *

COMMITTEE NOTE

Rule 71.1(e) allows a defendant to appear without answering. Form 28 includes information about this right in the Rule 71.1(d)(2) notice. It is useful to confirm this practice in the rule.

The information that identifies the attorney is changed to include telephone number and electronic-mail address, in line with similar amendments to Rules 11(a) and 26(g)(1).

Rule 78. Hearing Motions; Submission on Briefs

(a) Providing a Regular Schedule for Oral Hearings. A court may establish regular times and places for oral hearings on motions.

* * * * *

COMMITTEE NOTE

Rule 16 has superseded any need for the provision in former Rule 78 for orders for the advancement, conduct, and hearing of actions.

Style Forms

Style Forms 1-82 are recommended for approval for adoption as follows:

Form 1. Caption. *(Use on every summons, complaint, answer, motion, or other document.)*

United States District Court
for the
_____District of _____

A B, Plaintiff	)	
	)	
v.	)	
	)	**Civil Action No. _____**
C D, Defendant	)	
	)	
v.	)	
	)	
E F, Third-Party Defendant	)	
(*Use if needed.*)	)	

(Name of Document)

Form 2. Date, Signature, Address, E-mail Address, and Telephone Number.
(Use at the conclusion of pleadings and other papers that require a signature.)

Date _____

_____
(Signature of the attorney
or unrepresented party)

_____
(Printed name)

_____
(Address)

_____
(E-mail address)

_____
(Telephone number)

Form 3. Summons.

(Caption – See Form 1.)

To *name the defendant*:

A lawsuit has been filed against you.

Within 20 days after service of this summons on you (not counting the day you received it), you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff's attorney,_____, whose address is _____. If you fail to do so, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

Date _____

_____
Clerk of Court

(Court Seal)

(Use 60 days if the defendant is the United States or a United States agency, or is an officer or employee of the United States allowed 60 days by Rule 12(a)(3).)

Form 4. Summons on a Third-Party Complaint.

(Caption – See Form 1.)

To *name the third-party defendant:*

A lawsuit has been filed against defendant _____, who as third-party plaintiff is making this claim against you to pay part or all of what [he] may owe to the plaintiff _____.

Within 20 days after service of this summons on you (not counting the day you received it), you must serve on the plaintiff and on the defendant an answer to the attached third-party complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the defendant's attorney, _____ , whose address is, _____ , and also on the plaintiff's attorney, ,
whose address is, _____. If you fail to do so, judgment by default will be entered against you for the relief demanded in the third-party complaint. You also must file the answer or motion with the court and serve it on any other parties.

A copy of the plaintiff's complaint is also attached. You may – but are not required to – respond to it.

Date _____

_____
Clerk of Court

(Court Seal)

Form 5. Notice of a Lawsuit and Request to Waive Service of a Summons.

(Caption – See Form 1.)

To (*name the defendant – or if the defendant is a corporation, partnership, or association name an officer or agent authorized to receive service*):

Why are you getting this?

A lawsuit has been filed against you, or the entity you represent, in this court under the number shown above. A copy of the complaint is attached.

This is not a summons, or an official notice from the court. It is a request that, to avoid expenses, you waive formal service of a summons by signing and returning the enclosed waiver. To avoid these expenses, you must return the signed waiver within (*give at least 30 days or at least 60 days if the defendant is outside any judicial district of the United States*) from the date shown below, which is the date this notice was sent. Two copies of the waiver form are enclosed, along with a stamped, self-addressed envelope or other prepaid means for returning one copy. You may keep the other copy.

What happens next?

If you return the signed waiver, I will file it with the court. The action will then proceed as if you had been served on the date the waiver is filed, but no summons will be served on you and you will have 60 days from the date this notice is sent (see the date below) to answer the complaint (or 90 days if this notice is sent to you outside any judicial district of the United States).

If you do not return the signed waiver within the time indicated, I will arrange to have the summons and complaint served on you. And I will ask the court to require you, or the entity you represent, to pay the expenses of making service.

Please read the enclosed statement about the duty to avoid unnecessary expenses.

I certify that this request is being sent to you on the date below.

(Date and sign – See Form 2.)

Form 6. Waiver of the Service of Summons.

(Caption – See Form 1.)

To *name the plaintiff's attorney or the unrepresented plaintiff*:

I have received your request to waive service of a summons in this action along with a copy of the complaint, two copies of this waiver form, and a prepaid means of returning one signed copy of the form to you.

I, or the entity I represent, agree to save the expense of serving a summons and complaint in this case.

I understand that I, or the entity I represent, will keep all defenses or objections to the lawsuit, the court's jurisdiction, and the venue of the action, but that I waive any objections to the absence of a summons or of service.

I also understand that I, or the entity I represent, must file and serve an answer or a motion under Rule 12 within 60 days from _____, the date when this request was sent (or 90 days if it was sent outside the United States). If I fail to do so, a default judgment will be entered against me or the entity I represent.

(Date and sign – See Form 2.)

(Attach the following to Form 6.)

Duty to Avoid Unnecessary Expenses of Serving a Summons

Rule 4 of the Federal Rules of Civil Procedure requires certain defendants to cooperate in saving unnecessary expenses of serving a summons and complaint. A defendant who is located in the United States and who fails to return a signed waiver of service requested by a plaintiff located in the United States will be required to pay the expenses of service, unless the defendant shows good cause for the failure.

"Good cause" does *not* include a belief that the lawsuit is groundless, or that it has been brought in an improper venue, or that the court has no jurisdiction over this matter or over the defendant or the defendant's property.

If the waiver is signed and returned, you can still make these and all other defenses and objections, but you cannot object to the absence of a summons or of service.

If you waive service, then you must, within the time specified on the waiver form, serve an answer or a motion under Rule 12 on the plaintiff and file a copy with the court. By signing and returning the waiver form, you are allowed more time to respond than if a summons had been served.

Form 7. Statement of Jurisdiction.

a. (*For diversity-of-citizenship jurisdiction.*) The plaintiff is [a citizen of *Michigan*] [a corporation incorporated under the laws of *Michigan* with its principal place of business in *Michigan*]. The defendant is [a citizen of *New York*] [a corporation incorporated under the laws of *New York* with its principal place of business in *New York*]. The amount in controversy, without interest and costs, exceeds the sum or value specified by 28 U.S.C. § 1332.

b. (*For federal-question jurisdiction.*) This action arises under [the United States Constitution, *specify the article or amendment and the section*] [a United States treaty *specify*] [a federal statute, ___U.S.C. § ___].

c. (*For a claim in the admiralty or maritime jurisdiction.*) This is a case of admiralty or maritime jurisdiction. *(To invoke admiralty status under Rule 9(h) use the following:* This is an admiralty or maritime claim within the meaning of Rule 9(h).)

Form 8. Statement of Reasons for Omitting a Party.
(*If a person who ought to be made a party under Rule 19(a) is not named, include this statement in accordance with Rule 19(c).*)

This complaint does not join as a party *name* who [is not subject to this court's personal jurisdiction] [cannot be made a party without depriving this court of subject-matter jurisdiction] because *state the reason*.

Form 9. Statement Noting a Party's Death.

(Caption – See Form 1.)

In accordance with Rule 25(a) *name the person*, who is [a party to this action] [a representative of or successor to the deceased party] notes the death during the pendency of this action of *name*, [*describe as party* in this action].

(Date and sign – See Form 2.)

Form 10. Complaint to Recover a Sum Certain.

(Caption – See Form 1.)

1. (Statement of Jurisdiction -- See Form 7.)

(*Use one or more of the following as appropriate and include a demand for judgment.*)

(a) On a Promissory Note

2. On *date*, the defendant executed and delivered a note promising to pay the plaintiff on *date* the sum of $ _____ with interest at the rate of __ percent. A copy of the note [is attached as Exhibit A] [is summarized as follows: _____.]

3. The defendant has not paid the amount owed.

(b) On an Account

2. The defendant owes the plaintiff $_____ according to the account set out in Exhibit A.

(c) For Goods Sold and Delivered

2. The defendant owes the plaintiff $ _____ for goods sold and delivered by the plaintiff to the defendant from *date* to *date*.

(d) For Money Lent

2. The defendant owes the plaintiff $ _____ for money lent by the plaintiff to the defendant on *date*.

(e) For Money Paid by Mistake

2. The defendant owes the plaintiff $ _____ for money paid by mistake to the defendant on *date* under these circumstances: *describe with particularity in accordance with Rule 9(b).*

(f) For Money Had and Received

2. The defendant owes the plaintiff $ _____ for money that was received from *name* on *date* to be paid by the defendant to the plaintiff.

Demand for Judgment

Therefore, the plaintiff demands judgment against the defendant for $ _____, plus interest and costs.

(Date and sign – See Form 2.)

Form 11. Complaint for Negligence.

(Caption – See Form 1.)

1. (Statement of Jurisdiction – See Form 7.)

2. On *date*, at *place*, the defendant negligently drove a motor vehicle against the plaintiff.

3. As a result, the plaintiff was physically injured, lost wages or income, suffered physical and mental pain, and incurred medical expenses of $_____.

Therefore, the plaintiff demands judgment against the defendant for $ _____, plus costs.

(Date and sign – See Form 2).

Form 12. Complaint for Negligence When the Plaintiff Does Not Know Who Is Responsible.

(Caption – See Form 1.)

1. (Statement of Jurisdiction – See Form 7.)

2. On *date*, at *place*, defendant *name* or defendant *name* or both of them willfully or recklessly or negligently drove, or caused to be driven, a motor vehicle against the plaintiff.

3. As a result, the plaintiff was physically injured, lost wages or income, suffered mental and physical pain, and incurred medical expenses of $ _____.

Therefore, the plaintiff demands judgment against one or both defendants for $ _____, plus costs.

(Date and sign – See Form 2.)

Form 13. Complaint for Negligence Under the Federal Employers' Liability Act.

(Caption – See Form 1.)

1. (Statement of Jurisdiction – See Form 7.)

2. At the times below, the defendant owned and operated in interstate commerce a railroad line that passed through a tunnel located at _____.

3. On *__date__*, the plaintiff was working to repair and enlarge the tunnel to make it convenient and safe for use in interstate commerce.

4. During this work, the defendant, as the employer, negligently put the plaintiff to work in a section of the tunnel that the defendant had left unprotected and unsupported.

5. The defendant's negligence caused the plaintiff to be injured by a rock that fell from an unsupported portion of the tunnel.

6. As a result, the plaintiff was physically injured, lost wages or income, suffered mental and physical pain, and incurred medical expenses of $ _____.

Therefore, the plaintiff demands judgment against the defendant for $ _____, and costs.

(Date and sign – See Form 2.)

Form 14. Complaint for Damages Under the Merchant Marine Act.

(Caption – See Form 1.)

1. (Statement of Jurisdiction – See Form 7.)

2. At the times below, the defendant owned and operated the vessel *name* and used it to transport cargo for hire by water in interstate and foreign commerce.

3. On *date*, at *place*, the defendant hired the plaintiff under seamen's articles of customary form for a voyage from _____to _____ and return at a wage of $ _____ a month and found, which is equal to a shore worker's wage of $ _____ a month.

4. On *date*, the vessel was at sea on the return voyage. (*Describe the weather and the condition of the vessel.*)

5. (*Describe as in Form 11 the defendant's negligent conduct.*)

6. As a result of the defendant's negligent conduct and the unseaworthiness of the vessel, the plaintiff was physically injured, has been incapable of any gainful activity, suffered mental and physical pain, and has incurred medical expenses of $ _____.

Therefore, the plaintiff demands judgment against the defendant for $ _____, plus costs.

(Date and sign — See Form 2.)

Form 15. Complaint for the Conversion of Property.

(Caption — See Form 1.)

1. (Statement of Jurisdiction — See Form 7.)

2. On *date*, at *place*, the defendant converted to the defendant's own use property owned by the plaintiff. The property converted consists of *describe*.

3. The property is worth $_____.

Therefore, the plaintiff demands judgment against the defendant for $ _____, plus costs.

(Date and sign – See Form 2.)

Form 16. Third-Party Complaint.

(Caption – See Form 1.)

1. Plaintiff *name* has filed against defendant *name* a complaint, a copy of which is attached.

2. (*State grounds entitling defendant's name to recover from third-party defendant's name for (all or an identified share) of any judgment for plaintiff's name against defendant's name.*)

Therefore, the defendant demands judgment against *third-party defendant's name* for *all or an identified share* of sums that may be adjudged against the defendant in the plaintiff's favor.

(Date and sign – See Form 2.)

Form 17. Complaint for Specific Performance of a Contract to Convey Land.

(Caption – See Form 1.)

1. (Statement of Jurisdiction – See Form 7.)

2. On *date*, the parties agreed to the contract [attached as Exhibit A][summarize the contract].

3. As agreed, the plaintiff tendered the purchase price and requested a conveyance of the land, but the defendant refused to accept the money or make a conveyance.

4. The plaintiff now offers to pay the purchase price.

Therefore, the plaintiff demands that:

(a) the defendant be required to specifically perform the agreement and pay damages of $ _____, plus interest and costs, or

(b) if specific performance is not ordered, the defendant be required to pay damages of $ _____, plus interest and costs.

(Date and sign – See Form 2.)

Form 18. Complaint for Patent Infringement.

(Caption – See Form 1.)

1. (Statement of Jurisdiction — See Form 7.)

2. On *date*, United States Letters Patent No. _____ were issued to the plaintiff for an invention in an *electric motor*. The plaintiff owned the patent throughout the period of the defendant's infringing acts and still owns the patent.

3. The defendant has infringed and is still infringing the Letters Patent by making, selling, and using *electric motors* that embody the patented invention, and the defendant will continue to do so unless enjoined by this court.

4. The plaintiff has complied with the statutory requirement of placing a notice of the Letters Patent on all *electric motors* it manufactures and sells~~,~~ and has given the defendant written notice of the infringement.

Therefore, the plaintiff demands:

(a) a preliminary and final injunction against the continuing infringement;

(b) an accounting for damages; and

(c) interest and costs.

(Date and sign – See Form 2.)

Form 19. Complaint for Copyright Infringement and Unfair Competition.

(Caption – See Form 1.)

1. (Statement of Jurisdiction – See Form 7.)

2. Before *date*, the plaintiff, a United States citizen, wrote a book entitled_____.

3. The book is an original work that may be copyrighted under United States law. A copy of the book is attached as Exhibit A.

4. Between *date* and *date*, the plaintiff applied to the copyright office and received a certificate of registration dated _____ and identified as *date, class, number*.

5. Since *date*, the plaintiff has either published or licensed for publication all copies of the book in compliance with the copyright laws and has remained the sole owner of the copyright.

6. After the copyright was issued, the defendant infringed the copyright by publishing and selling a book entitled _____, which was copied largely from the plaintiff's book. A copy of the defendant's book is attached as Exhibit B.

7. The plaintiff has notified the defendant in writing of the infringement.

8. The defendant continues to infringe the copyright by continuing to publish and sell the infringing book in violation of the copyright, and further has engaged in unfair trade practices and unfair competition in connection with its publication and sale of the infringing book, thus causing irreparable damage.

Therefore, the plaintiff demands that:

(a) until this case is decided the defendant and the defendant's agents be enjoined from disposing of any copies of the defendant's book by sale or otherwise;

(b) the defendant account for and pay as damages to the plaintiff all profits and advantages gained from unfair trade practices and unfair competition in selling the defendant's book, and all profits and advantages gained from infringing the plaintiff's copyright (but no less than the statutory minimum);

(c) the defendant deliver for impoundment all copies of the book in the defendant's possession or control and deliver for destruction all infringing copies and all plates, molds, and other materials for making infringing copies;

(d) the defendant pay the plaintiff interest, costs, and reasonable attorney's fees; and

(e) the plaintiff be awarded any other just relief.

(Date and sign – See Form 2.)

Form 20. Complaint for Interpleader and Declaratory Relief.

(Caption – See Form 1.)

1. (Statement of Jurisdiction – See Form 7.)

2. On *date*, the plaintiff issued a life insurance policy on the life of *name* with *name* as the named beneficiary.

3. As a condition for keeping the policy in force, the policy required payment of a premium during the first year and then annually.

4. The premium due on *date* was never paid, and the policy lapsed after that date.

5. On *date*, after the policy had lapsed, both the insured and the named beneficiary died in an automobile collision.

6. Defendant *name* claims to be the beneficiary in place of *name* and has filed a claim to be paid the policy's full amount.

7. The other two defendants are representatives of the deceased persons' estates. Each defendant has filed a claim on behalf of each estate to receive payment of the policy's full amount.

8. If the policy was in force at the time of death, the plaintiff is in doubt about who should be paid.

Therefore, the plaintiff demands that:

(a) each defendant be restrained from commencing any action against the plaintiff on the policy;

(b) a judgment be entered that no defendant is entitled to the proceeds of the policy or any part of it, but if the court determines that the policy was in effect at the time of the insured's death, that the defendants be required to interplead and settle among themselves their rights to the proceeds, and that the plaintiff be discharged from all liability except to the defendant determined to be entitled to the proceeds; and

(c) the plaintiff recover its costs.

(Date and sign – See Form 2.)

Form 21. Complaint on a Claim for a Debt and to Set Aside a Fraudulent Conveyance Under Rule 18(b).

(Caption – See Form 1.)

1. (Statement of Jurisdiction — See Form 7.)

2. On *date*, defendant *name* signed a note promising to pay to the plaintiff on *date* the sum of $ _____ with interest at the rate of ___ percent. [The pleader may, but need not, attach a copy or plead the note verbatim.]

3. Defendant *name* owes the plaintiff the amount of the note and interest.

4. On *date*, defendant *name* conveyed all defendant's real and personal property *if less than all, describe it fully* to defendant *name* for the purpose of defrauding the plaintiff and hindering or delaying the collection of the debt.

Therefore, the plaintiff demands that:

(a) judgment for $ _____, plus costs, be entered against defendant(s) *name(s)*; and

(b) the conveyance to defendant *name* be declared void and ~~that~~ any judgment granted be made a lien on the property.

(Date and sign – See Form 2.)

Form 30. Answer Presenting Defenses Under Rule 12(b).

(Caption – See Form 1.)

Responding to Allegations in the Complaint

1. Defendant admits the allegations in paragraphs _____.

2. Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraphs _____.

3. Defendant admits *identify part of the allegation* in paragraph _____ and denies or lacks knowledge or information sufficient to form a belief about the truth of the rest of the paragraph.

Failure to State a Claim

4. The complaint fails to state a claim upon which relief can be granted.

Failure to Join a Required Party

5. If there is a debt, it is owed jointly by the defendant and *name* who is a citizen of _____. This person can be made a party without depriving this court of jurisdiction over the existing parties.

Affirmative Defense – Statute of Limitations

6. The plaintiff's claim is barred by the statute of limitations because it arose more than _____ years before this action was commenced.

Counterclaim

7. (*Set forth any counterclaim in the same way a claim is pleaded in a complaint. Include a further statement of jurisdiction if needed.*)

Crossclaim

8. (*Set forth a crossclaim against a coparty in the same way a claim is pleaded in a complaint. Include a further statement of jurisdiction if needed.*)

(Date and sign — See Form 2.)

Form 31. Answer to a Complaint for Money Had and Received with a Counterclaim for Interpleader.

(Caption – See Form 1.)

Response to the Allegations in the Complaint
(See Form 30.)

Counterclaim for Interpleader

1. The defendant received from *name* a deposit of $ _____.

2. The plaintiff demands payment of the deposit because of a purported assignment from *name*, who has notified the defendant that the assignment is not valid and who continues to hold the defendant responsible for the deposit.

Therefore, the defendant demands that:

(a) *name* be made a party to this action;

(b) the plaintiff and *name* be required to interplead their respective claims;

(c) the court decide whether the plaintiff or *name* or either of them is entitled to the deposit and discharge the defendant of any liability except to the person entitled to the deposit; and

(d) the defendant recover ~~its~~ costs and attorney's fees.

(Date and sign – See Form 2.)

Form 40. Motion to Dismiss Under Rule 12(b) for Lack of Jurisdiction, Improper Venue, Insufficient Service of Process, or Failure to State a Claim.

(Caption – See Form 1.)

The defendant moves to dismiss the action because:

1. the amount in controversy is less than the sum or value specified by 28 U.S.C. § 1332;

2. the defendant is not subject to the personal jurisdiction of this court;

3. venue is improper (this defendant does not reside in this district and no part of the events or omissions giving rise to the claim occurred in the district);

4. the defendant has not been properly served, as shown by the attached affidavits of _____; or

5. the complaint fails to state a claim upon which relief can be granted.

(Date and sign – See Form 2.)

Form 41. Motion to Bring in a Third-Party Defendant.

(Caption – See Form 1.)

The defendant, as third-party plaintiff, moves for leave to serve on *name* a summons and third-party complaint, copies of which are attached.

(Date and sign – See Form 2.)

Form 42. Motion to Intervene as a Defendant Under Rule 24.

(Caption – See Form 1.)

1. ___*name*___ moves for leave to intervene as a defendant in this action and to file the attached answer.

(*State grounds under Rule 24(a) or (b).)*

2. The plaintiff alleges patent infringement. We manufacture and sell to the defendant the articles involved, and we have a defense to the plaintiff's claim.

3. Our defense presents questions of law and fact that are common to this action.

(Date and sign – See Form 2.)

[An Intervener's Answer must be attached. See Form 30.]

Form 50. Request to Produce Documents and Tangible Things, or to Enter onto Land Under Rule 34.

(Caption – See Form 1.)

The plaintiff *name* requests that the defendant *name* respond within ____ days to the following requests:

1. To produce and permit the plaintiff to inspect and copy and to test or sample the following documents, including electronically stored information:

(*Describe each document and the electronically stored information, either individually or by category.*)

(*State the time, place, and manner of the inspection and any related acts.*)

2. To produce and permit the plaintiff to inspect and copy — and to test or sample — the following tangible things:

(*Describe each thing, either individually or by category.*)

(*State the time, place, and manner of the inspection and any related acts.)*

3. To permit the plaintiff to enter onto the following land to inspect, photograph, test, or sample the property or an object or operation on the property.

(*Describe the property and each object or operation.*)

(*State the time and manner of the inspection and any related acts.*)

(Date and sign – See Form 2.)

Form 51. Request for Admissions Under Rule 36.

(Caption — See Form 1.)

The plaintiff *name* asks the defendant *name* to respond within 30 days to these requests by admitting, for purposes of this action only and subject to objections to admissibility at trial:

1. The genuineness of the following documents, copies of which [are attached] [are or have been furnished or made available for inspection and copying].

(*List each document.*)

2. The truth of each of the following statements:

(*List each statement.*)

(Date and sign – See Form 2.)

Form 52. Report of the Parties' Planning Meeting.

(Caption – See Form 1.)

1. The following persons participated in a Rule 26(f) conference on *date* by *state the method of conferring*:

(*e.g., name* representing the plaintiff.)

2. Initial Disclosures. The parties [have completed] [will complete by *date*] the initial disclosures required by Rule 26(a)(1).

3. Discovery Plan. The parties propose this discovery plan:

(*Use separate paragraphs or subparagraphs if the parties disagree.*)

(a) Discovery will be needed on these subjects: (*describe.*)
(b) (Dates for commencing and completing discovery, including discovery to be commenced or completed before other discovery.)
(c) (Maximum number of interrogatories by each party to another party, along with the dates the answers are due.)
(d) (Maximum number of requests for admission, along with the dates responses are due.)
(e) (Maximum number of depositions by each party.)
(f) (Limits on the length of depositions, in hours.)
(g) (Dates for exchanging reports of expert witnesses.)
(h) (Dates for supplementations under Rule 26(e).)

4. Other Items:

(a) (A date if the parties ask to meet with the court before a scheduling order.)
(b) (Requested dates for pretrial conferences.)
(c) (Final dates for the plaintiff to amend pleadings or to join parties.)
(d) (Final dates for the defendant to amend pleadings or to join parties.)
(e) (Final dates to file dispositive motions.)
(f) (State the prospects for settlement.)
(g) (Identify any alternative dispute resolution procedure that may enhance settlement prospects.)
(h) (Final dates for submitting Rule 26(a)(3) witness lists, designations of witnesses whose testimony will be presented by deposition, and exhibit lists.)
(i) (Final dates to file objections under Rule 26(a)(3).)
(j) (Suggested trial date and estimate of trial length.)
(k) (Other matters.)

(Date and sign — see Form 2.)

Form 60. Notice of Condemnation.

(Caption – See Form 1.)

To *name the defendant*.

1. A complaint in condemnation has been filed in the United States District Court for the _____District of _____, to take property to use for *purpose*. The interest to be taken is *describe*. The court is located in the United States courthouse at this address: _____.

2. The property to be taken is described below. You have or claim an interest in it.

(*Describe the property.*)

3. The authority for taking this property is *cite*.

4. If you want to object or present any defense to the taking you must serve an answer on the plaintiff's attorney within 20 days [after being served with this notice][from (insert the date of the last publication of notice)]. Send your answer to this address: _____.

5. Your answer must identify the property in which you claim an interest, state the nature and extent of that interest, and state all your objections and defenses to the taking. Objections and defenses not presented are waived.

6. If you fail to answer you consent to the taking and the court will enter a judgment that takes your described property interest.

7. Instead of answering, you may serve on the plaintiff's attorney a notice of appearance that designates the property in which you claim an interest. After you do that, you will receive a notice of any proceedings that affect you. Whether or not you have previously appeared or answered, you may present evidence at a trial to determine compensation for the property and share in the overall award.

(Date and sign – See Form 2.)

Form 61. Complaint for Condemnation.

(Caption – See Form 1; name as defendants the property and at least one owner.)

1. (Statement of Jurisdiction – See Form 7.)

2. This is an action to take property under the power of eminent domain and to determine just compensation to be paid to the owners and parties in interest.

3. The authority for the taking is _____.

4. The property is to be used for _____.

5. The property to be taken is (*describe in enough detail for identification — or attach the description and state "is described in Exhibit A, attached."*)

6. The interest to be acquired is _____.

7. The persons known to the plaintiff to have or claim an interest in the property are: _____. (*For each person include the interest claimed.*)

8. There may be other persons who have or claim an interest in the property and whose names could not be found after a reasonably diligent search. They are made parties under the designation "Unknown Owners."

Therefore, the plaintiff demands judgment:

(a) condemning the property;

(b) determining and awarding just compensation; and

(c) granting any other lawful and proper relief.

(Date and sign – See Form 2.)

Form 70. Judgment on a Jury Verdict.

(Caption – See Form 1.)

This action was tried by a jury with Judge _____ presiding, and the jury has rendered a verdict.

It is ordered that:

[the plaintiff __*name*__ recover from the defendant __*name*__ the amount of $_____ with interest at the rate of __%, along with costs.]

[the plaintiff recover nothing, the action be dismissed on the merits, and the defendant __*name*__ recover costs from the plaintiff __*name*__.]

Date _____

_____
Clerk of Court

Form 71. Judgment by the Court without a Jury.

(Caption – See Form 1.)

This action was tried by Judge _____ without a jury and the following decision was reached:

It is ordered that [the plaintiff *name* recover from the defendant *name* the amount of $_____, with prejudgment interest at the rate of ___%, postjudgment interest at the rate of ___%, along with costs.] [the plaintiff recover nothing, the action be dismissed on the merits, and the defendant *name* recover costs from the plaintiff *name* .]

Date_____

_____
Clerk of Court

Form 80. Notice of a Magistrate Judge's Availability.

1. A magistrate judge is available under title 28 U.S.C. § 636(c) to conduct the proceedings in this case, including a jury or nonjury trial and the entry of final judgment. But a magistrate judge can be assigned only if all parties voluntarily consent.

2. You may withhold your consent without adverse substantive consequences. The identity of any party consenting or withholding consent will not be disclosed to the judge to whom the case is assigned or to any magistrate judge.

3. If a magistrate judge does hear your case, you may appeal directly to a United States court of appeals as you would if a district judge heard it.

A form called *Consent to an Assignment to a United States Magistrate Judge* is available from the court clerk's office.

Form 81. Consent to an Assignment to a Magistrate Judge.

(Caption – See Form 1.)

I voluntarily consent to have a United States magistrate judge conduct all further proceedings in this case, including a trial, and order the entry of final judgment. (Return this form to the court clerk — not to a judge or magistrate judge.)

Date_____

_____
Signature of the Party

Form 82. Order of Assignment to a Magistrate Judge.

(Caption – See Form 1.)

With the parties' consent it is ordered that this case be assigned to United States Magistrate Judge _____ of this district to conduct all proceedings and enter final judgment in accordance with 28 U.S.C. § 636(c).

Date _____

_____
United States District Judge

Style Amendments to the Electronic Discovery Amendments

Style amendments to Rules 16, 26, 33, 34, 37, and 45 are recommended for approval for adoption as follows:

Rule 16. Pretrial Conferences; Scheduling; Management[1]	**Rule 16. Pretrial Conferences; Scheduling; Management**
* * * * *	* * * * *
(b) Scheduling and Planning. Except in categories of actions exempted by district court rule as inappropriate, the district judge, or a magistrate judge when authorized by district court rule, shall, after receiving the report from the parties under Rule 26(f) or after consulting with the attorneys for the parties and any unrepresented parties by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time	**(b) Scheduling.**
(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. * * * * *	**(3) Contents of the Order.** **(A)** ***Required Contents.*** The scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions. **(B)** ***Permitted Contents.*** The scheduling order may: **(i)** modify the timing of disclosures under Rules 26(a) and 26(e)(1); **(ii)** modify the extent of discovery; **(iii)** provide for disclosure or discovery of electronically stored information; **(iv)** include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced; **(v)** set dates for pretrial conferences and for trial; and **(vi)** include other appropriate matters. * * * * *

[1] Includes amendments that take effect on December 1, 2006.

Rule 26. General Provisions Governing Discovery; Duty of Disclosure	**Rule 26. Duty to Disclose; General Provisions Governing Discovery**
(a) Required Disclosures; Methods to Discover Additional Matter.	**(a) Required Disclosures.**
(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:	**(1) Initial Disclosure.** **(A)** ***In General.*** Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the 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;	**(i)** the name and, if known, the address and telephone number of each individual likely to have discoverable information — along with the subjects of that information — that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;
(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; * * * * *	**(ii)** a copy — or a description by category and location — of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment; * * * * *
(b) Discovery Scope and Limits. * * * * *	**(b) Discovery Scope and Limits.** * * * * *
(2) Limitations.	**(2) Limitations on Frequency and Extent.**

(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.	**(A)** ***When Permitted.*** By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.
(B) 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.	**(B)** ***Specific Limitations on Electronically Stored Information.*** 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: * * * * *	**(C)** ***When Required.*** On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that: * * * * *
(5) Claims of Privilege or Protection of Trial- Preparation Materials.	**(5) Claiming Privilege or Protecting 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.	**(A)** ***Information Withheld.*** When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must: **(i)** expressly make the claim; and **(ii)** describe the nature of the documents, communications, or things not produced or disclosed — and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(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.	**(B)** ***Information Produced.*** If information produced in discovery 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; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.
* * * * *	* * * * *
(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 possibilities 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:	**(f) Conference of the Parties; Planning for Discovery.** * * * * * **(2) Conference Content; Parties' Responsibilities.** In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

(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).

* * * * *

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

(A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;

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

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

(D) any issues about claims of privilege or of protection as trial-preparation materials, including — if the parties agree on a procedure to assert these claims after production — whether to ask the court to include their agreement in an order;

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

(F) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

* * * * *

Rule 33. Interrogatories to Parties	Rule 33. Interrogatories to Parties
* * * * * **(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 . . . * * * * *	* * * * * **(d) Option to Produce Business Records.** If the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records (including electronically stored information), and if the burden of deriving or ascertaining the answer will be substantially the same for either party, the responding party may answer by: * * * * *

Rule 34. Production of Documents, Electronically Stored Information, and Things and Entry Upon Land for Inspection and Other Purposes	**Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto 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).	**(a) In General.** A party may serve on any other party a request within the scope of Rule 26(b): **(1)** to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control: **(A)** 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 either directly or, if necessary, after translation by the responding party into a reasonably usable form; or **(B)** any designated tangible things; or **(2)** to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.
(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).	**(b) Procedure.** **(1) Contents of the Request**. The request: **(A)** must describe with reasonable particularity each item or category of items to be inspected; **(B)** must specify a reasonable time, place, and manner for the inspection and for performing the related acts; and **(C)** may specify the form or forms in which electronically stored information is to be produced.

* * * * * 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.	**(2) Responses and Objections.** * * * * * **(D)** ***Responding to a Request for Production of Electronically Stored Information.*** The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form — or if no form was specified in the request — the party must state the form or forms it intends to use.
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. * * * * *	**(E)** ***Producing the Documents or Electronically Stored Information.*** Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information: **(i)** A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request; **(ii)** If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and **(iii)**A party need not produce the same electronically stored information in more than one form. * * * * *

Rule 37. Failure to Make Disclosures or Cooperate in Discovery; Sanctions	Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions
* * * * *	* * * * *
(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.	**(e) Failure to Provide 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.
* * * * *	
	(f) Failure to Participate in Framing a Discovery Plan.
	* * * * *

Rule 45. Subpoena	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) In General.** **(1) Form and Contents.** **(A)** ***Requirements – In General.*** Every subpoena must: **(i)** state the court from which it issued; **(ii)** state the title of the action, the court in which it is pending, and its civil-action number; **(iii)** command each person to whom it is directed to do the following at a specified time and place: attend and testify; produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or permit the inspection of premises; and **(iv)** set out the text of Rule 45(c) and (d). * * * * *
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.	**(C)** ***Combining or Separating a Command to Produce or to Permit Inspection; Specifying the Form for Electronically Stored Information.*** A command to produce documents, electronically stored information, or tangible things or to permit the inspection of premises may be included in a subpoena commanding attendance at a deposition, hearing, or trial, or may be set out in a separate subpoena. A subpoena may specify the form or forms in which electronically stored information is to be produced.
	(D) ***Command to Produce; Included Obligations.*** A command in a subpoena to produce documents, electronically stored information, or tangible things requires the responding party to permit inspection, copying, testing, or sampling of the materials.

(2) A subpoena must issue as follows: * * * * *	**(2) Issued from Which Court.** A subpoena must issue as follows: * * * * *
(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.	**(C)** for production or inspection, if separate from a subpoena commanding a person's attendance, from the court for the district where the production or inspection is to be made.

THE RULES AS PUBLISHED

Style Rules 1-86 are set out in full below, showing changes since publication in the conventional overstrike and underline form.

Changes have also been made since publication in "Style-Substance" Rules 11, 26, 30(b)(6), 31, 71.1, and 78. These changes, and the retraction of the proposals to amend Rules 8 and 36, are shown in the same form.

Changes have been made since publication in Style Forms 2, 5, 6, 17, 18, 19, 20, 30, 31, 51, and 71. These changes are shown in the same form.

The style changes to Rules 16, 26, 33, 34, 37, and 45 are shown in the same form.

AMENDMENTS TO THE
FEDERAL RULES OF CIVIL PROCEDURE

TITLE I. SCOPE OF RULES; FORM OF ACTION

Rule 1. Scope and Purpose

These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.

COMMITTEE NOTE

The language of Rule 1 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The merger of law, equity, and admiralty practice is complete. There is no need to carry forward the phrases that initially accomplished the merger.

The former reference to "suits of a civil nature" is changed to the more modern "civil actions and proceedings." This change does not affect ~~the~~ such questions as whether the Civil Rules apply to summary proceedings created by statute. See *SEC v. McCarthy*, 322 F.3d 650 (9th Cir. 2003); see also *New Hampshire Fire Ins. Co. v. Scanlon*, 362 U.S. 404 (1960).

The Style Project

The Civil Rules are the third set of the rules to be restyled. The restyled Rules of Appellate Procedure took effect in 1998. The restyled Rules of Criminal Procedure took effect in 2002. The restyled Rules of Civil Procedure apply the same general drafting guidelines and principles used in restyling the Appellate and Criminal Rules.

1. General Guidelines

Guidance in drafting, usage, and style was provided by Bryan Garner, *Guidelines for Drafting and Editing Court Rules*, Administrative Office of the United States Courts (1996) and Bryan Garner, *Dictionary of Modern Legal Usage* (2d ed. 1995).

2. Formatting Changes

Many of the changes in the restyled Civil Rules result from using format to achieve clearer presentation. The rules are broken down into constituent parts, using progressively indented subparagraphs with headings and substituting vertical for horizontal lists. "Hanging indents" are avoided. These formatting changes make the structure of the rules graphic and make the restyled rules easier to read and understand even when the words are not changed. Rule 14(a) illustrates the benefits of formatting changes.

3. Changes to Reduce Inconsistent, Ambiguous, Redundant, Repetitive, or Archaic Words

The restyled rules reduce the use of inconsistent terms that say the same thing in different ways. Because different words are presumed to have different meanings, such inconsistencies can result in confusion. The restyled rules reduce inconsistencies by using the same words to express the same meaning. For example, consistent expression is achieved without affecting meaning by the changes from "infant" in many rules to "minor" in all rules; from "upon motion or on its own initiative" in Rule 4(m) and variations in many other rules to "on motion or on its own"; and from "deemed" to "considered" in Rules 5(c), 12(e), and elsewhere. Some variations of expression have been carried forward when the context made that appropriate. As an example, "stipulate," "agree," and "consent" appear throughout the rules, and "written" qualifies these words in some places but not others. The number of variations has been reduced, but at times the former words were carried forward. None of the changes, when made, alters the rule's meaning.

The restyled rules minimize the use of inherently ambiguous words. For example, the word "shall" can mean "must," "may," or something else, depending on context. The potential for confusion is exacerbated by the fact that "shall" is no longer generally used in spoken or clearly written English. The restyled rules replace "shall" with "must," "may," or "should," depending on which one the context and established interpretation make correct in each rule.

The restyled rules minimize the use of redundant "intensifiers." These are expressions that attempt to add emphasis, but instead state the obvious and create negative implications for other rules. "The court in its discretion may" becomes "the court may"; "unless the order expressly directs otherwise" becomes "unless the court orders otherwise." The absence of intensifiers in the restyled rules does not change their substantive meaning. For example, the absence of the word "reasonable" to describe the written notice of foreign law required in Rule 44.1 does not mean that "unreasonable" notice is permitted.

The restyled rules also remove words and concepts that are outdated or redundant. The reference to "at law or in equity" in Rule 1 has become redundant with the merger of law and equity. Outdated words and concepts include the

reference to "demurrers, pleas, and exceptions" in Rule 7(c); the reference to "mesne" process in Rule 77(c); and the reference in Rule 81(f) to a now-abolished official position.

The restyled rules remove a number of redundant cross-references. For example, Rule 8(b) states that a general denial is subject to the obligations of Rule 11, but all pleadings are subject to Rule 11. Removing such cross-references does not defeat application of the formerly cross-referenced rule.

4. Rule Numbers

The restyled rules keep the same rule numbers to minimize the effect on research. Subdivisions have been rearranged within some rules to achieve greater clarity and simplicity. The only change that moves one part of a rule to another is the transfer of former Rule 25(d)(2) to Rule 17(d). The restyled rules include a comparison chart to make it easy to identify transfers of provisions between subdivisions and redesignations of some subdivisions.

5. Other Changes

The style changes to the rules are intended to make no changes in substantive meaning. A very small number of minor technical amendments that arguably do change meaning were approved separately from the restyled rules, but become effective at the same time. An example is adding "e-mail address" to the information that must be included in pleadings. These minor changes occur in Rules 4(k), 9(h), 11(a), 14(b), 16(c)(1), 26(g)(1), 30(b), 31, 40, 71.1, and 78.

Rule 2. One Form of Action

There is one form of action — the civil action.

COMMITTEE NOTE

The language of Rule 2 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.

TITLE II. COMMENCING AN ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS

Rule 3. Commencing an Action

A civil action is commenced by filing a complaint with the court.

COMMITTEE NOTE

The caption of Rule 3 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 4. Summons

(a) Contents; Amendments.

(1) Contents. ~~The~~ A summons must:

(A) name the court and the parties;

(B) be directed to the defendant;

(C) state the name and address of the plaintiff's attorney or — if unrepresented — of the plaintiff;

(D) state the time within which the defendant must appear and defend;

(E) notify the defendant that a failure to appear and defend will result in a default judgment against the defendant for the relief demanded in the complaint;

(F) be signed by the clerk; and

(G) bear the court's seal.

(2) Amendments. The court may permit a summons to be amended.

(b) Issuance. On or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is properly completed, the clerk must sign, seal, and issue it to the plaintiff for service on the defendant. A summons — or a copy of a summons that is addressed to multiple defendants — must be issued for each defendant to be served.

(c) Service.

(1) In General. A summons must be served with a copy of the complaint. The plaintiff is responsible for having the summons and complaint served within the time allowed by Rule 4(m) and must furnish the necessary copies to the person who makes service.

(2) By Whom. Any person who is at least 18 years old and not a party may serve a summons and complaint.

(3) By a Marshal or Someone Specially Appointed. At the plaintiff's request, the court may order that service be made by a United States marshal or deputy marshal or by a person specially appointed by the court. The court must so order if the plaintiff is authorized to proceed in forma pauperis under 28 U.S.C. §1915 or as a seaman under 28 U.S.C. § 1916.

(d) Waiving Service.

(1) Requesting a Waiver. An individual, corporation, or association that is subject to service under Rule 4(e), (f), or (h) has a duty to avoid unnecessary expenses of serving the summons. The plaintiff may notify such a defendant that an action has been commenced and request that the defendant waive service of a summons. The notice and request must:

(A) be in writing and be addressed:

(i) to the individual defendant; or

(ii) for a defendant subject to service under Rule 4(h), to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process;

(B) name the court where the complaint ~~has been~~ was filed;

(C) be accompanied by a copy of the complaint, two copies of a waiver form, and a prepaid means for returning the form;

(D) inform the defendant, using text prescribed in ~~Official~~ Form ~~1A~~ 5, of the consequences of waiving and not waiving service;

(E) state the date when the request is sent;

(F) give the defendant a reasonable time of at least 30 days after the request was sent — or at least 60 days if sent to the defendant outside any judicial district of the United States — to return the waiver; and

(G) be sent by first-class mail or other reliable means.

(2) Failure to Waive. If a defendant located within the United States fails, without good cause, to sign and return a waiver requested by a plaintiff located within the United States, the court must impose on the defendant:

(A) the expenses later incurred in making service; and

(B) the reasonable expenses, including attorney's fees, of any motion required to collect those service expenses.

(3) Time to Answer After a Waiver. A defendant who, before being served with process, timely returns a waiver need not serve an answer to the complaint until 60 days after the request was sent — or until 90 days after it was sent to the defendant outside any judicial district of the United States.

(4) Results of Filing a Waiver. When the plaintiff files a waiver, proof of service is not required and these rules apply as if a summons and complaint had been served at the time of filing the waiver.

(5) Jurisdiction and Venue Not Waived. Waiving service of a summons does not waive any objection to personal jurisdiction or to venue.

(e) Serving an Individual Within a Judicial District of the United States. Unless federal law provides otherwise, an individual — other than a minor, an incompetent person, or a person whose waiver has been filed — may be served in a judicial district of the United States by:

(1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or

(2) doing any of the following:

(A) delivering a copy of the summons and of the complaint to the individual personally;

(B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or

(C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

(f) Serving an Individual in a Foreign Country. Unless federal law provides otherwise, an individual — other than a minor, an incompetent person, or a person whose waiver has been filed — may be served at a place not within any judicial district of the United States:

(1) by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;

(2) if there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice:

(A) as prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction;

(B) as the foreign authority directs in response to a letter rogatory or letter of request; or

(C) unless prohibited by the foreign country's law, by:

(i) delivering a copy of the summons and of the complaint to the individual personally; or

(ii) using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt; or

(3) by other means not prohibited by international agreement, as the court orders.

(g) Serving a Minor or an Incompetent Person. A minor or an incompetent person in a judicial district of the United States must be served by following state law for serving a summons or like process on such a defendant in an action brought in the courts of general jurisdiction of the state where service is made. A minor or an incompetent person who is not within any judicial district of the United States must be served in the manner prescribed by Rule 4(f)(2)(A), (f)(2)(B), or (f)(3).

(h) Serving a Corporation, Partnership, or Association. Unless federal law provides otherwise or the defendant's waiver has been filed, a domestic or foreign corporation, or a partnership or other unincorporated association that is subject to suit under a common name, must be served:

(1) in a judicial district of the United States:

(A) in the manner prescribed by Rule 4(e)(1) for serving an individual; or

(B) by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process and — if the agent is one authorized by statute and the statute so requires — by also mailing a copy of each to the defendant; or

(2) at a place not within any judicial district of the United States, in any manner prescribed by Rule 4(f) for serving an individual, except personal delivery under (f)(2)(C)(i).

(i) Serving the United States and Its Agencies, Corporations, Officers, or Employees.

(1) United States. To serve the United States, a party must:

(A) **(i)** deliver a copy of the summons and of the complaint to the United States attorney for the district where the action is brought — or to an assistant United States attorney or clerical employee whom the United States attorney designates in a writing filed with the court clerk — or

(ii) send a copy of each by registered or certified mail to the civil-process clerk at the United States attorney's office;

(B) send a copy of each by registered or certified mail to the Attorney General of the United States at Washington, D.C.; and

(C) if the action challenges an order of a nonparty agency or officer of the United States, send a copy of each by registered or certified mail to the agency or officer.

(2) Agency; Corporation; Officer or Employee Sued in an Official Capacity. To serve a United States agency or corporation, or a United States officer or employee sued only in an official capacity, a party must serve the United States and also send a copy of the summons and of the complaint by registered or certified mail to the agency, corporation, officer, or employee.

(3) Officer or Employee Sued Individually. To serve a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf (whether or not the officer or employee is also sued in an official capacity), a party must serve the United States and also serve the officer or employee under Rule 4(e), (f), or (g).

(4) Extending Time. The court must allow a party a reasonable time to cure its failure to:

(A) serve a person required to be served under Rule 4(i)(2), if the party has served either the United States attorney or the Attorney General of the United States; or

(B) serve the United States under Rule 4(i)(3), if the party has served the United States officer or employee.

(j) Serving a Foreign, State, or Local Government.

(1) Foreign State. A foreign state or its political subdivision, agency, or instrumentality must be served in accordance with 28 U.S.C. § 1608.

(2) State or Local Government. A state, a municipal corporation, or any other state-created governmental organization that is subject to suit must be served by:

(A) delivering a copy of the summons and of the complaint to its chief executive officer; or

(B) serving a copy of each in the manner prescribed by that state's law for serving a summons or like process on such a defendant.

(k) Territorial Limits of Effective Service.

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

(A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located;

(B) who is a party joined under Rule 14 or 19 and is served within a judicial district of the United States and not more than 100 miles from where the summons was issued;

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

(D) when authorized by a federal statute.

(2) Federal Claim Outside State-Court Jurisdiction. For a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if:

(A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and

(B) exercising jurisdiction is consistent with the United States Constitution and laws.

(l) Proving Service.

(1) Affidavit Required. Unless service is waived, proof of service must be made to the court. Except for service by a United States marshal or deputy marshal, proof must be by the server's affidavit.

(2) Service Outside the United States. Service not within any judicial district of the United States must be proved as follows:

(A) if made under Rule 4(f)(1), as provided in the applicable treaty or convention; or

(B) if made under Rule 4(f)(2) or (f)(3), by a receipt signed by the addressee, or by other evidence satisfying the court that the summons and complaint were delivered to the addressee.

(3) Validity of Service; Amending Proof. Failure to prove service does not affect the validity of service. The court may permit proof of service to be amended.

(m) Time Limit for Service. If a defendant is not served within 120 days after the complaint is filed, the court — on motion or on its own after notice to the plaintiff — must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1).

(n) Asserting Jurisdiction over Property or Assets.

(1) Federal Law. The court may assert jurisdiction over property if authorized by a federal statute. Notice to claimants of the property must be given as provided in the statute or by serving a summons under this rule.

(2) State Law. On a showing that personal jurisdiction over a defendant cannot be obtained in the district where the action is brought by reasonable efforts to serve a summons under this rule, the court may assert jurisdiction over the defendant's assets found in the district. Jurisdiction is acquired by seizing the assets under the circumstances and in the manner provided by state law in that district.

COMMITTEE NOTE

The language of Rule 4 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 4(d)(1)(C) corrects an inadvertent error in former Rule 4(d)(2)(G). The defendant needs two copies of the waiver form, not an extra copy of the notice and request.

Rule 4(g) changes "infant" to "minor." "Infant" in the present rule means "minor." Modern word usage suggests that "minor" will better maintain the intended meaning. The same change from "infant" to "minor" is made throughout the rules. In addition, subdivision (f)(3) is added to the description of methods of service that the court may order; the addition ensures the evident intent that the court not order service by means prohibited by international agreement.

Rule 4(i)(4) corrects a misleading reference to "the plaintiff' in former Rule 4(i)(3). A party other than a plaintiff may need a reasonable time to effect service. Rule 4(i)(4) properly covers any party.

Former Rule 4(j)(2) refers to service upon an "other governmental organization subject to suit." This is changed to "any other state-created governmental organization that is subject to suit." The change entrenches the meaning indicated by the caption ("Serving a Foreign, State, or Local Government"), and the invocation of state law. It excludes any risk that this rule might be read to govern service on a federal agency, or other entities not created by state law.

Rule 4.1. Serving Other Process

(a) In General. Process — other than a summons under Rule 4 or a subpoena under Rule 45 — must be served by a United States marshal or deputy marshal or by a person specially appointed for that purpose. It may be served anywhere within the territorial limits of the state where the district court is located and, if authorized by a federal statute, beyond those limits. Proof of service must be made under Rule 4(l).

(b) Enforcing Orders: Committing for Civil Contempt. An order committing a person for civil contempt of a decree or injunction issued to enforce federal law may be served and enforced in any district. Any other order in a civil-contempt proceeding may be served only in the state where the issuing court is located or elsewhere in the United States within 100 miles from where the order was issued.

COMMITTEE NOTE

The language of Rule 4.1 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 5. Serving and Filing Pleadings and Other Papers

(a) Service: When Required.

(1) In General. Unless these rules provide otherwise, each of the following papers must be served on every party:

(A) an order stating that service is required;

(B) a pleading filed after the original complaint, unless the court orders otherwise under Rule 5(c) because there are numerous defendants;

(C) a discovery paper required to be served on a party, unless the court orders otherwise;

(D) a written motion, except one that may be heard ex parte; and

(E) a written notice, appearance, demand, or offer of judgment, or any similar paper.

(2) If a Party Fails to Appear. No service is required on a party who is in default for failing to appear. But a pleading that asserts a new claim for relief against such a party must be served on that party under Rule 4.

(3) Seizing Property. If an action is begun by seizing property and no person is or need be named as a defendant, any service required before the filing of an appearance, answer, or claim~~, or appearance~~ must be made on the person who had custody or possession of the property when it was seized.

(b) Service: How Made.

(1) Serving an Attorney. If a party is represented by an attorney, service under this rule must be made on the attorney unless the court orders service on the party.

(2) Service in General. A paper is served under this rule by:

(A) handing it to the person;

(B) leaving it:

(i) at the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or

(ii) if the person has no office or the office is closed, at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there;

(C) mailing it to the person's last known address — in which event service is complete upon mailing;

(D) leaving it with the court clerk if the person's ~~address is unknown~~ has no known address;

(E) sending it by electronic means if the person consented in writing — in which event service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served; or

(F) delivering it by any other means that the person consented to in writing — in which event service is complete when the person making service delivers it to the agency designated to make delivery.

(3) Using Court Facilities. If a local rule so authorizes, a party may use the court's transmission facilities to make service under Rule 5(b)(2)(E).

(c) Serving Numerous Defendants.

(1) In General. If an action involves an unusually large number of defendants, the court may, on motion or on its own, order that:

(A) defendants' pleadings and replies to them need not be served on other defendants;

(B) any crossclaim, counterclaim, avoidance, or affirmative defense in those pleadings and replies to them will be treated as denied or avoided by all other parties; and

(C) filing any such pleading and serving it on the plaintiff constitutes notice of the pleading to all parties.

(2) Notifying Parties. A copy of every such order must be served on the parties as the court directs.

(d) Filing.

(1) Required Filings; Certificate of Service. Any paper after the complaint that is required to be served — together with a certificate of service — must be filed 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: depositions, interrogatories, requests for documents or tangible things or to permit entry onto land, and requests for admission.

(2) How Filing Is Made — In General. A paper is filed by delivering it:

(A) to the clerk; or

(B) to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk.

(3) Electronic Filing, Signing, or Verification. A court may, by local rule, allow papers to be filed, signed, or verified by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. A local rule may require ~~filing by~~ electronic ~~means~~ filing only if reasonable exceptions are allowed. A paper filed ~~by electronic means~~ electronically in compliance with a local rule is a written paper for purposes of these rules.

(4) Acceptance by the Clerk. The clerk must not refuse to file a paper solely because it is not in the form prescribed by these rules or by a local rule or practice.

COMMITTEE NOTE

The language of Rule 5 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 5(a)(1)(E) omits the former reference to a designation of record on appeal. Appellate Rule 10 is a self-contained provision for the record on appeal, and provides for service.

Former Rule 5(b)(2)(D) literally provided that a local rule may authorize use of the court's transmission facilities to make service by non-electronic means agreed to by the parties. That was not intended. Rule 5(b)(3) restores the intended meaning — court transmission facilities can be used only for service by electronic means.

Rule 5(d)(2)(B) provides that "a" judge may accept a paper for filing, replacing the reference in former Rule 5(e) to "the" judge. Some courts do not assign a designated judge to each case, and it may be important to have another judge accept a paper for filing even when a case is on the individual docket of a particular judge. The ministerial acts of accepting the paper, noting the time, and transmitting the paper to the court clerk do not interfere with the assigned judge's authority over the action.

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 parties do not include the United States, ~~nor any~~ one of its agencies, or one of its officers~~,~~ or employees ~~is a party~~ in an official capacity~~,~~ ;or

(B) a state statute is questioned and ~~neither~~ the parties do not include the state, ~~nor any~~ one of its agencies, or one of its 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~~ questioned — or on the state attorney general if a state statute is ~~challenged~~ questioned — 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 appropriate ~~A~~attorney ~~G~~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~~ a statute has been questioned.

(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.

COMMITTEE NOTE

The language of Rule 5.1 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 6. Computing and Extending Time; Time for Motion Papers

(a) Computing Time. The following rules apply in computing any time period specified in these rules or in any local rule, court order, or statute:

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

(2) Exclusions from Brief Periods. Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days.

(3) Last Day. 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 weather or other conditions make the clerk's office inaccessible. When the last day is excluded, the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible.

(4) "Legal Holiday" Defined. As used in these rules, "legal holiday" means:

(A) the day set aside by statute for observing 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, or Christmas Day; and

(B) any other day declared a holiday by the President, Congress, or the state where the district court is located.

(b) Extending Time.

(1) In General. When an act may or must be done within a specified time, the court may, for good cause, extend the time:

(A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or

(B) on motion made after the time has expired if the party failed to act because of excusable neglect.

(2) Exceptions. A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b), except as those rules allow.

(c) Motions, Notices of Hearing, and Affidavits.

(1) In General. A written motion and notice of the hearing must be served at least 5 days before the time specified for the hearing, with the following exceptions:

(A) when the motion may be heard ex parte;

(B) when these rules set a different ~~period~~ time; or

(C) when a court order — which a party may, for good cause, apply for ex parte — sets a different ~~period~~ time.

(2) Supporting Affidavit. Any affidavit supporting a motion must be served with the motion. Except as Rule 59(c) provides otherwise, any opposing affidavit must be served at least 1 day before the hearing, unless the court permits service at another time.

(d) Additional Time After Certain Kinds of Service. When a party ~~must or~~ may or must act within a specified time after service and service is made under Rule 5(b)(2)(C), (D), (E), or (F), 3 days are added to the period.

COMMITTEE NOTE

The language of Rule 6 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.

TITLE III. PLEADINGS AND MOTIONS

Rule 7. Pleadings Allowed; Form of Motions and Other Papers

(a) Pleadings. Only these pleadings are allowed:

(1) a complaint;

(2) an answer to a complaint;

(3) an answer to a counterclaim designated as a counterclaim;

(4) an answer to a crossclaim;

(5) a third-party complaint;

(6) an answer to a third-party complaint; and

(7) if the court orders one, a reply to an answer ~~or a third-party answer~~.

(b) Motions and Other Papers.

(1) In General. A request for a court order must be made by motion. The motion must:

(A) be in writing unless made during a hearing or trial;

(B) state with particularity the grounds for seeking the order; and

(C) state the relief sought.

(2) Form. The rules governing captions and other matters of form in pleadings apply to motions and other papers.

COMMITTEE NOTE

The language of Rule 7 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 7(a) stated that "there shall be * * * an answer to a cross-claim, if the answer contains a cross-claim * * *." Former Rule 12(a)(2) provided more generally that "[a] party served with a pleading stating a cross-claim against that party shall serve an answer thereto * * *." New Rule 7(a) corrects this inconsistency by providing for an answer to a crossclaim.

For the first time, Rule 7(a)(7) expressly authorizes the court to order a reply to a counterclaim answer. A reply may be as useful in this setting as a reply to an answer, a third-party answer, or a crossclaim answer.

Former Rule 7(b)(1) stated that the writing requirement is fulfilled if the

motion is stated in a written notice of hearing. This statement was deleted as redundant because a single written document can satisfy the writing requirements both for a motion and for a Rule 6(c)(1) notice.

The cross-reference to Rule 11 in former Rule 7(b)(3) is deleted as redundant. Rule 11 applies by its own terms. The force and application of Rule 11 are not diminished by the deletion.

Former Rule 7(c) is deleted because it has done its work. If a motion or pleading is described as a demurrer, plea, or exception for insufficiency, the court will treat the paper as if properly captioned.

Rule 7.1. Disclosure Statement

(a) Who Must File; Contents. A nongovernmental corporate party must file two copies of a disclosure statement that:

(1) identifies any parent corporation and any publicly held corporation owning 10% or more of its stock; or

(2) states that there is no such corporation.

(b) Time to File; Supplemental Filing. A party must:

(1) file the disclosure statement with its first appearance, pleading, petition, motion, response, or other request addressed to the court; and

(2) promptly file a supplemental statement if any required information changes.

COMMITTEE NOTE

The language of Rule 7.1 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 8. General Rules of Pleading

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

(1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;

(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and

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

(b) Defenses; Admissions and Denials.

(1) In General. In responding to a pleading, a party must:

(A) state in short and plain terms its defenses to each claim asserted against it; and

(B) admit or deny the allegations asserted against it by an opposing party.

(2) Denials — Responding to the Substance. A denial must fairly respond to the substance of the allegation.

(3) General and Specific Denials. A party that intends in good faith to deny all the allegations of a pleading — including the jurisdictional grounds — may do so by a general denial. A party that does not intend to deny all the allegations must either specifically deny designated allegations or generally deny all except those specifically admitted.

(4) Denying Part of an Allegation. A party that intends in good faith to deny only part of an allegation must admit the part that is true and deny the rest.

(5) Lacking Knowledge or Information. A party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, and the statement has the effect of a denial.

(6) Effect of Failing to Deny. An allegation — other than one relating to the amount of damages — is admitted if a responsive pleading is required and the allegation is not denied. If a responsive pleading is not required, an allegation is considered denied or avoided.

(c) Affirmative Defenses.

(1) In General. In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including:

- 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; and
- waiver.

(2) Mistaken Designation. If a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so.

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

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

(2) Alternative Statements of a Claim or Defense. A party may set out two or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.

(3) Inconsistent Claims or Defenses. A party may state as many separate claims or defenses as it has, regardless of consistency.

(e) Construing Pleadings. Pleadings must be construed so as to do justice.

COMMITTEE NOTE

The language of Rule 8 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The former Rule 8(b) and 8(e) cross-references to Rule 11 are deleted as redundant. Rule 11 applies by its own terms. The force and application of Rule 11 are not diminished by the deletion.

Former Rule 8(b) required a pleader denying part of an averment to "specify so much of it as is true and material and * * * deny only the remainder." "[A]nd material" is deleted to avoid the implication that it is proper to deny something that the pleader believes to be true but not material.

Deletion of former Rule 8(e)(2)'s "whether based on legal, equitable, or maritime grounds" reflects the parallel deletions in Rule 1 and elsewhere. Merger is now successfully accomplished.

Rule 9. Pleading Special Matters

(a) Capacity or Authority to Sue; Legal Existence.

(1) In General. Except when required to show that the court has jurisdiction, a pleading need not allege:

(A) a party's capacity to sue or be sued;

(B) a party's authority to sue or be sued in a representative capacity; or

(C) the legal existence of an organized association of persons that is made a party.

(2) Raising Those Issues. To raise any of those issues, a party must do so by a specific denial, which must state any supporting facts that are peculiarly within the party's knowledge.

(b) Fraud or Mistake; Conditions of Mind. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

(c) Conditions Precedent. In pleading conditions precedent, it suffices to allege generally that all conditions precedent have occurred or been performed. But when denying that a condition precedent has occurred or been performed, a party must do so with particularity.

(d) Official Document or Act. In pleading an official document or official act, it suffices to allege that the document was legally issued or the act legally done.

(e) Judgment. In pleading a judgment or decision of a domestic or foreign court, a judicial or quasi-judicial tribunal, or a board or officer, it suffices to plead the judgment or decision without showing jurisdiction to render it.

(f) Time and Place. An allegation of time or place is material when testing the sufficiency of a pleading.

(g) Special Damages. If an item of special damage is claimed, it must be specifically stated.

(h) Admiralty or Maritime Claim.

(1) How Designated. If a claim for relief is within the admiralty or maritime jurisdiction and also within the court's subject-matter jurisdiction on some other ground, the pleading may designate the claim as an admiralty or maritime claim for purposes of Rules 14(c), 38(e), and 82 and the Supplemental Rules for ~~Certain~~ Admiralty ~~and~~ or Maritime Claims and Asset Forfeiture Actions. A claim cognizable only in the admiralty or maritime jurisdiction is an admiralty or maritime claim for those purposes, whether or not so designated.

(2) Amending a Designation. Rule 15 governs amending a pleading to add or withdraw a designation.

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

COMMITTEE NOTE

The language of Rule 9 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 10. Form of Pleadings

(a) Caption; Names of Parties. Every pleading must have a caption with the court's name, a title ~~that names the parties~~, a file number, and a Rule 7(a) designation. The title of the complaint must name all the parties; the title of other pleadings ~~may name~~, after naming the first party on each side ~~and~~, may refer generally to other parties.

(b) Paragraphs; Separate Statements. A party must state its claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances. A later pleading may refer by number to a paragraph in an earlier pleading. If doing so would promote clarity, each claim founded on a separate transaction or occurrence — and each defense other than a denial — must be stated in a separate count or defense.

(c) Adoption by Reference; ~~Attached Instrument~~ Exhibits. A statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion. A copy of a written instrument ~~attached~~ that is an exhibit to a pleading is a part of the pleading for all purposes.

COMMITTEE NOTE

The language of Rule 10 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 11. Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions

(a) Signature. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name — or by a party personally if

the party is ~~not represented by an attorney~~ unrepresented. The paper must state the signer's address and telephone number, if any. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

(b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper — whether by signing, filing, submitting, or later advocating it — an attorney or unrepresented party certifies 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, cause unnecessary delay, or needlessly increase the cost of litigation ~~costs~~;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely 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 belief or a lack of information ~~or belief~~.

(c) Sanctions.

(1) In General. If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

(2) Motion for Sanctions. A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion.

(3) On the Court's Initiative. On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b).

(4) Nature of a Sanction. A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; 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 part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.

(5) Limitations on Monetary Sanctions. The court must not impose a monetary sanction:

(A) against a represented party for violating Rule 11(b)(2); or

(B) on its own, unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(6) Requirements for an Order. An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

(d) Inapplicability to Discovery. This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.

COMMITTEE NOTE

The language of Rule 11 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 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; ~~and~~ Waiving Defenses; Pretrial Hearing

(a) Time to Serve a Responsive Pleading.

(1) In General. Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:

(A) A defendant must serve an answer:

(i) within 20 days after being served with the summons and complaint; or

(ii) if it has timely waived service under Rule 4(d), within 60 days after the request for a waiver was sent, or within 90 days after it was sent to the defendant outside any judicial district of the United States.

(B) A party must serve an answer to a counterclaim or crossclaim within 20 days after being served with the pleading that states the counterclaim or crossclaim.

(C) A party must serve a reply to an answer within 20 days after being served with an order to reply, unless the order specifies a different time.

(2) United States and Its Agencies, Officers, or Employees Sued in an Official Capacity. The United States, a United States agency, or a United States officer or employee sued only in an official capacity must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the United States attorney.

(3) United States Officers or Employees Sued in an Individual Capacity. A United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the officer or employee or service on the United States attorney, whichever is later.

(4) Effect of a Motion. Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

(A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must 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 must be served within 10 days after the more definite statement is served.

(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;

(2) lack of personal jurisdiction;

(3) improper venue;

(4) insufficient process;

(5) insufficient service of process;

(6) failure to state a claim upon which relief can be granted; and

(7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed — but early enough not to delay trial — a party may move for judgment on the pleadings.

(d) Result of Presenting Matters Outside the Pleadings. If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

(e) Motion for a More Definite Statement. A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 10 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order ~~that it considers appropriate~~.

(f) Motion to Strike. The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

(1) on its own; or

(2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 20 days after being served with the pleading.

(g) Joining Motions ~~Consolidating Defenses in a Motion.~~

(1) Right to Join ~~Consolidating Defenses~~. A motion under this rule may be joined with any other motion allowed by this rule.

(2) Limitation on Further Motions. Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

(h) Waiving and Preserving Certain Defenses.

(1) When Some Are Waived. A party waives any defense listed in Rule 12(b)(2)-(5) by:

(A) omitting it from a motion in the circumstances described in Rule 12(g)(2); or

(B) failing to either:

(i) make it by motion under this rule; or

(ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.

(2) When to Raise Others. Failure to state a claim upon which relief can be granted, to join a person required by Rule 19(b), or to state a legal defense to a claim may be raised:

(A) in any pleading allowed or ordered under Rule 7(a);

(B) by a motion under Rule 12(c); or

(C) at trial.

(3) Lack of Subject-Matter Jurisdiction. If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.

(i) Hearing Before Trial. If a party so moves, any defense listed in Rule 12(b)(1)-(7) — whether made in a pleading or by motion — and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial.

COMMITTEE NOTE

The language of Rule 12 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be

stylistic only.

Former Rule 12(a)(4)(A) referred to an order that postpones disposition of a motion "until the trial on the merits." Rule 12(a)(4) now refers to postponing disposition "until trial." The new expression avoids the ambiguity that inheres in "trial on the merits," which may become confusing when there is a separate trial of a single issue or another event different from a single all-encompassing trial.

Rule 13. Counterclaim and Crossclaim

(a) Compulsory Counterclaim.

(1) In General. A pleading must state as a counterclaim any claim that — at the time of its service — the pleader has against an opposing party if the claim:

(A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and

(B) does not require adding another party over whom the court cannot acquire jurisdiction.

(2) Exceptions. The pleader need not state the claim if:

(A) when the action was commenced, the claim was the subject of another pending action; or

(B) the opposing party sued on its claim by attachment or other process ~~by which the court did not acquire~~ that did not establish personal jurisdiction over the pleader on that claim, and the pleader does not assert any counterclaim under this rule.

(b) Permissive Counterclaim. A pleading may state as a counterclaim against an opposing party any claim that is not compulsory ~~against an opposing party~~.

(c) Relief Sought in a Counterclaim. A counterclaim need not diminish or defeat the recovery sought by the opposing party. It may request relief that exceeds in amount or differs in kind from the relief sought by the opposing party.

(d) Counterclaim Against the United States. These rules do not expand the right to assert a counterclaim — or to claim a credit — against the United States or a United States officer or agency.

(e) Counterclaim Maturing or Acquired After Pleading. The court may permit a party to file a supplemental pleading asserting a counterclaim that matured or was acquired by the party after serving an earlier pleading.

(f) Omitted Counterclaim. The court may permit a party to amend a pleading to add a counterclaim if it was omitted through oversight, inadvertence, or excusable neglect or if justice so requires.

(g) Crossclaim Against a Coparty. A pleading may state as a crossclaim any claim by one party against a coparty if the claim arises out of the transaction or occurrence that is the subject matter of the original action or of a counterclaim, or if the claim relates to any property that is the subject matter of the original action. The crossclaim may include a claim that the coparty is or may be liable to the crossclaimant for all or part of a claim asserted in the action against the crossclaimant.

(h) Joining Additional Parties. Rules 19 and 20 govern the addition of a person as a party to a counterclaim or crossclaim.

(i) Separate Trials; Separate Judgments. If the court orders separate trials under Rule 42(b), it may enter judgment on a counterclaim or crossclaim under Rule 54(b) when it has jurisdiction to do so, even if the opposing party's claims have been dismissed or otherwise resolved.

COMMITTEE NOTE

The language of Rule 13 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The meaning of former Rule 13(b) is better expressed by deleting "not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim." Both as a matter of intended meaning and current practice, a party may state as a permissive counterclaim a claim that does grow out of the same transaction or occurrence as an opposing party's claim even though one of the exceptions in Rule 13(a) means the claim is not a compulsory counterclaim.

Rule 14. Third-Party Practice

(a) When a Defending Party May Bring in a Third Party.

(1) Timing of the Summons and Complaint. A defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it. But the third-party plaintiff must, by motion, obtain the court's leave if it files the third-party complaint more than 10 days after serving its original answer.

(2) Third-Party Defendant's Claims and Defenses. The person served with the summons and third-party complaint — the "third-party defendant":

(A) must assert any defense against the third-party plaintiff's claim under Rule 12;

(B) must assert any counterclaim against the third-party plaintiff under Rule 13(a), and may assert any counterclaim against the third-party plaintiff under Rule 13(b) or any crossclaim against another third-party defendant under Rule 13(g);

(C) may assert against the plaintiff any defense that the third-party plaintiff has to the plaintiff's claim; and

(D) may also assert against the 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.

(3) Plaintiff's Claims Against a Third-Party Defendant. The plaintiff may assert against the third-party defendant any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The third-party defendant must then assert any defense under Rule 12 and any counterclaim under Rule 13(a), and may assert any counterclaim under Rule 13(b) or any crossclaim under Rule 13(g).

(4) Motion to Strike, Sever, or Try Separately. Any party may move to strike the third-party claim, to sever it, or to try it separately.

(5) Third-Party Defendant's Claim Against a Nonparty. A third-party defendant may proceed under this rule against a nonparty who is or may be liable to the third-party defendant for all or part of any claim against it.

(6) Third-Party Complaint In Rem. If it is within the admiralty or maritime jurisdiction, a third-party complaint may be in rem. In that event, a reference in this rule to the "summons" includes the warrant of arrest, and a reference to the defendant or third-party plaintiff includes, when appropriate, a person who asserts a right under Supplemental Rule C(6)(~~b~~ a)(i) in the property arrested.

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

(c) Admiralty or Maritime Claim.

(1) Scope of Impleader. If a plaintiff asserts an admiralty or maritime claim under Rule 9(h), the defendant or a person who asserts a right under Supplemental Rule C(6)(~~b~~ a)(i) may, as a third-party plaintiff, bring in a third-party defendant who may be wholly or partly liable — either to the plaintiff or to the third-party plaintiff — for remedy over, contribution, or otherwise on account of the same transaction, occurrence, or series of transactions or occurrences.

(2) Defending Against a Demand for Judgment for the Plaintiff. The third-party plaintiff may demand judgment in the plaintiff's favor against the third-party defendant. In that event, the third-party defendant must defend under Rule 12 against the plaintiff's claim as well as the third-party plaintiff's claim; and the action proceeds as if the plaintiff had sued both the third-party defendant and the third-party plaintiff.

COMMITTEE NOTE

The language of Rule 14 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 14 twice refers to counterclaims under Rule 13. In each case, the operation of Rule 13(a) depends on the state of the action at the time the pleading is filed. If plaintiff and third-party defendant have become opposing parties because one has made a claim for relief against the other, Rule 13(a) requires assertion of any counterclaim that grows out of the transaction or occurrence that is the subject matter of that claim. Rules 14(a)(2)(B) and (a)(3) reflect the distinction between compulsory and permissive counterclaims.

Rule 15. Amended and Supplemental Pleadings

(a) Amendments Before Trial.

(1) Amending as a Matter of Course. A party may amend its pleading once as a matter of course:

(A) before being served with a responsive pleading; or

(B) within 20 days after serving the pleading if a responsive pleading is not allowed and the action is not yet on the trial calendar.

(2) Other Amendments. ~~Except as allowed by Rule 15(a)(1)~~ In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

(3) Time to Respond. Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 10 days after service of the amended pleading, whichever is later.

(b) Amendments During and After Trial.

(1) ~~During~~ Based on an Objection at Trial. If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings to be amended. The court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits. The court may grant a continuance to enable the objecting party to meet the evidence.

(2) ~~After Trial~~ For Issues Tried by Consent. When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move — at any time, even after judgment — to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

(c) Relation Back of Amendments.

(1) When an Amendment ~~May~~ Relates Back. An amendment to a pleading relates back to the date of the original pleading when:

(A) the law that provides the applicable statute of limitations allows relation back;

(B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out — or attempted to be set out — in the original pleading; or

(C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:

(i) received such notice of the action that it will not be prejudiced in defending on the merits; and

(ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

(2) Notice to the United States. When the United States or a United States officer or agency is added as a defendant by amendment, the notice requirements of Rule 15(c)(1)(C)(i) and (ii) are satisfied if, during the stated period, process was delivered or mailed to the United States attorney or the United States attorney's designee, to the Attorney General of the United States, or to the officer or agency.

(d) Supplemental Pleadings. On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense. The court may order that the opposing party plead to the supplemental pleading within a specified time.

COMMITTEE NOTE

The language of Rule 15 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 15(c)(3)(A) called for notice of the "institution" of the action. Rule 15(c)(1)(C)(i) omits the reference to "institution" as potentially confusing. What counts is that the party to be brought in have notice of the existence of the action, whether or not the notice includes details as to its "institution."

Rule 16. Pretrial Conferences; Scheduling; Management

(a) Purposes of a Pretrial Conference. In any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as:

(1) expediting 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 settlement.

(b) Scheduling.

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

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

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

(2) Time to Issue. The judge must issue the scheduling order as soon as practicable, but in any event within the earlier of 120 days after any defendant has been served with the complaint ~~and within~~ or 90 days after any defendant has appeared.

(3) Contents of the Order.

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

(B) Permitted Contents. The scheduling order may:

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

(ii) modify the extent of discovery;

(iii) set dates for pretrial conferences and for trial; and

(iv) include other appropriate matters.

(4) Modifying a Schedule. A schedule may be modified only for good cause and with the judge's consent.

(c) Attendance and Matters for Consideration at a Pretrial Conference.

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

(2) Matters for Consideration. At any pretrial conference, the court may consider and take appropriate action on the following matters:

(A) formulating and simplifying the issues, and eliminating frivolous claims or defenses;

(B) amending the pleadings if necessary or desirable;

(C) obtaining admissions and stipulations about facts and documents to avoid unnecessary proof, and ruling in advance on the admissibility of evidence;

(D) avoiding unnecessary proof and cumulative evidence, and limiting the use of testimony under Federal Rule of Evidence 702;

(E) determining the appropriateness and timing of summary adjudication under Rule 56;

(F) controlling and scheduling discovery, including orders affecting disclosures and discovery under Rule 26 and Rules 29 through 37;

(G) identifying witnesses and documents, scheduling the filing and exchange of any pretrial briefs, and setting dates for further conferences and for trial;

(H) referring matters to a magistrate judge or a master;

(I) settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule;

(J) determining the form and content of the pretrial order;

(K) disposing of pending motions;

(L) adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;

(M) ordering a separate trial under Rule 42(b) of a claim, counterclaim, crossclaim, third-party claim, or particular issue;

(N) ordering the presentation of evidence early in the trial on a manageable issue that might, 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);

(O) establishing a reasonable limit on the time allowed to present evidence; and

(P) facilitating in other ways the just, speedy, and inexpensive disposition of the action.

(d) Pretrial Orders. After any conference under this rule, the court should issue an order reciting the action taken. This order controls the course of the action unless the court modifies it.

(e) Final Pretrial Conference and Orders. The court may hold a final pretrial conference to formulate a trial plan, including a plan to facilitate the admission of evidence. The conference must be held as close to the start of trial as is reasonable, and must be attended by at least one attorney who will conduct the trial for each party and by any unrepresented party. The court may modify ~~an~~ the order issued after a final pretrial conference only to prevent manifest injustice.

(f) Sanctions.

(1) In General. On motion or on its own, the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)-(vii), if a party or its attorney:

(A) fails to appear at a scheduling or other pretrial conference;

(B) is substantially unprepared to participate — or does not participate in good faith — in the conference; or

(C) fails to obey a scheduling or other pretrial order.

(2) Imposing Fees and Costs. Instead of or in addition to any other sanction, the court must order the party, its attorney, or both to pay the reasonable expenses — including attorney's fees — incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust.

COMMITTEE NOTE

The language of Rule 16 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.

TITLE IV. PARTIES

Rule 17. ~~The~~ Plaintiff and Defendant; Capacity; Public Officers

(a) Real Party in Interest.

(1) Designation in General. An action must be prosecuted in the name of the real party in interest. The following may sue in their own names without joining the person for whose benefit the action is brought:

(A) an executor;

(B) an administrator;

(C) a guardian;

(D) a bailee;

(E) a trustee of an express trust;

(F) a party with whom or in whose name a contract has been made for another's benefit; and

(G) a party authorized by statute.

(2) Action in the Name of the United States for Another's Use or Benefit. When a federal statute so provides, an action for another's use or benefit must be brought in the name of the United States.

(3) Joinder of the Real Party in Interest. The court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action. After ratification, joinder, or substitution, the action proceeds as if it had been originally commenced by the real party in interest.

(b) Capacity to Sue or Be Sued. Capacity to sue or be sued is determined as follows:

(1) for an individual who is not acting in a representative capacity, by the law of the individual's domicile;

(2) for a corporation, by the law under which it was organized; and

(3) for all other parties, by the law of the state where the court is located, except that:

(A) a partnership or other unincorporated association with no such capacity under that state's law may sue or be sued in its common name to enforce a substantive right existing under the United States Constitution or laws; and

(B) 28 U.S.C. §§ 754 and 959(a) govern the capacity of a receiver appointed by a United States court to sue or be sued in a United States court.

(c) Minor or Incompetent Person.

(1) With a Representative. The following representatives may sue or defend on behalf of a minor or an incompetent person:

(A) a general guardian;

(B) a committee;

(C) a conservator; or

(D) a like fiduciary.

(2) Without a Representative. A minor or an incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court must appoint a guardian ad litem — or issue another appropriate order — to protect a minor or incompetent person who is unrepresented in an action.

(d) Public Officer's Title and Name. A public officer who sues or is sued in an official capacity may be designated by official title rather than by name, but the court may order that the officer's name be added.

COMMITTEE NOTE

The language of Rule 17 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 17(d) incorporates the provisions of former Rule 25(d)(2), which fit better with Rule 17.

Rule 18. Joinder of Claims

(a) In General. A party asserting a claim, counterclaim, crossclaim, or third-party claim may join, as independent or alternative claims, as many claims as it has against an opposing party.

(b) Joinder of Contingent Claims. A party may join two claims even though one of them is contingent on the disposition of the other; but the court may grant relief only in accordance with the parties' relative substantive rights. In particular, a plaintiff may state a claim for money and a claim to set aside a conveyance that is fraudulent as to that plaintiff, without first obtaining a judgment for the money.

COMMITTEE NOTE

The language of Rule 18 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.

Modification of the obscure former reference to a claim "heretofore cognizable only after another claim has been prosecuted to a conclusion" avoids any uncertainty whether Rule 18(b)'s meaning is fixed by retrospective inquiry from some particular date.

Rule 19. Required Joinder of Parties

(a) Persons Required to Be Joined if Feasible.

(1) Required Party. A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:

(A) in that person's absence, the court cannot accord complete relief among existing parties; or

(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

(i) as a practical matter impair or impede the person's ability to protect the interest; or

(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

(2) Joinder by Court Order. If a person has not been joined as required, the court must order that the person be made a party. A person who refuses to join

as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff.

(3) Venue. If a joined party objects to venue and the joinder would make venue improper, the court must dismiss that party.

(b) When Joinder Is Not Feasible. If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:

(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;

(2) the extent to which any prejudice could be lessened or avoided by:

(A) protective provisions in the judgment;

(B) shaping the relief; or

(C) other measures;

(3) whether a judgment rendered in the person's absence would be adequate; and

(4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

(c) Pleading the Reasons for Nonjoinder. When asserting a claim for relief, a party must state:

(1) the name, if known, of any person who is required to be joined if feasible but is not joined; and

(2) the reasons for not joining that person.

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

COMMITTEE NOTE

The language of Rule 19 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 19(b) described the conclusion that an action should be dismissed for inability to join a Rule 19(a) party by carrying forward traditional terminology: "the absent person being thus regarded as indispensable." "Indispensable" was used only to express a conclusion reached by applying the tests of Rule 19(b). It has been discarded as redundant.

Rule 20. Permissive Joinder of Parties

(a) Persons Who May Join or Be Joined.

(1) Plaintiffs. Persons may join in one action as plaintiffs if:

(A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and

(B) any question of law or fact common to all plaintiffs will arise in the action.

(2) Defendants. Persons — as well as a vessel, cargo, or other property subject to admiralty process in rem — may be joined in one action as defendants if:

(A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and

(B) any question of law or fact common to all defendants will arise in the action.

(3) Extent of Relief. Neither a plaintiff nor a defendant need be interested in obtaining or defending against all the relief demanded. The court may grant judgment to one or more plaintiffs according to their rights, and against one or more defendants according to their liabilities.

(b) Protective Measures. The court may issue orders — including an order for separate trials — to protect a party against embarrassment, delay, expense, or other prejudice that arises from including a person against whom the party asserts no claim and who asserts no claim against the party.

COMMITTEE NOTE

The language of Rule 20 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 21. Misjoinder and Nonjoinder of Parties

Misjoinder of parties is not a ground for dismissing an action. On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party.

COMMITTEE NOTE

The language of Rule 21 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 22. Interpleader

(a) Grounds.

(1) By a Plaintiff. Persons with claims that may expose a plaintiff to double or multiple liability may be joined as defendants and required to interplead. Joinder for interpleader is proper even though:

(A) the claims of the several claimants, or the titles on which their claims depend, lack a common origin or are adverse and independent rather than identical; or

(B) the plaintiff denies liability in whole or in part to any or all of the claimants.

(2) By a Defendant. A defendant exposed to similar liability may seek interpleader through a crossclaim or counterclaim.

(b) Relation to Other Rules and Statutes. This rule supplements — and does not limit — the joinder of parties allowed by Rule 20. The remedy ~~it~~ this rule provides is in addition to — and does not supersede or limit — the remedy provided by 28 U.S.C. §§ 1335, 1397, and 2361. An action under those statutes must be conducted under these rules.

COMMITTEE NOTE

The language of Rule 22 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 23. Class Actions

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact ~~are~~ common to the class;

(3) the claims or defenses of the representative parties' ~~claims or defenses~~ are typical of the ~~class~~ claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) Certification Order.

(A) Time to Issue. At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) Defining the Class; Appointing Class Counsel. An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) Altering or Amending the Order. An order that grants or denies class certification may be altered or amended before final judgment.

(2) Notice.

(A) For (b)(1) or (b)(2) Classes. For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) For (b)(3) Classes. For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) Judgment. Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) Particular Issues. When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) Subclasses. When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) Conducting the ~~Class~~ Action.

(1) In General. In conducting ~~a class~~ an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require — to protect class members and fairly conduct the action — giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to ~~inform the court~~ signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) Combining and Amending Orders. An order under Rule 23(d)(1) may be altered or amended ~~as desirable~~ from time to time and may be combined with an order under Rule 16.

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposaled ~~settlement, voluntary dismissal, or compromise~~.

(2) If the proposal would bind class members, ~~T~~the court may approve ~~a settlement, voluntary dismissal, or compromise that would bind class members~~ it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposaled ~~settlement, voluntary dismissal, or compromise~~.

(4) If the class action was previously certified 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.

(5) Any class member may object to ~~a proposed settlement, voluntary dismissal, or compromise that~~ the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 10 days after the order is entered. 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. Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) Standard for Appointing Class Counsel. When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) Interim Counsel. The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) Duty of Class Counsel. Class counsel must fairly and adequately represent the interests of the class.

(h) Attorney's Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. 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) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

COMMITTEE NOTE

The language of Rule 23 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.

Amended Rule 23(d)(2) carries forward the provisions of former Rule 23(d) that recognize two separate propositions. First, a Rule 23(d) order may be combined with a pretrial order under Rule 16. Second, the standard for amending the Rule 23(d) order continues to be the more open-ended standard for amending Rule 23(d) orders, not the more exacting standard for amending Rule 16 orders.

As part of the general restyling, intensifiers that provide emphasis but add no meaning are consistently deleted. Amended Rule 23(f) omits as redundant the explicit reference to court of appeals discretion in deciding whether to permit an interlocutory appeal. The omission does not in any way limit the unfettered discretion established by the original rule.

Rule 23.1. Derivative Actions

(a) Prerequisites. This rule applies when one or more shareholders or members of a corporation or an unincorporated association bring a derivative action to enforce a right that the corporation or association may properly assert but has failed to enforce. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of shareholders or members who are similarly situated in enforcing the right of the corporation or association.

(b) Pleading Requirements. The complaint must be verified and must:

(1) allege that the plaintiff was a shareholder or member at the time of the transaction complained of, or that the plaintiff's share or membership later devolved on it by operation of law;

(2) allege that the action is not a collusive one to confer jurisdiction that the court would otherwise lack; and

(3) state with particularity:

(A) any effort by the plaintiff to obtain the desired action from the directors or comparable authority and, if necessary, from the shareholders or members; and

(B) the reasons for not obtaining the action or not making the effort.

(c) Settlement, Dismissal, and Compromise. A derivative action may be settled, voluntarily dismissed, or compromised only with the court's approval. Notice of a proposed settlement, voluntary dismissal, or compromise must be given to shareholders or members in the manner that the court orders.

COMMITTEE NOTE

The language of Rule 23.1 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 23.2. Actions Relating to Unincorporated Associations

This rule applies to an action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties. The action may be maintained only if it appears that those parties will fairly and adequately protect the interests of the association and its members. In conducting the action, the court may issue any appropriate orders corresponding with those in Rule 23(d), and the procedure for settlement, voluntary dismissal, or compromise must correspond with the procedure in Rule 23(e).

COMMITTEE NOTE

The language of Rule 23.2 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 24. Intervention

(a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:

(1) is given an unconditional right to intervene by a federal statute; or

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent ~~the movant's~~ that interest.

(b) Permissive Intervention.

(1) In General. On timely motion, the court may permit anyone to intervene who:

(A) is given a conditional right to intervene by a federal statute; or

(B) has a claim or defense that shares with the main action a common question of law or fact.

(2) By a Government Officer or Agency. On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on:

(A) a statute or executive order administered by the officer or agency; or

(B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.

(3) Delay or Prejudice. In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

(c) Procedure.

(1) Notice and Pleading Required. A motion to intervene must be served on the parties as provided in Rule 5. The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.

(2) Challenge to a Statute; Court's Duty. When the constitutionality of a statute affecting the public interest is questioned in any action, the court must, as provided in 28 U.S.C. § 2403, notify:

(A) the Attorney General of the United States, if a federal statute is challenged and neither the United States nor any of its officers, agencies, or employees is a party; and

(B) the Attorney General of the state, if a state statute is challenged and neither the state nor any of its officers, agencies, or employees is a party.

(3) Party's Responsibility. A party challenging the constitutionality of a statute should call the court's attention to its duty under Rule 24(c)(2), but failing to do so does not waive any constitutional right otherwise timely asserted.

COMMITTEE NOTE

The language of Rule 24 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The former rule stated that the same procedure is followed when a United States statute gives a right to intervene. This statement is deleted because it added nothing.

Rule 25. Substitution of Parties

(a) Death.

(1) Substitution if the Claim Is Not Extinguished. If a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representative. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent ~~may~~ must be dismissed.

(2) Continuation Among the Remaining Parties. After a party's death, if the right sought to be enforced survives only to or against the remaining parties, the action does not abate, but proceeds in favor of or against the remaining parties. The death should be noted on the record.

(3) Service. A motion to substitute, together with a notice of hearing, must be served on the parties as provided in Rule 5 and on nonparties as provided in Rule 4. A statement noting death must be served in the same manner. Service may be made in any judicial district.

(b) Incompetency. If a party becomes incompetent, the court may, on motion, permit the action to be continued by or against the party's representative. The motion must be served as provided in Rule 25(a)(3).

(c) Transfer of Interest. If an interest is transferred, the action may be continued by or against the original party unless the court, on motion, orders the transferee to be substituted in the action or joined with the original party. The motion must be served as provided in Rule 25(a)(3).

(d) Public Officers; Death or Separation from Office.

An action does not abate when a public officer who is a party in an official capacity dies, resigns, or otherwise ceases to hold office while the action is pending. The officer's successor is automatically substituted as a party. Later proceedings should be in the substituted party's name, but any misnomer not affecting the parties' substantial rights must be disregarded. The court may order substitution at any time, but the absence of such an order does not affect the substitution.

COMMITTEE NOTE

The language of Rule 25 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 25(d)(2) is transferred to become Rule 17(d) because it deals with designation of a public officer, not substitution.

TITLE V. DISCLOSURES AND DISCOVERY

Rule 26. Duty to Disclose; General Provisions Governing Discovery

(a) Required Disclosures.

(1) Initial Disclosure.

(A) In General. Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information — along with the subjects of that information — that the disclosing party may use to

support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy — or a description by category and location — of all documents, ~~data compilations~~ electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party — who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(B) Proceedings Exempt from Initial Disclosure. The following proceedings are exempt from initial disclosure:

(i) an action for review on an administrative record;

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

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

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

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

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

(vii) a proceeding ancillary to a proceeding in another court; and

(viii) an action to enforce an arbitration award.

(C) Time for Initial Disclosures — In General. A party must make the initial disclosures at or within 14 days after the parties' 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 this action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure.

(D) Time for Initial Disclosures — For Parties Served or Joined Later. A party that is first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order.

(E) Basis for Initial Disclosure; Unacceptable Excuses. A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated 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 General. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(B) Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report — prepared and signed by the witness — if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the data or other information considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous ten years;

(v) a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the ~~witness's~~ compensation to be paid for the study and testimony in the case.

(C) Time to Disclose Expert Testimony. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial; or

(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B), within 30 days after the other party's disclosure.

(D) Supplementing the Disclosure. The parties must supplement these disclosures when required under Rule 26(e).

(3) Pretrial Disclosures.

(A) In General. In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

(i) the name and, if not previously provided, the address and telephone number of each witness — separately identifying those the party expects to present and those it may call if the need arises;

(ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and

(iii) an identification of each document or other exhibit, including summaries of other evidence — separately identifying those items the party expects to offer and those it may offer if the need arises.

(B) Time for Pretrial Disclosures; Objections. Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds

for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made — except for one under Federal Rule of Evidence 402 or 403 — is waived unless excused by the court for good cause.

(4) Form of Disclosures. Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served.

[Current Rule 26(a)(5) is deleted]

(b) Discovery Scope and Limits.

(1) Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense — including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know 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)(B).

(2) Limitations on Frequency and Extent.

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

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

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

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

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

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

(3) Trial Preparation: Materials.

(A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) Protection Against Disclosure. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(C) Previous Statement. Any party or other person may, on request and without the required showing ~~required under Rule 26(b)(3)(A)~~, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording — or a transcription of it — that recites substantially verbatim the person's oral statement.

(4) Trial Preparation: Experts.

(A) Expert Who May Testify. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(B) Expert Employed Only for Trial Preparation. Ordinarily, a party may not, by interrogatories or 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 to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(C) Payment. Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (B); and

(ii) for discovery under (B), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

(5) Claiming Privilege or Protecting Trial-Preparation Materials. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(A) expressly make the claim; and

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

(c) Protective Orders.

(1) In General. A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending — or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include 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. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery;

(B) specifying terms, including time and place, for the disclosure or discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

(2) Ordering Discovery. If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.

(3) Awarding Expenses. Rule 37(a)(5) applies to the award of expenses.

(d) Timing and Sequence of Discovery.

(1) Timing. A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.

(2) Sequence. Unless, on motion, the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence; and

(B) discovery by one party does not require any other party to delay its discovery.

(e) Supplementing Disclosures and Responses.

(1) In General. A party who has made a disclosure under Rule 26(a) — or who has responded to an interrogatory, request for production, or request for admission — must supplement or correct its disclosure or response:

(A) in a timely manner if the party learns that in some material respect the disclosure or response 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; or

(B) as ordered by the court.

(2) Expert Witness. For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

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

(1) Conference Timing. Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable — and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b).

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

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

(A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;

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

(C) 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

(D) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

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

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

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

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

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

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

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

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation ~~costs~~; and

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

(2) Failure to Sign. ~~The court must strike~~ Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless ~~the omission~~ a signature is promptly ~~corrected~~ supplied after ~~being~~ the omission is called to the attorney's or party's attention. ~~Until the signature is provided, the other party has no duty to respond.~~

(3) Sanction for Improper Certification. If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

COMMITTEE NOTE

The language of Rule 26 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 26(a)(5) served ~~only~~ as an index of the discovery methods provided by later rules. It was deleted as redundant. Deletion does not affect the right to pursue discovery in addition to disclosure.

Former Rule 26(b)(1) began with a general statement of the scope of discovery that appeared to function as a preface to each of the five numbered paragraphs that followed. This preface has been shifted to the text of paragraph (1) because it does not accurately reflect the limits embodied in paragraphs (2), (3), or (4), and because paragraph (5) does not address the scope of discovery.

The reference to discovery of "books" in former Rule 26(b)(1) was deleted to achieve consistent expression throughout the discovery rules. Books remain a proper subject of discovery.

Amended Rule 26(b)(3) states that a party may obtain a copy of the party's own previous statement "on request." Former Rule 26(b)(3) expressly made the request procedure available to a nonparty witness, but did not describe the procedure to be used by a party. This apparent gap is closed by adopting the request procedure, which ensures that a party need not invoke Rule 34 to obtain a copy of the party's own statement.

Rule 26(e) stated the duty to supplement or correct a disclosure or discovery response "to include information thereafter acquired." This apparent limit is not reflected in practice; parties recognize the duty to supplement or correct by providing information that was not originally provided although it was available at

the time of the initial disclosure or response. These words are deleted to reflect the actual meaning of the present rule.

Former Rule 26(e) used different phrases to describe the time to supplement or correct a disclosure or discovery response. Disclosures were to be supplemented "at appropriate intervals." A prior discovery response must be "seasonably * * * amend[ed]." The fine distinction between these phrases has not been observed in practice. Amended Rule 26(e)(1)(A) uses the same phrase for disclosures and discovery responses. The party must supplement or correct "in a timely manner."

Former Rule 26(g)(1) did not call for striking an unsigned disclosure. The omission was an obvious drafting oversight. Amended Rule 26(g)(2) includes disclosures in the list of matters that the court must strike unless a signature is provided "promptly * * * after being called to the attorney's or party's attention."

Former Rule 26(b)(2)(A) referred to a "good faith" argument to extend existing law. Amended Rule 26(b)(1)(B)(i) changes this reference to a "nonfrivolous" argument to achieve consistency with Rule 11(b)(2).

Rule 27. Depositions to Perpetuate Testimony

(a) Before an Action Is Filed.

(1) Petition. A person who wants to perpetuate testimony about any matter cognizable in a United States court may file a verified petition in the district court for the district where any expected adverse party resides. The petition must ask for an order authorizing the petitioner to depose the named persons in order to perpetuate their testimony. The petition must be titled in the petitioner's name and must show:

(A) that the petitioner expects to be a party to an action cognizable in a United States court but cannot presently bring it or cause it to be brought;

(B) the subject matter of the expected action and the petitioner's interest;

(C) the facts that the petitioner wants to establish by the proposed testimony and the reasons to perpetuate it;

(D) the names or a description of the persons whom the petitioner expects to be adverse parties and their addresses, so far as known; and

(E) the name, address, and expected substance of the testimony of each deponent.

(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 reasonable diligence on an expected adverse party, the court may order service by publication or otherwise. The court must appoint an attorney to represent persons not served in the manner provided in Rule 4 and to cross-examine the deponent if an unserved person is not otherwise represented. If any expected adverse party is a minor or is incompetent, Rule 17(c) applies.

(3) Order and Examination. If satisfied that perpetuating the testimony may prevent a failure or delay of justice, the court must issue an order that designates or describes the persons whose depositions may be taken, specifies the subject matter of the examinations, and states whether the depositions will be taken orally or by written interrogatories. The depositions may then be taken under these rules, and the court may issue orders like those authorized by Rules 34 and 35. A reference in these rules to the court where an action is pending means, for purposes of this rule, the court where the petition for the deposition was filed.

(4) Using the Deposition. A deposition to perpetuate testimony may be used under Rule 32(a) in any later-filed district-court action involving the same subject matter if the deposition either was taken under these rules or, although not so taken, would be admissible in evidence in the courts of the state where it was taken.

(b) Pending Appeal.

(1) In General. The court where a judgment has been rendered may, if an appeal has been taken or may still be taken, permit a party to depose witnesses to perpetuate their testimony for use in the event of further proceedings in that court.

(2) Motion. The party who wants to perpetuate testimony may move for leave to take the depositions, on the same notice and service as if the action were pending in the district court. The motion must show:

(A) the name, address, and expected substance of the testimony of each deponent; and

(B) the reasons for perpetuating the testimony.

(3) Court Order. If the court finds that perpetuating the testimony may prevent a failure or delay of justice, the court may permit the depositions to be taken and may issue orders like those authorized by Rules 34 and 35. The depositions may be taken and used as any other deposition taken in a pending district-court action.

(c) Perpetuation by an Action. This rule does not limit a court's power to entertain an action to perpetuate testimony.

COMMITTEE NOTE

The language of Rule 27 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 28. Persons Before Whom Depositions May Be Taken

(a) Within the United States.

(1) In General. Within the United States or a territory or insular possession subject to United States jurisdiction, a deposition must be taken before:

(A) an officer authorized to administer oaths either by federal law or by the law in the place of examination; or

(B) a person appointed by the court where the action is pending to administer oaths and take testimony.

(2) Definition of "Officer." The term "officer" in Rules 30, 31, and 32 includes a person appointed by the court under this rule or designated by the parties under Rule 29(a).

(b) In a Foreign Country.

(1) In General. A deposition may be taken in a foreign country:

(A) under an applicable treaty or convention;

(B) under a letter of request, whether or not captioned a "letter rogatory";

(C) on notice, before a person authorized to administer oaths either by federal law or by the law in the place of examination; or

(D) before a person commissioned by the court to administer any necessary oath and take testimony.

(2) Issuing a Letter of Request or a Commission. A letter of request, a commission, or both may be issued:

(A) on appropriate terms after an application and notice of it; and

(B) without a showing that taking the deposition in another manner is impracticable or inconvenient.

(3) Form of a Request, Notice, or Commission. When a letter of request or any other device is used according to a treaty or convention, it must be captioned in the form prescribed by that treaty or convention. A letter of request may be addressed "To the Appropriate Authority in [name of country]." A deposition notice or a commission must designate by name or descriptive title the person before whom the deposition is to be taken.

(4) Letter of Request — Admitting Evidence. 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.

(c) Disqualification. A deposition must not be taken before a person who is any party's relative, employee, or attorney; who is related to or employed by any party's attorney; or who is financially interested in the action.

COMMITTEE NOTE

The language of Rule 28 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 29. Stipulations About Discovery Procedure

Unless the court orders otherwise, the parties may stipulate that:

(a) a deposition may be taken before any person, at any time or place, on any notice, and in the manner specified — in which event it may be used in the same way as any other deposition; and

(b) other procedures governing or limiting discovery be modified — but a stipulation extending the time for any form of discovery must have court approval if it would interfere with the time set for completing discovery, for hearing a motion, or for trial.

COMMITTEE NOTE

The language of Rule 29 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 30. Depositions by Oral Examination

(a) When a Deposition May Be Taken.

(1) Without Leave. A party may, by oral questions, depose any person, including a party, without leave of court except as provided in Rule 30(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45.

(2) With Leave. A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(2):

(A) if the parties have not stipulated to the deposition and:

(i) the deposition would result in more than 10 depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants;

(ii) the deponent has already been deposed in the case; or

(iii) the party seeks to take the deposition before the time specified in Rule 26(d), unless the party certifies in the notice, with supporting facts, that the deponent is expected to leave the United States and be unavailable for examination in this country after that time; or

(B) if the deponent is confined in prison.

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

(1) Notice in General. A party who wants to depose a person by oral questions must give reasonable written notice to every other party. The notice must state the time and place of the deposition and, if known, the deponent's name and address. If the name is unknown, the notice must provide a general

description sufficient to identify the person or the particular class or group to which the person belongs.

(2) Producing Documents. If a subpoena duces tecum is to be served on the deponent, the materials designated for production, as set out in the subpoena, must be listed in the notice or in an attachment. The notice to a party deponent may be accompanied by a request ~~complying with~~ under Rule 34 to produce documents and tangible things at the deposition.

(3) Method of Recording.

(A) Method Stated in the Notice. The party who notices the deposition must state in the notice the method for recording the testimony. Unless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The noticing party bears the recording costs. Any party may arrange to transcribe a deposition that was taken nonstenographically.

(B) Additional Method. With prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice. That party bears the expense of the additional record or transcript unless the court orders otherwise.

(4) By Remote Means. The parties may stipulate — or the court may on motion order — that a deposition be taken by telephone or other remote means. For the purpose of this rule and Rules 28(a), 37(a)(2), and 37(b)(1), the deposition takes place where the deponent answers the questions.

(5) Officer's Duties.

(A) Before the Deposition. Unless the parties stipulate otherwise, a deposition must be conducted before an officer appointed or designated under Rule 28. The officer must begin the deposition with an on-the-record statement that includes:

(i) the officer's name and business address;

(ii) the date, time, and place of the deposition;

(iii) the deponent's name;

(iv) the officer's administration of the oath or affirmation to the deponent; and

(v) the identity of all persons present.

(B) Conducting the Deposition; Avoiding Distortion. If the deposition is recorded nonstenographically, the officer must repeat the items in Rule 30(b)(5)(A)(i)-(iii) at the beginning of each unit of the recording medium. The deponent's and attorneys' appearance or demeanor must not be distorted through ~~camera or sound~~-recording techniques.

(C) After the Deposition. At the end of a deposition, the officer must state on the record that the deposition is complete and must set out any stipulations made by the attorneys about custody of the transcript or recording and of the exhibits, or about any other pertinent matters.

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

(c) Examination and Cross-Examination; Record of the Examination; Objections; Written Questions.

(1) Examination and Cross-Examination. The examination and cross-examination of a deponent proceed as they would at trial under the Federal Rules of Evidence, except Rules 103 and 615. After putting the deponent under oath or affirmation, the officer must record the testimony by the method designated under Rule 30(b)(3)(A). The testimony must be recorded by the officer personally or by a person acting in the presence and under the direction of the officer.

(2) Objections. An objection at the time of the examination — whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition — must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3).

(3) Participating Through Written Questions. Instead of participating in the oral examination, a party may serve written questions in a sealed envelope on the party noticing the deposition, who must deliver them to the officer. The officer must ask the deponent those questions and record the answers verbatim.

(d) Duration; Sanction; Motion to Terminate or Limit.

(1) Duration. Unless otherwise stipulated or ordered by the court, a deposition is limited to 1 day of 7 hours. The court must allow additional time consistent with Rule 26(b)(2) if needed ~~for a fair examination of~~ to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.

(2) Sanction. The court may impose an appropriate sanction — including the reasonable expenses and attorney's fees incurred by any party — on a person who impedes, delays, or frustrates the fair examination of the deponent.

(3) Motion to Terminate or Limit.

(A) Grounds. At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. The motion may be filed in the court where the action is pending or the deposition is being taken. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order.

(B) Order. The court may order that the deposition be terminated or may limit its scope and manner as provided in Rule 26(c). If terminated, the deposition may be resumed only by order of the court where the action is pending.

(C) Award of Expenses. Rule 37(a)(5) applies to the award of expenses.

(e) Review by the Witness; Changes.

(1) Review; Statement of Changes. On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) Changes Indicated in the Officer's Certificate. The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

(f) Certification and Delivery; Exhibits; Copies of the Transcript or Recording; Filing.

(1) Certification and Delivery. The officer must certify in writing that the witness was duly sworn and that the deposition accurately records the witness's testimony. The certificate must accompany the record of the deposition. Unless the court orders otherwise, the officer must seal the deposition in an envelope or package bearing the title of the action and marked "Deposition of [witness's name]" and must promptly send it to the attorney who arranged for the transcript or recording. The attorney must store it under conditions that will protect it against loss, destruction, tampering, or deterioration.

(2) Documents and Tangible Things.

(A) Originals and Copies. Documents and tangible things produced for inspection during a deposition must, on a party's request, be marked for identification and attached to the deposition. Any party may inspect and copy them. But if the person who produced them wants to keep the originals, the person may:

(i) offer copies to be marked, attached to the deposition, and then used as originals — after giving all parties a fair opportunity to verify the copies by comparing them with the originals; or

(ii) give all parties a fair opportunity to inspect and copy the originals after they are marked — in which event the originals may be used as if attached to the deposition.

(B) Order Regarding the Originals. Any party may move for an order that the originals be attached to the deposition pending final disposition of the case.

(3) Copies of the Transcript or Recording. Unless otherwise stipulated or ordered by the court, the officer must retain the stenographic notes of a deposition taken stenographically or a copy of the recording of a deposition taken by another method. When paid reasonable charges, the officer must furnish a copy of the transcript or recording to any party or the deponent.

(4) Notice of Filing. A party who files the deposition must promptly notify all other parties of the filing.

(g) Failure to Attend a Deposition or Serve a Subpoena; Expenses. A party who, expecting a deposition to be taken, attends in person or by an attorney may recover reasonable expenses for attending, including attorney's fees, if the noticing party failed to:

(1) attend and proceed with the deposition; or

(2) serve a subpoena on a nonparty deponent, who consequently did not attend.

COMMITTEE NOTE

The language of Rule 30 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 31. Depositions by Written Questions

(a) When a Deposition May Be Taken.

(1) Without Leave. A party may, by written questions, depose any person, including a party, without leave of court except as provided in Rule 31(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45.

(2) With Leave. A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(2):

(A) if the parties have not stipulated to the deposition and:

(i) the deposition would result in more than 10 depositions being taken under this rule or Rule 30 by the plaintiffs, or by the defendants, or by the third-party defendants;

(ii) the deponent has already been deposed in the case; or

(iii) the party seeks to take a deposition before the time specified in Rule 26(d); or

(B) if the deponent is confined in prison.

(3) Service; Required Notice. A party who wants to depose a person by written questions must serve them on every other party, with a notice stating, if

known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs. The notice must also state the name or descriptive title and the address of the officer before whom the deposition will be taken.

(4) Questions Directed to an Organization. A public or private corporation, a partnership, an association, or a governmental agency may be deposed by written questions in accordance with Rule 30(b)(6).

(5) Questions from Other Parties. Any questions to the deponent from other parties must be served on all parties as follows: cross-questions, within 14 days after being served with the notice and direct questions; redirect questions, within 7 days after being served with cross-questions; and recross-questions, within 7 days after being served with redirect questions. The court may, for good cause, extend or shorten these times.

(b) Delivery to the Officer; Officer's Duties. The party who noticed the deposition must deliver to the officer a copy of all the questions served and of the notice. The officer must promptly proceed in the manner provided in Rule 30(c), (e), and (f) to:

(1) take the deponent's testimony in response to the questions;

(2) prepare and certify the deposition; and

(3) send it to the party, attaching a copy of the questions and of the notice.

(c) Notice of Filing. A party who files the deposition must promptly notify all other parties of the filing.

COMMITTEE NOTE

The language of Rule 31 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 32. Using Depositions in Court Proceedings

(a) Using Depositions.

(1) In General. At a hearing or trial, all or part of a deposition may be used against a party on these conditions:

(A) the party was present or represented at the taking of the deposition or had reasonable notice of it;

(B) it is used to the extent it would be admissible under the Federal Rules of Evidence if the deponent were present and testifying; and

(C) the use is allowed by Rule 32(a)(2) through (8).

(2) Impeachment and Other Uses. Any party may use a deposition to contradict or impeach the testimony given by the deponent as a witness, or for any other purpose allowed by the Federal Rules of Evidence.

(3) Deposition of Party, Agent, or Designee. An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4).

(4) Unavailable Witness. A party may use for any purpose the deposition of a witness, whether or not a party, if the court finds:

(A) that the witness is dead;

(B) that the witness is more than 100 miles from the place of hearing or trial or is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition;

(C) that the witness cannot attend or testify because of age, illness, infirmity, or imprisonment;

(D) that the party offering the deposition could not procure the witness's attendance by subpoena; or

(E) on motion and notice, that exceptional circumstances make it desirable — in the interest of justice and with due regard to the importance of live testimony in open court — to permit the deposition to be used.

(5) Limitations on Use.

(A) Deposition Taken on Short Notice. A deposition must not be used against a party who, having received less than 11 days' notice of the deposition, promptly moved for a protective order under Rule 26(c)(1)(B)

requesting that it not be taken or be taken at a different time or place — and this motion was still pending when the deposition was taken.

(B) Unavailable Deponent; Party Could Not Obtain an Attorney. A deposition taken without leave of court under the unavailability provision of Rule 30(a)(2)(A)(iii) must not be used against a party who shows that, when served with the notice, it could not, despite diligent efforts, obtain an attorney to represent it at the deposition.

(6) Using Part of a Deposition. If a party offers in evidence only part of a deposition, an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part introduced, and any party may itself introduce any other parts.

(7) Substituting a Party. Substituting a party under Rule 25 does not affect the right to use a deposition previously taken.

(8) Deposition Taken in an Earlier Action. A deposition lawfully taken and, if required, filed in any federal- or state-court action may be used in a later action involving the same subject matter between the same parties, or their representatives or successors in interest, to the same extent as if taken in the later action. A deposition previously taken may also be used as allowed by the Federal Rules of Evidence.

(b) Objections to Admissibility. Subject to Rules 28(b) and 32(d)(3), an objection may be made at a hearing or trial to the admission of any deposition testimony that would be inadmissible if the witness were present and testifying.

(c) Form of Presentation. Unless the court orders otherwise, a party must provide a transcript of any deposition testimony the party offers, but may provide the court with the testimony in nontranscript form as well. On any party's request, deposition testimony offered in a jury trial for any purpose other than impeachment must be presented in nontranscript form, if available, unless the court for good cause orders otherwise.

(d) Waiver of Objections.

(1) To the Notice. An objection to an error or irregularity in a deposition notice is waived unless promptly served in writing on the party giving the notice.

(2) To the Officer's Qualification. An objection based on disqualification of the officer before whom a deposition is to be taken is waived if not made:

(A) before the deposition begins; or

(B) promptly after the basis for disqualification becomes known or, with reasonable diligence, could have been known.

(3) To the Taking of the Deposition.

(A) Objection to Competence, Relevance, or Materiality. An objection to a deponent's competence — or to the competence, relevance, or materiality of testimony — is not waived by a failure to make the objection before or during the deposition, unless the ground for it might have been corrected at that time.

(B) Objection to an Error or Irregularity. An objection to an error or irregularity at an oral examination is waived if:

(i) it relates to the manner of taking the deposition, the form of a question or answer, the oath or affirmation, a party's conduct, or other matters that might have been corrected at that time; and

(ii) it is not timely made during the deposition.

(C) Objection to a Written Question. An objection to the form of a written question under Rule 31 is waived if not served in writing on the party submitting the question within the time for serving responsive questions or, if the question is a recross-question, within 5 days after being served with it.

(4) To Completing and Returning the Deposition. An objection to how the officer transcribed the testimony — or prepared, signed, certified, sealed, endorsed, sent, or otherwise dealt with the deposition — is waived unless a motion to suppress is made promptly after the ~~defect~~ error or irregularity becomes known or, with reasonable diligence, could have been known.

COMMITTEE NOTE

The language of Rule 32 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 32(a) applied "[a]t the trial or upon the hearing of a motion or an interlocutory proceeding." The amended rule describes the same events as "a hearing or trial."

Rule 33. Interrogatories to Parties

(a) In General.

(1) Number. Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts. Leave to serve additional interrogatories may be granted to the extent consistent with Rule 26(b)(2).

(2) Scope. An interrogatory may relate to any matter that may be inquired into under Rule 26(b). An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time.

(b) Answers and Objections.

(1) Responding Party. The interrogatories must be answered:

(A) by the party to whom they are directed; or

(B) if that party is a public or private corporation, a partnership, an association, or a governmental agency, by any officer or agent, who must furnish the information available to the party.

(2) Time to Respond. The responding party must serve its answers and any objections within 30 days after being served with the interrogatories. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(3) Answering Each Interrogatory. Each interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath.

(4) Objections. The grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure.

(5) Signature. The person who makes the answers must sign them, and the attorney who objects must sign any objections.

(c) Use. An answer to an interrogatory may be used to the extent allowed by the Federal Rules of Evidence.

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

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

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

COMMITTEE NOTE

The language of Rule 33 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The final sentence of former Rule 33(a) was a redundant cross-reference to the discovery moratorium provisions of Rule 26(d). Rule 26(d) is now familiar, obviating any need to carry forward the redundant cross-reference.

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

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

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

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

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

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

(b) Procedure.

(1) Contents of the Request. The request must:

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

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

(2) Responses and Objections.

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

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

(C) Objections. An objection to part of a request must specify the part and permit inspection of the rest.

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

(c) Nonparties. As provided in Rule 45, a nonparty may be compelled to produce documents and tangible things or to permit an inspection.

COMMITTEE NOTE

The language of Rule 34 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The final sentence in the first paragraph of former Rule 34(b) was a redundant cross-reference to the discovery moratorium provisions of Rule 26(d). Rule 26(d) is now familiar, obviating any need to carry forward the redundant cross-reference.

The redundant reminder of Rule 37(a) procedure in the second paragraph of former Rule 34(b) is omitted as no longer useful.

Rule 35. Physical and Mental Examinations

(a) Order for an Examination.

(1) In General. The court where the action is pending may order a party whose mental or physical condition — including blood group — is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. The court has the same authority to order a party to produce for examination a person who is in its custody or under its legal control.

(2) Motion and Notice; Contents of the Order. The order:

(A) may be made only on motion for good cause and on notice to all parties and the person to be examined; and

(B) must specify the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it.

(b) Examiner's Report.

(1) Request by the Party or Person Examined. The party who moved for the examination must, on request, deliver to the requester a copy of the examiner's report, together with like reports of all earlier examinations of the same condition. The request may be made by the party against whom the examination order was issued or by the person examined.

(2) Contents. The examiner's report must be in writing and must set out in detail the examiner's findings, including diagnoses, conclusions, and the results of any tests.

(3) Request by the Moving Party. After delivering the reports, the party who moved for the examination may request — and is entitled to receive — from the party against whom the examination order was issued like reports of all earlier or later examinations of the same condition. But those reports need not be delivered by the party with custody or control of the person examined if the party shows that it could not obtain them.

(4) Waiver of Privilege. By requesting and obtaining the examiner's report, or by deposing the examiner, the party examined waives any privilege it may have — in that action or any other action involving the same controversy — concerning testimony about all examinations of the same condition.

(5) Failure to Deliver a Report. The court on motion may order — on just terms — that a party deliver the report of an examination. If the report is not provided, the court may exclude the examiner's testimony at trial.

(6) Scope. This subdivision (b) applies also to an examination made by the parties' ~~stipulation~~ agreement, unless the ~~stipulation~~ agreement states

otherwise. This subdivision does not preclude obtaining an examiner's report or deposing an examiner under other rules.

COMMITTEE NOTE

The language of Rule 35 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 36. Requests for Admission

(a) Scope and Procedure.

(1) Scope. A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(1) relating to:

(A) facts, the application of law to fact, or opinions about either; and

(B) the genuineness of any described documents.

(2) Form; Copy of a Document. Each matter must be separately stated. A request to admit the genuineness of a document must be accompanied by a copy of the document unless it is, or has been, otherwise furnished or made available for inspection and copying.

(3) Time to Respond; Effect of Not Responding. A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney. A shorter or longer time for responding may be stipulated to under Rule 29 or be ordered by the court.

(4) Answer. If a matter is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it. A denial must fairly respond to the substance of the matter; and when good faith requires that a party qualify an answer or deny only a part of a matter, the answer must specify the part admitted and qualify or deny the rest. The answering party may assert lack of ~~information or~~ knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny.

(5) Objections. The grounds for objecting to a request must be stated.

~~**(6) Matter Presenting a Trial Issue.**~~ A party must not object ~~to a request~~ solely on the ground that ~~it~~ the request presents a genuine issue for trial. ~~The party may deny the matter or state why it cannot admit or deny.~~

(~~7~~ 6) Motion Regarding the Sufficiency of an Answer or Objection. The requesting party may move to determine the sufficiency of an answer or objection. Unless the court finds an objection justified, it must order that an answer be served. On finding that an answer does not comply with this rule, the court may order either that the matter is admitted or that an amended answer be served. The court may defer its final decision until a pretrial conference or a specified time before trial. Rule 37(a)(5) applies to an award of expenses.

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

COMMITTEE NOTE

The language of Rule 36 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The final sentence of the first paragraph of former Rule 36(a) was a redundant cross-reference to the discovery moratorium provisions of Rule 26(d). Rule 26(d) is now familiar, obviating any need to carry forward the redundant cross-reference. The redundant reminder of Rule 37(c) in the second paragraph was likewise omitted.

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

(a) Motion for an Order Compelling Disclosure or Discovery.

(1) In General. On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. 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 disclosure or discovery in an effort to obtain it without court action.

(2) Appropriate Court. A motion for an order to a party must be made in the court where the action is pending. A motion for an order to a nonparty must be made in the court where the discovery is or will be taken.

(3) Specific Motions.

(A) To Compel Disclosure. 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.

(B) To Compel a Discovery Response. A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:

(i) a deponent fails to answer a question asked under Rule 30 or 31;

(ii) a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a)(4);

(iii) a party fails to answer an interrogatory submitted under Rule 33; or

(iv) a party fails to respond that inspection will be permitted — or fails to permit inspection — as requested under Rule 34.

(C) Related to a Deposition. When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order.

(4) Evasive or Incomplete Disclosure, Answer, or Response. For purposes of this subdivision (a), an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.

(5) Payment of Expenses; Protective Orders.

(A) If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing). If the motion is granted — or if the disclosure or requested discovery is provided after the motion was filed — the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if:

(i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;

(ii) the opposing party's nondisclosure, response, or objection was substantially justified; or

(iii) other circumstances make an award of expenses unjust.

(B) If the Motion Is Denied. If the motion is denied, the court may issue any protective order authorized under Rule 26(c) and must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.

(C) If the Motion Is Granted in Part and Denied in Part. If the motion is granted in part and denied in part, the court may issue any protective order authorized under Rule 26(c) and may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion.

(b) Failure to Comply with a Court Order.

(1) Sanctions in the District Where the Deposition Is Taken. If the court where the discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court.

(2) Sanctions in the District Where the Action Is Pending.

(A) For Not Obeying a Discovery Order. If a party or a party's officer, director, or managing agent — or a witness designated under Rule 30(b)(6) or 31(a)(4) — fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:

(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(iii) striking pleadings in whole or in part;

(iv) staying further proceedings until the order is obeyed;

(v) dismissing the action or proceeding in whole or in part;

(vi) rendering a default judgment against the disobedient party; or

(vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

(B) For Not Producing a Person for Examination. If a party fails to comply with an order under Rule 35(a) requiring it to produce another person for examination, the court may issue any of the orders listed in Rule 37(b)(2)(A)(i)-(vi), unless the disobedient party shows that it cannot produce the other person.

(C) Payment of Expenses. Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(c) Failure to Disclose, to ~~Amend~~ Supplement an Earlier Response, or to Admit.

(1) Failure to Disclose or ~~Amend~~ Supplement. If a party fails to ~~disclose the~~ provide information ~~required by Rule 26(a) — or to provide the additional or corrective information required by Rule 26(e) —~~ or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use ~~as~~ that information or witness to supply evidence on a motion, at a hearing, or at a trial ~~any witness or information not so disclosed~~, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

(A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;

(B) may inform the jury of the party's failure; and

(C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).

(2) Failure to Admit. If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. The court must so order unless:

(A) the request was held objectionable under Rule 36(a);

(B) the admission sought was of no substantial importance;

(C) the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or

(D) there was other good reason for the failure to admit.

(d) Party's Failure to Attend Its Own Deposition, Serve Answers to Interrogatories, or Respond to a Request for Inspection.

(1) In General.

(A) Motion; Grounds for Sanctions. The court where the action is pending may, on motion, order sanctions if:

(i) a party or a party's officer, director, or managing agent — or a person designated under Rule 30(b)(6) or 31(a)(4) — fails, after being served with proper notice, to appear for that person's deposition; or

(ii) a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response.

(B) Certification. A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action.

(2) Unacceptable Excuse for Failing to Act. A failure described in Rule 37(d)(1)(A) is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c).

(3) Types of Sanctions. Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)-(vi). Instead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(e) Failure to Participate in Framing a Discovery Plan. If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f), the court may, after giving an opportunity

to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

COMMITTEE NOTE

The language of Rule 37 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.

TITLE VI. TRIALS

Rule 38. Right to a Jury Trial; Demand

(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution — or as provided by a federal statute — is preserved to the parties inviolate.

(b) Demand. On any issue triable of right by a jury, a party may demand a jury trial by:

(1) serving the other parties with a written demand — which may be included in a pleading — no later than 10 days after the last pleading directed to the issue is served; and

(2) filing the demand in accordance with Rule 5(d).

(c) Specifying Issues. In its demand, a party may specify the issues that it wishes to have tried by a jury; otherwise, it is considered to have demanded a jury trial on all the issues so triable. If the party has demanded a jury trial on only some issues, any other party may — within 10 days after being served with the demand or within a shorter time ordered by the court — serve a demand for a jury trial on any other or all factual issues triable by jury.

(d) Waiver; Withdrawal. A party waives a jury trial unless its demand is properly served and filed. A proper demand may be withdrawn only if the parties consent.

(e) Admiralty and Maritime Claims. These rules do not create a right to a jury trial on issues in a claim ~~designated as~~ that is an admiralty or maritime claim under Rule 9(h).

COMMITTEE NOTE

The language of Rule 38 has been amended as part of the general restyling of

the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 39. Trial by Jury or by the Court

(a) When a Demand Is Made. When a jury trial has been demanded under Rule 38, the action must be designated on the docket as a jury action. The trial on all issues so demanded must be by jury unless:

(1) the parties or their attorneys file a stipulation to a nonjury trial or so stipulate on the record; or

(2) the court, on motion or on its own, finds that on some or all of those issues there is no federal right to a jury trial.

(b) When No Demand Is Made. Issues on which a jury trial is not properly demanded are to be tried by the court. But the court may, on motion, order a jury trial on any issue for which a jury might have been demanded.

(c) Advisory Jury; Jury Trial by Consent. In an action not triable of right by a jury, the court, on motion or on its own:

(1) may try any issue with an advisory jury; or

(2) may, with the parties' consent, try any issue by a jury whose verdict has the same effect as if a jury trial had been a matter of right, unless the action is against the United States and a federal statute provides for a nonjury trial.

COMMITTEE NOTE

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

Rule 40. Scheduling Cases for Trial

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

COMMITTEE NOTE

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

Rule 41. Dismissal of Actions

(a) Voluntary Dismissal.

(1) By the Plaintiff.

(A) Without a Court Order. Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

(ii) a stipulation of dismissal signed by all parties who have appeared.

(B) Effect. Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal- or state- court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.

(2) By Court Order; Effect. Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

(b) Involuntary Dismissal; Effect. If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule — except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19 — operates as an adjudication on the merits.

(c) Dismissing a Counterclaim, Crossclaim, or Third-Party Claim. This rule applies to a dismissal of any counterclaim, crossclaim, or third-party claim. A claimant's voluntary dismissal under Rule 41(a)(1)(A)(i) must be made:

(1) before a responsive pleading is served; or

(2) if there is no responsive pleading, before evidence is introduced at a hearing or trial.

(d) Costs of a Previously Dismissed Action. If a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant, the court:

(1) may order the plaintiff to pay all or part of the costs of that previous action; and

(2) may stay the proceedings until the plaintiff has complied.

COMMITTEE NOTE

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

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

Rule 42. Consolidation; Separate Trials

(a) Consolidation. If actions before the court involve a common question of law or fact, the court may:

(1) join for hearing or trial any or all matters at issue in the actions;

(2) consolidate the actions; ~~and~~ or

(3) issue any other orders to avoid unnecessary cost or delay.

(b) Separate Trials. For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims. When ordering a separate trial, the court must preserve any federal right to a jury trial.

COMMITTEE NOTE

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

Rule 43. Taking Testimony

(a) In Open Court. At trial, the witnesses' testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. For good cause ~~I~~in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.

(b) Affirmation Instead of an Oath. When these rules require an oath, a solemn affirmation suffices.

(c) Evidence on a Motion. When a motion relies on facts outside the record, the court may hear the matter on affidavits or may hear it wholly or partly on oral testimony or on depositions.

(d) Interpreter. The court may appoint an interpreter of its choosing; fix reasonable compensation to be paid from funds provided by law or by one or more parties; and tax the compensation as costs.

COMMITTEE NOTE

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

Rule 44. Proving an Official Record

(a) Means of Proving.

(1) Domestic Record. Each of the following evidences an official record — or an entry in it — that is otherwise admissible and is kept within the United States, any state, district, or commonwealth, or any territory subject to the administrative or judicial jurisdiction of the United States:

(A) an official publication of the record; or

(B) a copy attested by the officer with legal custody of the record — or by the officer's deputy — and accompanied by a certificate that the officer has custody. The certificate must be made under seal:

(i) by a judge of a court of record in the district or political subdivision where the record is kept; or

(ii) by any public officer with a seal of office and with official duties in the district or political subdivision where the record is kept.

(2) Foreign Record.

(A) In General. Each of the following evidences a foreign official record — or an entry in it — that is otherwise admissible:

(i) an official publication of the record; or

(ii) the record — or a copy — that is attested by an authorized person and is accompanied either by a final certification of genuineness or by a certification under a treaty or convention to which the United States and the country where the record is located are parties.

(B) Final Certification of Genuineness. A final certification must certify the genuineness of the signature and official position of the attester or of any foreign official whose certificate of genuineness relates to the attestation or is in a chain of certificates of genuineness relating to the attestation. A final certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States.

(C) Other Means of Proof. If all parties have had a reasonable opportunity to investigate a foreign record's authenticity and accuracy, the court may, for good cause, either:

(i) admit an attested copy without final certification; or

(ii) permit the record to be evidenced by an attested summary with or without a final certification.

(b) Lack of a Record. A written statement that a diligent search of designated records revealed no record or entry of a specified tenor is admissible as evidence that the records contain no such record or entry. For domestic records, the statement must be authenticated under Rule 44(a)(1). For foreign records, the statement must comply with (a)(2)(C)(ii).

(c) Other Proof. A party may prove an official record — or an entry or lack of an entry in it — by any other method authorized by law.

COMMITTEE NOTE

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

Rule 44.1. Determining Foreign Law

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

COMMITTEE NOTE

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

Rule 45. Subpoena

(a) In General.

(1) Form and Contents.

(A) Requirements – In General. Every subpoena must:

(i) state the court from which it issued;

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

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

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

(B) Command to Attend a Deposition — Notice of the Recording Method. A subpoena commanding attendance at a deposition must state the method for recording the testimony.

(B C) Command to Produce Materials or Permit Inspection. A command to produce documents or tangible things or to permit the inspection of premises may be included in a subpoena commanding attendance at a deposition, hearing, or trial, or may be set out in a separate subpoena.

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

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

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

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

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

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

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

(b) Service.

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

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

(A) within the district of the issuing court;

(B) outside that district but within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection;

(C) within the state of the issuing court if a state statute or court rule allows service at that place of a subpoena issued by a state court of general jurisdiction sitting in the place specified for the deposition, hearing, trial, production, or inspection; or

(D) that the court authorizes on motion and for good cause, if a federal statute so provides.

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

(4) Proof of Service. Proving service, when necessary, requires filing with the issuing court a statement showing the date and manner of service and the names of the persons served. The statement must be certified by the server.

(c) Protecting a Person Subject to a Subpoena.

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

(2) Command to Produce Materials or Permit Inspection.

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

(B) Objections. A person commanded to produce ~~designated materials~~ documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting or copying any or all of the ~~designated~~ materials or to inspecting the premises. The objection must be served before the earlier of the time specified for

compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production, inspection, or copying.

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

(3) Quashing or Modifying a Subpoena.

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

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

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

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

(iv) subjects a person to undue burden.

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

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

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

(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

(C) Specifying Conditions as an Alternative. In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying

a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(d) Duties in Responding to a Subpoena.

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

(2) Claiming Privilege or Protection. A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

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

(B) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(e) Contempt. The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

COMMITTEE NOTE

The language of Rule 45 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The reference to discovery of "books" in former Rule 45(a)(1)(C) was deleted to achieve consistent expression throughout the discovery rules. Books remain a proper subject of discovery.

Former Rule 45(b)(1) required "prior notice" to each party of any commanded production of documents and things or inspection of premises. Courts have agreed that notice must be given "prior" to the return date, and have tended to converge on

an interpretation that requires notice to the parties before the subpoena is served on the person commanded to produce or permit inspection. That interpretation is adopted in amended Rule 45(b)(1) to give clear notice of general present practice.

The language of former Rule 45(d)(2) addressing the manner of asserting privilege is replaced by adopting the wording of Rule 26(b)(5). The same meaning is better expressed in the same words.

Rule 46. Objecting to a Ruling or Order

A formal exception to a ruling or order is unnecessary. When the ruling or order is requested or made, a party need only state the action that it wants the court to take or objects to, along with the grounds for the request or objection. Failing to object does not prejudice a party who had no opportunity to do so when the ruling or order was made.

COMMITTEE NOTE

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

Rule 47. Selecting Jurors

(a) Examining Jurors. The court may permit the parties or their attorneys to examine prospective jurors or may itself do so. If the court examines the jurors, it must permit the parties or their attorneys to make any further inquiry it considers proper, or must itself ask any of their additional questions it considers proper.

(b) Peremptory Challenges. The court must allow the number of peremptory challenges provided by 28 U.S.C. § 1870.

(c) Excusing a Juror. During trial or deliberation, the court may excuse a juror for good cause.

COMMITTEE NOTE

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

Rule 48. Number of Jurors; Verdict

A jury must initially have at least ~~no fewer than~~ 6 and no more than 12 members, and each juror must participate in the verdict unless excused under Rule 47(c). Unless the parties stipulate otherwise, the verdict must be unanimous and be returned by a jury of at least 6 members.

COMMITTEE NOTE

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

Rule 49. Special Verdict; General Verdict and Questions

(a) Special Verdict.

(1) In General. The court may require a jury to return only a special verdict in the form of a special written finding on each issue of fact. The court may do so by:

(A) submitting written questions susceptible of a categorical or other brief answer;

(B) submitting written forms of the special findings that might properly be made under the pleadings and evidence; or

(C) using any other method that the court considers appropriate.

(2) Instructions. The court must ~~instruct the jury to enable it~~ give the instructions and explanations necessary to enable the jury to make its findings on each submitted issue.

(3) Issues Not Submitted. A party waives the right to a jury trial on any issue of fact raised by the pleadings or evidence but not submitted to the jury unless, before the jury retires, the party demands its submission to the jury. If the party does not demand submission, the court may make a finding on the issue. If the court makes no finding, it is considered to have made a finding consistent with its judgment on the special verdict.

(b) General Verdict with Answers to Written Questions.

(1) In General. The court may submit to the jury forms for a general verdict, together with written questions on one or more issues of fact that the jury must

decide. The court must ~~instruct the jury to enable it~~ give the instructions and explanations necessary to enable the jury to render a general verdict and answer the questions in writing, and must direct the jury to do both.

(2) Verdict and Answers Consistent. When the general verdict and the answers are consistent, the court must approve, for entry under Rule 58, an appropriate judgment on the verdict and answers.

(3) Answers Inconsistent with the Verdict. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may:

(A) approve, for entry under Rule 58, an appropriate judgment according to the answers, notwithstanding the general verdict;

(B) direct the jury to further consider its answers and verdict; or

(C) order a new trial.

(4) Answers Inconsistent with Each Other and the Verdict. When the answers are inconsistent with each other and one or more is also inconsistent with the general verdict, judgment must not be entered; instead, the court must direct the jury to further consider its answers and verdict, or must order a new trial.

COMMITTEE NOTE

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

Rule 50. Judgment as a Matter of Law in a Jury Trial; Related Motion for a New Trial; Conditional Ruling

(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 ~~at the close of all the evidence~~ under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. 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 file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may:

(1) allow judgment on the verdict, if the jury returned a verdict;

(2) order a new trial; or

(3) direct the entry of judgment as a matter of law.

(c) Granting the Renewed Motion; Conditional Ruling on a Motion for a New Trial.

(1) In General. If the court grants a renewed motion for judgment as a matter of law, it must also conditionally rule on any motion for a new trial by determining whether a new trial should be granted if the judgment is later vacated or reversed. The court must state the grounds for conditionally granting or denying the motion for a new trial.

(2) Effect of a Conditional Ruling. Conditionally granting the motion for a new trial does not affect the judgment's finality; if the judgment is reversed, the new trial must proceed unless the appellate court orders otherwise. If the motion for a new trial is conditionally denied, the appellee may assert error in that denial; if the judgment is reversed, the case must proceed as the appellate court orders.

(d) Time for a Losing Party's New-Trial Motion. Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered must be filed no later than 10 days after the entry of the judgment.

(e) Denying the Motion for Judgment as a Matter of Law; Reversal on Appeal. If the court denies the motion for judgment as a matter of law, the prevailing party may, as appellee, assert grounds entitling it to a new trial should the appellate court conclude that the trial court erred in denying the motion. If the appellate court reverses the judgment, it may order a new trial, direct the trial court to determine whether a new trial should be granted, or direct the entry of judgment.

COMMITTEE NOTE

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

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

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

Rule 51. Instructions to the Jury; Objections; Preserving a Claim of Error

(a) Requests.

(1) Before or at the Close of the Evidence. At the close of the evidence or at any earlier reasonable time that the court orders, a party may file and furnish to every other party written requests for the jury instructions it wants the court to give.

(2) After the Close of the Evidence. After the close of the evidence, a party may:

(A) file requests for instructions on issues that could not reasonably have been anticipated by an earlier time that the court set for requests; and

(B) with the court's permission, file untimely requests for instructions on any issue.

(b) Instructions. The court:

(1) must inform the parties of its proposed instructions and proposed action on the requests before instructing the jury and before final jury arguments;

(2) must give the parties an opportunity to object on the record and out of the jury's hearing before the instructions and arguments are delivered; and

(3) may instruct the jury at any time before the jury is discharged.

(c) Objections.

(1) How to Make. A party who objects to ~~a proposed~~ an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds for the objection.

(2) When to Make. An objection is timely if:

(A) a party objects at the opportunity provided under Rule 51(b)(2); or

(B) a party was not informed of an instruction or action on a request before that opportunity to object, and the party objects promptly after learning that the instruction or request will be, or has been, given or refused.

(d) Assigning Error; Plain Error.

(1) Assigning Error. A party may assign as error:

(A) an error in an instruction actually given, if that party properly objected; or

(B) a failure to give an instruction, if that party properly requested it and — unless the court rejected the request in a definitive ruling on the record — also properly objected.

(2) Plain Error. A court may consider a plain error in the instructions that has not been preserved as required by Rule 51(d)(1) if the error affects substantial rights.

COMMITTEE NOTE

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

Rule 52. Findings and Conclusions ~~in a Nonjury Proceeding~~ by the Court; Judgment on Partial Findings

(a) Findings and Conclusions ~~by the Court~~.

(1) In General. In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately. The findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court. Judgment must be entered under Rule 58.

(2) For an Interlocutory Injunction. In granting or refusing an interlocutory injunction, the court must similarly state the findings and conclusions that support its action.

(3) For a Motion. The court is not required to state findings or conclusions when ruling on a motion under Rule 12 or 56 or, unless these rules provide otherwise, on any other motion.

(4) Effect of a Master's Findings. A master's findings, to the extent adopted by the court, must be considered the court's findings.

(5) Questioning the Evidentiary Support. A party may later question the sufficiency of the evidence supporting the findings, whether or not the party requested findings, objected to them, moved to amend them, or moved for partial findings.

(6) Setting Aside the Findings. Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.

(b) Amended or Additional Findings. On a party's motion filed no later than 10 days after the entry of judgment, the court may amend its findings — or make additional findings — and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59.

(c) Judgment on Partial Findings. If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue. The court may, however, decline to render any judgment until the close of the evidence. A judgment on partial findings must be supported by findings of fact and conclusions of law as required by Rule 52(a).

COMMITTEE NOTE

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

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

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

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

Rule 53. Masters

(a) Appointment.

(1) Scope. 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 without a jury if appointment is warranted by:

(i) some exceptional condition; or

(ii) the need to perform an accounting or resolve a difficult computation of damages; or

(C) address pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district.

(2) Disqualification. A master must not have a relationship to the parties, attorneys, action, or court that would require disqualification of a judge under 28 U.S.C. § 455, unless the parties, with the court's approval, consent to the appointment after the master discloses any potential grounds for disqualification.

(3) Possible Expense or Delay. In appointing a master, the court must consider the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense or delay.

(b) Order Appointing a Master.

(1) Notice. Before appointing a master, the court must give the parties notice and an opportunity to be heard. Any party may suggest candidates for appointment.

(2) Contents. The appointing order 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(g).

(3) Issuing. The court may issue the order only after:

(A) the master files an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. § 455; and

(B) if a ground is disclosed, the parties, with the court's approval, waive the disqualification.

(4) Amending. The order may be amended at any time after notice to the parties and an opportunity to be heard.

(c) Master's Authority.

(1) In General. Unless the appointing order directs otherwise, a master may:

(A) regulate all proceedings;

(B) take all appropriate measures to perform the assigned duties fairly and efficiently; and

(C) if conducting an evidentiary hearing, exercise the appointing court's power to compel, take, and record evidence.

(2) Sanctions. The master may by order impose on a party any noncontempt sanction provided by Rule 37 or 45, and may recommend a contempt sanction against a party and sanctions against a nonparty.

(d) Master's Orders. A master who issues an order must file it and promptly serve a copy on each party. The clerk must enter the order on the docket.

(e) Master's Reports. A master must report to the court as required by the appointing order. The master must file the report and promptly serve a copy on each party, unless the court orders otherwise.

(f) Action on the Master's Order, Report, or Recommendations.

(1) Opportunity for a Hearing; Action in General. In acting on a master's order, report, or recommendations, the court must give the parties notice and an

opportunity to be heard; may receive evidence; and may adopt or affirm, modify, wholly or partly reject or reverse, or resubmit to the master with instructions.

(2) Time to Object or Move to Adopt or Modify. A party may file objections to — or a motion to adopt or modify — the master's order, report, or recommendations no later than 20 days after a copy is served, unless the court sets a different time.

(3) Reviewing Factual Findings. The court must decide de novo all objections to findings of fact made or recommended by a master, unless the parties, with the court's approval, stipulate that:

(A) the 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) Reviewing Legal Conclusions. The court must decide de novo all objections to conclusions of law made or recommended by a master.

(5) Reviewing Procedural Matters. Unless the appointing order establishes a different standard of review, the court may set aside a master's ruling on a procedural matter only for an abuse of discretion.

(g) Compensation.

(1) Fixing Compensation. Before or after judgment, the court must fix the master's compensation on the basis and terms stated in the appointing order, but the court may set a new basis and terms after giving notice and an opportunity to be heard.

(2) Payment. The compensation must be paid either:

(A) by a party or parties; or

(B) from a fund or subject matter of the action within the court's control.

(3) Allocating Payment. The court must allocate payment among the parties after considering the nature and amount of the controversy, the parties' means, and the extent to which any party is more responsible than other parties for the reference to a master. An interim allocation may be amended to reflect a decision on the merits.

(h) Appointing a Magistrate Judge. A magistrate judge is subject to this rule only when the order referring a matter to the magistrate judge states that the reference is made under this rule.

COMMITTEE NOTE

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

TITLE VII. JUDGMENT

Rule 54. Judgment; Costs

(a) Definition; Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment ~~must~~ should not include recitals of pleadings, a master's report, or a record of prior proceedings.

(b) Judgment on Multiple Claims or Involving Multiple Parties. When an action presents more than one claim for relief — whether as a claim, counterclaim, crossclaim, or third-party claim —or when multiple parties are involved, the court may ~~enter~~ direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the ~~court enters~~ entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

(c) Demand for Judgment; Relief to Be Granted. A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings. Every other final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.

(d) Costs; Attorney's Fees.

(1) Costs Other Than Attorney's Fees. Unless a federal statute, these rules, or a court order provides otherwise, costs — other than attorney's fees — should be allowed to the prevailing party. But costs against the United States, its officers, and its agencies may be imposed only to the extent allowed by law. The clerk may tax costs on 1 day's notice. On motion served within the next 5 days, the court may review the clerk's action.

(2) Attorney's Fees.

(A) Claim to Be by Motion. A claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages.

(B) Timing and Contents of the Motion. Unless a statute or a court order provides otherwise, the motion must:

(i) be filed no later than 14 days after the entry of judgment;

(ii) specify the judgment and the statute, rule, or other grounds entitling the movant to the award;

(iii) state the amount sought or provide a fair estimate of it; and

(iv) disclose, if the court so orders, the terms of any agreement about fees for the services for which the claim is made.

(C) Proceedings. Subject to Rule 23(h), the court must, on a party's request, give an opportunity for adversary submissions on the motion in accordance with Rule 43(c) or 78. The court may decide issues of liability for fees before receiving submissions on the value of services. The court must find the facts and state its conclusions of law as provided in Rule 52(a).

(D) Special Procedures by Local Rule; Reference to a Master or a Magistrate Judge. By local rule, the court may establish special procedures to resolve fee-related issues without extensive evidentiary hearings. Also, the court may refer issues concerning the value of services to a special master under Rule 53 without regard to the limitations of Rule 53(a)(1), and may refer a motion for attorney's fees to a magistrate judge under Rule 72(b) as if it were a dispositive pretrial matter.

(E) Exceptions. Subparagraphs (A)-(D) do not apply to claims for fees and expenses as sanctions for violating these rules or as sanctions under 28 U.S.C. § 1927.

COMMITTEE NOTE

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

Former Rule 54(b) required two steps to enter final judgment as to fewer than all claims among all parties. The court must make an express determination that there is no just reason for delay and also make an express direction for the

entry of judgment. Amended Rule 54(b) eliminates the express direction for the entry of judgment. There is no need for an "express direction" when the court expressly determines that there is no just reason for delay and enters a final judgment.

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

Rule 55. Default; Default Judgment

(a) Entering a Default. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default.

(b) Entering a Default Judgment.

(1) By the Clerk. If the plaintiff's claim is for a sum certain or a sum that can be made certain by computation, the clerk — on the plaintiff's request, with an affidavit showing the amount due — must enter judgment for that amount and costs against a defendant who has been defaulted for not appearing and who is neither a minor nor an incompetent person.

(2) By the Court. In all other cases, the party must apply to the court for a default judgment. A default judgment may be entered against a minor or incompetent person only if represented by a general guardian, conservator, or other like fiduciary who has appeared. If the party against whom a default judgment is sought has appeared personally or by a representative, that party or its representative must be served with written notice of the application at least 3 days before the hearing. The court may conduct hearings or make referrals — preserving any federal statutory right to a jury trial — when, to enter or effectuate judgment, it needs to:

(A) conduct an accounting;

(B) determine the amount of damages;

(C) establish the truth of any allegation by evidence; or

(D) investigate any other matter.

(c) Setting Aside a Default or a Default Judgment. The court may set aside an entry of default for good cause, and it may set aside a default judgment under Rule 60(b).

(d) Judgment Against the United States. A default judgment may be entered against the United States, its officers, or its agencies only if the claimant establishes a claim or right to relief by evidence that satisfies the court.

COMMITTEE NOTE

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

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

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

Rule 56. Summary Judgment

(a) By a Claiming Party. A party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim. The motion may be filed at any time after:

(1) 20 days have passed from commencement of the action; or

(2) the opposing party serves a motion for summary judgment.

(b) By a Defending Party. A party against whom relief is sought may move at any time, with or without supporting affidavits, for summary judgment on all or part of the claim.

(c) Serving the Motion; Proceedings. The motion must be served at least 10 days before the day set for the hearing. An opposing party may serve opposing affidavits before the hearing day. The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show

that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

(d) Case Not Fully Adjudicated on the Motion.

(1) Establishing Facts. If summary judgment is not rendered on the whole action, the court should, to the extent practicable, determine what material facts are not genuinely at issue. The court should so determine by examining the pleadings and evidence before it and by interrogating the attorneys. It should then issue an order specifying what facts — including items of damages or other relief — are not genuinely at issue. The facts so specified must be treated as established in the action.

(2) Establishing Liability. An interlocutory summary judgment may be rendered on liability alone, even if there is a genuine issue on the amount of damages.

(e) Affidavits; Further Testimony.

(1) In General. A supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated. If a paper or part of a paper is referred to in an affidavit, a sworn or certified copy must be attached to or served with the affidavit. The court may permit an affidavit to be supplemented or opposed by depositions, answers to interrogatories, or additional affidavits.

(2) Opposing Party's Obligation to Respond. When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must — by affidavits or as otherwise provided in this rule — set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.

(f) When Affidavits Are Unavailable. If a party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) deny the motion;

(2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or

(3) issue any other just order.

(g) Affidavit Submitted in Bad Faith. If satisfied that an affidavit under this rule is submitted in bad faith or solely for delay, the court must order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt.

COMMITTEE NOTE

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

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

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

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

Rule 57. Declaratory Judgment

These rules govern the procedure for obtaining a declaratory judgment under 28 U.S.C. § 2201. ~~A party may~~ Rules 38 and 39 govern a demand for a jury trial ~~under~~

~~Rules 38 and 39~~. The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate. The court may order a speedy hearing of a declaratory-judgment action.

COMMITTEE NOTE

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

Rule 58. Entering Judgment

(a) Separate Document. Every judgment and amended judgment must be set out in a separate document, but a separate document is not required for an order disposing of a motion:

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

(2) to amend or make additional findings ~~of fact~~ under Rule 52(b);

(3) for attorney's fees under Rule 54;

(4) for a new trial, or to alter or amend the judgment, under Rule 59; or

(5) for relief under Rule 60.

(b) Entering Judgment.

(1) Without the Court's Direction. Subject to Rule 54(b) and unless the court orders otherwise, the clerk must, without awaiting the court's direction, promptly prepare, sign, and enter the judgment when:

(A) the jury returns a general verdict;

(B) the court awards only costs or a sum certain; or

(C) the court denies all relief.

(2) Court's Approval Required. Subject to Rule 54(b), the court must promptly approve the form of the judgment, which the clerk must promptly enter, when:

(A) the jury returns a special verdict or a general verdict with answers to written questions; or

(B) the court grants other relief not described in this subdivision (b).

(b) Time of Entry. For purposes of these rules, judgment is entered at the following times:

(1) if a separate document is not required, when the judgment is entered in the civil docket under Rule 79(a); or

(2) if a separate document is required, when the judgment is entered in the civil docket under Rule 79(a) and the earlier of these events occurs:

(A) it is set out in a separate document; or

(B) 150 days have run from the entry in the civil docket.

(d) Request for Entry. A party may request that judgment be set out in a separate document as required by Rule 58(a).

(e) Cost or Fee Awards. Ordinarily, the entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees. But if a timely motion for attorney's fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and become effective to order that the motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59.

COMMITTEE NOTE

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

Rule 59. New Trial; Altering or Amending a Judgment

(a) In General.

(1) Grounds for New Trial. The court may, on motion, grant a new trial on all or some of the issues — and to any party — as follows:

(A) after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court; ~~and~~ or

(B) after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court.

(2) Further Action After a Nonjury Trial. After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment.

(b) Time to File a Motion for a New Trial. A motion for a new trial must be filed no later than 10 days after the entry of judgment.

(c) Time to Serve Affidavits. When a motion for a new trial is based on affidavits, they must be filed with the motion. The opposing party has 10 days after being served 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' stipulation. The court may permit reply affidavits.

(d) New Trial on the Court's Initiative or for Reasons Not in the Motion. No later than 10 days after the entry of judgment, the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. In either event, the court must specify the reasons in its order.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend a judgment must be filed no later than 10 days after the entry of the judgment.

COMMITTEE NOTE

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

Rule 60. Relief from a Judgment or Order

(a) Corrections Based on Clerical Mistakes; Oversights and Omissions. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) Grounds for Relief from a Final Judgment, ~~or~~ Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.

(1) Timing. A motion under Rule 60(b) must be made within a reasonable time — and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(2) Effect on Finality. The motion does not affect the judgment's finality or suspend its operation.

(d) Other Powers to Grant Relief. This rule does not limit a court's power to:

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;

(2) grant relief under 28 U.S.C. § 1655 to a defendant who ~~is~~ was not personally notified of the action; or

(3) set aside a judgment for fraud on the court.

(e) Bills and Writs Abolished. The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.

COMMITTEE NOTE

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

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

Rule 61. Harmless Error

Unless justice requires otherwise, no error in admitting or excluding evidence — or any other error by the court or a party — is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.

COMMITTEE NOTE

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

Rule 62. Stay of Proceedings to Enforce a Judgment

(a) Automatic Stay; Exceptions for Injunctions, Receiverships, and Patent Accountings. Except as stated in this rule, no execution may issue on a judgment, nor may proceedings be taken to enforce it, until 10 days have passed after its entry. But unless the court orders otherwise, the following are not ~~automatically~~ stayed after being entered, even if an appeal is taken:

(1) an interlocutory or final judgment in an action for an injunction or a receivership; or

(2) a judgment or order that directs an accounting in an action for patent infringement.

(b) Stay Pending the Disposition of a Motion. On appropriate terms for the opposing party's security, the court may stay the execution of a judgment — or any proceedings to enforce it — pending disposition of any of the following motions:

(1) under Rule 50, for judgment as a matter of law;

(2) under Rule 52(b), to amend the findings or for additional findings;

(3) under Rule 59, for a new trial or to alter or amend a judgment; or

(4) under Rule 60, for relief from a judgment or order.

(c) Injunction Pending an Appeal. ~~After an appeal is taken~~ While an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights. If the judgment appealed from is rendered by a statutory three-judge district court, the order must be made either:

(1) by that court sitting in open session; or

(2) by the assent of all its judges, as evidenced by their signatures.

(d) Stay with Bond on Appeal. If an appeal is taken, the appellant may~~,~~ obtain a stay by supersedeas bond, ~~obtain a stay,~~ except in an action described in Rule 62(a)(1) or (2). The bond may be given upon or after filing the notice of appeal or after obtaining the order allowing the appeal. The stay takes effect when the court approves the bond.

(e) Stay Without Bond on an Appeal by the United States, Its Officers, or Its Agencies. The court must not require a bond, obligation, or other security from the appellant when granting a stay on an appeal by the United States, its officers, or its agencies or on an appeal directed by a department of the federal government.

(f) Stay in Favor of a Judgment Debtor Under State Law. If a judgment is a lien on the judgment debtor's property under ~~state~~ the law of the state where the court ~~sits~~ is located, the judgment debtor is entitled to the same stay of execution the state court would give.

(g) Appellate Court's Power Not Limited. ~~While an appeal is pending, t~~This rule does not limit the power of the appellate court or one of its judges or justices ~~to~~:

(1) to stay proceedings~~;~~

~~**(2)**~~ — or suspend, modify, restore, or grant an injunction — while an appeal is pending; or

(~~3~~ 2) to issue an order to preserve the status quo or the effectiveness of the judgment to be entered.

(h) Stay with Multiple Claims or Parties. A court may stay the enforcement of a final judgment entered under Rule 54(b) until it enters a later judgment or judgments, and may prescribe terms necessary to secure the benefit of the stayed judgment for the party in whose favor it was entered.

COMMITTEE NOTE

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

The final sentence of former Rule 62(a) referred to Rule 62(c). It is deleted as an unnecessary. Rule 62(c) governs of its own force.

Rule 63. Judge's Inability to Proceed

If ~~the~~ a judge ~~who commenced~~ conducting a hearing or trial is unable to proceed, any other judge may proceed ~~with it~~ upon certifying familiarity with the record and determining that the case may be completed without prejudice to the parties. In a hearing or a nonjury trial, the successor judge must, at a party's request, recall any witness whose testimony is material and disputed and who is available to testify again without undue burden. The successor judge may also recall any other witness.

COMMITTEE NOTE

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

TITLE VIII. PROVISIONAL AND FINAL REMEDIES

Rule 64. Seizing a Person or Property

(a) Remedies Under State Law — In General. At the commencement of and throughout an action, every remedy is available that, under the law of the state where the court is located, provides for seizing a person or property to ~~satisfy~~ secure satisfaction of the potential judgment. But a federal statute governs to the extent it applies.

(b) Specific Kinds of Remedies. The remedies available under this rule include the following — however designated and regardless of whether state procedure requires an independent action:

- arrest;
- attachment;
- garnishment;
- replevin;
- sequestration; and
- other corresponding or equivalent remedies.

COMMITTEE NOTE

The language of Rule 64 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 64 stated that the Civil Rules govern an action in which any remedy available under Rule 64(a) is used. The Rules were said to govern from the time the action is commenced if filed in federal court, and from the time of removal if removed from state court. These provisions are deleted as redundant. Rule 1 establishes that the Civil Rules apply to all actions in a district court, and Rule 81(c)(1) adds reassurance that the Civil Rules apply to a removed action "after it is removed."

Rule 65. Injunctions and Restraining Orders

(a) Preliminary Injunction.

(1) Notice. The court may issue a preliminary injunction only on notice to the adverse party.

(2) Consolidating the Hearing with the Trial on the Merits. Before or after beginning ~~a~~ the hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing. Even when consolidation is not ordered, evidence that is received on the motion and that would be admissible at trial becomes part of the trial record and need not be repeated at trial. But the court must preserve any party's right to a jury trial.

(b) Temporary Restraining Order.

(1) Issuing Without Notice. The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if:

(A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and

(B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

(2) Contents; Expiration. Every temporary restraining order issued without notice must state the date and hour it was issued; describe the injury and state why it is irreparable; state why the order was issued without notice; and be promptly filed in the clerk's office and entered in the record. The order expires at the time after entry — not to exceed 10 days — that the court sets, unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension. The reasons for an extension must be entered in the record.

(3) Expediting the Preliminary-Injunction Hearing. If the order is issued without notice, the motion for a preliminary injunction must be set for hearing at the earliest possible time, taking precedence over all other matters except hearings on older matters of the same character. At the hearing, the party who obtained the order must proceed with the motion; if the party does not, the court must dissolve the order.

(4) Motion to Dissolve. On 2 days' notice to the party who obtained the order without notice — or on shorter notice set by the court — the adverse party may appear and move to dissolve or modify the order. The court must then hear and decide the motion as promptly as justice requires.

(c) Security. ~~If t~~The court may issue~~s~~ a preliminary injunction or a temporary restraining order~~, the court must require~~ only if the movant ~~to~~ give~~s~~ security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. The United States, its officers, and its agencies are not required to give security.

(d) Contents and Scope of Every Injunction and Restraining Order.

(1) Contents. Every order granting an injunction and every restraining order must:

(A) state the reasons why it issued;

(B) state its terms specifically; and

(C) describe in reasonable detail — and not by referring to the complaint or other document — the act or acts restrained or required.

(2) Persons Bound. The order binds only the following who receive actual notice of it by personal service or otherwise:

(A) the parties;

(B) the parties' officers, agents, servants, employees, and attorneys; and

(C) other persons ~~who receive actual notice of the order by personal service or otherwise and~~ who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).

(e) Other Laws Not Modified. These rules do not modify the following:

(1) any federal statute relating to temporary restraining orders or preliminary injunctions in actions affecting employer and employee;

(2) 28 U.S.C. § 2361, which relates to preliminary injunctions in actions of interpleader or in the nature of interpleader; or

(3) 28 U.S.C. § 2284, which relates to actions that must be heard and decided by a three-judge district court.

(f) Copyright Impoundment. This rule applies to copyright-impoundment proceedings.

COMMITTEE NOTE

The language of Rule 65 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The final sentence of former Rule 65(c) referred to Rule 65.1. It is deleted as unnecessary. Rule 65.1 governs of its own force.

Rule 65(d)(2) clarifies two ambiguities in former Rule 65(d). The former rule was adapted from former 28 U.S.C. § 363, but omitted a comma that made clear the common doctrine that a party must have actual notice of an injunction in order to be bound by it. Amended Rule 65(d) restores the meaning of the earlier statute, and also makes clear the proposition that an injunction can be enforced against a person who acts in concert with a party's officer, agent, servant, employee, or attorney.

Rule 65.1. Proceedings Against a Surety

Whenever these rules (including the Supplemental Rules for ~~Certain~~ Admiralty ~~and~~ or Maritime Claims and Asset Forfeiture Actions) require or allow a party to give security, and security is given through a bond or other undertaking with one or more sureties, each surety submits to the court's jurisdiction and irrevocably appoints the court clerk as its agent for receiving service of any papers that affect its liability on the bond or undertaking. The surety's liability may be enforced on motion without an independent action. The motion and any notice that the court orders may be served on the court clerk, who must promptly mail a copy of each to every surety whose address is known.

COMMITTEE NOTE

The language of Rule 65.1 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 66. Receivers

These rules govern an action in which the appointment of a receiver is sought or a receiver sues or is sued. But the practice in administering an estate by a receiver or a similar court-appointed officer must ~~administer an estate according to~~ accord with the historical practice in federal courts or ~~as provided in~~ with a local rule. An action in which a receiver has been appointed may be dismissed only by court order.

COMMITTEE NOTE

The language of Rule 66 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 67. Deposit into Court

(a) Depositing Property. If any part of the relief sought is a money judgment or the disposition of a sum of money or some other deliverable thing, a party — on notice to every other party and by leave of court — may deposit with the court all or part of the money or thing, whether or not that party claims any of it. The depositing party must deliver to the clerk a copy of the order permitting deposit.

(b) Investing and Withdrawing Funds. Money paid into court under this rule must be deposited and withdrawn in accordance with 28 U.S.C. §§ 2041 and 2042

and any like statute. The money must be deposited in an interest-bearing account or invested in a court-approved, interest-bearing instrument.

COMMITTEE NOTE

The language of Rule 67 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 68. Offer of Judgment

(a) Making an Offer; Judgment on an Accepted Offer. ~~At least~~ More than 10 days before the trial begins, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 10 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.

(b) Unaccepted Offer. An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.

(c) Offer After Liability Is Determined. When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be served within a reasonable time — but at least 10 days — before a hearing to determine the extent of liability.

(d) Paying Costs After an Unaccepted Offer. If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.

COMMITTEE NOTE

The language of Rule 68 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 69. Execution

(a) In General.

(1) Money Judgment; Applicable Procedure. A money judgment is enforced by a writ of execution, unless the court ~~orders~~ directs otherwise. The procedure on execution — and in proceedings supplementary to and in aid of judgment or execution — must ~~follow~~ accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies.

(2) Obtaining Discovery. In aid of the judgment or execution, the judgment creditor or a successor in interest whose interest appears of record may obtain discovery from any person — including the judgment debtor — as provided in these rules or by the procedure of the state where the court is located.

(b) Against Certain Public Officers. When a judgment has been entered against a revenue officer in the circumstances stated in 28 U.S.C. § 2006, or against an officer of Congress in the circumstances stated in 2 U.S.C. § 118, the judgment must be satisfied as those statutes provide.

COMMITTEE NOTE

The language of Rule 69 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.

Amended Rule 69(b) incorporates directly the provisions of 2 U.S.C. § 118 and 28 U.S.C. § 2006, deleting the incomplete statement in former Rule 69(b) of the circumstances in which execution does not issue against an officer.

Rule 70. Enforcing a Judgment for a Specific Act

(a) Party's Failure to Act; Ordering Another to Act. If a judgment requires a party to convey land, to deliver a deed or other document, or to perform any other specific act and the party fails to comply within the time specified, the court may order the act to be done — at the disobedient party's expense — by another person appointed by the court. When done, the act has the same effect as if done by the party.

(b) Vesting Title. If the real or personal property is within the district, the court — instead of ordering a conveyance — may enter a judgment divesting any party's title and vesting it in others. That judgment has the effect of a legally executed conveyance.

(c) Obtaining a Writ of Attachment or Sequestration. On application by a party entitled to performance of an act, the clerk must issue a writ of attachment or sequestration against the disobedient party's property to compel obedience.

(d) Obtaining a Writ of Execution or Assistance. On application by a party who obtains a judgment or order for possession, the clerk must issue a writ of execution or assistance.

(e) Holding in Contempt. The court may also hold the disobedient party in contempt.

COMMITTEE NOTE

The language of Rule 70 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 71. Enforcing Relief For or Against a Nonparty

When an order grants relief for a nonparty or may be enforced against a nonparty, the procedure for enforcing the order is the same as for a party.

COMMITTEE NOTE

The language of Rule 71 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.

TITLE IX. SPECIAL PROCEEDINGS

Rule 71.1. Condemning Real or Personal Property

(a) Applicability of Other Rules. These rules govern proceedings to condemn real and personal property by eminent domain, except as this rule provides otherwise.

(b) Joinder of Properties. The plaintiff may join separate pieces of property in a single action, no matter ~~who owns them or whether they are~~ whether they are owned by the same persons or sought for the same use.

(c) Complaint.

(1) Caption. The complaint must contain a caption as provided in Rule 10(a). The plaintiff must, however, name as defendants both the property — designated generally by kind, quantity, and location — and at least one owner of some part of or interest in the property.

(2) Contents. The complaint must contain a short and plain statement of the following:

(A) the authority for the taking;

(B) the uses for which the property is to be taken;

(C) a description sufficient to identify the property;

(D) the interests to be acquired; and

(E) for each piece of property, a designation of each defendant who has been joined as an owner or owner of an interest in it.

(3) Parties. When the action commences, the plaintiff need join as defendants only those persons who have or claim an interest in the property and whose names are then known. But before any hearing on compensation, the plaintiff must add as defendants all those persons who have or claim an interest and whose names have become known or can be found by a reasonably diligent search of the records, considering both the property's character and value and the interests to be acquired. All others may be made defendants under the designation "Unknown Owners."

(4) Procedure. Notice must be served on all defendants as provided in Rule 71.1(d), whether they were named as defendants when the action commenced or were added later. A defendant may answer as provided in Rule 71.1(e). The court, meanwhile, may order any distribution of ~~the~~ a deposit that the facts warrant.

(5) Filing; Additional Copies. In addition to filing the complaint, the plaintiff must give the clerk at least one copy for the defendants' use and additional copies at the request of the clerk or a defendant.

(d) Process.

(1) Delivering Notice to the Clerk. On filing a complaint, the plaintiff must promptly deliver to the clerk joint or several notices directed to the named defendants. When adding defendants, the plaintiff must deliver to the clerk additional notices directed to the new defendants.

(2) Contents of the Notice.

(A) Main Contents. Each notice must name the court, the title of the action, and the defendant to whom it is directed. It must describe the

property sufficiently to identify it, but need not describe any property other than that to be taken from the named defendant. The notice must also state:

(i) that the action is to condemn property;

(ii) the interest to be taken;

(iii) the authority for the taking;

(iv) the uses for which the property is to be taken;

(v) that the defendant may serve an answer on the plaintiff's attorney within 20 days after being served with the notice; and

(vi) that the failure to so serve an answer constitutes consent to the taking and to the court's authority to proceed with the action and fix the compensation.

(B) Conclusion. The notice must conclude with the name of the plaintiff's attorney and an address within the district in which the action is brought where the attorney may be served.

(3) Serving the Notice.

(A) Personal Service. When a defendant whose address is known resides within the United States or a territory subject to the administrative or judicial jurisdiction of the United States, personal service of the notice (without a copy of the complaint) must be made in accordance with Rule 4.

(B) Service by Publication.

(i) A defendant may be served by publication only when the plaintiff's attorney files a certificate stating that the attorney believes the defendant cannot be personally served, because after diligent inquiry within the state where the complaint is filed, the defendant's place of residence is still unknown or, if known, that it is beyond the territorial limits of personal service. Service is then made by publishing the notice — once a week for at least three successive weeks — in a newspaper published in the county where the property is located or, if there is no such newspaper, in a newspaper with general circulation where the property is located. Before the last publication, a copy of the notice must also be mailed to every defendant who cannot be personally served but whose place of residence is then known. Unknown owners may be served by publication in the same manner by a notice addressed to "Unknown Owners."

(ii) Service by publication is complete on the date of the last publication. The plaintiff's attorney must prove publication and mailing by a certificate, attach a printed copy of the published notice, and mark on the copy the newspaper's name and the dates of publication.

(4) Effect of Delivery and Service. Delivering the notice to the clerk and serving it have the same effect as serving a summons under Rule 4.

(5) Proof of Service; Amending the Proof or Notice. Rule 4(l) governs proof of service. The court may permit the proof or the notice to be amended.

(e) Appearance or Answer.

(1) Notice of Appearance. A defendant that has no objection or defense to the taking of its property may serve a notice of appearance designating the property in which it claims an interest. The defendant must then be given notice of all later proceedings affecting the defendant.

(2) Answer. A defendant that has an objection or defense to the taking must serve an answer within 20 days after being served with the notice. The answer must:

(A) identify the property in which the defendant claims an interest;

(B) state the nature and extent of the interest; and

(C) state all the defendant's objections and defenses to the taking.

(3) Waiver of Other Objections and Defenses; Evidence on Compensation. A defendant waives all objections and defenses not stated in its answer. No other pleading or motion asserting an additional objection or defense is allowed. But at the trial on compensation, a defendant — whether or not it has previously appeared or answered — may present evidence on the amount of compensation to be paid and may share in the award.

(f) Amending Pleadings. Without leave of court, the plaintiff may — as often as it wants — amend the complaint at any time before the trial on compensation. But no amendment may be made if it would result in a dismissal inconsistent with Rule 71.1(i)(1) or (2). The plaintiff need not serve a copy of an amendment, but must serve notice of the filing, as provided in Rule 5(b), on every affected party who has appeared and, as provided in Rule 71.1(d), on every affected party who has not appeared. In addition, the plaintiff must give the clerk at least one copy of each amendment for the defendants' use, and additional copies at the request of the clerk or a defendant. A defendant may appear or answer in the time and manner and with the same effect as provided in Rule 71.1(e).

(g) Substituting Parties. If a defendant dies, becomes incompetent, or transfers an interest after being joined, the court may, on motion and notice of hearing, order that the proper party be substituted. Service of the motion and notice on a nonparty must be made as provided in Rule 71.1(d)(3).

(h) Trial of the Issues.

(1) Issues Other Than Compensation; Compensation. In an action involving eminent domain under federal law, the court tries all issues, including compensation, except when compensation must be determined:

(A) by any tribunal specially constituted by a federal statute to determine compensation; or

(B) if there is no such tribunal, by a jury when a party demands one within the time to answer or within any additional time the court sets, unless the court appoints a commission.

(2) Appointing a Commission; Commission's Powers and Report.

(A) Reasons for Appointing. If a party has demanded a jury, the court may instead appoint a three-person commission to determine compensation because of the character, location, or quantity of the property to be condemned or for other just reasons.

(B) Alternate Commissioners. The court may appoint up to two additional persons to serve as alternate commissioners to hear the case and replace commissioners who, before a decision is filed, the court finds unable or disqualified to perform their duties. Once the commission renders its final decision, the court must discharge any alternate who has not replaced a commissioner.

(C) Examining the Prospective Commissioners. Before making its appointments, the court must advise the parties of the identity and qualifications of each prospective commissioner and alternate, and may permit the parties to examine them. The parties may not suggest appointees, but for good cause may object to ~~the appointment of~~ a prospective commissioner or alternate.

(D) Commission's Powers and Report. A commission has the powers of a master under Rule 53(c). Its action and report are determined by a majority. Rule 53(d), (e), and (f) apply to its action and report.

(i) Dismissal of the Action or a Defendant.

(1) Dismissing the Action.

(~~1~~ A) **By the Plaintiff.** If no compensation hearing on a piece of property has begun, and if the plaintiff has not acquired title or a lesser interest or taken possession, the plaintiff may, without a court order, dismiss the action as to that property by filing a notice of dismissal briefly describing the property.

(~~2~~ B) **By Stipulation.** Before a judgment is entered vesting the plaintiff with title or a lesser interest in or possession of property, the plaintiff and affected defendants may, without a court order, dismiss the action in whole or in part by filing a stipulation of dismissal. And if the parties so stipulate, the court may vacate a judgment already entered.

(~~3~~ C) **By Court Order.** At any time before compensation has been determined and paid, the court may, after a motion and hearing, dismiss the action as to a piece of property. But if the plaintiff has already taken title, a lesser interest, or possession as to any part of it, the court must award compensation for the title, lesser interest, or possession taken.

(2) Dismissing a Defendant. The court may at any time dismiss a defendant who was unnecessarily or improperly joined.

(~~4~~ 3) **Effect.** A dismissal is without prejudice unless otherwise stated in the notice, stipulation, or court order.

(j) Deposit and Its Distribution.

(1) Deposit. The plaintiff must deposit with the court any money required by law as a condition to the exercise of eminent domain and may make a deposit when allowed by statute.

(2) Distribution; Adjusting Distribution. After a deposit, the court and attorneys must expedite the proceedings so as to distribute the deposit and to determine and pay compensation. If the compensation finally awarded to a defendant exceeds the amount distributed to that defendant, the court must enter judgment against the plaintiff for the deficiency. If the compensation awarded to a defendant is less than the amount distributed to that defendant, the court must enter judgment against that defendant for the overpayment.

(k) Condemnation Under a State's Power of Eminent Domain. This rule governs an action involving eminent domain under state law. But if state law provides for trying an issue by jury — or for trying the issue of compensation by jury or commission or both — that law governs.

(l) Costs. Costs are not subject to Rule 54(d).

COMMITTEE NOTE

The language of Rule 71A has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 71A has been redesignated as Rule 71.1 to conform to the designations used for all other rules added within the original numbering system.

Rule 72. Magistrate Judges: Pretrial Order

(a) Nondispositive Matters. When a pretrial matter not dispositive of a party's claim or defense is referred to a magistrate judge to hear and decide, the magistrate judge must promptly conduct the required proceedings and, when appropriate, issue a written order stating the decision. A party may serve and file objections to the order within 10 days after being served with a copy. A party may not assign as error a defect in the order not timely objected to. The district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law.

(b) Dispositive Motions and Prisoner Petitions.

(1) Findings and Recommendations. A magistrate judge must promptly conduct the required proceedings when assigned, without the parties' consent, to hear a pretrial matter dispositive of a claim or defense or a prisoner petition challenging the conditions of confinement. A record must be made of all evidentiary proceedings and may, at the magistrate judge's discretion, be made of any other proceedings. The magistrate judge must enter a recommended disposition, including, if appropriate, proposed findings of fact. The clerk must promptly mail a copy to each party.

(2) Objections. 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. Unless the district judge orders otherwise, the objecting party must promptly arrange for transcribing the record, or whatever portions of it the parties agree to or the magistrate judge considers sufficient.

(3) Resolving Objections. The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to. The

district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.

COMMITTEE NOTE

The language of Rule 72 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 73. Magistrate Judges: Trial by Consent; Appeal

(a) Trial by Consent. When authorized under 28 U.S.C. § 636(c), a magistrate judge may, if all parties consent, conduct ~~the proceedings in~~ a civil action or proceeding, including a jury or nonjury trial. A record ~~of the proceedings~~ must be made in accordance with 28 U.S.C. § 636(c)(5).

(b) Consent Procedure.

(1) In General. When a magistrate judge has been designated to conduct civil actions or proceedings, the clerk must give the parties written notice of their opportunity to consent under 28 U.S.C. § 636(c). To signify their consent, the parties must jointly or separately file a statement consenting to the referral. A district judge or magistrate judge may be informed of a party's response to the clerk's notice only if all parties have consented to the referral.

(2) Reminding the Parties About Consenting. A district judge, magistrate judge, or other court official may ~~again advise~~ remind the parties of the magistrate judge's availability, but must also advise them that they are free to withhold consent without adverse substantive consequences.

(3) Vacating a Referral. On its own for good cause — or when a party shows extraordinary circumstances — the district judge may vacate a referral to a magistrate judge under this rule.

(c) Appealing a Judgment. In accordance with 28 U.S.C. § 636(c)(3), an appeal from a judgment entered at a magistrate judge's direction may be taken to the court of appeals as would any other appeal from a district-court judgment.

COMMITTEE NOTE

The language of Rule 73 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 74.

COMMITTEE NOTE

Rule 74 was abrogated in 1997 to reflect repeal of the statute providing for appeal from a magistrate judge's judgment to the district court. The rule number is reserved for possible future use

Rule 75.

COMMITTEE NOTE

Rule 75 was abrogated in 1997 to reflect repeal of the statute providing for appeal from a magistrate judge's judgment to the district court. The rule number is reserved for possible future use.

Rule 76.

COMMITTEE NOTE

Rule 76 was abrogated in 1997 to reflect repeal of the statute providing for appeal from a magistrate judge's judgment to the district court. The rule number is reserved for possible future use.

TITLE X. DISTRICT COURTS AND CLERKS: CONDUCTING BUSINESS; ISSUING ORDERS

Rule 77. Conducting Business; Clerk's Authority; Notice of an Order or Judgment

(a) When Court Is Open. Every district court is considered always open for filing any paper, issuing and returning process, making a motion, or entering an order.

(b) Place for Trial and Other Proceedings. Every trial on the merits must be conducted in open court and, so far as convenient, in a regular courtroom. Any other act or proceeding may be done or conducted by a judge in chambers, without the attendance of the clerk or other court official, and anywhere inside or outside the district. But no hearing — other than one ex parte — may be conducted outside the district unless all the affected parties consent.

(c) Clerk's Office Hours; Clerk's Orders.

(1) Hours. The clerk's office — with a clerk or deputy on duty — must be open during business hours every day except Saturdays, Sundays, and legal holidays. But a court may, by local rule or order, require that the office be open for specified hours on Saturday or a particular legal holiday other than one listed in Rule 6(a)(4)(A).

(2) Orders. Subject to the court's power to suspend, alter, or rescind the clerk's action for good cause, the clerk may:

(A) issue process;

(B) enter a default;

(C) enter a default judgment under Rule 55(b)(1); and

(D) act on any other matter that does not require the court's action.

(d) Serving Notice of an Order or Judgment.

(1) Service. Immediately after entering an order or judgment, the clerk must serve notice of the entry, as provided in Rule 5(b), on each party who is not in default for failing to appear. The clerk must record the service on the docket. A party also may serve notice of the entry as provided in Rule 5(b).

(2) Time to Appeal Not Affected by Lack of Notice. Lack of notice of the entry does not affect the time for appeal or relieve — or authorize the court to relieve — a party for failing to appeal within the time allowed, except as allowed by Federal Rule of Appellate Procedure (4)(a).

COMMITTEE NOTE

The language of Rule 77 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 78. Hearing Motions; Advancing an Action

(a) Providing a Regular Schedule for Oral Hearings; Other Orders. A court may establish regular times and places for oral hearings on motions. But at any time or place, on notice that the judge considers reasonable, the judge may issue an order to advance, conduct, and hear an action.

(b) Providing for Submission on Briefs. By rule or order, the court may provide for submitting and determining motions on briefs, without oral hearings.

COMMITTEE NOTE

The language of Rule 78 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 79. Records Kept by the Clerk

(a) Civil Docket.

(1) In General. The clerk must keep a record known as the "civil docket" in the form and manner prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States. The clerk must enter each civil action in the docket. Actions must be assigned consecutive file numbers, which must be noted in the docket where the first entry of the action is made.

(2) Items to be Entered. The following items must be marked with the file number and entered chronologically in the docket:

(A) papers filed with the clerk;

(B) process issued, and proofs of service or other returns showing execution; and

(C) appearances, orders, verdicts, and judgments.

(3) Contents of Entries; Jury Trial Demanded. Each entry must briefly show the nature of the paper filed or writ issued, the substance of each proof of service or other return, and the substance and date of entry of each order and judgment. When a jury trial has been properly demanded or ordered, the clerk must enter the word "jury" in the docket.

(b) Civil Judgments and Orders. The clerk must keep a copy of every final judgment and appealable order; of every order affecting title to or a lien on real or personal property; and of any other order that the court directs to be kept. The clerk must keep these in the form and manner prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States.

(c) Indexes; Calendars. Under the court's direction, the clerk must:

(1) keep indexes of the docket and of the judgments and orders described in Rule 79(b); and

(2) prepare calendars of all actions ready for trial, distinguishing jury trials from nonjury trials.

(d) Other Records. The clerk must keep any other 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.

COMMITTEE NOTE

The language of Rule 79 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 80. Stenographic Transcript as Evidence

If stenographically reported testimony at a hearing or trial is admissible in evidence at a later trial, the testimony may be proved by a transcript certified by the person who ~~recorded~~ reported it.

COMMITTEE NOTE

The language of Rule 80 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

~~Former Rule 80(c) was limited to testimony "stenographically reported." It is revised to reflect the use of other methods of recording testimony at a trial or hearing.~~

TITLE XI. GENERAL PROVISIONS

Rule 81. Applicability of the Rules in General; Removed Actions

(a) Applicability to Particular Proceedings.

(1) Prize Proceedings. These rules do not apply to prize proceedings in admiralty governed by 10 U.S.C. §§ 7651–7681.

(2) Bankruptcy. These rules apply to bankruptcy proceedings to the extent provided by the Federal Rules of Bankruptcy Procedure.

(3) Citizenship. These rules apply to proceedings for admission to citizenship to the extent that the practice in those proceedings is not specified in federal

statutes and has previously conformed to the practice in civil actions. The provisions of 8 U.S.C. § 1451 for service by publication and for answer apply in proceedings to cancel citizenship certificates.

(4) Special Writs. These rules apply to proceedings for habeas corpus and for quo warranto to the extent that the practice in those proceedings:

(A) is not specified in a federal statute, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Cases; and

(B) has previously conformed to the practice in civil actions.

(5) Proceedings Involving a Subpoena. These rules apply to proceedings to compel testimony or the production of documents through a subpoena issued by a United States officer or agency under a federal statute, except as otherwise provided by statute, by local rule, or by court order in the proceedings.

(6) Other Proceedings. These rules, to the extent applicable, govern proceedings under the following laws, except as these laws provide other procedures:

(A) 7 U.S.C. §§ 292, 499g(c), for reviewing an order of the Secretary of Agriculture;

(B) 9 U.S.C., relating to arbitration;

(C) 15 U.S.C. § 522, for reviewing an order of the Secretary of the Interior;

(D) 15 U.S.C. § 715d(c), for reviewing an order denying a certificate of clearance;

(E) 29 U.S.C. §§ 159, 160, for enforcing an order of the National Labor Relations Board;

(F) 33 U.S.C. §§ 918, 921, for enforcing or reviewing a compensation order under the Longshore and Harbor Workers' Compensation Act; and

(G) 45 U.S.C. § 159, for reviewing an arbitration award in a railway-labor dispute.

(b) Scire Facias and Mandamus. The writs of scire facias and mandamus are abolished. Relief previously available through them may be obtained by appropriate action or motion under these rules.

(c) Removed Actions.

(1) Applicability. These rules apply to a civil action after it is removed from a state court.

(2) Further Pleading. After removal, repleading is unnecessary unless the court orders it. A defendant who did not answer before removal must answer or present other defenses or objections under these rules within the longest of these periods:

(A) 20 days after receiving — through service or otherwise — a copy of the initial pleading stating the claim for relief;

(B) 20 days after being served with the summons for an initial pleading on file at the time of service; or

(C) 5 days after the notice of removal is filed.

(3) Demand for a Jury Trial.

(A) As Affected by State Law. A party who, before removal, expressly demanded a jury trial in accordance with state law need not renew the demand after removal. If the state law did not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time. The court must so order at a party's request and may so order on its own. A party who fails to make a demand when so ordered waives a jury trial.

(B) Under Rule 38. If all necessary pleadings have been served at the time of removal, a party entitled to a jury trial under Rule 38 must be given one if the party serves a demand within 10 days after:

(i) it files a notice of removal; or

(ii) it is served with a notice of removal filed by another party.

(d) Law Applicable.

(1) State Law. When these rules refer to state law, the term "law" includes the state's statutes and the state's judicial decisions.

(2) District of Columbia. The term "state" includes, where appropriate, the District of Columbia. When these rules provide for state law to apply, in the District Court for the District of Columbia:

(A) the law applied in the District governs; and

(B) the term "federal statute" includes any Act of Congress that applies locally to the District.

COMMITTEE NOTE

The language of Rule 81 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 81(c) has been revised to reflect the amendment of 28 U.S.C. § 1446(a) that changed the procedure for removal from a petition for removal to a notice of removal.

Former Rule 81(e), drafted before the decision in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), defined state law to include "the statutes of that state and the state judicial decisions construing them." The *Erie* decision reinterpreted the Rules of Decision Act, now 28 U.S.C. § 1652, recognizing that the "laws" of the states include the common law established by judicial decisions. Long-established practice reflects this understanding, looking to state common law as well as statutes and court rules when a Civil Rule directs use of state law. Amended Rule 81(d)(1) adheres to this practice, including all state judicial decisions, not only those that construe state statutes.

Former Rule 81(f) is deleted. The office of district director of internal revenue was abolished by restructuring under the Internal Revenue Service Restructuring and Reform Act of 1998, Pub.L. 105-206, July 22, 1998, 26 U.S.C. § 1 Note.

Rule 82. Jurisdiction and Venue Unaffected

These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts. An admiralty or maritime claim under Rule 9(h) is not a civil action for purposes of 28 U.S.C. §§ 1391–1392.

COMMITTEE NOTE

The language of Rule 82 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 83. Rules by District Courts; Judge's Directives

(a) Local Rules.

(1) In General. After giving public notice and an opportunity for comment, a district court, acting by a majority of its district judges, may adopt and amend rules governing its practice. A local rule must be consistent with — but not duplicate — federal statutes and rules adopted under 28 U.S.C. §§ 2072 and 2075, and must 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 must, on their adoption, be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public.

(2) Requirement of Form. A local rule imposing a requirement of form must not be enforced in a way that causes a party to lose any right because of a nonwillful failure to comply.

(b) Procedure 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 the district's local rules. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

COMMITTEE NOTE

The language of Rule 83 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 84. Forms

The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.

COMMITTEE NOTE

The language of Rule 84 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 85. Title

These rules may be cited as the Federal Rules of Civil Procedure.

COMMITTEE NOTE

The language of Rule 85 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 86. Effective Dates

(a) In General. These rules and any amendments take effect at the time specified by the Supreme Court, subject to 28 U.S.C. § 2074. They govern:

(1) proceedings in an action commenced after their effective date; and

(2) proceedings after that date in an action then pending unless:

(A) the Supreme Court specifies otherwise; or

(B) ~~in the district court's opinion,~~ the court determines that applying them in a particular action would be infeasible or work an injustice.

(b) December 1, 2007 Amendments. If any provision in Rules 1-5.1, 6-73, or 77-86 conflicts with another law, priority in time for the purpose of 28 U.S.C. § 2072(b) is not affected by the amendments taking effect on December 1, 2007.

COMMITTEE NOTE

The language of Rule 86 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The subdivisions that provided an incomplete list of the effective dates of the original Civil Rules and amendments made up to 1963 are deleted as no longer useful.

Rule 86(b) is added to clarify the relationship of amendments taking effect on December 1, 2007, to other laws for the purpose of applying the "supersession" clause in 28 U.S.C. § 2072(b). Section 2072(b) provides that a law in conflict with an Enabling Act Rule "shall be of no further force or effect after such rule[] ha[s] taken effect." The amendments that take effect on December 1, 2007, result from the general restyling of the Civil Rules and from a small number of technical revisions adopted on a parallel track. None of these amendments is intended to affect resolution of any conflict that might arise between a rule and another law. Rule 86(b) makes this intent explicit. Any conflict that arises should be resolved by

looking to the date the specific conflicting rule provision first became effective.

PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF CIVIL PROCEDURE
SEPARATE FROM STYLE REVISION PROJECT

Rule 4. Summons

* * * * *

(k) Territorial Limits of Effective Service.

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

* * * * *

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

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

* * * * *

COMMITTEE NOTE

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

Rule 9. Pleading Special Matters

* * * * *

(h) Admiralty or Maritime Claim.

* * * * *

~~**(2) Amending a Designation.** Rule 15 governs amending a pleading to add or withdraw a designation.~~

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

COMMITTEE NOTE

Rule 15 governs pleading amendments of its own force. The former redundant statement that Rule 15 governs an amendment that adds or

withdraws a Rule 9(h) designation as an admiralty or maritime claim is deleted. The elimination of paragraph (2) means that "(3)" will be redesignated as "(2)" in Style Rule 9(h).

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

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

* * * * *

COMMITTEE NOTE

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

Rule 14. Third-Party Practice

* * * * *

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

* * * * *

COMMITTEE NOTE

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

Rule 16. Pretrial Conferences; Scheduling; Management

* * * * *

(c) Attendance and Matters for Consideration at a Pretrial Conference.

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

* * * * *

COMMITTEE NOTE

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

Rule 26. Duty to Disclose; General Provisions Governing Discovery

* * * * *

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

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

* * * * *

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

(i) consistent with these rules and warranted by existing law or a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

* * * * *

COMMITTEE NOTE

As with the Rule 11 signature on a pleading, written motion, or other paper, disclosure and discovery signatures should include not only a postal

address but also a telephone number and electronic-mail address. A signer who lacks one or more of those addresses need not supply a nonexistent item.

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

Rule 30. Depositions by Oral Examination

* * * * *

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

* * * * *

(3) Method of Recording.

(A) Method Stated in the Notice. The party who notices the deposition must state in the notice the method for recording the testimony. Unless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The noticing party bears the recording costs. Any party may arrange to transcribe a deposition ~~that was taken nonstenographically~~.

* * * * *

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

* * * * *

COMMITTEE NOTE

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

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

Rule 31. Depositions by Written Questions

* * * * *

(c) Notice of Completion or Filing.

(1) Completion. The party who noticed the deposition must notify all other parties when it is completed.

(2) Filing. A party who files the deposition must promptly notify all other parties of the filing.

COMMITTEE NOTE

The party who noticed a deposition on written questions must notify all other parties when the deposition is completed, so that they may make use of the deposition. A deposition is completed when it is recorded and the deponent has either waived or exercised the right of review under Rule 30(e)(1).

Rule 40. Scheduling Cases for Trial

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

COMMITTEE NOTE

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

Rule 71.1. Condemning Real or Personal Property

* * * * *

(d) Process.

* * * * *

(2) Contents of the Notice.

(A) Main Contents. Each notice must name the court, the title of the action, and the defendant to whom it is directed. It must describe the property sufficiently to identify it, but need not describe any property other than that to be taken from the named defendant. The notice must also state:

(i) that the action is to condemn property;

(ii) the interest to be taken;

(iii) the authority for the taking;

(iv) the uses for which the property is to be taken;

(v) that the defendant may serve an answer on the plaintiff's attorney within 20 days after being served with the notice;

(vi) that the failure to so serve an answer constitutes consent to the taking and to the court's authority to proceed with the action and fix the compensation; and

(vii) that a defendant who does not serve an answer may file a notice of appearance.

(B) Conclusion. The notice must conclude with the name, telephone number, and e~~lectronic~~-mail address of the plaintiff's attorney, and an address within the district in which the action is brought where the attorney may be served.

* * * * *

COMMITTEE NOTE

Rule 71.1(e) allows a defendant to appear without answering. Form 28 includes information about this right in the Rule 71.1(d)(2) notice. It is useful to confirm this practice in the rule.

The information that identifies the attorney is changed to include telephone number and electronic-mail address, in line with similar amendments to Rules 11(a) and 26(g)(1).

Rule 78. Hearing Motions; ~~*Advancing an Action*~~ Submission on Briefs

(a) Providing a Regular Schedule for Oral Hearings~~; Other Orders~~. A court may establish regular times and places for oral hearings on motions. ~~But at any time or place, on notice that the judge considers reasonable, the judge may issue an order to advance, conduct, and hear an action.~~

* * * * *

COMMITTEE NOTE

Rule 16 has superseded any need for the provision in former Rule 78 for orders for the advancement, conduct, and hearing of actions.

Form 1. Caption. (*Use on every summons, complaint, answer, motion, or other document.*)

United States District Court
for the
_____District of _____

A B, Plaintiff	)	
	)	
v.	)	
	)	**Civil Action No. _____**
C D, Defendant	)	
	)	
v.	)	
	)	
E F, Third-Party Defendant	)	
(*Use if needed.*)	)	

(Name of Document)

Form 2. Date, Signature, Address, E-mail Address, and Telephone Number.
(Use at the conclusion of pleadings and other papers that require a signature.)

Date _____

_____
(Signature of the attorney
or unrepresented party)

_____
(Printed name)

_____
~~(E-mail address)~~

_____
(Address)

_____
(E-mail address)

_____
(Telephone number)

Form 3. Summons.

(Caption – See Form 1.)

To *name the defendant*:

A lawsuit has been filed against you.

Within 20 days after service of this summons on you (not counting the day you received it), you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff's attorney,_____, whose address is _____. If you fail to do so, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

Date _____

_____
Clerk of Court

(Court Seal)

(Use 60 days if the defendant is the United States or a United States agency, or is an officer or employee of the United States allowed 60 days by Rule 12(a)(3).)

Form 4. Summons on a Third-Party Complaint.

(Caption – See Form 1.)

To *name the third-party defendant:*

A lawsuit has been filed against defendant _____, who as third-party plaintiff is making this claim against you to pay part or all of what [he] may owe to the plaintiff _____.

Within 20 days after service of this summons on you (not counting the day you received it), you must serve on the plaintiff and on the defendant an answer to the attached third-party complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the defendant's attorney, _____ , whose address is, _____ , and also on the plaintiff's attorney, ,
whose address is, _____. If you fail to do so, judgment by default will be entered against you for the relief demanded in the third-party complaint. You also must file the answer or motion with the court and serve it on any other parties.

A copy of the plaintiff's complaint is also attached. You may – but are not required to – respond to it.

Date _____

_____
Clerk of Court

(Court Seal)

Form 5. Notice of a Lawsuit and Request to Waive Service of a Summons.

(Caption – See Form 1.)

To (*name the defendant – or if the defendant is a corporation, partnership, or association name an officer or agent authorized to receive service*):

Why are you getting this?

A lawsuit has been filed against you, or the entity you represent, in this court under the number shown above. A copy of the complaint is attached.

This is not a summons, or an official notice from the court. It is a request that, to avoid ~~costs~~ expenses, you waive formal service of a summons by signing and returning the enclosed waiver. To avoid these ~~costs~~ expenses, you must return the signed waiver within (*give at least 30 days or at least 60 days if the defendant is outside any judicial district of the United States*) from the date shown below, which is the date this notice was sent. Two copies of the waiver form are enclosed, along with a stamped, self-addressed envelope or other prepaid means for returning one copy. You may keep the other copy.

What happens next?

If you return the signed waiver, I will file it with the court. The action will then proceed as if you had been served on the date the waiver is filed, but no summons will be served on you and you will have 60 days from the date this notice is sent (see the date below) to answer the complaint (or 90 days if this notice is sent to you outside any judicial district of the United States).

If you do not return the signed waiver within the time indicated, I will arrange ~~for formal service~~ to have the summons and complaint served on you. A~~a~~nd I will ask the court to require you, or the entity you represent, to pay the ~~costs~~ expenses of making service.

Please read the enclosed statement about the duty to ~~waive formal service~~ avoid unnecessary expenses.

I certify that this request is being sent to you on the date below.

(Date and sign – See Form 2.)

Form 6. Waiver of the Service of Summons.

(Caption – See Form 1.)

To *name the plaintiff's attorney or the unrepresented plaintiff*:

I have received your request to waive service of a summons in this action along with a copy of the complaint, two copies of this waiver form, and a prepaid means of returning one signed copy of the form to you.

I, or the entity I represent, agree to save the ~~cost~~ expense of serving a summons and complaint in this case.

I understand that I, or the entity I represent, will keep all defenses or objections to the lawsuit, the court's jurisdiction, and the venue of the action, but that I waive any objections to the absence of a summons or of service.

I also understand that I, or the entity I represent, must file and serve an answer or a motion under Rule 12 within 60 days from _____, the date when this request was sent (or 90 days if it was sent outside the United States). If I fail to do so, a default judgment will be entered against me or the entity I represent.

(Date and sign – See Form 2.)

(Attach the following to Form 6.)

Duty to Avoid Unnecessary ~~Costs~~ Expenses of Serving a Summons

Rule 4 of the Federal Rules of Civil Procedure requires certain defendants to cooperate in saving unnecessary ~~costs~~ expenses of serving a summons and complaint. A defendant who is located in the United States and who fails to return a signed waiver of service requested by a plaintiff located in the United States will be required to pay the ~~costs~~ expenses of service, unless the defendant shows good cause for the failure.

"Good cause" does *not* include a belief that the lawsuit is groundless, or that it has been brought in an improper venue, or that the court has no jurisdiction over this matter or over the defendant or the defendant's property.

If the waiver is signed and returned, you can still make these and all other defenses and objections, but you cannot object to the absence of a summons or of service.

If you waive service, then you must, within the time specified on the waiver form, serve an answer or a motion under Rule 12 on the plaintiff and file a copy with the court. By signing and returning the waiver form, you are allowed more time to respond than if a summons had been served.

Form 7. Statement of Jurisdiction.

a. (*For diversity-of-citizenship jurisdiction.*) The plaintiff is [a citizen of *Michigan*] [a corporation incorporated under the laws of *Michigan* with its principal place of business in *Michigan*]. The defendant is [a citizen of *New York*] [a corporation incorporated under the laws of *New York* with its principal place of business in *New York*]. The amount in controversy, without interest and costs, exceeds the sum or value specified by 28 U.S.C. § 1332.

b. (*For federal-question jurisdiction.*) This action arises under [the United States Constitution, *specify the article or amendment and the section*] [a United States treaty *specify*] [a federal statute, ___U.S.C. § ___].

c. (*For a claim in the admiralty or maritime jurisdiction.*) This is a case of admiralty or maritime jurisdiction. *(To invoke admiralty status under Rule 9(h) use the following:* This is an admiralty or maritime claim within the meaning of Rule 9(h).)

Form 8. Statement of Reasons for Omitting a Party.
(*If a person who ought to be made a party under Rule 19(a) is not named, include this statement in accordance with Rule 19(c).*)

This complaint does not join as a party *name* who [is not subject to this court's personal jurisdiction] [cannot be made a party without depriving this court of subject-matter jurisdiction] because *state the reason*.

Form 9. Statement Noting a Party's Death.

(Caption – See Form 1.)

In accordance with Rule 25(a) *name the person*, who is [a party to this action] [a representative of or successor to the deceased party] notes the death during the pendency of this action of *name*, [*describe as party* in this action].

(Date and sign – See Form 2.)

Form 10. Complaint to Recover a Sum Certain.

(Caption – See Form 1.)

1. (Statement of Jurisdiction -- See Form 7.)

(*Use one or more of the following as appropriate and include a demand for judgment.*)

(a) On a Promissory Note

2. On *date*, the defendant executed and delivered a note promising to pay the plaintiff on *date* the sum of $ _____ with interest at the rate of __ percent. A copy of the note [is attached as Exhibit A] [is summarized as follows: _____.]

3. The defendant has not paid the amount owed.

(b) On an Account

2. The defendant owes the plaintiff $_____ according to the account set out in Exhibit A.

(c) For Goods Sold and Delivered

2. The defendant owes the plaintiff $ _____ for goods sold and delivered by the plaintiff to the defendant from *date* to *date*.

(d) For Money Lent

2. The defendant owes the plaintiff $ _____ for money lent by the plaintiff to the defendant on *date*.

(e) For Money Paid by Mistake

2. The defendant owes the plaintiff $ _____ for money paid by mistake to the defendant on *date* under these circumstances: *describe with particularity in accordance with Rule 9(b).*

(f) For Money Had and Received

2. The defendant owes the plaintiff $ _____ for money that was received from *name* on *date* to be paid by the defendant to the plaintiff.

Demand for Judgment

Therefore, the plaintiff demands judgment against the defendant for $ _____, plus interest and costs.

(Date and sign – See Form 2.)

Form 11. Complaint for Negligence.

(Caption – See Form 1.)

1. (Statement of Jurisdiction – See Form 7.)

2. On *date*, at *place*, the defendant negligently drove a motor vehicle against the plaintiff.

3. As a result, the plaintiff was physically injured, lost wages or income, suffered physical and mental pain, and incurred medical expenses of $_____.

Therefore, the plaintiff demands judgment against the defendant for $ _____, plus costs.

(Date and sign – See Form 2).

Form 12. Complaint for Negligence When the Plaintiff Does Not Know Who Is Responsible.

(Caption – See Form 1.)

1. (Statement of Jurisdiction – See Form 7.)

2. On *date*, at *place*, defendant *name* or defendant *name* or both of them willfully or recklessly or negligently drove, or caused to be driven, a motor vehicle against the plaintiff.

3. As a result, the plaintiff was physically injured, lost wages or income, suffered mental and physical pain, and incurred medical expenses of $ _____.

Therefore, the plaintiff demands judgment against one or both defendants for $ _____, plus costs.

(Date and sign – See Form 2.)

Form 13. Complaint for Negligence Under the Federal Employers' Liability Act.

(Caption – See Form 1.)

1. (Statement of Jurisdiction – See Form 7.)

2. At the times below, the defendant owned and operated in interstate commerce a railroad line that passed through a tunnel located at _____.

3. On *__date__*, the plaintiff was working to repair and enlarge the tunnel to make it convenient and safe for use in interstate commerce.

4. During this work, the defendant, as the employer, negligently put the plaintiff to work in a section of the tunnel that the defendant had left unprotected and unsupported.

5. The defendant's negligence caused the plaintiff to be injured by a rock that fell from an unsupported portion of the tunnel.

6. As a result, the plaintiff was physically injured, lost wages or income, suffered mental and physical pain, and incurred medical expenses of $ _____.

Therefore, the plaintiff demands judgment against the defendant for $ _____, and costs.

(Date and sign – See Form 2.)

Form 14. Complaint for Damages Under the Merchant Marine Act.

(Caption – See Form 1.)

1. (Statement of Jurisdiction – See Form 7.)

2. At the times below, the defendant owned and operated the vessel *name* and used it to transport cargo for hire by water in interstate and foreign commerce.

3. On *date*, at *place*, the defendant hired the plaintiff under seamen's articles of customary form for a voyage from _____ to _____ and return at a wage of $ _____ a month and found, which is equal to a shore worker's wage of $ _____ a month.

4. On *date*, the vessel was at sea on the return voyage. (*Describe the weather and the condition of the vessel.*)

5. (*Describe as in Form 11 the defendant's negligent conduct.*)

6. As a result of the defendant's negligent conduct and the unseaworthiness of the vessel, the plaintiff was physically injured, has been incapable of any gainful activity, suffered mental and physical pain, and has incurred medical expenses of $ _____.

Therefore, the plaintiff demands judgment against the defendant for $ _____, plus costs.

(Date and sign — See Form 2.)

Form 15. Complaint for the Conversion of Property.

(Caption — See Form 1.)

1. (Statement of Jurisdiction — See Form 7.)

2. On *date*, at *place*, the defendant converted to the defendant's own use property owned by the plaintiff. The property converted consists of *describe*.

3. The property is worth $_____.

Therefore, the plaintiff demands judgment against the defendant for $ _____, plus costs.

(Date and sign – See Form 2.)

Form 16. Third-Party Complaint.

(Caption – See Form 1.)

1. Plaintiff *name* has filed against defendant *name* a complaint, a copy of which is attached.

2. (*State grounds entitling defendant's name to recover from third-party defendant's name for (all or an identified share) of any judgment for plaintiff's name against defendant's name.*)

Therefore, the defendant demands judgment against *third-party defendant's name* for *all or an identified share* of sums that may be adjudged against the defendant in the plaintiff's favor.

(Date and sign – See Form 2.)

Form 17. Complaint for Specific Performance of a Contract to Convey Land.

(Caption – See Form 1.)

1. (Statement of Jurisdiction – See Form 7.)

2. On *date*, the parties agreed to the contract [attached as Exhibit A][summarize the contract].

3. As agreed, the plaintiff tendered the purchase price and requested a conveyance of the land, but the defendant refused to accept the money or make a conveyance.

4. The plaintiff now offers to pay the purchase price.

Therefore, the plaintiff demands that:

(a) ~~that~~ the defendant ~~now~~ be required to specifically perform the agreement and pay damages of $ _____, plus interest and costs, or

(b) ~~that~~ if specific performance is not ordered, the defendant be required to pay damages of $ _____, plus interest and costs~~, if specific performance is not ordered~~.

(Date and sign – See Form 2.)

Form 18. Complaint for Patent Infringement.

(Caption – See Form 1.)

1. (Statement of Jurisdiction — See Form 7.)

2. On *date*, United States Letters Patent No. _____ were issued to the plaintiff for an invention in an *electric motor*. The plaintiff owned the patent throughout the period of the defendant's infringing acts and still owns the patent.

3. The defendant has infringed and is still infringing the Letters Patent by making, selling, and using *electric motors* that embody the patented invention, and the defendant will continue to do so unless enjoined by this court.

4. The plaintiff has complied with the statutory requirement of placing a notice of the Letters Patent on all *electric motors* it manufactures and sells, and has given the defendant written notice of the infringement.

Therefore, the plaintiff demands:

(a) a preliminary and final injunction against the continuing infringement;

(b) an accounting for damages; and

(c) ~~an assessment of~~ interest and costs ~~against the defendant~~.

(Date and sign – See Form 2.)

Form 19. Complaint for Copyright Infringement and Unfair Competition.

(Caption – See Form 1.)

1. (Statement of Jurisdiction – See Form 7.)

2. Before *date*, the plaintiff, a United States citizen, wrote a book entitled_____.

3. The book is an original work that may be copyrighted under United States law. A copy of the book is attached as Exhibit A.

4. Between *date* and *date*, the plaintiff applied to the copyright office and received a certificate of registration dated _____ and identified as *date, class, number*.

5. Since *date*, the plaintiff has either published or licensed for publication all copies of the book in compliance with the copyright laws and has remained the sole owner of the copyright.

6. After the copyright was issued, the defendant infringed the copyright by publishing and selling a book entitled _____, which was copied largely from the plaintiff's book. A copy of the defendant's book is attached as Exhibit B.

7. The plaintiff has notified the defendant in writing of the infringement.

8. The defendant continues to infringe the copyright by continuing to publish and sell the infringing book in violation of the copyright, and further has engaged in unfair trade practices and unfair competition in connection with its publication and sale of the infringing book ~~by continuing to publish and sell the infringing book in violation of the copyright~~, thus causing irreparable damage.

Therefore, the plaintiff demands that:

(a) ~~that~~ until this case is decided the defendant and the defendant's agents be enjoined from disposing of any copies of the defendant's book by sale or otherwise;

(b) ~~that~~ the defendant account for and pay as damages to the plaintiff all profits and advantages gained from unfair trade practices and unfair competition in selling the defendant's book, and all profits and advantages gained from infringing the plaintiff's copyright (but no less than the statutory minimum);

(c) ~~that~~ the defendant deliver for impoundment all copies of the book in the defendant's possession or control and deliver for destruction all infringing copies and all plates, molds, and other materials for making infringing copies;

(d) ~~that~~ the defendant pay the plaintiff interest, costs, and reasonable attorney's fees; and

(e) ~~that~~ the plaintiff be awarded any other just relief.

(Date and sign – See Form 2.)

Form 20. Complaint for Interpleader and Declaratory Relief.

(Caption – See Form 1.)

1. (Statement of Jurisdiction – See Form 7.)

2. On *date*, the plaintiff issued a life insurance policy on the life of *name* with *name* as the named beneficiary.

3. As a condition for keeping the policy in force, the policy required payment of a premium during the first year and then annually.

4. The premium due on *date* was never paid, and the policy lapsed after that date.

5. On *date*, after the policy had lapsed, both the insured and the named beneficiary died in an automobile collision.

6. Defendant *name* claims to be the beneficiary in place of *name* and has filed a claim to be paid the policy's full amount.

7. The other two defendants are representatives of the deceased persons' estates. Each defendant has filed a claim on behalf of each estate to receive payment of the policy's full amount.

8. If the policy was in force at the time of death, the plaintiff is in doubt about who should be paid.

Therefore, the plaintiff demands that:

(a) ~~that~~ each defendant be restrained from commencing any action against the plaintiff on the policy;

(b) a judgment be entered that no defendant is entitled to the proceeds of the policy or any part of it, but if the court determines that the policy was in effect at the time of the insured's death, that the defendants be required to interplead and settle among themselves their rights to the proceeds, and that the plaintiff be discharged from all liability except to the defendant determined to be entitled to the proceeds; and

(c) ~~that~~ the plaintiff recover its costs.

(Date and sign – See Form 2.)

Form 21. Complaint on a Claim for a Debt and to Set Aside a Fraudulent Conveyance Under Rule 18(b).

(Caption – See Form 1.)

1. (Statement of Jurisdiction — See Form 7.)

2. On *date*, defendant *name* signed a note promising to pay to the plaintiff on *date* the sum of $ _____ with interest at the rate of ___ percent. [The pleader may, but need not, attach a copy or plead the note verbatim.]

3. Defendant *name* owes the plaintiff the amount of the note and interest.

4. On *date*, defendant *name* conveyed all defendant's real and personal property *if less than all, describe it fully* to defendant *name* for the purpose of defrauding the plaintiff and hindering or delaying the collection of the debt.

Therefore, the plaintiff demands that:

(a) judgment for $ _____, plus costs, be entered against defendant(s) *name(s)*; and

(b) the conveyance to defendant *name* be declared void and ~~that~~ any judgment granted be made a lien on the property.

(Date and sign – See Form 2.)

Form 30. Answer Presenting Defenses Under Rule 12(b).

(Caption – See Form 1.)

Responding to Allegations in the Complaint

1. Defendant admits the allegations in paragraphs _____.

2. Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraphs _____.

3. Defendant admits *identify part of the allegation* in paragraph _____ and denies or lacks knowledge or information sufficient to form a belief about the truth of the rest of the paragraph.

Failure to State a Claim

4. The complaint fails to state a claim upon which relief can be granted.

Failure to Join a Required Party

5. If there is a debt, it is owed jointly by the defendant and *name* who is a citizen of _____. This person can be made a party without depriving this court of jurisdiction over the existing parties.

Affirmative Defense – Statute of Limitations

6. The plaintiff's claim is barred by the statute of limitations because it arose more than ____ years before this action was commenced.

Counterclaim

7. (*Set forth any counterclaim in the same way a claim is pleaded in a complaint. Include a further statement of jurisdiction if needed.*)

Crossclaim

8. (*Set forth ~~the~~ a crossclaim against a ~~defendant~~ coparty in the same way a claim is pleaded in a complaint. Include a further statement of jurisdiction if needed.*)

(Date and sign — See Form 2.)

Form 31. Answer to a Complaint for Money Had and Received with a Counterclaim for Interpleader.

(Caption – See Form 1.)

Response to the Allegations in the Complaint
(See Form 30.)

Counterclaim for Interpleader

1. The defendant received from *name* a deposit of $ _____.

2. The plaintiff demands payment of the deposit because of a purported assignment from *name*, who has notified the defendant that the assignment is not valid and who continues to hold the defendant responsible for the deposit.

Therefore, the defendant demands that:

(a) *name* be made a party to this action;

(b) the plaintiff and *name* be required to interplead their respective claims;

(c) the court decide whether the plaintiff or *name* or either of them is entitled to the deposit and discharge the defendant of any liability except to the person entitled to the deposit; and

(d) the defendant recover ~~its~~ costs and attorney's fees.

(Date and sign – See Form 2.)

Form 40. Motion to Dismiss Under Rule 12(b) for Lack of Jurisdiction, Improper Venue, Insufficient Service of Process, or Failure to State a Claim.

(Caption – See Form 1.)

The defendant moves to dismiss the action because:

1. the amount in controversy is less than the sum or value specified by 28 U.S.C. § 1332;

2. the defendant is not subject to the personal jurisdiction of this court;

3. venue is improper (this defendant does not reside in this district and no part of the events or omissions giving rise to the claim occurred in the district);

4. the defendant has not been properly served, as shown by the attached affidavits of _____; or

5. the complaint fails to state a claim upon which relief can be granted.

(Date and sign – See Form 2.)

Form 41. Motion to Bring in a Third-Party Defendant.

(Caption – See Form 1.)

The defendant, as third-party plaintiff, moves for leave to serve on *name* a summons and third-party complaint, copies of which are attached.

(Date and sign – See Form 2.)

Form 42. Motion to Intervene as a Defendant Under Rule 24.

(Caption – See Form 1.)

1. ___*name*___ moves for leave to intervene as a defendant in this action and to file the attached answer.

(*State grounds under Rule 24(a) or (b).)*

2. The plaintiff alleges patent infringement. We manufacture and sell to the defendant the articles involved, and we have a defense to the plaintiff's claim.

3. Our defense presents questions of law and fact that are common to this action.

(Date and sign – See Form 2.)

[An Intervener's Answer must be attached. See Form 30.]

Form 50. Request to Produce Documents and Tangible Things, or to Enter onto Land Under Rule 34.

(Caption – See Form 1.)

The plaintiff *name* requests that the defendant *name* respond within ____ days to the following requests:

1. To produce and permit the plaintiff to inspect and copy and to test or sample the following documents, including electronically stored information:

(*Describe each document and the electronically stored information, either individually or by category.*)

(*State the time, place, and manner of the inspection and any related acts.*)

2. To produce and permit the plaintiff to inspect and copy — and to test or sample — the following tangible things:

(*Describe each thing, either individually or by category.*)

(*State the time, place, and manner of the inspection and any related acts.)*

3. To permit the plaintiff to enter onto the following land to inspect, photograph, test, or sample the property or an object or operation on the property.

(*Describe the property and each object or operation.*)

(*State the time and manner of the inspection and any related acts.*)

(Date and sign – See Form 2.)

Form 51. Request for Admissions Under Rule 36.

(Caption — See Form 1.)

The plaintiff *name* asks the defendant *name* to respond within ~~———~~30 days to these requests by admitting, for purposes of this action only and subject to objections to admissibility at trial:

1. The genuineness of the following documents, copies of which [are attached] [are or have been furnished or made available for inspection and copying].

(*List each document.*)

2. The truth of each of the following statements:

(*List each statement.*)

(Date and sign – See Form 2.)

Form 52. Report of the Parties' Planning Meeting.

(Caption – See Form 1.)

1. The following persons participated in a Rule 26(f) conference on *date* by *state the method of conferring*:

(*e.g., name* representing the plaintiff.)

2. Initial Disclosures. The parties [have completed] [will complete by *date*] the initial disclosures required by Rule 26(a)(1).

3. Discovery Plan. The parties propose this discovery plan:

(*Use separate paragraphs or subparagraphs if the parties disagree.*)

(a) Discovery will be needed on these subjects: (*describe.*)
(b) (Dates for commencing and completing discovery, including discovery to be commenced or completed before other discovery.)
(c) (Maximum number of interrogatories by each party to another party, along with the dates the answers are due.)
(d) (Maximum number of requests for admission, along with the dates responses are due.)
(e) (Maximum number of depositions by each party.)
(f) (Limits on the length of depositions, in hours.)
(g) (Dates for exchanging reports of expert witnesses.)
(h) (Dates for supplementations under Rule 26(e).)

4. Other Items:

(a) (A date if the parties ask to meet with the court before a scheduling order.)
(b) (Requested dates for pretrial conferences.)
(c) (Final dates for the plaintiff to amend pleadings or to join parties.)
(d) (Final dates for the defendant to amend pleadings or to join parties.)
(e) (Final dates to file dispositive motions.)
(f) (State the prospects for settlement.)
(g) (Identify any alternative dispute resolution procedure that may enhance settlement prospects.)
(h) (Final dates for submitting Rule 26(a)(3) witness lists, designations of witnesses whose testimony will be presented by deposition, and exhibit lists.)
(i) (Final dates to file objections under Rule 26(a)(3).)
(j) (Suggested trial date and estimate of trial length.)
(k) (Other matters.)

(Date and sign — see Form 2.)

Form 60. Notice of Condemnation.

(Caption – See Form 1.)

To *name the defendant*.

1. A complaint in condemnation has been filed in the United States District Court for the _____District of _____, to take property to use for *purpose*. The interest to be taken is *describe*. The court is located in the United States courthouse at this address: _____.

2. The property to be taken is described below. You have or claim an interest in it.

(*Describe the property.*)

3. The authority for taking this property is *cite*.

4. If you want to object or present any defense to the taking you must serve an answer on the plaintiff's attorney within 20 days [after being served with this notice][from (insert the date of the last publication of notice)]. Send your answer to this address: _____.

5. Your answer must identify the property in which you claim an interest, state the nature and extent of that interest, and state all your objections and defenses to the taking. Objections and defenses not presented are waived.

6. If you fail to answer you consent to the taking and the court will enter a judgment that takes your described property interest.

7. Instead of answering, you may serve on the plaintiff's attorney a notice of appearance that designates the property in which you claim an interest. After you do that, you will receive a notice of any proceedings that affect you. Whether or not you have previously appeared or answered, you may present evidence at a trial to determine compensation for the property and share in the overall award.

(Date and sign – See Form 2.)

Form 61. Complaint for Condemnation.

(Caption – See Form 1; name as defendants the property and at least one owner.)

1. (Statement of Jurisdiction – See Form 7.)

2. This is an action to take property under the power of eminent domain and to determine just compensation to be paid to the owners and parties in interest.

3. The authority for the taking is _____.

4. The property is to be used for _____.

5. The property to be taken is (*describe in enough detail for identification — or attach the description and state "is described in Exhibit A, attached."*)

6. The interest to be acquired is _____.

7. The persons known to the plaintiff to have or claim an interest in the property are: _____. (*For each person include the interest claimed.*)

8. There may be other persons who have or claim an interest in the property and whose names could not be found after a reasonably diligent search. They are made parties under the designation "Unknown Owners."

Therefore, the plaintiff demands judgment:

(a) condemning the property;

(b) determining and awarding just compensation; and

(c) granting any other lawful and proper relief.

(Date and sign – See Form 2.)

Form 70. Judgment on a Jury Verdict.

(Caption – See Form 1.)

This action was tried by a jury with Judge _____ presiding, and the jury has rendered a verdict.

It is ordered that:

[the plaintiff __*name*__ recover from the defendant __*name*__ the amount of $_____ with interest at the rate of __%, along with costs.]

[the plaintiff recover nothing, the action be dismissed on the merits, and the defendant __*name*__ recover costs from the plaintiff __*name*__.]

Date _____ _____

Clerk of Court

Form 71. Judgment by the Court without a Jury.

(Caption – See Form 1.)

This action was tried by Judge _____ without a jury and the following decision was reached:

It is ordered that [the plaintiff *name* recover from the defendant *name* the amount of $_____, with prejudgment interest at the rate of ___%, postjudgment interest at the rate of ____%, along with costs.] [the plaintiff recover nothing, the action be dismissed on the merits, and the defendant *name* recover costs from the plaintiff *name* .]

Date_____

_____
Clerk of Court

Form 80. Notice of a Magistrate Judge's Availability.

1. A magistrate judge is available under title 28 U.S.C. § 636(c) to conduct the proceedings in this case, including a jury or nonjury trial and the entry of final judgment. But a magistrate judge can be assigned only if all parties voluntarily consent.

2. You may withhold your consent without adverse substantive consequences. The identity of any party consenting or withholding consent will not be disclosed to the judge to whom the case is assigned or to any magistrate judge.

3. If a magistrate judge does hear your case, you may appeal directly to a United States court of appeals as you would if a district judge heard it.

A form called *Consent to an Assignment to a United States Magistrate Judge* is available from the court clerk's office.

Form 81. Consent to an Assignment to a Magistrate Judge.

(Caption – See Form 1.)

I voluntarily consent to have a United States magistrate judge conduct all further proceedings in this case, including a trial, and order the entry of final judgment. (Return this form to the court clerk — not to a judge or magistrate judge.)

Date_____ _____

Signature of the Party

Form 82. Order of Assignment to a Magistrate Judge.

(Caption – See Form 1.)

With the parties' consent it is ordered that this case be assigned to United States Magistrate Judge _____ of this district to conduct all proceedings and enter final judgment in accordance with 28 U.S.C. § 636(c).

Date _____

_____
United States District Judge

THE RESTYLED E-DISCOVERY AMENDMENTS

Attached is the package of proposed amendments to Style Rules 16, 26, 33, 34, 37, and 45 to account for the e-discovery amendments to the current Civil Rules that are expected to take effect in December 2006.

The attached document sets out proposed amendments to the Style Rules circulated for public comment in February 2005.

The changes to be made in the February 2005 Style Rules by the Conference-approved e-discovery amendments are shown by single-underlinings and single-strikethroughs. The changes to be made in the e-discovery amendments as part of the current restyling process are shown by double-underlinings and double-strikethroughs.

AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 16. Pretrial Conferences; Scheduling; Management

* * * * *

(b) Scheduling.

* * * * *

(3) Contents of the Order.

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

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

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

(ii) modify the extent of discovery;

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

(iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after ~~production~~ information is produced;

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

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

* * * * *

Rule 26. Duty to Disclose; General Provisions Governing Discovery

(a) Required Disclosures.

(1) Initial Disclosure.

(A) ***In General.*** Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information — along with the subjects of that information — that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy — or a description by category and location — of all documents, ~~data compilations~~ electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party — who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials

bearing on the nature and extent of injuries suffered; and

(iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment or to indemnify or reimburse for payments made to satisfy the judgment.

* * * * *

(b) Discovery Scope and Limits.

* * * * *

(2) Limitations on Frequency and Extent.

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

(B) ***Specific Limitations on Electronically Stored Information.*** 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.

(~~B~~ C) ***When Required.*** On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

* * * * *

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

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

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

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

(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~~; must 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 information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

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

* * * * *

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

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

(A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;

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

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

(D) any issues ~~relating to~~ about claims of privilege or of protection as trial-preparation materials, including — if the parties agree on a procedure to assert ~~such~~ these claims after production — whether to ask the court to include their agreement in an order;

(C E) 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

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

* * * * *

Rule 33. Interrogatories to Parties

* * * * *

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

* * * * *

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

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

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

(A) any designated 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 ~~[em-dash] translated~~ either directly or, if necessary, after translation by the ~~respondent~~ responding party ~~translates them~~ into a reasonably usable form; or

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

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

(b) Procedure.

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

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

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

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

(2) Responses and Objections.

* * * * *

(D) ***Responding to a Request for Production of Electronically Stored Information.*** ~~If objection is made to the~~ The response may state an objection to a requested form ~~or forms~~ for producing electronically stored information. If the responding party objects to a requested form — or if no form was specified in the request — the ~~responding~~ party must state the form or forms it intends to use.

(~~D~~ E) ***Producing the Documents or Electronically Stored Information.*** ~~Unless the parties otherwise agree, or the court otherwise orders~~ Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:

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

(ii) ~~i~~If a request does not specify ~~the~~ a form ~~or forms~~ for producing electronically stored information, a ~~responding~~ party must produce ~~the information~~ it in a form or forms in which it is ordinarily maintained or in a ~~form or forms that are~~ reasonably usable form or forms; and

(iii) ~~a~~ A party need not produce the same electronically stored information in more than one form.

* * * * * *

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

* * * * *

(e) Failure to Provide 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.

(e f) Failure to Participate in Framing a Discovery Plan. If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f), the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

Rule 45. Subpoena

(a) In General.

(1) Form and Contents.

(A) ***Requirements – In General.*** Every subpoena must:

(i) state the court from which it issued;

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

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

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

* * * * *

(C) ~~***Command to Produce Materials or Permit Inspection***~~ ***Combining or Separating a Command to Produce or to Permit Inspection; Specifying the Form for Electronically Stored Information.*** A command to produce documents, electronically stored information, or tangible things or to permit the inspection~~, copying, testing, or sampling~~ of premises may be included in a subpoena commanding attendance at a deposition, hearing, or trial, or may be set out in a separate subpoena. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(D) ***Command to Produce; Included Obligations.*** A command in a subpoena to produce documents, electronically stored information, or tangible things requires the responding party to permit inspection, copying, testing, or sampling of the materials.

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

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

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

(C) for production~~,~~ or 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.

* * * * *

(b) Service.

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

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

(A) within the district of the issuing court;

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

(C) within the state of the issuing court if a state statute or court rule allows service at that place of a subpoena issued by a state court of general jurisdiction sitting in the place specified for the deposition, hearing, trial, production, or inspection~~, copying, testing, or sampling~~; or

(D) that the court authorizes on motion and for good cause, if a federal statute so provides.

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

(4) Proof of Service. Proving service, when necessary, requires filing with the issuing court a statement showing the date and manner of service and the names of the persons served. The statement must be certified by the server.

(c) Protecting a Person Subject to a Subpoena.

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

(2) Command to Produce Materials or Permit Inspection.

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

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

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

(ii) ~~Inspection and copying~~ These acts may be ~~done~~ required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer

from significant expense resulting from compliance.

* * * * *

(d) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

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

(B) ***Form for Producing Electronically Stored Information Not Specified.*** If a subpoena does not specify ~~the~~ a form ~~or forms~~ for producing electronically stored information, ~~a~~ the person responding ~~to a subpoena~~ must produce ~~the information~~ it in a form or forms in which ~~the person~~ it is ordinarily ~~maintains it~~ maintained or in a reasonably usable form or forms ~~that are reasonably usable~~.

(C) ***Electronically Stored Information Produced in Only One Form.*** ~~A~~ The person responding ~~to a subpoena~~ need not produce the same electronically stored information in more than one form.

(D) ***Inaccessible Electronically Stored Information.*** ~~A~~ The 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~~ for a protective order, the person ~~from whom discovery is sought~~ responding 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.

(2) Claiming Privilege or Protection.

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

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

(~~B~~ ii) describe the nature of the withheld documents, communications, or things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) ***Information Produced.*** 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~~; must not use or disclose the information until the claim is resolved ~~. If the receiving party disclosed the information before being notified, it~~; must take reasonable steps to retrieve ~~it.~~ the information if the party disclosed it before being notified; ~~A receiving party~~ and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) Contempt. The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

CHANGES MADE AFTER PUBLICATION AND COMMENT

Style Rules 1-86

Most of the changes in Styles Rule 1-86 reflect style improvements made in response to public comments and continuing work by consultants, reporters, Subcommittees A and B, the Standing Committee Style Subcommittee, and the Advisory Committee. They are marked above as changes made after publication. An explanation of each would be both burdensome and unnecessary. Many are self-explanatory. Some are set out in the introduction to the Style Project materials. Others are explained in the minutes of the May 2006 Civil Rules Committee meeting. A few changes — and decisions against change — deserve individual mention here as well.

Present Rule 1 says that the Rules govern "in all suits of a civil nature." Style Rule 1 as published changed this to "all civil actions and proceedings." Comments suggested that the addition of "proceedings" might inadvertently expand the domain governed by the Civil Rules. The Standing Committee Style Subcommittee was persuaded that "and proceedings" should be removed. Subcommittee A accepted this recommendation. Further consideration, however, persuaded the Advisory Committee that "and proceedings" should be retained. The reasons for concluding that the term "civil actions" does not express all of the events properly governed by the Rules are described in the draft Minutes for the May meeting. As noted in the introduction, the Committee Note to Rule 1 is expanded to include a general description of the Style Project.

Present Rule 25(a)(1) is a classic illustration of the "shall" trap. It says that "the action shall be dismissed as to" a deceased party unless a motion to substitute is made within 90 days after death is suggested on the record. Style Rule 25(a)(1) translated "shall"as "may," providing that the action "may be dismissed." This choice was bolstered by considering the effects of the Rule 6(b)authority to extend the 90-day period even after it expires. To say that the court "must" dismiss might distract attention from the alternative authority to extend the time and grant a motion to substitute. Comments suggested that "may" effects a substantive change. The comments took pains to express no view on the desirability of substantive change. The Committee concluded that it is better to replace "may" with "must," and to delete the Committee Note explanation of the Rule 6(b) reasons for concluding that "may" does not work a substantive change.

A syntactic ambiguity in Rule 65(d) was corrected in response to comments and further research demonstrating that the ambiguity resulted from inadvertent omission of a comma when the Rule was adopted to carry forward former 28 U.S.C. § 363. As revised, Rule 65(d) clearly provides that an injunction binds a party only after actual notice. It also clearly provides that after actual notice of an injunction, the injunction binds a person in active concert or participation with a party's officers, agents, servants, employees, and attorneys. The change is explained further in the new paragraph added to the Rule 65 Committee Note.

Finally, the Committee decided not to change the approach taken to identifying shifts of material among subdivisions. The Bankruptcy Rules Committee urged that the Committee Notes should identify decisions to rearrange material among subdivisions of the same rule to improve clarity and simplicity. In Rule 12, for example, subdivision (c) was divided between Style Rule 12(c) and (d), while former subdivision (d) became Style Rule 12(I). The purpose of expanding the Committee Notes would be to alert future researchers — particularly those who rely on tightly focused electronic searches — to define search terms that will reach back before the Style Amendments took effect. The approach taken in the published Style Rules was to identify in Committee Notes only the one instance in which material was shifted between Rules — from Rule 25 to Rule 17. Forty-four shifts among subdivisions of the same rule were charted in Appendix B, "Current and Restyled Rules Comparison Chart." The chart is set out below. The Committee decided again that this approach is better than

the alternative of adding length to many of the Committee Notes. It can be expected that many rules publications will draw attention to the changes identified in the chart.

Style-Substance Track

Two rules published on the Style-Substance Track were abandoned.

Rule 8 would have been revised to call for "a demand for the relief sought, which may include ~~relief in the~~ alternative forms or different types of relief." Comments showed that the old-fashioned "relief in the alternative" better describes circumstances in which the pleader is uncertain as to the available forms of relief, or prefers a form of relief that may not be available.

Rule 36 would have been amended to make clear the rule that an admission adopted at a final pretrial conference can be withdrawn or amended only on satisfying the "manifest injustice" standard of Style Rule 16(e). Revisions of Style Rule 16(e) make this clear, avoiding the need to further amend Rule 36.

Civil Forms

Two changes in the Style Forms bear note.

Form 19, the complaint for copyright infringement, was revised so that paragraph 8 no longer implies that there might be a common-law remedy for simply continuing to publish and sell an infringing book.

Form 51, a request for Rule 36 admissions, was revised to incorporate the 30-day period to respond set by Rule 36. The fill-in-the-blank approach taken by present Form 25 might mislead some practitioners into specifying an invalid shorter period.

"E-Discovery" Style Amendments: Rules 16, 26, 33, 34, 37, and 45

As noted above, the Style revisions to the "e-discovery" amendments published for comment in 2004, before the Style Project was published for comment in 2005, are all "changes made after publication." All involve pure style. They can be evaluated by reading the overstrike-underline version set out above.

Appendix A – Civil Rules Style Project Global Drafting Issues

Note – This chart does not include the restyled electronic-discovery amendments to Rules 16, 26, 33, 34, 37, and 45

#	Issue	Occurrences in the Current Rules	Status/Recommendation (✓in far-right column means resolved as noted)	✓
1	*"a party or a party's legal representative"*	Only in Rule 60(b).	Use "a party or its legal representative."	✓
2	*"of record"* / *"on the record"* / *"upon the record"* / *"into the record"*	5(a), 11(a), 26(g)(1), 26(g)(2), 39(a), 43(e), 65(b), 69(a); 51(b), 51(c), 51(d); 25(a)(1), 25(a)(2), 30(b)(4), 30(c), 72(b); 72(a)	In general, use "on the record." Change 30(c)(2) from "in the record" to "on the record." (Style rule 5(a), 39(a), and 43(c) don't use "of record." In context, the other uses of "of record" (e.g., "attorney of record") are okay. All uses of "upon the record" have been converted to "on the record" or been deleted. New 72(a) doesn't use "into the record.")	✓
3	*"action"* / *"case"*	"Case" rather than "action" is used to refer to a pending lawsuit in Rules 1, 9(h), 16(a)(2), 16(a)(5), 16(b)(6), 16(c)(13), 19(a), 26(a)(1)(E), 26(a)(2)(B), 26(a)(2)(C), 26(b)(2), 26(b)(3), 26(f), 26(g)(2)(C), 27(b) 30(a)(2)(B), 30(f)(1), 31(a)(2)(B), 32(c), 50(a)(2), 55(b)(2), 56(d), 57, 63, 65(e), 71A(h), 72(a), 72(b), 73(a), 73(b), 81(c), 83(b).	Uniformly retain "case" as it occurs in current rules. Exceptions: 1) In Rule 1, the former reference to "suits of a civil nature" has been changed to "actions and proceedings." 2) In Rule 73(a) and (b), changed "case" to "action"	✓
4	*"adverse party"* / *"opposing party"*	"adverse party" – 8(b), 12(b), 15(a), 15(d), 27(a)(1), 27(a)(2), 32(a)(2), 32(a)(4), 41(a)(1), 56(a), 56(c), 56(e), 60(b), 62(b), 62(c), 65(a)(1), 65(b), 68 "opposing party" – 13(a), 13(b), 13(c), 13(i), 18(a), 37(a)(4)(A), 59(c).	Use "opposing party" unless "adverse party" is necessary for substantive reasons. Exceptions: "adverse party" is retained in the style drafts of Rules 27(a)(1), 27(a)(2), 32(a)(2), 32(a)(4), 65(a)(1) and 65(b). *See* Prof. Marcus memo (Style 556) highlighting those places where it may be important to retain "adverse party."	✓

#	Issue	Occurrences in the Current Rules	Status/Recommendation (✓in far-right column means resolved as noted)	✓
5	*"agree" / "stipulate" / "consent"*	*See* the list in STYLE 442.	**Note:** This issue will be addressed in the top-to-bottom review.	✓
6	*"allege" / "aver"*	*"allege"* or *"allegation"* – 11(b)(3), 11(c)(1), 23(d), 23.1, 56(e) *"aver"* or *"averment"* – 8(b), 8(d), 8(e), 9(a), 9(b), (c), (d), (e), (f), 10(b), 22(1), 55(b)(2).	Uniformly use "allege" or "allegation" rather than "aver" or "averment." Exceptions: Rule 8(e) changes "aver" to "plead. In Rule 9(a)(2), Style Subcommittee suggests changing "a specific negative averment" to "a specific denial." Rule 10(b) changes "all averments of claims or defenses" to "a party must state its claims or defenses." Rule 22(1) changes "the plaintiff avers that the plaintiff is not liable" to "the plaintiff denies liability."	✓
7	*"assert" / "state"* Which of these verb(s) (or their variants) should be used in describing the act of putting forth in litigation a claim or defense?	*"state"* – 7(b), 8(a), 8(b), 8(e)(2), 9(b), 9(g), 10(b), 12(b), 12(h)(2), 13(a), 13(b), 13(g), 15(d), 18(b). *"assert"* – 4(n), 5(a), 8(b), 12(a)(3)(A), 12(b), 13(d), 13(g), 14(a), 14(b), 14(c), 15(c)(2), 18(a), 19(c), 20(a), 20(b), 23(g)(1)(C)(i), 23.1(a), 24(c), 50(c), 50(d), 56(b).	Use "assert" and "state" as in the current rules. Exception: Current Rule 13(a): "pleader is not stating any counterclaim" has been restyled as "pleader does not assert any counterclaim." Rule 45(d)(2)(A): "expressly assert the claim" has been restyled as "expressly make the claim."	✓
8	*"attorney" / "counsel"*	*"attorney"* appears frequently. *"counsel"* – 23(c), 23(g), 23(h), 26(a)(1)(E)(iii), 30(b)(4), 32(a)(3), 53(a)(2), and 56(d). *"attorney or counsel"* – 28(c)	Uniformly use "attorney" when referring to a party's legal representative.	✓

#	Issue	Occurrences in the Current Rules	Status/Recommendation (✓in far-right column means resolved as noted)	✓
9	*"attorney's fees" / "attorneys' fees" / "attorney fees"*	4(d), 11(c)(1)(A), 11(c)(2), 16(f), 23(g)(1)(C)(iii), 23(g)(2)(C), 23(h), 23(h)(1), 26(g)(3), 30(d)(3), 30(g)(1), 30(g)(2), 37(a)(4)(A),(B), 37(b)(2), 37(c)(1), 37(c)(2), 37(d), 37(g), 45(c)(1), 54(d), 54(d)(1), 54(d)(2)(A), 54(d)(2)(D), 56(g), 58(a)(1)(C), 58(c)(2)	Uniformly use "attorney's fee(s)."	✓
10	*"directed [by the court]" / "ordered [by the court]"*	*"directs[ed]"* – 4(c)(2), 4(f)(3), 4(g), 4(m), 5(c), 11(c)(1)(B), 11(c)(2), 12(a)(2), 16(a), 23(c)(2)(A), 23(c)(2)(B), 23(c)(3), 23(d), 23(e)(1)(B), 23(g)(1)(C)(iii), 23.1, 25(c), 26(a)(2)(B), 26(a)(2)(C), 26(a)(3), 26(c)(8), 29, 30(d)(1), 32(c), 33(b)(3), 34(b), 37(b)(1), 43(e), 43(f), 49(b), 50(b)(1)(C), 50(b)(2)(B), 50(d), 51(a), 53(b)(2), 53(c), 53(d), 53(e), 53(f), 54(b), 54(d)(1), 54(d)(2)(B), 56(d), 59(a), 62(h), 69(a), 70, 71A(h), 72(b), 73(c), 77, 79(b), 81(c)	In general, use "order" rather than "direct." Exceptions: Do not make any change in 5(c)(2) (too clumsy); 26(c)(1)(F),(G), and (H) (the introductory words already refer to "ordering"); any of 49 ("direct" seems better for telling the jury what to do); 50(b)(3) ("direct the entry of judgment"); 53(b)(2) (again, too clumsy with "order" already in the sentence; you don't want to say the order orders); and 59(a)(2) (another one directing the entry of judgment). Rule 69(a)(1): "unless the court orders otherwise" has been changed to "unless the court directs otherwise."	✓
11	*"Court in the district ...." / "court for the district ...."*	*"in"* – 26(c)(1), 27(a)(1), 30(d)(4), 37(a)(1), 37(b)(1) *"for"* – 45(a)(2)	Uniformly use "court for the district." (Style 30 and 37 now omit the reference.)	✓
12	*"crossclaim" / "cross-claim"*	5(c), 7(a), 8(a), 12(a)(2), 12(a)(3)(A), 12(a)(3)(B), 12(b), 13(g), 13(h), 13(i), 14(a), 16(a)(13), 18(a), 22(1), 41(c), 42(b), 54(b), 55(d), 56(a), 56(b)	Uniformly use "crossclaim" with no hyphen.	✓

#	Issue	Occurrences in the Current Rules	Status/Recommendation (✓in far-right column means resolved as noted)	✓
13	*"considered" / "deemed"*	*"consider[s][ed]"* – 9(f), 37(b)(1), 50(b), 52(a), 62(c), 78 *"deem[s][ed]"* – 5(c), 12(e), 15(d), 17(c), 27(a)(3), 38(c), 40, 41(a)(2), 41(d), 45(e), 47(a), 49(a), 55(b)(2), 56(d), 65(c), 68, 72(b), 77(a),	Uniformly use "considered."	✓
14	*"determine" / "decide"*	*"determine"* – 11(c), 12(d), 19(b), 23(c)(1)(A), 26(a)(1)(E), 26(b)(2), 36(a), 50(a)(1), 50(d), 54(b), 54(d)(2)(C), 55(b)(2), 65(b), 65(e), 68, 71A(h), 71(A)(i)(1), 71(A)(i)(3), 72(a) *"decide"* – 53(a)(1)(B), 53(g)(3), 53(g)(4).	Retain the uses of "decide." On the "determine" list, change the following to "decide": 12(d) [now 12(i)]; 50(a)(1)(A); 54(d)(2)(C); 65(b)(5); 65(e)(3); and 72(a).	✓
15	*"action ... brought in a United States district court" /* *"district court" / "court of the United States" / "United States district court"*	27(a)(4) *"court of the United States"* – 17(b), 23.1, 27(a)(1), 32(a)(4), 41(a)(1) *"United States district court"* – 1, 27(a)(1), 27(a)(4), 81(a)(4), 81(a)(5), 81(c), 82 *"district court"* – 7.1(a), 9(h), 16(b), 23(f), 27(b), 40, 52(b), 62(c), 62(f), 65(e), 66, 73(a), 73(c), 77(a), 77(c), 78, 81(a)(3), 81(a)(4), 81(a)(5), 83(a),	Rule 27(a)(4) authorizes use of a deposition in an action "subsequently brought in a United States district court." Restyled rule 27 adopts the phrase "later-filed district-court action." The style drafts change "court of the United States" to "United States court," except in Rule 23.1 where it is simply "the court." *See* Marcus research memos on this issue. STYLE 335 and 428B The style drafts change "United States district court" to "district court" in Rule 27, but retain United States district court in Rule 1. The style drafts generally retain "district court," but sometimes translate it simply as "court." Resolution: Change from "district court" to "court" in 77(c)(1) and 78.	✓

#	Issue	Occurrences in the Current Rules	Status/Recommendation (✓in far-right column means resolved as noted)	✓
16	*"entry [enter] upon land" / "entry onto land"*	5(d)(1), 26(a)(5), 34(a)	Uniformly use "entry onto land." (Style 26 omits the reference.)	✓
17	*"fails to obey" / "is not obeyed" / "disobedient"* *["disobey" does not appear in the rules]*	*"fail[s][ure] to obey"* – 16(f), 37(b)(2), 45(e) *"is not obeyed"* – 12(e) *"disobedient"* – 37(b)(2), 70	Uniformly use to "fail[] to obey" as verb phrase. Uniformly use "disobedient" as adjective. *Note*: Style draft of Rule 12 still uses "is not obeyed" because the sentence is in passive voice.	✓
18	*"federal statute" / "United States statute" / "Act or act of Congress"*	4(k)(1)(D), 4(n)(1), 4.1(a), 12(a)(1), 17(a), 24(a), 24(b), 24(c), 38(a), 39(a), 39(c), 40, 41(a)(1), 42(b), 45(b)(2), 54(d)(1), 55(b)(2), 62(c), 64, 65(e), 69(a), 71A(h), 81(a)(2), 81(a)(3), 81(e), 83(a)(1)	Uniformly use "federal statute."	✓
19	*"federal law" / "United States law" / "Constitution [and/or] laws of the United States"*	4(e), 4(f), 4(h), 4(k)(2), 4.1(b), 17(b), 28(a), 28(b), 43(a), 71A(h), 83(b)	Uniformly use "federal law." Exception: Rules 4(k)(2)(B) and 17(b)(3)(A) will remain "the United States Constitution and laws."	✓
20	*"Federal Rules of Evidence" / "rules of evidence"*	*"Federal Rules of Evidence"* – 16(c)(4), 26(a)(2)(A), 30(c), 32(a)(1), 32(a)(4), 43(a), 44.1 *"rules of evidence"* – 32(a), 33(c),	Uniformly use "Federal Rules of Evidence."	✓

#	Issue	Occurrences in the Current Rules	Status/Recommendation (✓in far-right column means resolved as noted)	✓
21	*"for good cause" / "for cause shown" / "for good cause shown" / "shows good cause" / "showing of good cause" / "for valid cause"*	*"for good cause"* – 26(a)(3), 26(b)(1), 32(c), 47(c), 59(c) *"for cause shown"* – 6(b), 6(d), 31(a)(4), 45(b)(3), 78(c) *"for good cause shown"* – 4(d)(2), 26(c), 33(b)(4), 35(a), 43(a), 44(a)(2), 55(c), 65(b), 73(b) *"shows good cause"* – 4(m) *"showing of good cause"* – 16(b) *"for valid cause"* – 71A(h)	Uniformly use "for good cause." <u>Note</u>: 4(d)(2) and 4(m) have minor variants. (43(a) omits the reference to good cause.)	✓
22	*"in its discretion"*	6(b), 16(a), 23(f), 39(b), 43(f), 62(b), 62(c), 71A(h)	Uniformly omit "in its discretion."	✓
23	*"in/under [subdivision]["(a)", etc.]"* *vs.* *in/under "(a)", etc.*	Numerous rules.	**Note:** This issue will be addressed in the top-to-bottom review.	✓

#	Issue	Occurrences in the Current Rules	Status/Recommendation (✓in far-right column means resolved as noted)	✓
24	*"issue" / "make" / "enter"* Which verb(s) (or variant) should be used in referring to a judge's creation (issuance, making, entry) of a court order?	*"enter"* – 11(c)(1)(B), 16(b), 16(e), 25(d)(1), 26(a)(1)(D), 26(f)(4), 37(a)(4)(B), 37(a)(4)(C), 37(b)(2), 53(b)(3), 53(e), 65(b)(2), 72(a), *"issue"* – 4(b), 4(k)(1)(B), 4.1(b), 11(c)(2)(B), 16(b), 65(a), 65(c), *"make"* – 12(e), 16(f), 17(c), 20(b), 23.2, 26(c), 27(a)(2), 27(a)(3), 27(b), 35(b)(1), 37(b)(2), 37(c)(2), 37(d), 41(d), 42(a), 53(e), 56(d), 56(f), 62(g), 71, 78,	Uniformly use "issue" rather than "make" or "enter" in reference to orders. Exception: 1) use "enter" or "entry" in reference to entry of judgment.	✓
25	*"just" / "appropriate" / "[when] {if} justice so requires" / "which justice requires" / "in the interest of justice"*	*"just" / "justice requires" / "interest of justice"* – 8(c), 12(e), 13(f), 15(a), 15(d), 16(f), 21, 26(c), 26(d), 27(a)(2), 27(a)(3), 28(b), 35(b)(1), 37(a)(4)(C), 37(b)(2), 37(d), 56(d), 56(f), 60(b), 61, 65(b), 71A(h); *"appropriate"* – 23(d), 23.2, 62(g),	Resolution: In 26(c)(1), omit "that justice requires"; in 28(b)(2), omit "in an appropriate case"; and in 56(f)(3), change "appropriate" back to "just". *See* STYLE 462, Kimble memo on "qualifiers and intensifiers."	✓
26	*"make any [just?] order"* Should "any order" always be qualified with a term such as "just"?	*"may make any order which justice requires"* – 26(c) *"may make such orders in regard to the failure as are just"* – 37(d) *"make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered."* 62(g)	Resolution: no changes to style drafts.	✓

#	Issue	Occurrences in the Current Rules	Status/Recommendation (✓in far-right column means resolved as noted)	✓
27	*"minor" / "infant"*	*"infant"* – 4(e), 4(f), 4(g), 17(c), 55(b)(1), 55(b)(2) *"minor"*– 27(a)(2)	Uniformly use "minor."	✓
28	*"file" / "make"* (in reference to a motion)	*"make[s] a motion"* – 12(g), 27(b), 30(d)(4) *"motion made"* – 6(b), 12(f), *"motion filed"* – 52(b) *"may ... move"* – 56(a), (b)	Style draft of 12(g) retains "make a motion." Style draft of 27(b) adopts: "may move." Style draft of 30(d)(4) translates the current rule language – "suspended for the time necessary to make a motion for an order" to "time necessary to obtain an order." 6(b) and 12(f) retain "motion made" 52(b) retains "motion filed" Style draft of 56(a) adopts "motion may be filed" and 56(b) retains "may move" Resolution: no changes to style drafts.	✓
29	*"must" / "may" / "should"* *"must not" / "may not"* *"must" / "should"*	The issue arises throughout the rules.	**Note:** This issue will be addressed in the top-to-bottom review. *See* research reports from Prof. Rowe (STYLE 196) and committee staff (STYLE 209*i*).	✓
30	*"nonjury trial" / "trial without a jury"*	*"trial without a jury"* – 39(c), 52(c), 63 *"nonjury trial"* – 73(a)	Uniformly use "nonjury trial."	✓
31	*"on its own" / "on its own initiative" / "on its own motion"/ [note: "sua sponte" does not appear in the rules]*	4(m), 5(c), 11(c)(1)(B), 11(c)(2)(B), 12(f), 16(f), 21, 26(b)(2), 26(g)(3), 39(a), 39(c), 59(d), 60(a), 73(b), 81(c)	Uniformly use "on its own."	✓
32	*"on motion" / "upon motion"*	The issue arises throughout the rules.	Uniformly use "on motion."	✓

#	Issue	Occurrences in the Current Rules	Status/Recommendation (✓in far-right column means resolved as noted)	✓
33	*"On [upon] reasonable notice" / "on notice"* There are numerous variations on these, as noted here.	*"[on] [upon] [after] notice"* – 4(m), 11(c), 12(a)(4)(A), 12(e), 14(a), 28(b), 35(a), 40, 44.1, 45(c)(2)(B), 53(b)(4), 53(h)(1), 59(d), 67 *"reasonable notice" – 16(d)*, 26(b)(2), 30(b)(1), 32(a), 37(a), *"[with] prior notice"* – 30(b)(3), 45(b)(1), *"prompt notice"* – 30(f)(3) *"proper notice"* – 37(d)	Resolution: In general, preserve the language of the current rules. In some cases, however, the style drafts adopt "on notice" instead of "on reasonable notice." One change: Delete "proper" in 37(d)(1)(A)(i).	✓
34	*"opportunity to be heard" / "opportunity for hearing"*	*"opportunity to be heard"* – 37(a)(4), 37(c), 53(b)(1), 53(b)(4), 53(g)(1), 53(h)(1), 59(d) *"opportunity for hearing"* – 37(g)	Uniformly use "opportunity to be heard."	✓
35	*"pleader"* Should "pleader" or "party" be used to refer to a pleading party?	*"pleader"* – 8(a), 8(b), 9(a), 12(b), 13(a), 13(e), 13(f), 19(c)	The style drafts substitute "party" for "pleader" in all instances where the current rule uses "pleader" except in Rules 8(a) and 13(a). Resolution: No need to change.	✓

#	Issue	Occurrences in the Current Rules	Status/Recommendation (✓in far-right column means resolved as noted)	✓
36	*"permit" / "allow"*	*"allow[ed]"* – 4(a), 4(c)(1), 4(d)(2)(F), 4(f)(2), 4(i)(3), 4(l), 6(a), 6(b), 7, 14(b), 16(c)(15), 17(a), 25(b), 27(b), 30(d)(1), 30(e), 32(a)(3)(E), 32(d)(3)(C), 36(a), 37(b)(2)(B), 43(a), 45(b)(1), 45(c)(3)(A)(i), 47(b), 50(b)(1)(A), 54(d), 62(d), 68, 71A(d)(4), 71A(e), 71A(f), 71A(h), 77(c), 77(d), *"permit[ted]"* – 5(d), 5(e), 6(b), 6(d), 8(d), 12(a)(4), 12(b), 12(e), 12(f), 12(g), 12(h)(1), 12(h)(2), 13(e), 15(a), 15(c)(1), 15(d), 16(b)(4), 22(1), 23(f), 24(a), 24(b), 26(b)(2), 26(c), 26(f), 30(c), 32(a)(1), 32(a)(4), 33(c), 33(d), 34(a), 34(b), 36(b), 37(a)(2)(B), 37(b)(2), 37(c)(1), 43(a), 44(a)(2), 45(a)(1)(C), 45(b)(2), 45(c)(2)(A), 45(c)(2)(B), 47(a), 54(d)(1), 56(e), 56(f), 59(c), 65.1, 67, 71A(h), 71A(j), 77(d)	Use "permit" rather than "allow," except in reference actions that are controlled by a rule. Change "permit" to "enable" in Rules 33(d) and 56(f).	✓
37	*"prescribed in" / "prescribed by" / "provided in" / "provided by"* *"as provided" / "as prescribed" / "in accordance with" / "in the manner provided" / "pursuant to" / "under"*	various rules	**Note:** This issue will be addressed in the top-to-bottom review.	✓

#	Issue	Occurrences in the Current Rules	Status/Recommendation (✓in far-right column means resolved as noted)	✓
38	*"pretrial conference"* To what extent can this term be used generically for all types of pretrial judge-party conferences (including scheduling, settlement, and status)?	16, 26(a)(1), 26(f), 33(c), 36(a) "Rule 16(b) conference" appears in 26(f) "Rule 26(f) conference" appears in 26(a)(1)	Use "pretrial conference" when reference is generic, but not when it is specific. Style 16 and 36(a) use "pretrial conference" in a generic sense. Style 26 continues to refer to a "16(b)" conference and, internally, to the "26(f)" conference. These specific references were retained and seem appropriate. (Style 33 no longer makes any reference.)	✓
39	*"question of law or fact"* *"issue of fact"* *"question of law"*	*"question[s] of law or fact"*– 20(a), 23(a), 23(b)(3), 24(b), 42(a) *"issue[s] of fact"* – 38(c), 49(a), 49(b) *"question of law"* – 44.1 *"factual contentions"* – 11(b)(3), 11(b)(4)	The style draft translates "question of law or fact " to "legal or factual question" in Rule 20(a), but the style draft retains "question of law or fact" in Rule 24(b), 42(a). Style draft of Rule 38(c) translates "issues of fact" to "factual issues." Style draft of Rule 49(a) and (b) retains "issue[s] of fact." The style draft retains "question of law" in Rule 44.1 The style draft retains "factual contentions" in Rule 11(b)(3) and (4). Resolution: No changes to style drafts, except in Rule 20(a)(1)(B) change "legal or factual question" to "question of law or fact."	✓
40	*"reasonable expenses incurred ..."* Regarding the motion? For the motion?	11(c)(1)(A), 16(f), 26(g)(3), 30(g)(1), (2), 37(a)(4)(A), (B), and (C), 37(b)(2), (c)(1), (c)(2), (c)(d), and (g), 56(g)	Resolution: ok to vary these, but 11(c) and 26(g) should be consistent.	✓

#	Issue	Occurrences in the Current Rules	Status/Recommendation (✓in far-right column means resolved as noted)	✓
41	*"secure" / "obtain*	*The rules use "obtain[ed][ing][able]" throughout.* *Rule 37 used both obtain and secure: "secure" at 37(a)(2)(A) and (B), but "obtain" at 37(a)(4)* *"secure" otherwise appears only in 1, 62(c), and 62(h)*	Uniformly use "obtain." Exception: *Rule 1*, because of tradition, and *Rule 62(c) and (h)*, which would either need to retain "secure" or use a different phrasing.	✓
42	*"service of summons or [other] like process" / "service of process"* *"after service" /"after . . . is served" / "after being served" / "after . . . has been served"*	*"service of [a] summons"* – 4(d)(1), 4(g), 4(j)(2), 4(n)(2), 5(a), 27(a)(2), 81(c) *"service of process"* – 4(d)(2)(A), 4(e)(2), 4(h)(1), 12(b)(5), 12(h)(1), 19(a), 5(d), 6(e), 11(c), 12(a)(1), 12(a)(2), 12(a)(3), 12(a)(4)(B), 12(f), 15(a), 16(b), 25(a)(1), 26(a)(1), 31(a)(4), 32(d)(3)(C), 33(b)(3), 33(d), 34(b), 36(a), 37(d), 38(b), 38(c), 41(c), 45(c)(2)(B), 53(g)(2), 56(a), 59(c), 68, 71A(d)(2) 71A(e), 72(a), 72(b), 81(c)	Resolution: 1) Change Rule 4(g) to "service of a summons." 2) Change Rule 59(c) from "after service" to "after being served." 3) Change Rule 71.1(d)(2)(A)(v) from "after service of the notice" to "after being served with the notice."	✓
43	*"state in which the district court is <u>located</u>" / "state in which the district court is <u>held</u>"*	*"located"* – 4(e)(1), 4(k)(1)(A), 4(n)(2), 4.1(a) *"held"* – 6(a), 17(b), 64, 69(a), 81(e)	Uniformly use "state where the district court is located."	✓

#	Issue	Occurrences in the Current Rules	Status/Recommendation (✓in far-right column means resolved as noted)	✓
44	*"substantial [justice] [rights]" / "substantially [justified] [impair] [verbatim] [unprepared]"*	8(f), 16(f) (twice), 19(a), 23(b)(1)(B), 25(d)(1), 26(b)(3) (three times), 26(g)(3), 33(d), 37(a)(4)(A), 37(a)(4)(B), 37(b)(2), 37(c)(1), 37(c)(2), 37(d), 45(c)(3)(B)(iii)(twice), 51(d)(2), 56(d)(twice), 61(twice),	Resolution: Delete "substantial" from Rule 8(f). (The style drafts of Rules 1-37 & 45 generally retain the current rule language (repeating "substantially" or "substantial" in the style drafts), while the Rule 38-63 style draft deletes "substantial." See STYLE 462, Kimble memo on "qualifiers and intensifiers.")	✓
45	*"that is" / "who is"* Which phrase(s) should be used when discussing a party or potential party that can be either a natural person or an organization (i.e., government agency, corporation, partnership)?	*"that is"* – 4(d)(2), 4(h), 9(a), *"who is"* – 4(c)(2), 4(k)(1)(B), 14(a), 17(b), 19(a), 25(d), 26(a)(2)(B), 26(b)(4)(B), 28(c), 31(a)(3), 37(a)(1), 45(b)(1), 45(b)(2), 45(c)(2)(B), 45(c)(3)(A), 63, 65(c), 71, 77(d) *"party which is"* – 11(c)(5)(B) *"defendant who"* – 4(d)(1), 4(k)(1), (2), 14(c)	Resolution: ok to vary.	✓
46	*"the court shall require ... unless the court finds..."* *restyle to:* *"the court must require ... unless ....* *or* *"the court must require ....But the court may not order .... if..."*	37(a)(4), 37(b)(2), 37(c)(2), 37(d)	Resolution: ok to vary.	✓
47	*"trial of all issues"*	39(a), 71(h)	Uniformly use "trial on ... issues."	✓

#	Issue	Occurrences in the Current Rules	Status/Recommendation (✓in far-right column means resolved as noted)	✓
48	*"trial by jury" / "tried before a jury"*	*"trial by jury"* – 38(a - e), 39 (a - c), 42(b), 49(a), 50(a)(1), 55(b)(2), 57, 59(a), 65(a)(2), 71A(h), 71A(k), 79(a), 81(c) *"tried before a jury"* – 32(c)	Uniformly use "jury trial," except for 38(a) and 39(a), which retain "trial by jury."	✓
49	*"waive[r]" "waiving" /*	4(many), 8(c), 12(b), 12(h), 24(c), 26(a)(3), 32(d)(1) 32(d)(2), 32(d)(3)(A), 32(d)(3)(B), 32(d)(3)(C), 32(d)(4), 33(b)(4), 35(b)(2), 38(d), 45(c)(3)(A)(iii), 49(a), 53(b)(3), 71A(e), 81(c)	Uniformly use "waiver."	✓
50	*"writing" / "paper"*	*"writing"* – 4(i)(1)(A), 34(a) *"paper"* – 5(a), 5(d), 5(e), 6(a), 6(e), 7(b)(2), 11(a), 11(b), 11(c)(1)(A), 45(c)(2)(A), 56(e), 65.1, 77(a), 77(d), 79(a)	Resolution: no changes to style drafts.	✓
51	*cross-references* and *hortatory references*	Arises frequently throughout the Civil Rules.	**Note:** This issue will be addressed in the top-to-bottom review.	✓
52	*geographic references: "any judicial district of the United States" / "the United States" / "the United States or a territory or insular possession subject to the jurisdiction of the United States"*	Rules 4(d)(1(E), 4(d)(2), 4(d)(3), 4(e), 4(f), 4(g), 4(h)(1), (2), 4(k)(1)(B), 4(*l*)(2), 4.1(b), 12(a)(1)(A)(ii), 25(a)(3), 28(a), 30(a)(2)(C), 32(a)(3)(B), 44(a)(1), 45(b)(2), 71A(d)(3)(A)	Resolution: No changes to style drafts. (Subcommittee A decided that the restyled rules should continue to use the geographic terms used in the corresponding provisions of the current rules. This decision is reflected in the latest style drafts.) Research and email exchanges on this issue include: STYLE 35, 42, 43, 48, 49, and 118.	✓

#	Issue	Occurrences in the Current Rules	Status/Recommendation (✓in far-right column means resolved as noted)	✓
53	*governmental agencies, officers, employees, and other instrumentalities*	Rules 4(i), 4(j), 12(a)(2), (3), 13(d), 15(c)(2), 24(b)(2), 24(c)(2), 30(b)(6), 31(a)(3), 32(a)(2), 33(a), 45(b)(1), 54(d)(1), 55(e), 62(e), 65(c), 81(a)(3), 81(f)	Resolution: 1) In Rules 4(i)(2), 4(i)(3) and (4)(i)(4)(B) change to "a United States agency or corporation" and "a United States officer or employee." 2) In the first clause of Rule 5(c)(2), reverse the order of "agency" and "officer."	✓

Appendix B – Current and Restyled Rules Comparison Chart

Note: This chart compares the current rules with the restyled rules (to the subdivision level). For additional information, see the Committee Notes for specific rules. This chart does not include the restyled electronic-discovery amendments to Rules 16, 26, 33, 34, 37, and 45

Current Rule	*Restyled Rule*
5(e)	5(d)(2)-(4)
6(d)	6(c)
6(e)	6(d)
7(c)	Deleted
8(d)	8(b)(6)
8(e)	8(d)
8(f)	8(e)
12(b)(final sentence) and 12(c)(final sentence)	12(d)
12(d)	12(i)
16(d)	16(e)
16(e)	16(d)
22(1)	22(a)
22(1)(final sentence) and 22(2)	22(b)
23.1	23.1(a)-(c)
25(d)(2)	17(d)
26(a)(5)	Deleted
30(d)(1)	30(c)(2)(second and third sentence)
33(a)(part of first sentence)	33(b)(1)
33(c)(part of first sentence, second paragraph)	33(a)(2)
37(g)	37(e)
43(d)	43(b)
43(e)	43(c)
43(f)	43(d)
50(c)(2)	50(d)
50(d)	50(e)
52(b)(final sentence)	52(a)(5)
53(d)	53(c)(1)(C)
53(e)	53(d)
53(f)	53(e)
53(g)	53(f)

Current Rule	*Restyled Rule*
53(h)	53(g)
53(i)	53(h)
55(d)	Deleted
55(e)	55(d)
56(c)(final sentence)	56(d)(2)
58(a)(2)	58(b)
58(b)	58(c)
58(c)	58(e)
60(b)(second sentence)	60(c)
60(b)(third sentence)	60(d)
60(b)(fourth sentence)	60(e)
80(c)	80
81(e)	81(d)
81(f)	Deleted

SUPERSESSION AND THE STYLE PROJECT

I. Introduction

The public comments to the Style Project include expressions of concern that the Style amendments to the Civil Rules may "supersede" conflicting provisions in statutes in effect when the amendments are enacted. The supersession provision of the Rules Enabling Act, Section 2072(b), provides that laws that conflict with an Enabling Act rule "shall be of no further force or effect after such rule[] [has] taken effect." The concern is that adopting the Style Rules will generate arguments that all provisions in every Civil Rule have "taken effect" on the date the Style Rules were enacted – anticipated to be December 1, 2007 – making them supersede any inconsistent statute enacted before that date.

This issue is not new to the Style Project. It was raised and addressed in the earlier Style Amendments to the Appellate and Criminal Rules. The first two parts of this memorandum explore the reasons why the concern about supersession does not present a problem for the Civil Rules Style Project. At the same time, this memorandum recognizes that just as it is important for the Style Project to state explicitly and clearly that the amendments are intended to be stylistic only, it is also useful to state explicitly and clearly that the relationship between the Rules and existing laws is unchanged. The third part of this memorandum examines alternative ways to accomplish this goal. The memorandum recommends a statement in Rule 86 that addresses and should foreclose the supersession concern.

Adoption of a new Rule 86(b) would make explicit the relationship between the Style amendments and existing statutes and address the supersession concern described at length in the memorandum that follows. The proposed rule and committee note take into account the new E-Government Act rule, Rule 5.2, which is also expected to take effect on December 1, 2007. Rule 5.2 must be kept on the same schedule as the corresponding E-Government Act provisions in the

Appellate, Bankruptcy, and Criminal Rules. The supersession effect of Rule 5.2 is properly measured from December 1, 2007. The Rule 86(b) draft accommodates this by stating that the December 1, 2007 "amendments" do not "change" the effective date, and the Committee Note explicitly addresses Rule 5.2.

PROPOSED AMENDMENT TO THE
FEDERAL RULES OF CIVIL PROCEDURE

Rule 86. Effective Dates

* * * * *

(b) *December 1, 2007 Amendments.* The amendments adopted on December 1, 2007 do not change the date on which any provision that conflicts with another law took effect for purposes of 28 U.S.C. § 2072(b).

Committee Note

The amendments adopted on December 1, 2007 take effect on that date for all purposes other than comparing the effective dates of a rule and another law that conflicts with the rule. These amendments do not change the meaning of any rule, except new Rule 5.2 which was first adopted on December 1, 2007. If there is a conflict, the portion of the rule that conflicts with another law took effect on the day that part of the rule was first adopted. A conflict between any rule other than Rule 5.2 and another law should be resolved under 28 U.S.C. § 2072(b) on December 1, 2007 in the same way it would have been resolved on November 30, 2007. Amendments adopted after December 1, 2007, will be treated in the same way as amendments adopted before then.

Finally, an appendix to this memorandum provides further research supporting the Supreme Court's authority to improve the expression of the rules, without changing substantive meaning or supersession consequences, within the Rules Enabling Act.

II. The Supersession Concern

The Rules Enabling Act begins with §§ 2072(a) and (b):

> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.
>
> (b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

The second sentence of § 2072(b) is often referred to as the "supersession" clause. By general acceptance, it operates on a last-in-time principle akin to conflicting statutes. An Enabling Act rule provision supersedes an earlier conflicting statute; a statute supersedes an earlier conflicting Enabling Act rule provision. The words "no further force or effect" can refer only to a statute existing at the time a rule is adopted.

Whether a rule conflicts with an existing statute depends on the meaning of each. The Style Project is intended to make it easier to understand the Civil Rules and to make style and terminology consistent throughout the Rules. The changes are stylistic only. Each rule will have the same substantive meaning on December 1, 2007, that it had before that date. Because substantive meaning does not change when the Style Rules take effect, the relationship between the Civil Rules and any previously-enacted conflicting statute also remains the same.

Prior experience with rule amendments fully supports this conclusion. The Rules Enabling Act rules have been amended a number of times. Those amendments range in purpose and nature from adding entirely new rules to changing the substantive meaning of portions of rules to making small or technical changes that have little if any effect on meaning. A rule does not supersede a statute with a conflicting provision whenever there is an amendment to any part of that rule, no matter how small, how technical, or how unrelated to the conflicting statutory provision. Instead, supersession is determined by looking to the nature and purpose of the amendment and comparing

the date of the statute with the date the particular substantive rule provision that is inconsistent with that statute first "took effect."

There are very few conflicts between the Civil Rules and existing statutes and the issue is unfamiliar to most lawyers and judges. There are good reasons for the scarcity of conflicts. Many procedure statutes disappeared after enactment of the Rules Enabling Act in 1934 and recodification of the Judicial Code in 1948. Since then, Congress generally has been content to entrust development of procedural rules to the Enabling Act process, and the Supreme court and the Judicial Conference have been careful to avoid knowing supersession of statutory provisions. The occasions for colorable claims of conflict between statute and rule are rare. But some do occur. The most commonly cited conflict is the relationship between Civil Rule 11 and the Private Securities Litigation Reform Act. Rule 11 was last substantively amended in 1993. The PSLRA was enacted in 1995. It includes provisions that are inconsistent with Civil Rule 11.[1] In 1995, the PSLRA superseded the inconsistent provisions of Rule 11 that took effect in 1993. If the remaining steps in the Style Project occur on schedule, Rule 11, amended only for style, will take effect on December 1, 2007. Because the Style amendments do not change the substantive meaning of Rule 11, that date does not affect the relationship between Rule 11 and the PSLRA. That relationship is determined by the time when the Rule's substantive provision that is inconsistent with the PSLRA first took effect, compared to the effective date of the PSLRA. Because the substance of the inconsistent provisions of Rule 11 took effect two years before the PSLRA, the Style amendments – which are unrelated to the substance of the conflicting provisions – do not change the supersession relationship. The statute still trumps the rule.

Stated more generally, the supersession determination depends on comparing the date the substantive rule provision that conflicts with the statute became effective with the date the

[1] The PSLRA also establishes special pleading standards and provides for a stay of discovery on terms that may be inconsistent with the Civil Rules.

conflicting statute became effective. The later date controls, not subsequent dates when the rule is again amended in some way that does not affect or have any bearing on the substance of the conflicting provision. The Style Project does not change supersession effects because the changes – including those made in the few rules that may conflict with statutory provisions in effect on December 1, 2007 – are intended to be stylistic only.

III. Precedents on Supersession

Past style revisions provide supporting precedent for the conclusion that the Style Project will not change the supersession relationship between the Civil Rules and statutes in effect on December 1, 2007. Most of the Civil Rules were amended in 1987 to achieve a gender-neutral style. There is no evidence of any suggestion that those amendments had an effect on supersession. The Appellate Rules were the first to be completely restyled. As described below, the few cases that address supersession after the Appellate Rules were restyled recognize that the style changes do not affect supersession. One case appears to have adopted a different approach, but that case did not focus on the issue.

The Criminal Rules were the next to be restyled. The Rules Committees recognized that the pre-Style version of Criminal Rule 48(b) had been followed by the Speedy Trial Act, which was inconsistent in important respects. The 2002 Committee Note accompanying the Style Rules stated that "[i]n re-promulgating Rule 48(b), the Committee intends no change in the relationship between that rule and the Speedy Trial Act." There is no evidence of any attempt to argue that Rule 48(b) now supersedes the Speedy Trial Act. Instead, the Speedy Trial Act continues to apply over inconsistent provisions of Style Rule 48(b).

The decisions that focus on the supersession question follow the approach set out above. There are a few cases that could be read to support a different approach, but they did not actually focus on the question. The existence of these cases, however, provides another reason to make an

explicit disclaimer of any supersession effect from adopting the Style version of the Civil Rules.

Autoskill Inc. v. National Education Support Systems, Inc., 10th Cir. 1993, 994 F.2d 1476, is clear. Autoskill won a preliminary injunction against NESS. Six days later NESS filed a voluntary Chapter 11 petition. Commencing the Chapter 11 proceeding constituted an "order for relief." Sixty-six days after the injunction issued and 60 days after the order for relief, NESS filed a notice of appeal. The appeal was timely under 11 U.S.C. § 108(b)(2), which allows 60 days after the order for relief to file any notice that would have been timely if filed when the order for relief entered. The appeal was not timely under the 30-day provision in Appellate Rule 4. The Rule 4 period was established in 1968 when the Appellate Rules first took effect. Section 108(b)(2) was adopted in 1978. But Appellate Rule 4 was amended in 1979. The court looked to the nature of the 1979 amendments and the Committee Note. It found that "[t]he change was made for clarity only and did not change the meaning of the rule." Thus "the two changes that have been made * * * were not substantive, and do not affect our application of § 2072." 994 F.2d at 1485 & n. 8. The statute prevailed; the style change did not alter the pre-Style supersession relationship.

Local 38, Sheet Metal Workers v. Custom Air Systems, Inc., 2d Cir. 2003, 333 F.3d 345, follows the *Autoskill* decision. It agreed that "[a] statute enacted subsequently to a rule * * * trumps the rule." The 1979 Rule 4 amendments did not establish Rule 4 as the more recent enactment: "To be sure, there were minor revisions to Rule 4(a) subsequent to the enactment of § 108(b), but as the Tenth Circuit explained, those changes were not substantive and thus do not affect our analysis." 333 F.3d at 348 n. 2.

U.S. v. Wilson, 5th Cir. 2002, 306 F.2d 231, 235-237, is less clear, but seems to support the same approach. The government appealed a suppression order by notice filed 32 days after the order was signed and dated but only 29 days after the order was entered on the docket. 18 U.S.C. § 3731 set the time for a government appeal at 30 days after the order was "rendered." Appellate Rule 4(b) set the time at 30 days after entry of the order. The court held the appeal timely by applying Rule

4(b). "[W]here a conflict exists between a Rule and a statute, the most recent of the two prevails." Implicit repeal is disfavored in the same way when a Federal Rule is offered to repeal a statute as when a statute is offered to repeal another statute. But there is a difference between "rendering" an order and "entering" an order. "Rule 4(b) trumps § 3731." In reaching this result, the court looked to several sets of dates. "Rendered" was first used in the Criminal Appeals Act long before the Appellate Rules were first adopted in 1968. Section 3731 was most recently amended in 1994. Appellate Rule 4(b) was last amended [by the Style amendments] in 1998. The court expressed its confidence that the Supreme Court considered the conflict between rule and statute in determining that Rule 4(b) would run appeal time from entry of the order. "In any event, the Rules were promulgated after § 3731 was enacted; the Rules, including Rule 4(b), have been amended more recently than § 3731; and, the terms rendered and entered date to the respective establishment of the Criminal Appeals Act and the Rules, the latter being the most recent." Finally, § 3731 itself says that the provisions for government appeals are to be liberally construed. The *Wilson* opinion properly looked to the respective dates on which the conflicting provisions were first adopted. Rule 4(b) with "entry" came after adoption of § 3731 with "rendered," so Rule 4(b) controls. Some ambiguity is introduced by the portion of the opinion that notes the dates of the most recent amendments, even though they did not change the respective and controlling words — and even though the 1998 Rule 4(b) amendment was part of the Appellate Rules Style Project.

Baugh v. Taylor, 5th Cir. 1997, 117 F.3d 197, 201, also reflects the proper approach. This case addressed 28 U.S.C. § 1915(a)(3) and Appellate Rule 24. Section 1915(a)(3) provides that an appeal may not be taken in forma pauperis if the trial court certifies in writing that the appeal is not taken in good faith. Appellate Rule 24 provides that a party denied leave to proceed in forma pauperis on appeal could move for permission in the court of appeals. The Fifth Circuit found no conflict and no supersession, observing that the provision set out as § 1915(a)(3) by amendment in 1996 was in § 1915(a) long before Rule 24(a) was adopted in 1967 "to spell out the procedural

implementation of * * * § 1915. The [1996 statute] merely moved this provision from subsection (a) of section 1915 to subsection (a)(3). We do not view this relocation as evidence of congressional intent to abrogate procedures in Rule 24 that have coexisted peacefully for three decades with the identical provision." Although the setting presented the converse question whether a more recent statute had superseded an earlier Enabling Act rule, the principle is constant. A cosmetic or technical change that does not change meaning does not count in determining whether statute or rule is more recent.

Two cases in one circuit deserve particular attention because of inconsistency with the approach demonstrated in the cases described above. In *Floyd v. U.S. Postal Service*, 6th Cir. 1997, 105 F.3d 274, the court reached a conclusion opposite to the ruling in the *Baugh* case. It found that § 1915(a)(3) was inconsistent with Appellate Rule 24(a) and that as the later in time, § 1915(a)(3) superseded Rule 24(a). Two years later, in *Callihan v. Schneider*, 6th Cir. 1999, 178 F.3d 800, 802-804, the court reversed course because Appellate Rule 24(a) was amended [as part of the Style Project] in 1998, carrying forward without change the provision for moving in the court of appeals for leave to appeal in forma pauperis. The court did not follow the approach of the cases described above and analyze the relationship of the substantive provisions of the statute and rule, or when those substantive provisions became effective. Instead, the court simply stated that Appellate Rule 24 became the newest provision upon its amendment and superseded the once superseding statute. There is no explanation, no recognition of the effect of the fact that the revisions carried forward the rule's meaning without change, and no explanation of the reason for concluding that the supersession relationship should be reversed by a style amendment that was recognized to carry forward the once-superseded meaning.

McConville v. U.S., 2d Cir. 1952, 197 F.2d 680, 682 presented an appeal-time question under then Civil Rule 73(a). "[E]ffective March 19, 1948," Rule 73(a) shortened the time to appeal but also excepted the time to consider such motions as the timely Rule 52(b) motion made in that

case. As measured by Rule 73(a), the appeal was timely. The appeal may not have been timely under the provisions of 28 U.S.C. § 2107 as it stood when Rule 73(a) was amended. Section 2107, however, was almost immediately amended to reflect the Rule 73(a) period but even as amended did not reflect the provision for tolling appeal time. The court first said that the new version of § 2107 should be construed to conform with Rule 73(a) "since the new statute was so obviously 'in conformity with * * * proposed amendment to Rule 73 * * *,' as the Reviser's Note states." But the court went on to say that "the rule was reenacted (with some changes not here pertinent) on December 29, 1948, effective October 20, 1949, and, in accordance with * * * § 2072, supersedes all inconsistent statutory enactments." Although that passage may seem to suggest that any amendment of a Rule establishes superseding effect even though the amendment does not touch an existing inconsistency between the rule and a superseding statute enacted before the amendment, this suggestion is weakened by footnote 1, which adds that an amendment of May 24, 1949, before the effective date of the October 20, 1949, amendment, "had no connection with this issue."

The cases are few in number but seem to support two conclusions. First, the Supreme Court is authorized by the Enabling Act to restyle the Rules to improve and clarify expression, without changing substantive meaning, and to adopt the restyled rules without affecting the supersession relationships between those rules and previously-enacted statutes. This conclusion is squarely supported by the rule that revision and consolidation of laws change their effect only if change is clearly intended.[2] Second, an explicit disclaimer of any supersession effect will be helpful. Such a disclaimer should avoid misapplied supersession analyses that can occur because supersession is so rarely encountered and because it is easier to compare the dates a rule amendment and a statute took effect than to examine the nature and purpose of the rule amendment and to compare the dates

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[2] *E.g., Finley v. U.S.*, 1989, 490 U.S. 545, 553-554, 109 S.Ct. 2003, 2009. The 1948 codification of the Judicial Code did not expand supplemental jurisdiction under the Federal Tort Claims Act: "Under established canons of statutory construction, 'it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed.' *Anderson v. Pacific Coast S.S. Co.*, 225 U.S. 187, 199 * * * (1912)."

when the substance of the conflicting rule provision and statute were first enacted. The safer course is some explicit provision to ensure that the Style Project neither expands nor contracts the supersession effects of each rule. The clear effectiveness of the explicit disclaimer in the Criminal Rules Style Project provides a model.

IV. Supersession Provisions

The apparent effectiveness of the explicit disclaimer frames the question for the Civil Rules Style Project: how best to ensure that the December 1, 2007, Style Amendments do not affect the supersession relationships between any Civil Rule and any statute enacted before December 1, 2007.

The easiest to execute would be the addition of language to the Committee Note for each rule stating that the Style amendments do not affect supersession relationships. A second approach would adopt an express rule provision stating that the Style amendments do not affect supersession relationships. A third approach would be to state the proposition in the message transmitting the Style Rules from the Supreme Court to Congress. A combination is also possible, such as a new rule combined with a Committee Note in Rule 1, the Notes for the Rules that are candidates for supersession arguments (such as Rule 11), or all the Committee Notes, referring to the new rule text. Each method has some advantages and also some disadvantages, but the best solution may be to adopt an express rule text and support it by cross-references in Committee Note.

A. Committee Note Approach

The advantage of addressing supersession in Committee Notes is that it is easy to provide a clear statement without worrying about the fine points of rule drafting. There also is some reason to hope that Committee Notes will be an obvious point of inquiry when something as exotic as a supersession question arises. The well-established "later-in-time" approach will in any event require the parties and court to identify the time when the rule provision and statute took effect. It would seem natural to consult the contemporary Committee Note to identify the purpose of the rule or

amendment. Even those who (unfairly) view Committee Notes with the skepticism that often greets legislative "history" should be willing to accept a statement of the Style Project's purposes.

One disadvantage of relying on Committee Notes is that busy courts and lawyers do not always look beyond rule text and statutory language. Another is that a statement in a single Committee Note, whether appended to Rule 1, to Rule 86, or to some other rule, may not be sufficient. The Notes repeatedly admonish that the Style Project does not affect substantive meaning, but the supersession issue is not a problem for every, or even for many, rules.

Any use of Committee Notes to address this issue should include Rule 1. The question is whether to include the Note language in every rule or only in those rules likely to raise the issue, such as Rule 11. The Note language would also be a useful way to distinguish any non-Style Rule or amendment adopted at the same time. For example, if new Civil Rule 5.2 should take effect at the same time as the Style Rules, the Rule 5.2 Committee Note would not have the "Style-only" language. If it seems useful, distinctions also could be made in the Committee Notes for the rules amended on the "Style-Substance" track.

Committee Note language for each of the rules (or for those identified as candidates for raising the issue) can be illustrated as an addition to the language that is standard for each of the Style Rules:

> The language of Rule __ 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. As a result, they do not change the effect of this rule in determining whether a law that conflicts with this rule has "no further force or effect" by virtue of 28 U.S.C. § 2072. The rule's effect for this purpose is the same on December 1, 200X as it was on November 30, 200X.

An alternative might be to add a somewhat longer generic statement to the Committee Note

for Rule 1, supplemented by an explicit cross-reference in the separate Committee Note for each rule or for some of the Rules. The Rule 1 Note language might look like this:

> 28 U.S.C. § 2072(b) provides that "All laws in conflict with such rules [adopted under § 2072(a)] shall have no further force or effect after such rules have taken effect." The style changes made in Rule 1 and in each of the other Civil Rules are stylistic only and do not change the effect of the Civil Rules on any other law. The existence of conflict is determined as of the original effective date of the substantive provision that raises the conflict question.

Still another alternative would be to adopt express rule text and then add a brief cross-reference either in Committee Note 1 or in all or some of the Committee Notes: "As stated in Rule 86(b), these changes do not affect the supersession relationships between this rule and any conflicting laws."

B. Rule 86(b)

A provision negating any supersession effects from the Style amendments could be added to an existing rule or could become a new separate rule. An express rule provision has at least two advantages. One is that there can be no quibbling about the authority of a mere Committee Note. A second is that the Committee Note to a new rule provision could be somewhat more elaborate than a common statement included in all or some Committee Notes. Candidates that have been suggested from among the current rules include Rules 1, 81, and 86. Of these, Rule 86 seems the most likely. It deals with effective dates and the effect of amendments on pending actions. A "no-new-supersession" provision essentially says that earlier effective dates control for supersession purposes. That logical connection may not actually draw many readers to Rule 86, but it may bolster the case for Rule 86 over competing candidates. A separate rule could be used as an alternative. The most attractive locations are likely to be up front, as a new Rule 1.1, or at the very end as a new Rule 87. The model sketched here is framed as a new Rule 86(b):

Rule 86. Effective Dates.

(a) *Effective Dates.* These rules * * *.

(b) *December 1, 2007 Amendments.* The amendments adopted on December 1, 2007 do not change the date on which any provision that conflicts with another law took effect for purposes of 28 U.S.C. § 2072(b).

Committee Note

The language of Rule 86 * * *.

The subdivisions that provided * * *.

Rule 86(b) is added to express the relationship between the [general] restyling of all the Civil Rules and other laws. The amendments adopted on December 1, 2007 take effect on that date for all purposes other than comparing the effective dates of a rule and another law that conflicts with the rule. These amendments do not change the meaning of any rule, except new Rule 5.2 which was first adopted on December 1, 2007. If there is a conflict, the portion of the rule that conflicts with another law took effect on the day that part of the rule was first adopted. A conflict between any rule other than Rule 5.2 and another law should be resolved under 28 U.S.C. § 2072(b) on December 1, 2007 in the same way it would have been resolved on November 30, 2007. Amendments adopted after December 1, 2007, will be treated in the same way as amendments adopted before then.

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As noted, a complicating drafting issue arises from the expectation that new Rule 5.2 will take effect on December 1, 2007. It is important to keep Rule 5.2 on the same schedule as the E-Government Act provisions in the Appellate, Bankruptcy, and Criminal Rules. The supersession effect of Rule 5.2, in its initial form, will be measured from December 1, 2007. The Rule 86(b) draft is intended to accommodate this difficulty in stating that the December 1, 2007 "amendments" do not "change" the effective date. The Committee Note is explicit. It would be possible to add an explicit exception for Rule 5.2 in the rule text: "The amendments adopted on December 1, 2007, except for [new] Rule 5.2, do not change * * *"; or perhaps at the end: ", but Rule 5.2 takes effect on December 1, 2007."

C. Supreme Court Message

A third method of addressing supersession is to include a statement in the message that transmits the Style Rules from the Supreme Court to Congress. This method is not likely to prove effective as the sole means of making the point. It seems likely that more than a few lawyers and judges will not think to look for the message, particularly as the Style Rules come to be viewed as

the way the Rules always have been. But it could be a wise precaution to repeat the no-supersession point in the Court's message. The message would reassure Congress that there is no intent to smuggle through any clandestine amendments of statutory procedure.

V. Conclusion

The Supreme Court has authority to restyle the rules to improve expression and achieve easier, more consistent, and better application. Style changes do not affect the supersession relationships between the few rules that may conflict with statutes. The best way to foreclose arguments that the Style Amendments change the supersession effect of a rule is by express rule language. A new Rule 86(b) will foreclose uncertainty — on and after the date of adopting the Style amendments the Civil Rules will have the same relationship to conflicting statutes in force on the date of adoption as they had the day before adoption.

Appendix: Authority to Avoid Supersession

Section 2072 establishes rulemaking authority and decrees that a § 2072(a) rule supersedes a conflicting law. It can be claimed that the supersession provision takes the question out of the Supreme Court's hands — that if there is a conflict, a later-adopted rule must supersede an earlier statute no matter what the Court intends. The Court, on this view, must take the Enabling Act as an integrated whole that denies authority to adopt a rule that does not supersede.

The better view is that the Supreme Court can decide whether an Enabling Act rule supersedes an inconsistent statute. The Civil Rules themselves include several provisions illustrating this point by expressly providing that a rule operates unless "a statute provides otherwise."

So too the Court should have authority to amend one part of a rule without expanding the supersession effect of other parts. Rule 11 can be used as an example. Present Rule 11(c)(1)(A) provides a "safe harbor" period of 21 days to withdraw or correct a challenged position. It is possible that consideration of this period in the Time Project might lead to a conclusion that the period should be 14 days or 28 days. If Rule 11 were amended solely by substituting "14" or "28" for "21," there would be no reason to conclude that all of Rule 11 takes effect anew, reversing the supersession effects of statutes adopted between the next-most-recent version and the new rule. It would be impossible to live with such supersession consequences. Surely the answer is that supersession is measured by the effective date of the first amendment that added the rule provision that conflicts with a statute. Nor should the answer depend on the form chosen for adopting the amendment. A mere change in the number of days for the safe harbor likely would be published and adopted without setting out all of Rule 11, nor even all of Rule 11(c). But there is no clear formula for determining how much of a rule is published to show the place and effect of a proposed amendment. The choice is made by looking for sufficient context to illustrate the amendment, and may be affected by a desire to make other small adjustments (including style improvements) at the same time. These expository choices should not be constrained by fear of unintended supersession

consequences.

The same conclusion holds for style amendments. The clear intent to carry forward present meaning mandates that the same meaning have the same supersession consequences. The Style Project cannot be made impossible by the assertion that on the effective date the entire set of Civil Rules supersedes any conflicting law that until then had superseded a Civil Rule. The Supreme Court's authority to implement the intent to achieve supersession neutrality inheres in the language, purpose, and structure of the Enabling Act.

The Enabling Act reflects a sturdy accommodation of congressional and judicial responsibilities. Congress has the authority to create the inferior federal courts, and with that the authority to regulate most matters of procedure. But this is the authority to create "courts," vested with some part of the "judicial power." The courts have some measure of inherent responsibility to function as courts acting to discharge a judicial power. Congress could not, in the name of reducing cost and delay, direct that cases be decided by tossing a coin. Apart from whatever modest constraints these concerns may impose on legislative regulation of judicial procedure, the courts have real advantages in developing and implementing rules of procedure. The central feature of the Enabling Act is the supervised delegation of rulemaking authority, subject in the first instance to acquiescence by Congress and further subject to congressional revision.

Supersession reflects a special element in this delegation. The central purpose has been to ensure that an Enabling Act rule that first undertakes to establish procedure in a particular area will displace statutes that had been necessary before then. Examples are provided by the initial Civil Rules,[3] the Appellate Rules,[4] the merger of the Admiralty Rules into the Civil Rules,[5] and such

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[3] Penfield Oil Co. v. §, 1947, 330 U.S. 585, 589 & nn 4, 5, 67 S.Ct. 918, 920-921 & nn. 4, 5.

[4] *American Paper Institute v. ICC*, D.C.Cir.1979, 607 F.2d 1011; *Griffith v. NLRB*, 9th Cir.1977, 545 F.2d 1194, 1197 n. 3; *Feeder Line Towing Serv. v. Toledo, Peoria & Western R.R.*, 7th Cir.1976, 539 F.2d 1107, 1108-1109; *Motteler v. J.A. Jones Constr. Co.*, 7th Cir.1971, 447 F.2d 954; *Jack Neilson, Inc. v. Tug Peggy,* 5th Cir.1970, 428 F.2d 54, 55; *Waterman S.S. Corp. v. Cottons*, 9th

specific matters as the 1951 adoption of Civil Rule 71A to establish uniform condemnation procedures in place of a welter of statutory provisions.[6]

Other supersession questions arise from court rules that are not part of a generalized program to substitute court rules for a procedural system generally governed by statutes. *Henderson v. U.S.*[7] is the leading Supreme Court example. The 1920 Suits in Admiralty Act directed that service be made "forthwith" on the Attorney General and the United States Attorney. In 1982 Congress enacted its own Rule 4 amendments as part of a package designed to transfer service obligations from the marshals to plaintiffs. The version in effect at the time of service in the *Henderson* case, then Rule 4(j), allowed 120 days for service and authorized an extension for good cause. Henderson served the Attorney General 47 days after filing, and — after obtaining a good-cause extension — served the United States Attorney 148 days after filing. Finding that at least the 148-day period was not "forthwith," the Court held that Rule 4(j) superseded the Act. The central point of dispute focused on the question whether service forthwith was a condition of the United States' waiver of immunity; the Court ruled that it was not. Going on to find an irreconcilable conflict, the Court further concluded that Rule 4(j), "as is the whole of Rule 4," is "a nonjurisdictional rule governing 'practice and procedure', * * * rendering provisions like the Suits in Admiralty Act's service 'forthwith' requirement 'of no further force or effect,' § 2072(b)." There is one special twist in the decision.

Cir.1969, 419 F.2d 372; *Albatross Tanker Corp. v. S.S. Amoco Delaware*, 2d Cir. 1969, 418 F.2d 248.

[5] *Hansen v. Trawler Snoopy, Inc.*, 1st Cir.1967, 384 F.2d 131, 132. (Several of the cases cited in note 4 above involved supersession by Appellate Rule 4 of statutory appeal-time provisions for admiralty cases. The shift from focus on former Civil Rule 73(a) in the *Trawler Snoopy* case reflects the short interval between the 1966 merger of admiralty practice into the Civil Rules and the 1968 effective date of the Appellate Rules.)

[6] *See Kirby Forest Indus., Inc. v. U.S.*, 1984, 467 U.S. 1, 4 n. 2, 104 S.Ct. 2187, 2191 n. 1; *U.S. v. 93.970 Acres of Land*, 1959, 360 U.S. 328, 333 n. 7, 79 S.Ct. 1193, 1196 n. 7; *Northern Border Pipeline Co. v. 64.111 Acres of Land*, 7th Cir.2003, 344 F.3d 693; *Southern Nat. Gas Co. v. Land, Cullman Cty.*, 11th Cir.1999, 197 F.3d 1368.

[7] 1996, 517 U.S. 654, 116 S.Ct. 1638.

Although the passage just quoted seems to rely directly on § 2072(b), the Court recognized in an earlier passage that Rule 4(j) "was not simply prescribed by this Court pursuant to the Rules Enabling Act. * * * Instead, the Rule was enacted into law by Congress * * *. As the United States acknowledges, however, a Rule made law by Congress supersedes conflicting laws no less than a Rule this Court prescribes."[8]

Many of the remaining cases involve claims that a statute has superseded a court rule. In that setting the Supreme Court has referred to "the necessary clear expression of congressional intent" to supersede.[9] Lower courts frequently look for a "clear statement,"[10] and refer to a presumption that court rules apply.[11] Calls for "clear statement" also appear in decisions dealing with arguments that a rule has superseded a statute.[12]

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[8] The Court then quoted the brief for the United States: "'We agree * * * that Section 2072(b) provides the best evidence of congressional intent regarding the proper construction with Rule 4(j) and its interaction with other laws.'" 517 U.S. at 668-669, 116 S.Ct. at 1646.

[9] *Califano v. Yamasaki*, 1979, 442 U.S. 682, 698-701, 99 S.Ct. 2545, 2556-2558 (a class action may be maintained under Civil Rule 23 for review of determinations that Social Security benefits were overpaid; the statute does not impliedly preclude this procedure).

[10] *Jackson v. Stinnett*, 5th Cir.1996, 102 F.3d 132, 135-136 (PLRA supersedes in part Appellate Rule 24; even absent a clear statement, irreconcilable conflict requires that a later statute be followed); *Robbins v. Pepsi-Cola Metro. Bottling Co.*, 7th Cir.1986, 800 F.2d 641; *Gaubert v. Federal Home Loan Bank Bd.*, C.A.D.C.1988, 863 F.3d 59, 67; *Grossman v. Johnson*, 1st Cir.1982, 674 F.2d 115, 118-123; *U.S. v. Gustin-Bacon Div., Certain-Teed Prods. Corp.*, 10th Cir.1970, 427 F.2d 539 (The requirement in 42 U.S.C. § 2000e-6(a) that complaint set forth facts pertaining to a pattern or practice of resistance to the full enjoyment of statutory rights "ought to be construed to harmonize with the Rules, if feasible"; compliance with the notice-pleading standards of Civil Rule 8 suffices, in part because an insistence on fact pleading would "directly contradict the spirit and purpose of Rule 8(a) and the general concept of modern federal pleading").

[11] "There is a firm presumption that the Federal Rules of Civil Procedure apply in all civil actions * * *." *Walsh v. Ford Motor Co.*, D.C.Cir.1986, 807 F.2d 1000, 1009 (the Magnuson-Moss Warranty Act's protective policies do not warrant departure from the class-certification standards in Civil Rule 23); *Weiss v. Temporary Inv. Fd.*, 3d Cir.1982, 692 F.2d 928, 936, vacated on other grounds 1984, 4365 U.S. 1001, 104 S.Ct. 989.

[12] *Floyd v. U.S. Postal Serv.*, 6th Cir.1997, 105 F.3d 274, 278 (no clear statement, but Appellate Rule 24 and the PLRA "are not reconcilable" — recall that after Appellate Rule 24 was renewed by the 1998 Style amendments, the court concluded that the supersession was reversed, *Callihan v. Schneider*, 6th Cir.1999, 178 F.3d 800).

Not surprisingly, many of the cases dealing with seeming conflicts between a court rule and a statute invoke the "implied repeal" approach to reconciling seemingly inconsistent statutes. In rejecting an argument that Civil Rule 54(d) establishes authority to award costs beyond those authorized by statute, the Supreme Court invoked the familiar axiom that "[r]epeals by implication are not favored."[13] Lower courts offer the same advice.[14]

These general approaches leave open fascinating questions whether general "implied repeal" approaches should extend to potential conflicts between court rules and statutes. The delicate relationships established by the Enabling Act delegation from Congress to the Supreme Court surely require independent analysis before settling on an overall approach.[15] Because the outcome for the Style Project is so clear, a bare sketch should suffice here.

The first difference from an assertion of a conflict between two statutes is that the court rules flow from a particularly constrained source of authority. The rule must be a "general rule[] of

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[13] *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 1987, 482 U.S. 437, 442, 107 S.Ct. 2494, 2497-2498.

[14] *U.S. v. Wilson*, 5th Cir.2002, 306 F.3d 231, 237: The court generally disfavors implicit amendment or repeal of statutes, but where there is irreconcilable conflict, "'the later act to the extent of the conflict constitutes an implied repeal of the earlier one.' * * * We thus view a Federal Rule of Appellate Procedure the same way that we do a federal statute."

Jackson v. Stinnett, 5th Cir.1996, 102 F.3d 132, 135: "The second limit on Congress's power to amend the Rules is the general disfavor with which we view implicit amendment or repeal of statutes."

"Repeals by implication are not favored by the courts." *Floyd v. U.S. Postal Serv.*, 6th Cir.1997, 105 F.3d 274, 278.

"Although repeals by implication are not favored, we do not believe that Congress must explicitly state that a procedural rule is superseded in order to 'clearly express' that proposition." The Multiemployer Pension Plan Amendments providing for prompt payment of withdrawal assessments establish a system that supersedes the stay by supersedeas bond provisions of Civil Rule 62(d).

[15] Three articles provide helpful perspectives. A fascinating exchange is provided by Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 Duke L.J. 281 and Burbank, *Hold the Corks: A Comment on Paul Carrington's "Substance" and "Procedure" in the Rules Enabling Act*, 1989 Duke L.J. 1012. A more recent article, delving deeply into supersession analysis, is Genetin, *Expressly Repudiating Implied Repeals Analysis: A New Framework for Resolving Conflicts Between Congressional Statutes and Federal Rules*, 2002, 51 Emory L.J. 677.

practice and procedure" or "evidence," and it must not "abridge, enlarge or modify any substantive right." Even a rule that in most applications is a valid general rule of procedure may fail to supersede a particular statute because it would affect a substantive right established by the statute.[16]

The limits on the Enabling Act's delegation relate to a more complex set of questions. The relationships between subsequent Congresses (and for that matter within a single Congress) are a continuum of the same legislative powers. In the Enabling Act Congress expressed a special respect for the distinctive capacities and procedures the judiciary can bring to bear in developing rules of procedure. In return, the judiciary must show special respect for statutes. The question whether a later statute supersedes a court rule is not quite the same as the question whether a later court rule supersedes a statute. Judge Easterbrook, for example, has rejected reliance on the general disfavor of repeals by implication:

> The Rules of Civil Procedure * * * cannot "repeal" any statute; the Constitution does not give the Judicial Branch any power to repeal laws enacted by the Legislative Branch. But Congress itself may decide that procedural rules in statutes should be treated as fallbacks, to apply only when the rules are silent. And it has done just this, * * * in what has come to be called the supersession clause of the Rules Enabling Act * * *[17]

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[16] A clear example is *Durant v. Husband*, 3d Cir.1994, 28 F.2d 12, 15. The Virgin Islands Tort Claims Act waives sovereign immunity, but the waiver is conditional. One condition is that no judgment by default can be entered against the government. "To the extent that the Virgin Islands waiver of sovereign immunity is flatly conditioned on the non-availability of a default judgment, the matter is one of substance and not procedure. Applying Rule 55(e) to permit default judgments against the Virgin Islands government in the present case would significantly 'enlarge' the substantive rights conferred on claimants under section 3411(a) of the Tort Claims Act."

The same thought was expressed in *U.S. v. Microsoft Corp., D.C.Cir.*1999, 165 F.3d 952, 959-960. The court concluded that there is no conflict between the discovery protective-order provisions of Rule 26(c)(5) and the Publicity in Taking Evidence Act of 1913. But it observed that a statute is superseded by a later conflicting court rule "unless such supersession would 'abridge, enlarge or modify [a] substantive right.'"

[17] *Northern Border Pipeline Co. v. 64.111 Acres of Land*, 7th Cir.2003, 344 F.3d 693, 694.

A similar view may be implied in *U.S. v. Kim*, 9th Cir.2002, 298 F.3d 746, 748-749. After finding that the appeal-time provisions of Appellate Rule 4(b) are inconsistent with and supersede the provision in 18 U.S.C. § 3731, Judge Noonan concluded: "The Rule trumps the statute. No conflict exists because § 2072 has abolished it." Here too reliance is placed on one Act of Congress to supersede another — albeit the superseding statute, § 2072, may have been enacted first and

A somewhat similar thought was expressed in characterizing implied repeal as arising not from conflict between the court rule and a later statute but from conflict between the Enabling Act and the statute that conflicted with an earlier rule.[18]

As a further complication, there is some lingering uneasiness about the Enabling Act structure that enables a rule prescribed by the Supreme Court to supersede an earlier statute without any affirmative act by Congress. This delegation is more than a delegation of Congressional authority because it excludes the President from the process — there is no bill enacted by House and Senate and presented to the President.

These considerations suggest at least two observations. Although a conflict once found is resolved by the later-in-time rule, the distinctions between legislating and rulemaking may require different approaches in determining whether there is a conflict. The courts have special responsibility for, and control over, the meaning of court rules. Even when rule and statute clearly affect only procedure — when the statute does not establish a specific substantive right that must not be abridged, enlarged, or modified — the courts may, by construction, subordinate a later rule to an earlier statute more readily than they would subordinate a later statute to an earlier rule.

For present purposes, it is more important to consider the respect the Enabling Act process should show for statutes as court rules are developed and amended. The authority to supersede a statute should be exercised with great care. The best cases for supersession will involve matters that are clearly and purely procedural. Supersession may be further supported when confronting a statute embodying antiquated concepts of procedure, or when there is a need to establish uniform procedure in face of a welter of disparate statutory procedures, or when experience shows a clearly better way

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negates future legislation only through the mediating direction of an Enabling Act rule.

[18] *Jackson v.Stinnett*, 5th Cir.1996, 102 F.3d 132, 135-136: "To the extent that the Rules Enabling Act (as expressed in [Appellate] Rule 24(a)) actually conflicts with the PLRA, we hold that the statute repeals the Rule."

of doing things.

The responsibility to respect statutes carries with it authority to expressly disclaim supersession. An intent not to supersede controls.[19] If there is any apparent reason to defer to a known statute, or to a concern that there may be unknown or future statutes, disclaimer can be accomplished by qualifying a general rule by such terms as "unless a statute provides otherwise." But such terms are not always possible. The Style Project demonstrates the need to implement a no-supersession intent by other means. The Supreme Court must be able to improve the drafting of the Civil Rules, as it has done for the Appellate Rules and the Criminal Rules, without changing their meaning and without affecting existing supersession consequences.[20] That is the intent of the Project. The difficult task that remains is to identify the best means of implementing that intent. Part IV provides beginning sketches but should not deter efforts to develop more creative solutions.

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[19] "[T]he first inquiry should be to determine the intent of the Court and Congress in the particular case and to harmonize to avoid an irreconcilable clash of Court and congressional authority if possible." Genetin, 51 Emory L.J. 677, 732, note 16 above.

[20] A parallel to the Style Projects may be found in 1987, when 58 Civil Rules and four Supplemental Rules were amended to make them gender-neutral. The 1987 Committee Notes say blandly: "The amendments are technical. No substantive change is intended." There is no indication that anyone thought that those amendments created new effective dates for supersession purposes.

Summary of Comments

The written comments on Style Rules 1-86, the Style-Substance Rules, and the Style Forms, are described in the Summary of Comments. The hearing on November 18, 2005, and discussion at the Committee meeting that followed, are described in the Notes on the meeting.

SUMMARY OF COMMENTS: STYLE RULES

(Two of the most detailed sets of comments are identified without repeating the full CV designation each time. One set, 05-CV-22, was submitted by Professor Stephen B. Burbank and Gregory P. Joseph, Esq., on the basis of work done by a 21-person working group, is identified simply as "Burbank-Joseph." Similarly, 05-CV-008, submitted by the Committee on Civil Litigation of the United States District Court for the Eastern District of New York, is identified as "EDNY.")

The summaries are at times embroidered by responses. Although this approach is new to the task of summarizing comments, the Style Project presents some issues that may benefit from counterpoint.

Overall Project

Hon. W. Eugene Davis, 05-CV-007: Judge Davis chaired the Criminal Rules Advisory Committee during the style revision project. He opposed the project while the decision to go ahead was deliberated, fearing that "we would make inadvertent, substantive changes or create ambiguities that would result in wasteful, satellite litigation." But the fears "turned out to be almost totally unfounded. We have experienced minimal litigation over the meaning of the style changes. Judge Will Garwood, who was Chair of the Appellate Rules Committee during their style revision project, also tells me that satellite litigation over the meaning of the changes to those rules has not been a problem." "I have every reason to believe that the concern about significant satellite litigation over the meaning of the changes to the Civil Rules will turn out to be just as unfounded as it was with the Criminal Rules."

EDNY: Review of the Burbank-Joseph comments led to an independent consideration of the costs of the style enterprise. "[T]he unanimous judgment of every member of the Committee who expressed a view" was that "the costs and other disadvantages of the style revision project outweigh its benefits." First, there is the risk of unintended consequences. After finding a number of ambiguities and apparent substantive changes, review of the Burbank-Joseph report found that they had uncovered many more — and that there was almost no overlap, suggesting that "there remain a significant number of unintended consequences that neither we nor [they] have spotted." Second, any style revision will bring "disruptions." "[T]he sheer magnitude of the rewording and subdivision of rules that have become familiar to the courts and the profession in their present form will complicate research and reasoning about the rules for many years to come." Third, courts and the profession will be so occupied "in digesting the style revisions" that it will be more difficult to accomplish desirable substantive rules revisions. It would be better to implement style revisions of particular rules or groups of rules "as the need for substantive changes in those rules or groups of rules becomes apparent."

Prof. Bradley Scott Shannon, 05-CV-009: "The non-substantive problems associated with the Federal Rules of Civil Procedure are sufficiently great so as to warrant revision. Overall, the Advisory Committee has done a fine job in this regard, and the restyled rules as proposed, whatever their flaws, are superior to the Rules as they currently exist."

Plain Language Action and Information Network (PLAIN), 05-CV-010: "This draft is a tremendous improvement over the current version. It will be easier to use, and thus should save time and effort, and achieve a higher degree of conformance with the procedures it outlines."

Hon. Peter D. Keisler, Assistant Attorney General, 05-CV-011: In the judgment of the United States Department of Justice "the revisions should help simplify and clarify the text of many of the Rules so that practitioners can better understand and apply them." Attorneys in the Criminal Division and in the Civil Division's appellate staff have found that the style changes in the Criminal Rules and Appellate Rules "have been positive and beneficial. the Department strongly supports the current initiative to restyle the Civil Rules * * *."

Susan Kleimann, President Kleimann Communications Group, 05-CV-012: The style amendments "will make it easier for judges, lawyers, and the public to find the information they need, understand what they find, and be able to use that information effectively."

Lawyers for Civil Justice, 05-CV-014: "Plain language is critical to clear understanding and our reading of the Style Revisions convinces us that lawyers and litigants will save lots of time and trouble in reading and interpreting these rules, if they are adopted. * * * Increased clarity will bring about easier and faster understanding of the Rules and dealings among lawyers will be simplified and facilitated." LCJ disagrees with those who believe the changes are not worth the effort. "Similar claims were made about the re-styling of the Criminal and Appellate Rules, but those have been on the books for some time and appear to have worked well in practice."

John Beisner, Esq. 05-CV-015: The restyled rules attempt to minimize the frequent debates about the meanings of even familiar Civil Rules, "to ensure that our federal judicial rules provide a clear roadmap to litigating in our federal courts — rather than construct a trap for the unwary." Simplifying the rules "will also increase attorney efficiency and even has the potential to reduce ever-escalating attorneys' fees. One study conducted in Australia found that on average, lawyers are able to arrive at a solution 30 percent faster when they consult plain versions of legislation versus traditionally styled legislation. See Law Reform Comm'n of Victoria, Plain English and the Law 69-70 (1987)." "[T]he restyling * * * reflects a broadly-based, overdue realization by public and private entities that simpler is better."

Some comments suggest that the Style Project will interfere with the more important need "to rewrite the rules for 21st Century legal practice. * * * I believe that these concerns are ill-founded." There is no apparent present plan to convene a "Constitutional convention" to rewrite the Civil Rules from scratch. The wisdom of any such project is questionable. Some of the rules are controversial, but gradational change is better than wholesale change. And in any event, a sweeping revision of the whole system would take many years, if not decades. "It makes no sense to force attorneys to litigate under potentially confusing rules for several years simply because a more ambitious project is being planned that could easily take many years to implement." Indeed, by making the rules clearer the style project will save attorneys time, not waste their time by forcing them to relearn a new set of rules and then put aside the new learning for a still newer set of rules.

Hon. Thomas S. Zilly, Advisory Committee on Bankruptcy Rules, 05-CV-016: "The restyling significantly improves the Civil Rules both as to their clarity and readability."

Donald P. Byrne, Esq., 05-CV-017: After a career writing FAA regulations as Assistant Chief Counsel for Regulations, finds the revised rules "a great improvement in communication, especially for lawyers like me who refer to the Civil Rules only occasionally. They're easier to read, digest, and remember." It was a challenge to get through the original rules. "The proposed style revisions make the ride much smoother and the road map much clearer."

ABA Section of Litigation, 05-CV-018: The Litigation Section Council has not taken a position on the Style Rules, but notes the honor and privilege of enjoying the opportunity to participate in the style process through two members assigned to assist in the project and through the Section's liaison to the Advisory Committee. The Committee responded to countless questions raised by these Section representatives.

Committee on United States Courts, State Bar of Michigan, 05-CV-019: "The amendments will enhance the readability, internal consistency and organization of the Federal Rules."

Hon. Bill Wilson, 05-CV-020: Writes in response to the doubts expressed by the EDNY committee. Judge Wilson was a member of the Style Subcommittee when the restyling of the Criminal Rules began. The same objections to restyling were voiced then. "The legal profession has traditionally been very conservative about changes (style or substantive) to any rules with which members of the profession have worked. I am satisfied that plain, simple language is to be preferred." "We need rules so plain that practicing lawyers can understand them. In fact, we ought to make them so plain that even judges can understand them. I urge full steam ahead on this restyling project and others."

Patricia Lee Refo, Esq., and Scott J. Atlas, Esq., 05-CV-021: Scott Atlas and Patricia Refo are past chairs of the ABA Section of Litigation and both were members of the Burbank-Joseph Committee. "In our view, the potential benefits outweigh any conceivable transaction costs. The revised rules represent a significant improvement over the existing rules in terms of resolving ambiguities to conform to clear case law and using plain English so that younger and less experienced federal court practitioners can more easily comprehend the text. We have long thought that the language used in the original rules has outlived its usefulness and that practitioners would be better served by a more straightforward text. The Restyling Project accomplishes this goal."

Burbank-Joseph: "[A] number of members favored continuing the effort." They thought the restyling of other sets of rules had been successful. They agreed that there will be some unintended changes in meaning, but noted that this Committee's comments and others will reduce the number. They conclude that such disadvantages are outweighed by the advantages in greater accessibility of the restyled rules, "particularly to younger and less experienced practitioners." But "[a] greater number of participants were either mildly or strongly negative." The Committee found a number of serious problems, and there may be many more that have not been identified. Whatever benefits may be realized "will pale in comparison with the transaction costs, not just those engendered by uncertainty about a change in meaning, but those generated by the need to learn the new rules (and pay for the new treatises), together with the additional transaction costs that will follow when local rules and standing orders are changed to conform to the restyled rules." Beyond these costs, restyling "might retard or make more difficult the more important task of determining whether we have an appropriate set of rules for litigation in the twenty-first century." It would be better to include restyling as one component of the substantive enterprise — "the bar would not tolerate having to relearn the rules more than once in a generation." Finally, Burbank and Joseph themselves are concerned with problems that "have negative implications for access to court (e.g., Rule 68) and/or for the protection of individual rights (e.g., Rule 65) * * *."

Federal Magistrate Judges Assn., 05-CV-024: "The FMJA supports the proposed restyling of the Civil Rules. The proposed style revisions improve the Civil Rules both as to their clarity and readability."

Council of the ABA Section of Litigation Resolution, April 2006: The Council unanimously adopted this resolution: "Resolved, that the ABA Section of Litigation applauds the Judicial Conference Advisory Committee on Federal Rules of Civil Procedure for its extraordinary efforts on the Restyling Project to modernize the Federal Rules of Civil Procedure without changing their substantive meaning. Success in this effort would be an important service to the Bench, Bar, federal court litigants, and the American public."

Rules 1, 2

Burbank-Joseph: We wrestled with the addition of "proceeding" to Rule 1. It would be possible to take up the suggestion by expanding Rule 2: "There is one form of action or proceeding — the civil action." But that would make a petition to perpetuate testimony, for example, a "civil action." Another possibility would be to rescind Rule 2 — the forms of action are dead and their graveyard influence is limited to substance, not procedure. Rule 2, however, has a dedicated constituency and there is little need to court opposition. The only obvious choice is to delete "and proceedings" from Rule 1, as well as "and proceeding" at the end. The difficulty is that the Civil Rules do apply to many events that are difficult to describe as a "civil action." "[a]nd proceeding" was adopted as one example of the theory that a Style Rule can properly describe something that the present rule means — "suits of a civil nature" may be even more restrictive than "civil action." No recommendation on this one.

Rule 4(c)

Alan B. Morrison, Esq., 05-CV-003: (1) * * * ~~A summons must be served with a copy of the complaint.~~ The plaintiff is responsible for having the summons and a copy of the complaint served * * *."

Rule 4(d)

Burbank-Joseph: For Rule 4(d)(1)(D): The comment on Rule 5 adds a note on Proposed Style Form 5 pointing out that we must change the reference to Official Form 1A.

EDNY: Suggests that (d)(1)(F), (d)(2), and (d)(3) be made parallel — now, only (d)(2) calls on the defendant to sign the waiver as well as to return it. ("sign" does not appear in any of the parallel parts of present Rule 4(d). Form 1A repeatedly calls on the defendant to sign the waiver. The most important place to include "sign" in the rule text is (d)(2). It seems an even choice whether to add it to (d)(1)(F) and (d)(3).)

Rule 4(e)

Burbank-Joseph: This is a neat point. The idea that "dwelling house" does not encompass an apartment, condominium that does not stand alone, mobile home, or the like, seems quaint today. But it is possible that the original intent is that there is only one suitable place — only if the defendant does not have a "dwelling house" can a "usual place of abode" be the place of leaving process. Today the central question is whether alternatives are desirable — should we have to worry whether the summer home or the winter home is the "dwelling" or "usual place"? At least if the answer seems a bit more clear than the comment lets on, we might adhere to the Style version.

Rule 4(i)

Prof. Bradley Scott Shannon, 05-CV-009: The letters a should be capitalized in United States Attorney and Assistant United States Attorney — see (i)(1)(A)(i) and (ii).

Rule 4(k)

Alan B. Morrison, Esq., 05-CV-003: (2)(A): "the defendant is not subject to jurisdiction in the ~~any state's~~ courts of general jurisdiction of any state; * * *." "State's" is ambiguous here.

Rule 4(m)

Alan B. Morrison, Esq., 05-CV-003: Style Rule 15(c)(1)(C) allows relation back as to a new defendant if the new defendant received notice of the required quality "within the period provided by Rule 4(m) for serving the summons and complaint." This carries forward a perplexity that exists in the present rules. Rule 4(m) does not apply to service abroad. The conclusion may be that relation back is not permitted as to a defendant who would have to be served abroad. This could be fixed by revising 4(m): "Except in calculating the time limits under Rule 15(c)(1)(C), ~~T~~this subdivision does not apply to service in a foreign country * * *."

Rule 4.1(b)

Prof. Bradley Scott Shannon, 05-CV-009: Although present Rule 4.1(b) refers only to a "decree or injunction," it might be better to substitute "order" for "decree," or perhaps to use all three words — "order, decree, or injunction." [This may risk a substantive change — contempt is an available sanction for failure to obey a discovery order, but it is not clear whether "decree" should be read to include discovery orders or other procedural orders enforceable by contempt.]

Rule 5(a)

Jack E. Horsley, Esq., 05-CV-002: This one is puzzling. It suggests adding "briefs and excerpts from the record" following "record on appeal." But "record on appeal" appears only in the present rule. It was omitted from the Style Rule because Appellate Rule 10 is a self-contained provision for the record on appeal, including service. Perhaps this is a suggestion to restore "designation of the record on appeal" to the Style Rule.

Rule 5(b)

Burbank-Joseph: Rule 5(b)(2)(B)(ii): This does seem to be the same as Rule 4(e) above. (4B Federal Practice & Procedure: Civil 3d, § 1147, p. 445, says that the dwelling house or usual place of abode words have seldom been interpreted for Rule 5; Rule 4 precedents should be useful.)

Burbank-Joseph: Rule 5(b)(2)(D): The comment seems to be right. The present rule allows service by leaving a copy with the clerk only if the person "has no known address." Those words imply some obligation to attempt to find an address. The Style version, "if the person's address is unknown," does not carry that implication as forcefully. (Section 1147, pp. 445-446, is not helpful; it simply observes that Rule 11 signature requirements make it unlikely that there will be no known address. Compare the "if any" question put to Rules 11 and 26(g) on the Style-Substance Track.)

Rule 5(d)

Prof. Bradley Scott Shannon, 05-CV-009: Present Rule 5(e) allows a paper to be filed with "the" judge." Style Rule 5(d)(2)(B) allows filing with "a" judge. It is not clear whether the present rule allows filing only with the judge assigned to the action. The Style Rule seems to allow filing with any judge — indeed, it is not limited on its face to a judge of the court where the action is pending. The Rule should be made clear. [4B FP&P § 1153 notes that the purpose of filing with the judge is to permit immediate action in pressing circumstances. There may be situations in which action could properly be taken by a judge not assigned to the case. For that matter, it is conceivable that not every case will have been assigned to a judge when the need for action arises — indeed, individual docket systems may not persist forever.]

Rule 6(b)

Prof. Bradley Scott Shannon, 05-CV-009: Rule 6(b) says "may or must"; Rule 6(d), says "must or may." The same sequence should be followed in both.

Rule 6(c)

Jack E. Horsley, Esq., 05-CV-002: "must be served at least 5 days and not more than 10 days Before the time specified for the hearing * * *." This would "put a closure" on the time.

Rule 7(a)

EDNY: The response to a counterclaim should be referred to as a "reply," not as an "answer." A change from the historic usage would "engender unnecessary confusion." (The Style version, by characterizing the response to a counterclaim as an "answer," enables the court to order a reply to the response. The present rule does not authorize an order to reply to a reply. The change was deliberate.)

Burbank-Joseph: Rule 7(a)(7): There are two comments. The first is straight-forward. Present Rule 7(a) says there shall be "a third-party answer." Style 7(a)(6) changes this to "an answer to a third-party complaint." Because all first-response pleadings are now called "answer," it is redundant to refer to a third-party answer in 7(a)(7), which should be: "(7) if the court orders one, a reply to an answer ~~or a third-party answer~~." That seems right.

The second is not as clear. "[T]his" proposed change is a change of meaning and should be included in the style-substance track. It is not entirely clear which change is meant — the present rule explicitly authorizes an order to reply to a third-party answer. Changing the description from "third-party answer" to "answer to a third-party complaint" hardly seems to count. The idea probably is that present Rule 7 does not explicitly authorize the court to order a reply to an answer to a counterclaim because it characterizes the response to a counterclaim as a "reply," not an "answer." That does seem to be a change, at least on quick reading of 5 FP&P Civil 3d §§ 1183-1188. But the purpose of the change is evident — as observed in § 1184, a counterclaim is equivalent to a complaint, and an answer is as important as an answer to a complaint even if it is called a "reply." So a response to the answer may be just as useful as a response to an initial answer. At this point in the process, redescribing this as a "style-substance" point is likely to make a difference only if a distinction is drawn in dealing with supersession questions. And even then it makes a difference only if there is some statute out there that might be superseded; it may be safer to treat it as a matter of style so that there is no possible supersession effect.

Rule 7.1

Burbank-Joseph: Rule 7.1(a): The tag line should be "Who Must File: Contents." This is pure style, but looks good.

Rule 8(a)

Burbank-Joseph: Rule 8(a)(3): The suggestion is to restore words from the present rule: "a demand for judgment for the relief sought." It is urged that "judgment is surely an integral part of the relief sought in any action." This seems pure style.

Rule 8(b)

Burbank-Joseph: The suggestion is to change the caption to reflect the first words of paragraph (1): "~~Defenses and Denials~~ Responding to a Pleading." Again, this seems pure style — and an improvement.

Rule 8(d)

Burbank-Joseph: Rule 8(d)(3): Cross-references to Rule 11 are sufficiently sensitive to be noted with individual rules as well as with the global issues.

Rule 9(a)

Burbank-Joseph: Rule 9(a)(2): Present Rule 9(a) calls for a "specific negative averment." Style 9(a)(2) calls for a "specific denial." The suggestion is that "denial" refers only to a response to an allegation, and does not fit this setting because 9(a)(1) says that a pleading need not allege these things. The proposed drafting remedy is "must do so by a specific ~~denial, which must state~~ statement setting out [forth] any supporting facts that are peculiarly within the party's knowledge." This change may lose part of the meaning — a "specific denial" can be made without any supporting facts if the party making the denial does not have peculiar knowledge of any supporting facts, while "statement" might imply a duty to have and state supporting facts.

Rule 9(b)

PLAIN, 05-CV-010: "must state with particularity the circumstances" is jargon; it should be ""must state the specific circumstances."

Rule 9(h)

Burbank-Joseph: Rule 9(h)(1): The suggestion is to add a comma for clarity: "for purposes of Rules 14(c), 38(e), and 82, and the Supplemental Rules * * *."

Separately, note that we must catch up with the "2006" amendments by changing the title of the Supplemental Rules.

Rule 10(a)

Burbank-Joseph: The suggestion: "Every pleading must have * * * ~~a title that names the parties~~, a file number * * *. The title of the complaint must name all the parties; the title of other pleadings ~~may~~ must name the first party on each side * * *." The argument: The reference to title in the first sentence is redundant with the second sentence. "Must" is necessary in the second sentence because "may" implies that no party need be named.

Rule 10(c)

Burbank-Joseph: There was much discussion about deleting the reference to "exhibit." The suggestion is to restore the prior heading and restore "Exhibit": "(c) Adoption by Reference; ~~Attached Instrument~~ Exhibits. * * * A copy of a written instrument attached as an exhibit to a pleading is a part of the pleading * * *." The underlying concern is that many different kinds of papers may be filed simultaneously with a pleading, and perhaps even physically attached to it (or filed by electronic means that blur the distinction physical and metaphysical attachment). There should be a clear signal of the filer's intention, accomplished by designating as an "exhibit" anything the pleader intends to incorporate in the pleading. The most likely source of confusion may lie in "attached"; it might be better to fall back closer still to the present rule if we can manage it — something like "A copy of a written exhibit to a pleading is a part of the pleading." A pleading may incorporate a writing that is not attached. That may happen because the writing already is an exhibit — it is attached to the complaint, and the answer invokes it. Or it may happen because reliance on a writing makes it part of the pleading even though no party has attached it to any pleading. So the complaint alleges breach of a contract that is not attached. The defendant may be permitted to invoke a clause in the contract

by pleading without attaching the contract as an exhibit. Referring to an "exhibit" does not fully capture that phenomenon. This subject may deserve some further drafting attention.

Rule 11(a)

Hon. Richard E. Door, 05-CV-001: "must be signed * * * in the attorney's individual name * * *." Although "name" standing alone should be read as the real name, it is better to retain "individual" from the present rule. The suggestion is prompted by experience in an action that an attorney filed in his own name by a complaint signed in a fictitious name so "very close to his individual name that one would never think it was fictitious." There should be "no doubt about the line of responsibility for the pleading."

EDNY: "unless the omission is promptly corrected after being called to the attorney's or unrepresented party's attention."

Rule 11(b)

Burbank-Joseph: Rule 11(b)(1): References to "costs" and "expenses" have bedeviled the Style process from the beginning. Research may be needed. The question may not be whether there are clearly established and distinctive meanings for "cost of litigation" as compared to "litigation costs." It may be whether there is sufficient possibility of confusion to deter a change intended to be only a style change. The purpose was to carry forward the same meaning, and to include all expenses inflicted by the improper purpose. (The same point is addressed to Rule 26(g)(1)(B)(ii).)

Rule 11(c)

Burbank-Joseph: Rule 11(c)(2): This seems pure style. The intent is to authorize an award to the party that prevailed on the motion, no matter who wins the ultimate judgment.

Burbank-Joseph: Rule 11(c)(3), (5): Global issue — "on its own initiative."

Rule 12

Burbank-Joseph: Rule 12 Caption: Aside from these suggestions, is "When and How" too terse — should it be closer to the present "When and How Made [Presented]"? The suggestion here, taking from the 12(g), is that the caption should be in this part "~~Consolidating and Waiving Defenses~~ Consolidation and Waiver." The point is that a motion for more definite statement, a motion for judgment on the pleadings, and a motion to strike [may] fall within the 12(g) consolidation requirement, but may not involve "defenses." This seems largely style, but persuasive.

Hon. Thomas S. Zilly, 05-CV-016: To help future researchers into Rule 12 and Bankruptcy Rule 7012, the Committee Note should say that present subdivision (c) has been divided between new subdivisions (c) and (d), while present subdivision (d) has become subdivision (i).

Rule 12(a)

Prof. Bradley Scott Shannon, 05-CV-009: As in Rule 4(i), make capital the "a" — United States Attorney.

Rule 12(b)

Prof. Bradley Scott Shannon, 05-CV-009: This comment renews an issue that has been discussed at some length. Rule 12(b) says that every defense must be asserted in the responsive pleading if one is required, but allows seven defenses to be made by motion. Rule 12(h)(2) and (3) then permit two of the seven enumerated defenses — failure to state a claim or to join a Rule 19(b) party — to be

raised by a Rule 12(c) motion or at trial, and allows a lack of subject-matter jurisdiction to be raised at any time. It is urged that this internal inconsistency should be corrected.

Rule 12(f)

Burbank-Joseph: Rule 12(f)(1): Global style: on its own "initiative."

Rule 12(g)

Burbank-Joseph: Rule 12(g) caption: See Rule 12 caption above. Again, this seems a style question. Here the suggestion is that the caption should be "Consolidating Defenses and Objections." But a motion for judgment on the pleadings, for example, may be made by a plaintiff asserting that the answer establishes the plaintiff's claim; that hardly seems a "defense or objection." Perhaps "Consolidating Motions" would accurately capture both (1) and (2) — (1) says you may consolidate; (2) says that if you do not consolidate, you may not make a later motion except as provided in 12(h).

Rule 12(h)

Jack E. Horsley, Esq., 05-CV-002: There are confusing references to (b)(2) and "sub-paragraph (3)" on p. 37. Since it refers to "subject-matter jurisdiction," the most likely interpretation is that the suggestion relates to 12(h)(3). But that remains uncertain, because the suggestion is to add an inapposite reference to summary judgment: "If the court determines at any time that it lacks subject-matter jurisdiction, or summary judgment, the court must dismiss the action."

Robert MacKay, 05-CV-004: Suggests, somewhat diffidently, that Rule 12(h)(1)(B)(i) is redundant. The suggestion seems to reflect a misunderstanding. Rule 12(h)(1)(A) governs when a party has made a motion. (h)(1)(B)(i) governs when there was no motion. Both are needed.

Burbank-Joseph: Rule 12(h)(1)(B): The question of breaking the structure down as far as "(i)" items is a global style question. The cross-reference to Rule 15(a) might well be improved by making it "15(a)(1)."

Burbank-Joseph: Rule 12(h)(2): Style 12(b)(7) carries forward a motion to dismiss "for failure to join a party under Rule 19." Present Rule 12(h)(2) limits waiver by preserving a "defense of failure to join a party indispensable under Rule 19." The distinction in the present rule is deliberate. An objection based on failure to join a Rule 19(a) party is lost if not properly raised. There is no "gap," as the suggestion implies.

Burbank-Joseph: Rule 12(h)(3): The comment is correct in suggesting that present Rule 12(h)(3) is too simple. It should be read, first, to incorporate all of the doctrines that permit jurisdiction to be established even though jurisdiction could not be supported at the time of the initial complaint or removal. And it should also be read to require remand, not dismissal, when there is no subject-matter jurisdiction to support removal. It might be possible to cure these defects either in the Style Rule or in a Style-Substance Rule. But there is no reason to believe that the present rule has created any problems in this direction, and there is reason to be cautious about attempting a correction that does not unintentionally change something.

Rule 13(b)

Burbank-Joseph: The suggestion is that some difficulty might arise from saying that a pleading may state any claim as a counterclaim — Rule 13(a) says that some "must" be stated. The suggested cure

is to add a few words: "A pleading may also state as a counterclaim ~~any claim~~ against an opposing party any claim that is not a compulsory counterclaim under Rule 13(a)." This seems a style matter.

Rule 14(a)

Burbank-Joseph: Rule 14(a)(6): The present rule begins: "A third-party complaint, if within the admiralty and maritime jurisdiction, may be in rem * * *." Style Rule 14(a)(6) begins: "If it is within the admiralty or maritime jurisdiction, a third-party complaint may be in rem." The suggestion is that the Style version "implies that in rem jurisdiction is automatically available if the third party complaint is admiralty or maritime," while the present rule does not. It is difficult to see the differences of implication. In any event, the next step of the suggestion is that there is no problem "if the qualifications in the existing rule are inherent in an in rem action." The "qualifications" appear to be the references, omitted from the Style Rule, to "against any vessel, cargo, or other property subject to admiralty or maritime process in rem." Those words were omitted as surplusage: all they do is say "we really mean that a third-party complaint can assert an in rem claim against any property properly subject to an in rem claim." This suggestion is puzzling, but seems to involve a style matter.

Separately, the reference to Supplemental Rule C~~(b)~~(1) should be changed to conform to the 2006 amendment making this C(a)(1).

Rule 15(b)

Burbank-Joseph: This is style, but persuasive. The suggestion is right in observing that an argument under (b)(2) that an issue has been tried by consent can be made at trial — for example in a request for instructions or in response to a motion for judgment as a matter of law. The headings for (1) and (2) can be improved. For (1), "Evidence Objected to at Trial" might be abbreviated to "Objections at Trial." For (2), "Issues Tried by Consent" seems fine.

Rule 15(c)

Alan B. Morrison, Esq., 05-CV-003:(c)(1)(B): "a claim or defense that arose out of the ~~conduct,~~ transaction, or occurrence set out * * *." "conduct" does not appear in similar phrases in other rules, and has no independent meaning. [These phrases may have been varied deliberately to send a subtle message that the different rules contemplate different things. As early as 14(c)(1) "transaction or occurrence" is supplemented by "or series of transactions or occurrences." In 15(d) it is "transaction, occurrence, or event." In 20(a) it again is "transaction, occurrence, or series of transactions or occurrences." In 24(a) it is a claim related to the "property or transaction." Cf. 13(g), where property also appears. The Style Project deliberately chose not to adopt a uniform phrase for all of these different settings.]

Burbank-Joseph: Rule 15(c)(1) Caption: This is Style, but seems right. Style Rule 15(c)(1) begins: "An amendment * * * relates back." It does not say "may" relate back. It should be "When an Amendment ~~May~~ Relates Back."

Burbank-Joseph: Rule 15(c)(1)(C): Two suggestions. The first is the global issue whether to subdivide down to items. The second goes to one aspect of the unfortunate reliance on Rule 4(m) that has beset the agenda item on Rule 15 that has again been assigned to a subcommittee for study.

EDNY: " * * * if, during the ~~stated~~ period provided by Rule 4(m), process was delivered * * *."

Rule 16(b)

Alan B. Morrison, Esq., 05-CV-003: Both the present rule and the Style Rule are ambiguous. The deadline for a scheduling order is "within 120 days after any defendant has been served *and* within 90 days after any defendant has appeared." Does "within * * * and within" mean "by the later of" or "by the earlier of"? Choose one. [Unless there is a clearly established reading, this is the sort of ambiguity that seems to lie outside the limits of Style.]

PLAIN, 05-CV-010: "but ~~in any event~~ within 120 days * * *." "in any event" is jargon.

Burbank-Joseph: Rule 16(b)(3)(B): Global style issue about "items."

Rule 16(c)

Burbank-Joseph: Rule 16(c)(1): This is one of many "intensifier" debates. The suggestion is: "~~If appropriate, t~~The court may require * * *." The argument for retaining an intensifier here is that there is a lot of sensitivity about requiring a party or its representative to be present or reasonably available by telephone to consider possible settlement.

Rule 16(d)

EDNY: Rule 16(d): " * * * the court ~~should~~ shall issue an order * * *." "[T]he proposed change seems to create the inference that there is discretion when, under the current Rule, there is not."

Burbank-Joseph: Rules 16(d) and (e): The suggestion is that the Style Rule simply inverts the order of present (d) and (e), and that searches will be easier if the present order is retained. But the Style Rule is a mix-and-match approach: Style (d) begins with the first sentence of present (e), directing entry of an order after any Rule 16 conference. This style choice was made deliberately.

Burbank-Joseph: Rule 16(e): This seems to be a style suggestion. The Style Rule assumed that the final sentence refers to a Style Rule 16(d) order reciting the action taken at the conference, not to an order issued after a pretrial conference but independent of it. If a style change seems indicated, it might be accomplished with fewer words: "The court may modify an order issued under Rule 16(d) after a final pretrial conference only * * *."

Rule 16(f)

Burbank-Joseph: Rule 16(f)(1): Global style — "on its own initiative."

Rule 17

Burbank-Joseph: Rule 17 Title: A style matter. The present rule's "Parties Plaintiff and Defendant" is not obviously more open to other parties than Style's "The Plaintiff and Defendant," although it more obviously refers to plural plaintiffs or defendants. The convention that we draft in the singular might be satisfied by "~~The~~ Plaintiff and Defendant."

Rule 17(a)

Burbank-Joseph: Rule 17(a), (c): The breaking up into separate parts is a style matter. There is a valid style concern that Style 17(c) seems to establish an exclusive list of representatives who may sue or defend on behalf of a minor, as compared to "such as" in the present rule. Recognizing "a like fiduciary" in Style (c)(1)(D) may be protection enough.

Rule 18(a)

Burbank-Joseph: This is style, but persuasive. Style Rule 8(a) begins by saying "a pleading that states a claim for relief — whether an original claim, a counterclaim, a crossclaim, or a third-party claim — * * *." Style 18(a) should preserve the distinction: "asserting an original claim * * *." Or it might not be too radical to shorten both 8(a) and 18(a): "A pleading that states a claim for relief must contain"; "A party asserting a claim may join * * *."

Rule 19(a)

Alan B. Morrison, Esq., 05-CV-003: The captions for both present Rule 19(a) and Style Rule 19(a) refer to persons to be joined if feasible. That term does not appear in the Rule 19(a) rule text. It is disconcerting to find the term in the Rule 19(b) rule text, referring to "a person who is required to be joined if feasible." The disconnect can be cured in either of two ways: (1) In Rule 19(a) — " * * * must be joined as a party if feasible and if: * * *."; or (2) In Rule 19(b): "If a person who is required to be joined ~~if feasible~~ under Rule 19(a) cannot be joined * * *."

Rule 19(b)

Alan B. Morrison, Esq., 05-CV-003: The references to an "adequate" judgment in (b)(3) and to an "adequate" remedy in (b)(4) "do not tell the court from whose perspective — plaintiff or defendant or both — the court should inquire."

Burbank-Joseph: Rule 19(b)(2): Pure style. This touches on the global issue of subdividing provisions, even though 19(b)(2) does not descend to the level of "items." The concern that subparts imply rigidity (exclusiveness) rather than flexibility is somewhat elusive, particularly since subparagraph (C) is "other measures."

Rule 20(a)

Alan B. Morrison, Esq., 05-CV-003: Both (a)(1)(B) and (a)(2)(B) carry forward the language of present Rule 20(a) allowing joinder of plaintiffs or defendants if a common question "*will* arise in the action." The difficulty is that no one can know at the outset whether a common question will arise. "may" seems too open-ended; is likely to seems better.

Separately (a)(3) carries forward the present rule in saying that the court "may" grant judgment for one or more plaintiffs or against one or more defendants. Why not "must"?

Rule 21

Burbank-Joseph: (1) A subtle argument: the present rule allowing addition or deletion of parties "at any stage of the action" means only before judgment; "at any time" in Style 21 may authorize action after judgment. Researching no further than 7 FP&P Civil 3d, § 1688.1, it appears that a motion to drop or add a party may be made on appeal, and even after an action has reached the Supreme Court. Perhaps the Style version is appropriate. (2) The global issue: "on its own initiative."

Rule 22(a)

Jack E. Horsley, Esq., 05-CV-002: Add to 22(a)(2): A defendant exposed to similar liability may seek interpleader through a crossclaim or counterclaim, or a motion to dismiss because of failure to allege facts sufficient to constitute a prima facie case."

Rule 22(b)

*Alan B. Morrison, Esq., 05-CV-003: "This rule supplements * * * Rule 20. The remedy ~~it~~ this rule provides is in addition to * * *." "it" might be misread to refer to Rule 20 as the closest antecedent.

Rule 23(a)

Burbank-Joseph: Rule 23(a)(3): A subtle style point. Present (a)(3) requires that "the claims or defenses of the representative parties are typical of the *claims or defenses of the class*." Style (a)(3) changes this to "typical of the class claims or defenses." The suggestion is that the present rule uses "class" to refer to all questions that inhere in the claims of each class member, while the Style Rule uses "class" to modify only the parts of the claims or defenses that are common to all class members — that is what makes them "class" claims. We deliberately chose to be very conservative in restyling Rule 23 after some initial hesitation whether to style it at all. This point deserves careful consideration.

Rule 23(b)

Burbank-Joseph: Rule 23(b)(1): This suggestion is similar to the (a)(3) suggestion, but less developed. The concern is that "juxtaposing 'individual' and 'class'" works a subtle change in meaning. In this context, referring to prosecution of individual actions by or against individuals comprised within the class definition, it is difficult to share the concern.

Burbank-Joseph: Rule 23(b)(1)(B): Two purely style points. (1) The suggestion prefers the present language as clearer, more idiomatic, and accurate: that "would as a practical matter be dispositive," is better than the Style "that, as a practical matter, would be dispositive." (2) "or" should be added after (1)(B). (Our style convention is to use "or," or "and," only after the next-to-last item in a series. "or" is used after (1)(A) because it is next-to-last in the (1)(A), (B) series.)

Burbank-Joseph: Rule 23(b)(3): Launches a whole series of style suggestions similar to the (a)(3) and (b)(1) suggestions. Here, the change would be "questions of law or fact common to the ~~class~~ members of the class." Again, the theory is that using "class" as an adjective to modify "members" emphasizes the constituent role of those included in the class as part of the class entity, while referring to "members of the class," and so on, emphasizes the individuality of the same people. "The risk of changing the meaning of an important rule outweighs the stylistic benefit * * *."

Burbank-Joseph: Rule 23(b)(3)(A): "the ~~class members'~~ interests of members of the class." See (b)(3) above.

Rule 23(b)(3)(B): "by or against ~~class~~ members of the class." See above.

Rule 23(c)

Burbank-Joseph: Rule 23(c)(2)(B): Global issue: subdivision to the (i), etc. item level.

Burbank-Joseph: Rule 23(c)(3)(B): "whom the court finds to be ~~class~~ members of the class." See (b)(3) above.

Burbank-Joseph: Rule 23(c)(3)(B): This style suggestion is subtle. It appears to suggest an improvement on the drafting of present (c)(3) that better expresses present meaning; clearly it does not suggest reverting to the present drafting. As revised, the Style Rule would require that the judgment in a (b)(3) class action "include and specify or describe those to whom the Rule 23(c)(2) notice was directed~~;~~ and who have not requested exclusion, and whom the court finds to be class members." The concern is that notice and failure to request exclusion should be tightly bound in a way that separation by commas in an apparent series of independent elements does not accomplish. The only way to be bound is to be one to whom notice was directed and to fail to request exclusion.

Burbank-Joseph: Rule 23(c)(4): Suggested restoration: "an action may be brought or maintained as a class action with respect to particular issues." The concern is that "brought" establishes the proposition that the initial request for certification need not assert a "whole" class, but may be limited to an issues class.

Rule 23(d)

Burbank-Joseph: Rule 23(d)(1)(B): Global issue: subdivision to items goes too far.

Rule 23(h)

Susan Kleimann, 05-CV-012: "The movant must serve ~~N~~notice of the motion ~~must be served~~ on all parties * * *."

Rule 23.1(b)

Susan Kleimann, 05-CV-012: The rule says that the complaint must be verified — who must verify it? Make it active. ["A" plaintiff must verify? "The" plaintiff?]

Rule 25(a)

Burbank-Joseph: Rule 25(a)(1): Present Rule 25(a)(1) says that the action "shall" be dismissed if there is no timely motion for substitution. The Style Rule says "may." The concern is that this should be treated as Style-Substance unless "there is unanimous agreement in the case law that the existing language confers discretion." This issue was considered at length, with the advice of consultants. We should resurrect the records. It is not clear at the moment whether the Style version satisfies a test of "unanimous agreement in the case law." One question is whether that is the appropriate standard. A second question is whether there is any realistic supersession concern that would justify treating this as Style-Substance, and whether treating it as Style-Substance would actually augment the risk of unintended supersession.

EDNY: Rule 25(a)(1): Makes the same point. The present rule does not give discretion — the action must be dismissed. "The Committee is not necessarily advocating that the Rule should be a mandatory one, but merely wishes to draw attention to the fact that a substantive change is being made."

Rule 26(a)

Burbank-Joseph: Rule 26(a)(1)(A)(iv): Suggested addition: "to satisfy all or part of a possible judgment in the action." The concern is that absent this limit, the rule might require disclosure of irrelevant insurance agreements. Pure style. [It is not clear whether the failure to object on the global issue of subdividing at the item level was deliberate. Since the same global issue is not raised as to (a)(2) or (3), it may be recognized that items help navigate this particularly long subdivision. But the eventual failure to comment on items wherever they appear suggests that the point was taken to have been made in general terms. They made it clear at the November 18 hearing: the objection to item subdivision extends to all rules.]

EDNY: 26(a)(2)(B): "~~this~~ the expert disclosure required by 26(a)(2)(A) * * *."

Burbank-Joseph: Rule 26(a)(2)(B)(vi): Another neat suggestion: add these words: "(vi) a statement of the compensation to be paid for the study and the witness's ~~compensation for study~~ testimony in the case." (I think that is how they would do it.) The concern is that "the witness's compensation for study" does not include compensation paid to others who do work to support the witness's study. "The current disclosure requirement captures everything done by the expert as well as the back-up firm because disclosure is not limited to the expert's individual compensation."

Burbank-Joseph: Rule 26(a)(5): This one is fascinating. What now is (a)(5) was all of (a) until 1993, when the creation of disclosure in (a)(1) through (4) demoted it to a tag-end subdivision. It also was revised to expressly include Rule 45, albeit only one specific part; the Committee Note seems to suggest the only purpose was to "take note" of Rule 45 inspection "without the need for a deposition." It is fascinating — and sobering — to learn that some lawyers have been willing to argue that Rule 36 requests to admit and Rule 45 subpoenas are not "discovery" procedures. The idea that such arguments might be used "to elude discovery cutoff dates" is, well, surprising. But there the reported cases are; it seems likely that there are many more unreported examples. If deleting the seemingly redundant index will encourage lawyers to make such arguments, or will cause courts greater difficulty in rejecting them, we might rethink this style choice. One method of styling would be simply to list the rule numbers for the devices now described mostly by words — Rules 30, 31, 33, 34, 35, 36, and [part of] 45.

Rule 26(b)

Burbank-Joseph: Rule 26(b)(1): This comment notes that several rules refer to discovery of "documents and tangible things." One involves Style Rules 26(b)(5) and 45(d)(2), which refer to "documents, communications, or things not produced or disclosed." The inconsistency in terminology does not appear to be inadvertent. Rule 26(b)(5) is the privilege log rule; Rule 45(d)(2) is its analog for discovery from a nonparty, almost certainly copied from 26(b)(5) to be consistent. A response to an interrogatory, for example, could easily log as privileged a "communication" that is not a document. (Some thought should be given to the question whether this is true for nonparty discovery under Rule 45: could a subpoena duces tecum seek production of a "communication" that is not reduced to "document" form? Literally Rule 26(b)(5) applies at deposition. Style Rule 45(d)(2) applies to a person "withholding subpoenaed information"; does that read on a deposition response? Note that present Rule 45(d)(2) applies to "information subject to a subpoena [that] is withheld"; that might seem to aim at a deposition better than does the Style language.)

A second inconsistency is Style Rule 45(c)(2)(B). This rule establishes the procedure for objections by "[a] person commanded to produce designated materials or to permit inspection." The present rule applies to "a person commanded to produce and permit inspection and copying." The changes were the subject of explicit style discussion. The Style Rule's "designated materials" has no analog in the present rule. Do we need it? If we need it, would it be better to make it parallel to 45(c)(2)(A), which addresses "[a] person commanded to produce designated documents or tangible things"?

Prof. Bradley Scott Shannon, 05-CV-009: Rule 26(b)(1): A few unnecessary words can be omitted: "Unless otherwise limited by court order, ~~the scope of discovery is as follows:~~ * * *."

EDNY: Rule 26(b)(4)(B): " * * * But a party may do so only: * * *." Present Rule 26(b)(4)(B) allows discovery of a trial-preparation expert "only" in the two listed circumstances; the Style Rule should be consistent.

Susan Kleimann, 05-CV-012: "[W]hat exactly does 'manifest injustice' mean"? This is legal jargon.

Rule 26(e)

Burbank-Joseph: This comment tests one of the limits adopted in the Style process. Present Rule 26(e) limits the duty to supplement disclosures and discovery responses by defining it as a duty "to include information thereafter acquired." This limit was deliberately deleted in Style 26(e) on the theory, explained in the Committee Note, that in practice lawyers recognize a duty to add to prior responses whenever they learn information that makes the initial response incomplete or incorrect; it makes no difference whether the information was available at the time of the initial response or was thereafter acquired. This approach reflects the determination that a Style Rule can properly reflect what the present rule means in practice, no matter what it seems to say. The comment suggests that in practice there is a distinction between supplementing a prior response and correcting a prior response. The "safe harbor" opportunity to correct a Rule 11 violation is pointed to as an illustration of correction. It seems all the same thing — what counts is that the correction or supplementation is made, not what it is called. But perhaps there are differences. Correction is relevant to Rule 26(g) sanctions, or may be. Correction may not come within the present Rule 37(c)(1) sanctions for failure to supplement "under Rule 26(e)(1) or (2)." These possibilities may suggest that it strains Style Project limits too far to delete "information thereafter acquired" from the rule text.

Rule 26(g)

Burbank-Joseph: Rule 26(g)(1)(B)(ii): (Apparently the protest about subdividing down to the item level is now going without saying.) This raises the same question about the change from "the cost of litigation" to "litigation costs" as was directed to Rule 11(b) in the same terms.

Burbank-Joseph: Rule 26(g)(2): This one is intriguing. Present Rule 26(g)(2) says that if a discovery request, response, or objection is not signed, "a party shall not be obligated *to take any action with*

respect to it until it is signed." Style Rule 26(g)(2) reduces this to "the other party has no duty to respond." The suggestion is to restore the present language: "has no duty to ~~respond~~ take any action with respect to it." The explanation, however, raises issues that may not be addressed by simply restoring the present language. The suggestion is that an unsigned request, response, or objection is "inoperative." What action, after all, is taken in response to a discovery response? Or in response to an objection — there is no duty to move to compel discovery anyway? Do we mean to say that an unsigned response does not count for purposes of meeting the deadline for response or a discovery cutoff? The present rule does not say that. The conservative course would be to restore the present language and let the questions sort themselves out without attempting to reassure ourselves that the economy of words cannot affect the outcome.

Rule 30(b)

Alan B. Morrison, Esq., 05-CV-003: Present Rule 30(b)(5) provides that the notice to a party deponent may be accompanied by a Rule 34 request for the production of documents and tangible things at the taking of the deposition, concluding: "The procedure of Rule 34 shall apply to the request." Style Rule 30(b)(2) says that the notice to a party deponent may be accompanied by "a request complying with Rule 34 to produce documents and tangible things at the deposition." The comment observes that some subparts of Rule 34 are inconsistent with parts of Rule 30, particularly the time to respond. "It may be easier to specify the parts of Rule 34 that do apply — such as the description requirement under (b)(1)(A) — and not get involved with the rest of Rule 34." [To the extent there is a problem, it is not much aggravated by the Style Rule, although the specificity of the present rule is a help — Rule 34 procedures apply, including the time to "respond." The response may be production, or it may be an objection, or it may be a statement inspection and related activities "will be permitted." It is plain that these control — a response cannot be forced within 20 days by noticing the deposition for 20 days hence, and so on. "complying with Rule 34" in the Style Rule should be read the same way; whether the compression effected by Style is worth the potential misreading deserves attention.]

Jack E. Horsley, Esq., 05-CV-002: Style Rule 30(b)(5)(A)(v) requires the officer conducting a deposition to begin with a statement that includes the identity of all persons present. "[I]t would be advisable to add * * * a statement communicating why the identity of persons present should be part of the officer's observation."

Burbank-Joseph: Rule 30(b)(3)(A), 30(b)(5)(B): Present Rule 30(b)(2) refers to recording by "sound, sound-and-visual" means. This appears in Style Rule 30(b)(3)(A)(3) as "audio, audiovisual." Present Rule 30(b)(4) inveighs against distorting the demeanor or appearance of witnesses or attorneys "through camera or sound-recording techniques." Style Rule 30(b)(5)(B) carries forward "camera or sound-recording techniques"; it should be conformed to 30(b)(3)(A). That sounds right. There are at least two choices. Style (b)(5)(B) could refer to "camera or ~~sound-~~ audio recording techniques," or it could be simply: "camera or ~~sound-~~ recording techniques."

Rule 30(f)

Burbank-Joseph: Rule 30(f)(1), 31(b): Present Rule 30(f) requires that the officer taking a deposition "promptly send it to the attorney who arranged for the transcript or recording." Style Rule 30(f)(1) carries these words forward without change. Present Rule 31(b), addressed to a deposition on written questions, directs the officer to "file or mail the deposition." Style Rule 31(b)(3) instead directs the officer to "send it to the party." (In the structure of the rule, this means "the party who noticed the deposition.") Deletion of filing from Style 31(b)(3) reflects the amendment of Rule 5(d) that directs filing of discovery materials only when "used in the proceeding or the court orders filing." It is suggested that these provisions should be made identical; a preference is expressed for mailing to the "party" to take account of pro se cases. This suggestion presents two questions. The first is the scope of the Style Project. Rule 31 needed to be revised to account for Rule 5(d), and in a way that surmounts the possible ambiguity of the present rule by reading it to direct mailing to the party who noticed the deposition. Should the desire to make these directions uniform bring a clear change in

Rule 30(f) within the reach of Style? That question in turn leads to the question whether the change should simply substitute "party" for "attorney." It might make sense to direct that a copy of the oral deposition be sent to the party who arranged for the transcript or recording, not to the party who noticed the deposition. (Who is in charge when different parties designate different modes of recording?) And to provide differently in Rule 31. In the end the suggestion is to refer these issues to the Style-Substance track. There is no likely supersession question here. Calling it style-substance now makes no difference unless the question is put off for a further round of public comment — and then the question would be whether to delay the entire Style Project, or to let it go forward with the most satisfactory current approximation and address the larger change separately.

Burbank-Joseph: Rule 30(f)(4), 31(c): Present Rule 30(f)(3) directs the party taking the deposition to give prompt notice of its filing. Present Rule 31(c) says "when the deposition is filed the party taking it shall promptly give notice thereof." These rules reflect former Rule 5(d), which directed that discovery materials be filed unless the court ordered otherwise. Rule 5(d) was amended in 2000 to direct that discovery materials not be filed until used in the proceeding or the court orders filing. One question may be whether the Style Project can be the occasion for correcting the failure to make conforming amendments of Rules 30 and 31 in 2000. The present suggestion, aimed toward the Style-Substance track, is that the "notice of filing" should be deleted. Other rule provisions "cover the notice requirements" when transcripts are filed in connection with motion practice or similar events. That fairly puts the question: is there any value in requiring separate notice of filing? Suppose a party makes a motion for summary judgment, with appropriate notice, and then remembers to file the supporting discovery materials, or makes additional filings in response to the arguments against summary judgment: is there a clear independent notice requirement? And if a modified notice requirement seems desirable — or the conservative thing to do in the Style Project — can it properly be done as a matter of Style?

Rule 33(a)

Burbank-Joseph: Rule 33(a)(2): The suggestion fairly joins the issue. Is it really proper to decree that it is only a matter of style to correct the lamentable drafting that gave us present Rule 33(c): "An interrogatory otherwise proper is not ~~necessarily~~ objectionable merely because an answer * * * involves an opinion or contention that relates to fact or the application of law to fact"? The suggestion is that an opinion interrogatory may indeed be objectionable, as when it is addressed to a nonexpert and asks for an expert opinion. There will be arguments that the objection is "merely because" an opinion is sought, and that the subject is relevant, so the party must answer. There was a strong view earlier that correction is clearly called for, but that it is better not to test the limits of the Style Project in this way. This suggestion invites further consideration of that view.

Rule 34(a)

Burbank-Joseph: The comment renews the suggestion to adopt consistent usages of "document" and "tangible thing." It is noted again here as a reminder that the addition of "electronically stored information" to several rules in the amendments still on track to take effect on December 1, 2006, requires careful attention to all of the related rules to make sure that there are no unintentional oversights.

Rule 36(a)

Burbank-Joseph: Rule 36(a)(5), (6): Pure Style: paragraphs (5) and (6) should be combined. Both deal with objections. Fewer paragraphs are better than more.

Rule 37(a)

Prof. Bradley Scott Shannon: Present Rule 37(a)(2)(B) refers only to a failure to respond to a request for inspection under Rule 34 and an order compelling inspection. Style Rule 37(a)(3)(B) should not be expanded to include in the introduction an order compelling "production."

Rule 37(b)

Burbank-Joseph: Rule 37(b)(2)(A)(i): This suggestion is similar to one made with Rule 11(c)(2) and again with Rule 50(e), but the context of each rule invites different reflections. Present Rule 37(b)(2)(A) authorizes as a sanction for disobeying a discovery order that facts be taken to be established "in accordance with the claim of the party obtaining the order." Style Rule 37(b)(2)(A)(i) renders this as established "as the prevailing party claims." In this setting it seems nearly impossible that anyone would contend that the "prevailing party" means the party that ultimately wins judgment. It can mean only the party that prevailed by obtaining the discovery order and then by winning the sanction for violating the discovery order. But the Style question remains: is it somehow safer to fall back on the present language — "as the ~~prevailing~~ party obtaining the order claims"?

Rule 37(c)

Burbank-Joseph: Rule 37(c)(1): This is a suggestion to improve an ambiguity that exists equally in the present rule and in the Style Rule. It seems to be well within the limits of the Style Project. Present Rule 37(c)(1) begins by addressing failure "to *disclose* information as required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2)," and as a sanction says that the party is not "permitted to use as evidence * * * information not so *disclosed*." Style Rule 37(c)(1) is similar. The problem is that "disclose" in its first appearance seems to be aimed at Rule 26(a) disclosures, while "disclosed" in the second appearance clearly embraces both failure to supplement discovery responses and also failure to correct an incomplete disclosure by way of discovery or other writing. This is not good drafting. One way to revise the Style Rule might be:

> **(1)** ***Failure to Disclose or Amend.*** If a party fails to disclose the information or a witness required by Rule 26(a) — or to provide the additional or corrective information required by Rule 26(e) — the party is not allowed to use the information or witness to supply ~~as~~ evidence on a motion, at a hearing, or at a trial ~~any witness or information not so disclosed~~ * * *.

(This may not be an improvement. We might seek a substitute for "disclosed" in the second appearance. "Revealed,""supplied," or something like that.)

Rule 38(e)

Burbank-Joseph: Rule 38(e): This is pure style, but I like it. So much for "under." The point is that Style Rule 9(h) says that a claim cognizable only in the admiralty or maritime jurisdiction is governed by Rules 14(c), 38(e), 82, and the Supplemental Rules "whether or not so designated." A claim that could be brought either under the savings clause or in admiralty is governed by those rules only if designated as an admiralty or maritime claim. Style Rule 38(e), by referring to "a claim designated as an admiralty or maritime claim under Rule 9(h)," may seem to leave out an inexorably admiralty or maritime claim that does not depend on designation. To be sure, little is likely to turn on this — Style Rule 38(e) will not be read to create a right to jury trial on a pure admiralty or maritime claim; Style Rule 38(a) pretty much takes care of that. The suggestion is to restore the present language: "issues in ~~a claim designated as~~ an admiralty or maritime claim ~~under~~ within the meaning of Rule 9(h)." Or we could preserve our fond affection for "under": "issues in a claim ~~designated as~~ that is an admiralty or maritime claim under Rule 9(h)."

Rule 39(a)

Burbank-Joseph: Rule 39(a)(1): This is a variation on the global issue of "written stipulation." Here present Rule 39(a) provides for waiver of jury trial after demand " by an oral stipulation made in open court and entered in the record." Style Rule 39(a)(1) reduces this to "so stipulate on the record." The suggestion notes some uncertainty as to the meaning of "open court," and also observes that a party can waive a prior jury demand through conduct (apparently suggesting that a stipulation on the record may be conduct that effects a waiver even though it is not in "open court"). But as a style matter it suggests restoring "so stipulate on the record in open court" to avoid any risk.

Rule 40

Hon. Thomas S. Zilly, 05-CV-016: Present Rule 40 includes a third method for placing an action on the trial calendar — "such other manner as the courts deem expedient." This is omitted from Style Rule 40. The omission may create confusion as to self-calendaring systems that enable a party to select an available date without prior notice to other parties. The Style-Substance Track version of Rule 40 seems to erase any doubt — it does not impose any implicit limits on the means a court may provide for scheduling trials. There is no need for change if the Committees believe it useful to permit self-calendaring systems. [Presumably a self-calendaring system does provide notice of the date selected, and likely a means for challenging the date.]

Rule 41(c)

Burbank-Joseph: Rule 41(c)(2): Present Rule 41(c) provides that the claimant on a counterclaim, crossclaim, or third-party claim can take an involuntary dismissal under 41(a)(1) "before a responsive pleading is served, or if there is none, before the introduction of evidence at *the* trial or hearing." Style Rule 41(c)(1)(2) changes "the" to "a": "before evidence is introduced at *a* hearing or trial." The suggestion is that "a hearing" could refer to a pretrial hearing at which evidence is introduced. Surely that is right. So the question is whether, as suggested, "the" hearing in the present rule looks only to a trial on an equitable claim. This question ties to a problem that was considered to be beyond the reach of a Style Project. As observed in 9 FP&P: Civil 2d, § 2374, the right to dismiss an action without court order terminates on the filing of an answer or of a motion for summary judgment. It appears to be absent-mindedness, not deliberate choice, that a motion for summary judgment does not cut off the right to dismiss a counterclaim, crossclaim, or third-party claim. (The Treatise cites a 1940 district-court decision that submission of an affidavit by the plaintiff on a motion for summary judgment is not the introduction of evidence at a trial or hearing.) "[T]he trial or hearing" is itself ambiguous. Suppose the claim is tried ahead of the counterclaim: does introduction of evidence at that trial cut off the right to dismiss the counterclaim without court order? "a" could easily change the answer. This is a matter of style, but in all the suggestion to revert to "the" deserves serious consideration.

Rule 42(a)

PLAIN, 05-CV-010: "join * * * any ~~or all~~ matters * * *."

EDNY: "and" between paragraphs (2) and (3) should become "or." "[C]ourts have traditionally viewed these options in the disjunctive, even though they were set forth in the original Rule in the conjunctive."

Prof. Bradley Scott Shannon, 05-CV-009: The same suggestion as EDNY above.

Rule 43(a)

Burbank-Joseph: This style suggestion is another round in the debate about "intensifiers." The 1996 Rule 43(a) amendment was deliberately drafted with intensifiers to signal the exceptional character of testimony by contemporaneous transmission from a different location. "for good cause shown in compelling circumstances" was not a mere reflex of ingrained habit. Style Rule 43(a) deleted "for good cause shown." As a global convention, "shown" is not likely to be restored. That leaves the style question: will users of the rule understand that the rules do not use intensifiers, and that "compelling circumstances" means the same as "for good cause [shown] in compelling circumstances"?

Rule 43(b), etc.

Hon. Thomas S. Zilly, 05-CV-016: Reflecting the prior abrogation of subdivisions (b) and (c), present subdivisions (d), (e), and (f) are redesignated as (b), (c), and (d). This change could create confusion for future researchers into Rule 43 and Bankruptcy Rule 9014. As with Rule 12, the Committee Note should point to the change.

Rule 44.1

EDNY: " * * * give notice by a pleading or other reasonable written notice ~~writing~~ * * *." "We believe that the elimination of the word 'reasonable' from the proposed Rule might lead some to argue that any written notice — even if unreasonable — would satisfy the Rule."

Rule 45(a)

Burbank-Joseph: This question troubled us during the style process. Present Rule 45(a)(3) authorizes an attorney to issue a subpoena "on behalf of" a court. Style Rule 45(a)(3) refers to it as a subpoena "from" a court. The comment suggests that "from" implies that the "attorney must obtain the subpoena from" the court. "The entire point of this provision is just the opposite." The comment seems to fear that "from" means the attorney must persuade the court to issue the subpoena. But the rule says that the "attorney * * * may issue and sign a subpoena from." There is no room to doubt that the attorney issues the subpoena. Unless the comment means something else, change may not be indicated.

Rule 45(b)

Hon. Thomas S. Zilly, 05-CV-016: Present Rule 45(b)(1) requires service on each party of "prior notice" of a subpoena commanding production of documents or things. Style Rule 45(b)(1) directs that before the subpoena is served "a notice must be served on each party." This is ambiguous — how long "before"? 30 seconds? A sufficient time to afford other parties an opportunity to act before the subpoena is served? The consensus of the Bankruptcy Rules Advisory Committee was that service on the parties should be "with" or "contemporaneously with" service on the subpoenaed person. In addition, the Committee Note indicates that the Style Rule resolves some level of uncertainty and disagreement in the cases; it may be more than merely "stylistic."

Burbank-Joseph: Rule 45(b)(1): This one also is puzzling. Present Rule 45(b)(1) says that notice of a subpoena commanding production of documents or things must be served on each party "in the manner prescribed by Rule 5(b)." Those words are omitted from Style Rule 45(b)(1). The comment suggests concern that "Because a subpoena is process, the reference to Rule 5 eliminates any confusion that service need be effected on a party pursuant to Rule 4." But there should be no confusion. Rule 4 governs service of the summons. Rule 4.1 governs service of "[p]rocess — other than a summons under Rule 4 or a subpoena under Rule 45 * * *." Rule 5(a)(1)(E) says that a "written notice" must be served on every party. Rule 5(b) establishes the manner of service under Rule 5. Absent more explanation, this one does not seem to indicate a need for change.

Rule 45(c)

Burbank-Joseph: Rule 45 (c)(2)(B)(ii): A fine style point. Present Rule 45(c)(2)(B) says that if a person commanded to produce objects, the party serving the subpoena "shall not be entitled to inspect and copy * * * except pursuant to an order of the court." Style Rule 45(c)(2)(B)(i) says that the serving party may move for an order compelling production, etc.; 45(c)(2)(B)(ii) says: "Inspection and copying may be done only as directed in the order." The concern is that under the present rule it is clear that a party not "entitled" to inspect and copy can inspect and copy if the dispute is resolved without court order, while the Style version may imply that the parties cannot resolve the objection by agreement. It would be a rare court that insisted that a discovery dispute could not be resolved without its order. At any rate, the suggested revision would read: "(ii) ~~Inspection and copying may be done only~~ The serving party shall not be entitled to inspect or copy except as directed in the order * * *." [Our style would be "is not entitled."] There are other possible drafting approaches, to be explored if the subject is taken up.

Rule 48

Burbank-Joseph: The point seems to be a matter of style. Present Rule 48 begins: "The court shall seat a jury of not fewer than six * * *." It goes on to allow the parties to stipulate to a verdict "taken

from a jury reduced in size to fewer than six members." This seems clear: the jury must be at least six at the outset, and can be reduced by stipulation only when the jury is "reduced" by some event after it is seated. Style Rule 48 begins "A jury must have no fewer than 6 * * *." It concludes that "unless the parties stipulate otherwise" the verdict must "be returned by a jury of at least 6 members." That might imply that the parties can stipulate at the outset to a jury of fewer than 6 members. Of course the intent of the Style rule is the same as the present rule: there must be at least 6 at the beginning, and also at the end unless the parties stipulate to fewer than 6.

Prof. Bradley Scott Shannon, 05-CV-009: Finds a different ambiguity. The opening statement that a jury must have no fewer than 6 members seems to contradict the second sentence statement that the parties can stipulate to a verdict returned by a jury reduced to fewer than 6 members. "At the start of trial" could be added go the first sentence to correct this problem.

PLAIN, 05-CV-010: "Unless the parties stipulate otherwise, the verdict must be unanimous ~~and must be returned by a jury of at least 6 members~~." The concept of "at least 6" need not be repeated. [This comment seems to read the rule as if a stipulation can authorize a less-than-unanimous verdict, but cannot authorize a verdict by a jury reduced to fewer than 6 members. Is this a plausible misreading?]

Rule 49(a)

Burbank-Joseph: Rule 49(a)(2): Style suggestions. "The court must ~~instruct the jury~~ give the instructions and explanations that are necessary to enable ~~it~~ the jury to make ~~its~~ findings on each submitted issue." (1) "[E]xplanation" is restored from the present rule because it may mean more than instructions — for example, responding to jury questions. This suggestion parallels concerns expressed earlier. The present rule seems to reflect a concern that submission of a special verdict may be improved by explaining to the jury the nature of their task in ways that do not involve instructions on the substantive law. The suggestion deserves renewed consideration. (2) "[T]o enable it to make its findings" in the Style Rule is criticized because "it" might refer to the court rather than the jury. This criticism ignores the style convention of the last antecedent, and in any event suggests an implausible reading of the Style Rule.

Burbank-Joseph: Rule 49(a)(3): Present Rule 49(a): "[E]ach 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." This can be read to say that if the plaintiff objects but the defendant does not and the plaintiff wins the verdict on other issues, or the court decides the issue to the plaintiff's satisfaction, the defendant has waived the right to jury trial. (Surely this result would follow if the defendant argued that the issue should not be submitted to the jury.) Style Rule 49(a)(3) begins by stating that "A party waives the right to a jury trial on any issue of fact * * * unless, before the jury retires, *the* party demands its submission to the jury. If *the* party does not demand submission, the court may make a finding * * *." This more clearly expresses the meaning attributed to the present rule above. But the suggestion is that the present rule means something else: If the plaintiff objects to omission of the issue, the court may not make a finding and the defendant is entitled to jury trial of the issue. If that is right, revision is in order; the suggestion is "If ~~the party does not~~ no party demands submission, * * *." (Compare Rule 51(d)(1)(A): during the recent revision of Rule 51, it was suggested that any party should be allowed to raise on appeal an objection to the instructions that was made by any other party, so long as it is the same objection. That suggestion was rejected in favor of the view expressed in the rule — only the party that made the objection can assert error on appeal.)

Rule 49(b)

Burbank-Joseph: Rule 49(b)(1): This suggestion is similar to the first suggestion for Rule 49(a)(2) above. Present Rule 49(b) requires the court to give the jury "such explanation or instructions" as may be necessary. Style Rule 49(b)(1) omits any reference to explanation. Communicating to the jury the thought that they must both return a general verdict and also answer the written questions may well be better described as "explanation" than as "instruction." The specific suggestion is: "The court must ~~instruct the jury to enable it to render a general verdict and~~ direct the jury to answer the

questions in writing and to render a general verdict, and must ~~direct~~ give the instructions and explanations that are necessary for it to do ~~so~~ both." [A streamlined version might be: "The court must give an explanation and instructions that enable the jury to render a general verdict and answer the questions in writing."]

Rule 50(a)

Jack E. Horsley, Esq., 05-CV-002: Suggests adding — just where is not clear — "and make a prima facie case."

Rule 50(e)

Prof. Bradley Scott Shannon, 05-CV-009: **(1)** Present Rule 50(d) says only that "nothing in this rule precludes [the appellate court] from determining that the appellee is entitled to a new trial." That is not the same as the Style Rule's statement that the appellate court may order a new trial. This part should be rewritten to reflect the present rule or should be deleted. **(2)** Present Rule 50(d) does not say that an appellate court can order judgment as a matter of law after the trial court denies the motion. It is a mistake "to codify some perceived ability, based only on pragmatism, on the part of appellate courts to decide issues not first decided by trial courts."

Rule 51(c)

Burbank-Joseph: Rule 51(c)(1): This suggestion seems right on. "A party who objects to an ~~proposed~~ instruction * * * must do so on the record * * *." Present (c)(1) is "an instruction." The suggestion correctly observes that an objection is timely under (c)(2)(B) if the party first learns of the instruction when it is given. And the objection should be made on the record.

Rule 52

Burbank-Joseph: A persuasive style suggestion for the Rule title. Rule 52(a)(1) includes actions tried with an advisory jury. So: "Findings and Conclusions by the Court ~~in a Nonjury Proceeding~~; * * *."

Rule 54(a)

Burbank-Joseph: A sensible style suggestion, with a possible variation, that also points to an internal absurdity of Rule 54(a). (1) The suggestion is that "shall" in the present rule should become "may" in the Style Rule, not "must." The dilemmas that arise from "shall" are familiar. Here the point that a judgment "should still be given effect" despite a violation of Rule 54(a) seems persuasive. Perhaps the best outcome would be: "A judgment ~~must~~ should not include recitals * * *." (But note that Rule 58(a) requires that a judgment must be set out in a "separate document" that cannot include anything else. "Must" might after all be appropriate but for the next problem.) (2) Rule 54(a) defines a judgment as any order from which an appeal lies. That includes all sorts of things other than final judgments. The most likely sort of self-contradiction arises from collateral-order doctrine. As one familiar example, an order denying an official-immunity motion to dismiss or for summary judgment might well explore — "recite" — the pleadings. It would be foolish to say that because Rule 54(a) transforms the order into a judgment the court cannot explain its decision in this way. More generally, the margins of collateral-order appeal are uncertain; the district judge may have no reason to suppose that an order that recites pleadings or the like is a "judgment" because it is appealable.

Rule 54(b)

Burbank-Joseph: Style: "the court may ~~enter~~ direct the entry of a final judgment." The suggestion points out that under Rule 58(b)(1) the clerk enters judgment, and under 58(b)(2) the court approves judgment "which the clerk must promptly enter." So in Rule 59(a)(2) it is provided that on motion for a new trial in a nonjury case the court may "direct the entry of a new judgment."

Rule 54(d)

Alan B. Morrison, Esq., 05-CV-003: Present Rule 54(d)(2)(C) provides for a hearing on a request for attorney fees "on request * * * of a class member." Style Rule 54(d)(2)(C) begins "Subject to Rule 23(h) * * *." The Committee Note is clear, but the rule text is not. It would be better to delete this from (d)(2)(C) and add it to the exceptions in (e): "Subparagraphs (A)-(D) do not apply to claims for fees and expenses * * * subject to [governed by? under?] Rule 23(h)." (Style Rule 54(d)(2)(C) was deliberately drafted after extensive discussion; it is intended that most of the (d)(2) procedure apply to fee motions in class actions.)

Burbank-Joseph: Rule 54(d)(1): Several style suggestions.

(1) Present Rule 54(d)(1) is: "Except when *express provision* therefor is made" by statute or rule. Restore "expressly provide otherwise." Courts recite "express provision," and this is not surplusage.

(2) Present Rule 54(d)(1) is "unless the court otherwise directs." This should be restored. The Style Rule is "Unless * * * a court order provides otherwise." That might be interpreted to allow a court to provide otherwise by standing order.

The suggestion that combines (1) and (2) is:

Unless a federal statute or these rules ~~or a court order~~ expressly provides ~~otherwise~~ or the court directs otherwise, costs * * *.

(3) A familiar problem of translating "shall." Present Rule 54(d)(1) begins with exceptions, then says "fees shall be allowed as of course to the prevailing party." It is wrong to Style this as "should be allowed." As a matter of logic, providing exceptions and then saying "shall" implies "must" unless the exceptions apply. And "as of course" "was meant to create a mandatory presumption in favor of allowing costs in the absence of the court's specific explanation to the contrary, according to 10 Moore § 54.101[1][a]." A contrasting sense seems to be expressed in 10 FP&P: Civil 3d, § 2668: Allowing costs to the prevailing party "is not a rigid practice * * * inasmuch as the rule itself empowers the court to direct otherwise. Other then when the matter is controlled by a federal statute or rule, Rule 54(d) vests the court with a sound discretion, which extends to all civil actions and embodies a practice long recognized in equity. * * * In keeping with the discretionary character of the rule, the federal courts are free to pursue a case-by-case approach and to make their decisions on the basis of the circumstances and equities of each case." Apart from the seeming differences of treatise views, one of the considerations in translating "shall" has been to avoid "must" when the "must" is qualified by significant discretion.

Burbank-Joseph: Rule 54(d)(2)(D): A style suggestion that seems right. The tagline should be expanded: " * * * Reference to a Master or a Magistrate Judge." The rule expressly includes a magistrate judge.

Rule 55(b)

Burbank-Joseph: Rule 55(b)(2): Again two suggestions.

(1) "the party must apply to the court for a default judgment." So says the present rule. Although the caption is "By the Court," the caption is "not supposed to carry weight." The balance of the rule does not supply any indication that it is the court, not the clerk, that directs entry of judgment in the circumstances covered by (b)(2).

(2) "The court may conduct evidentiary hearings or make referrals * * *." The present rule requires service of notice "at least 3 days prior to *the* hearing on" the application for default judgment. The implication that there must be a hearing is lost in the Style Rule. (In considering this style point, there may be a need for further research. 10A FP&P: Civil 3d, § 2688, begins: "Rule 55 does not require that testimony be presented as a prerequisite to the entry of a default judgment, and thus several courts have determined that a hearing is not required before entering a default." If there is a hearing, it "is not considered a trial, but is in the nature of an inquiry before the judge.")

Rule 56(a)

Burbank-Joseph: This suggestion ties to the Time Counting Project: "A party claiming relief may move * * * after * * * (1) 20 days have passed from commencement of the action." The present rule is "after the expiration of 20 days from the commencement of the action." This creates a "dead zone of twenty days." As distinguished from most time periods, the 20th day — although the last day of the designated period — is not the last day for doing something but the last day before something can be done. The style question is whether there is any doubt about the meaning of the Style Rule.

Rule 56(c)

EDNY: In Style Rules 56(c), (d), and (e)(2), "should" should be replaced by "'shall,' as in the current Rule, because otherwise it would appear that a substantive change would result." (This particular problem of translating "shall" was resolved in favor of "should" because of the well-established proposition that a district court has discretion to deny summary judgment even though the required showing has been made. The Committee Note addresses the change.)

Rule 56(d)

Burbank-Joseph: Rule 56(d)(1): The suggestion: "If on motion summary judgment is not rendered on the whole action * * *." The concern: without "on motion," which is in the present rule, the Style Rule may seem to impose a duty on the court to act sua sponte to enter "partial summary adjudication."

Prof. Bradley Scott Shannon, 05-CV-009: Rule 56(d)(2): Rule 56(d)(1) makes (d)(2) "redundant and therefore unnecessary." [Style Rule 56(d)(2) is taken from the final sentence of Present Rule 56(c). It may serve some purpose, in part to reassure that a court may not only establish "facts" but also may establish liability, and in part to solidify the rule that a Rule 56 order establishing liability is not ordinarily an appealable judgment. That it may also carry forward some tension with collateral-order appeal doctrine seems inevitable — an order granting summary judgment on liability for a plaintiff, rejecting an official-immunity defense, is appealable as if a "final" decision.]

Rule 56(e)

Alan B. Morrison, Esq., 05-CV-003: " * * * an opposing party ~~may~~ must not rely ~~merely~~ on allegations or denials in its own pleading * * *." "Merely" adds nothing. "may" is inadequate because failure to submit counter evidence forfeits the right to claim the facts are in dispute. ["merely," adapted from the present rule, does serve a role. Without it, the rule would say that a party may not rely on its own allegations or denials — but the allegations or denials are essential to identify the materiality of facts. As to the choice between "may" and "must," the dilemma is familiar. "may" seems to work. And it may be better in this setting — this sentence comes into play only if the moving party has "supported" a motion for summary judgment in the sense that its showing has carried the summary judgment burden and it wins summary judgment unless the nonmoving party fights back.]

Rule 57

Burbank-Joseph: A style suggestion: "A party may demand a jury trial under the circumstances and in the manner provided in Rules 38 and 39." This is another challenge to our beloved "under." The concern is that simply saying "under" may imply that Rule 57 creates a right to jury trial that can be perfected by making a timely demand under Rule 38. The Style response is that Rule 38 only sets out the procedure for asserting a jury trial right that arises from another source. But the Style conventions may not deter lawyers from making the argument, and even might fail the court confronted with the argument.

Rule 58(a)

Burbank-Joseph: Rule 58(a)(2): The comment on Rule 62(b), described below, might best be resolved by this change: "to amend or make additional findings ~~of fact~~ under Rule 52(b)."

Rule 59

Hon. Thomas S. Zilly, 05-CV-016: The caption might better reflect the rule if it read: "New Trial; Altering or Amending a Judgment"

Rule 59(a)

Burbank-Joseph: (1) Both (1)(A) and (B): "for any reason for which a new trial ~~has~~ could have been properly granted in * * *." It is asserted that present Rule 59(a) "clearly conveys the sense of limiting the grounds to proper reasons for granting a new trial." The source for that assertion in the present rule text is not clear. Clearly it says "have heretofore been granted," without "properly." (This language should not be read to mean that if one court grants a new trial for an improper reason all later courts may grant new trials for the same reason — that it is made "proper" by the first court's erroneous grant "heretofore.") Changing to "could have been" seems to open it up — never mind whether it ever has been done, so long as it could have been done. More importantly, this language was vigorously contested during the Style process. The maddeningly obscure language of the present rule was carried forward from a sense of at least two things — it has not actually required that specific precedent be found, and it has not impeded flexible development of new-trial standards.

(2) A style "and" "or" choice. Present Rule 59 separates (1) and (2) by "and." The suggestion is that "or" fits better — it was either a jury trial or a nonjury trial. Of course it might be both — a single trial may be tried in part to a jury, in part to the court. In that setting "and" actually fits better, or may seem to. But "or" is likely to cause less confusion to casual readers, and fits better with the common preference for "or" in Style Rule lists of alternatives.

Rule 59(c)

Burbank-Joseph: Another global issue on "written" stipulation.

Rule 60(a)

Burbank-Joseph: Change the tag line: "Corrections ~~Based on~~ of Clerical Mistakes~~;~~ and of Oversights and Omissions."

Rule 60(b)

Alan B. Morrison, Esq., 05-CV-003: Present and Style Rule both refer to granting relief from a judgment to a party or its "legal representative." This term appears nowhere else in the rules; it adds nothing; and it may cause confusion in comparison to the reference only to a party in the Rule 60(d)(1) recognition of an independent action for relief from a judgment.

Burbank-Joseph: Add to the tag line: "Grounds for Relief From a Final Judgment, ~~or~~ Order, or Proceeding." Whatever a "final proceeding" might be, they added "final" in 1948 deliberately to describe all three — judgments, orders and proceedings. (The question whether to retain "proceeding" in the rule text was fought in the Style process; it was deliberately retained, so why not add it to the tag line?)

Rule 60(d)

Burbank-Joseph: Rule 60(d)(2) A good style suggestion: "grant relief * * * to a defendant who ~~is~~ was not personally notified * * *."

Rule 61

Alan B. Morrison, Esq., 05-CV-003: Both present and Style Rules are captioned "harmless error," but that phrase does not appear in either rule text. The present rule is verbose and to some extent

internally inconsistent. The Style Rule is less clear, but still substantially redundant. Why bother to say "at every stage of the proceeding"? Begin: "The court must disregard ~~all~~ harmless errors and defects * * *." Append "unless the interest of justice otherwise requires" to that. [This part is unclear. But remember other suggestions that Rule 61 at least should conform to Evidence Rule 103. We may want to think further about this one; the current Style version inherits a lot from the present rule, and reflects a conservative approach to change.]

Burbank-Joseph: The suggestion is that "the Committee not restyle Rule 61 but rewrite it to incorporate the standards of Fed.R.Evid. 103 and place it on the style/substance track." Evidence Rule 103(a) begins: "Error may not be predicated upon a ruling * * * unless a substantial right of the party is affected * * *." The first sentence of present Rule 61 concludes by saying that no error is ground for relief unless refusal to act on the error "appears to the court inconsistent with *substantial* justice." Style Rule 61 inverts the order of the sentence, and begins "Unless justice requires otherwise." No "substantial." But the second sentence concludes by stating that the court must disregard all errors and defects "that do not affect any party's substantial rights." So the Style question is twofold, beginning with the common grounds that Rule 61 should be consistent with Evidence Rule 103 and that the same words should be used to express the same thought in different sets of rules. First, "substantial" was no doubt dropped from "justice" as an "intensifier" — what other sort of justice do we seek? Insubstantial? Absolute? Second, "substantial" does appear in the Style Rule, and in a position that clearly applies to all errors, including errors in admitting or excluding evidence. Is that parallel enough?

Rule 62(a)

Burbank-Joseph: "But unless the court orders otherwise, the following are not ~~automatically~~ stayed * * *." The first sentence establishes a 10-day period before execution may issue. The second sentence excepts two situations from the 10-day stay. The suggestion is that "automatically" is distracting. The 10-day stay results from Rule 62(a), not from court order; there is no stay in three sets of circumstances unless the court orders a stay.

Rule 62(b)

Burbank-Joseph: Rule 62(b)(2): This Style comment finds inconsistencies of expression that trace to the present rules. Both present and Style Rule 52(a) direct the court to "find the facts specially." Present and Style Rule 52(b), addressing amended or additional findings, refer only to "findings" and "additional findings," without adding "fact." Present and Style Rule 58(a)(2), although referring to Rule 52(b), speak of "additional findings of fact." Present Rule 59 on new trial motions says the court may "amend findings of fact * * * or make new findings." That accurately reflects the terminology of 52(a) and (b) — the originals are referred to as findings of fact, and the new or amended ones are referred to as findings. Finally, both present and Style 62(b) accurately refer to a Rule 52(b) motion as one "to amend the findings or for additional findings." If consistency is to be achieved, the best approach may be to amend Rule 58(a)(2).

Rule 62(c)

Burbank-Joseph: (1) The suggestion: "After an appeal is taken from an interlocutory ~~order~~ or final judgment that grants * * * an injunction." The reason: Present Rule 62(c) is "interlocutory or final judgment." Rule 54(a) describes any order from which an appeal lies as a "judgment." And Rule 62(a)(1), governing stays, refers to "an interlocutory or final judgment in an action for an injunction." But "order" may be defended: The underlying statute, § 1292(a), governs appeals from "interlocutory orders." Rule 54(a) makes it a judgment only if an appeal lies; Rule 62(c) seems to apply even if the order is not in fact appealable (fine lines are drawn, for example, in determining whether an order "denies" and injunction). And "order" could not be added to Rule 62(a)(1) because there are many interlocutory orders in injunction actions that are not involved with execution or stays. Finally, Rule 54(a)'s "definition" is a wreck that remains uncorrected because of the difficulty of repair. So a nice style choice.

(2) The suggestion: " * * * the court may suspend, modify, restore, or grant an injunction while the appeal is pending on terms * * *." The present rule is "during the pendency of an appeal." Compare Style Rule 60(a): "after an appeal has been docketed and while it is pending," a district court can correct a clerical mistake only with appellate leave. This same question is caught up in drafting an "indicative ruling" procedure, where similar language has been suggested.

(3) The suggestion: "on terms for bond or other terms that appropriately secure the opposing party's rights." The argument: Present Rule 62(c) is "terms * * * it considers proper for the security of the rights of the adverse party." Style Rule 62(b) begins "on appropriate terms for * * * security." If an intensifier is proper in 62(b), why not also 62(c)?

Rule 62(d)

Alan B. Morrison, Esq., 05-CV-003: [This comment seems to overlook Appellate Rule 5(d)(2). Both present and Style Rule 62(d) allow an appellant to file a supersedeas bond "after filing the notice of appeal or after obtaining the order allowing the appeal." The comment appears to assume that a notice of appeal is required when an appeal is not available as a matter of right but instead requires permission of the court of appeals, as under § 1292(b) or Rule 23(f). But a notice of appeal is required by Appellate Rule 3 only for an appeal as a matter of right; Appellate Rule 5(d)(2) states that a notice of appeal need not be filed after a court of appeals grants a petition for permission to appeal.]

Burbank-Joseph: The suggestion: "the appellant may, by supersedeas bond, obtain a stay, ~~except in an action described~~ subject to the exceptions contained in Rule 62(a)(1) or (2)." The argument: A stay may be obtained by court order in the 62(a)(1) or (2) cases. Rule 62(d) means only to say that a stay may not be obtained in those cases by posting a supersedeas bond. "except in an action" may carry the wrong implication that no stay at all is available. The same result might be obtained, retaining the Style preference for "except," by rearranging: "the appellant may obtain a stay by supersedeas bond, except in an action described * * *."

Rule 62(f)

Burbank-Joseph: A recurrent style question: "under ~~state~~ the law of the state where the court sits." The court does not sit in state law, it sits in a state.

Rule 62(g)

Burbank-Joseph: This suggestion draws from reading the present rule to recognize appellate court authority "to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered" outside the period when an appeal is pending. It is pointed out that the All Writs Act authorizes a court of appeals to act without an appeal — before an appeal can be taken, or after the mandate issues. In related fashion, it is suggested that it "sounds a bit silly" to begin the rule "While an appeal is pending" — there is an implication that the rule *does* limit appeal power outside the time when an appeal is pending. Combining the style suggestions, the revised rule might look like this:

(g) Appellate Court's Power Not Limited. ~~While an appeal is pending, t~~This rule does not limit the power of the appellate court or one of its judges or justices ~~to~~:

(1) while an appeal is pending, to stay proceedings, or to suspend, modify, restore, or grant an injunction; ~~**(2)**~~ or

(3~~2~~) to issue an order to preserve the status quo or the effectiveness of the judgment to be entered.

Rule 63

Jack E. Horsley, Esq., 05-CV-002: " * * * any other judge may proceed with it upon certifying familiarity with the record and any pending motions * * *." (This version is an approximation of the apparent suggestion.)

Burbank-Joseph: An apparently correct suggestion: "If the judge who ~~commenced~~ conducted a hearing or trial is unable to proceed * * *." The present rule is "If a trial or hearing has been commenced and the judge is unable to proceed * * *." This language includes the situation in which one judge commences the proceeding, a successor is named, and the successor becomes unable to proceed. The Style language does not, at least not without strain.

Rule 64(a)

Burbank-Joseph: The suggestion renews an issue that provoked extensive discussion earlier: "every remedy ~~is available~~ that~~, under the law of the state where the court is located~~ provides for seizing a person or property to satisfy the potential judgment is available under the circumstances and in the manner provided by the law of the state where the court is located." The Style version was drafted on the assumption that "is available that, under the law of the state * * * provides for" means "is available under the circumstances and in the manner provided by the law of the state." Pure style.

Hon. Thomas S. Zilly, 05-CV-016: " * * * provides for seizing a person or property to secure satisfaction of ~~satisfy~~ the potential judgment." This would make it clear that seizure of the person does not satisfy the judgment, but is designed to secure satisfaction.

Rule 64(b)

Burbank-Joseph: This revisits the global issue about subdividing to the point of items in a different guise: "bullets" are described as "irksome practical problems." How is a bullet rule quoted — are ellipses required? Must the bullet point appear? (Note that present Rule 23(c)(2)(B) uses six bullets; the Style Rule converts them to romanet items (i) through (vii).)

Rule 65(a)

Burbank-Joseph: Many references are provided to explore the question whether a preliminary injunction can issue only after a "hearing," or whether notice and an opportunity for hearing suffice. The change from "Before * * * *the* hearing" in the present rule to "Before * * * *a* hearing" in the Style Rule is suggested to dilute the implication of "the" that a hearing is required. Rather than change back to "the," it is suggested that the proposed change be placed on the Style-Substance track.

Rule 65(b)

Burbank-Joseph: Rule 65(b)(1): The suggestion: "without written or oral notice." The argument: present Rule 65(b) is "without written or oral notice." The 1966 Committee Note says that "informal notice * * * is to be preferred to no notice at all." In the other direction, the Style Rule's simple reference to "notice" might be read to refer to notice that is served. The present rule, moreover, refers to injury that will result "before the adverse party or that party's attorney can be heard." That further weakens the encouragement to give notice to the attorney.

Rule 65(c)

Burbank-Joseph: The central concern is that present Rule 65(c) is commonly read to allow a court to waive security despite saying that "[n]o * * * injunction shall issue except upon the giving of security * * * in such sum as the court deems proper." Style Rule 65(c) says "the court must require the movant to give security in an amount that the court considers proper." The style fear is that "must require" is stronger than "no injunction shall issue except." The published Style draft reflects the belief that discretion in setting the amount of security includes discretion to set it at zero, carrying forward present practice. Whether or not that is right, the concern is carried further in the suggestion that the rule should be redrafted to make explicit the extent of the court's discretion. That may be more than Style-Substance, better a project for independent consideration and publication as a substantive change. A supersession concern is also suggested: if the Style Rule restricts discretion more than the present rule, it might supersede statutes that imply greater discretion. This concern needs to be developed further, apart from the general supersession concerns addressed to the entire enterprise. By the look of the descriptions, the statutes that have been involved in the cases do not

speak directly to injunction bonds. Instead, they evince policies that favor enforcement in the public interest. Supersession in relation to general policies is a rather slippery concept. But there well may be statutes that provide for preliminary injunctions without bond. If so, the present rule may have unintended supersession consequences (depending on the date of the statute), and a Style Rule should recognize that statutes control (surely there is no intent to supersede such statutes, whether old or contemporary).

Rule 65(d)

Burbank-Joseph: Rule 65(d)(2): The Style Rule correctly translates the present rule if the present rule was properly punctuated. The suggestion raises an important question whether the present rule was indeed properly punctuated. The present rule uses a series separated by commas to describe the persons bound by an injunction. The final item in the series is "those persons in active concert or participation with them who receive actual notice of the order." Absent a comma, this limits the notice requirement to persons in active concert or participation. But the suggestion points to substantial evidence that an injunction does not bind a party until the party has notice, and does not bind a party's officer, etc., until that person has notice. That is an attractive proposition. If further research bears it out, the notice requirement can be worked into (d)(2), something like: "The order binds only the following persons who receive actual notice of the order by personal service or otherwise:"

Burbank-Joseph: Rule 65(d)(2)(C): This one certainly is a research project. Present Rule 65(d) says that an injunction "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* * * *." This language is thought to be ambiguous: does "them" refer to parties and their officers etc., or only to "parties"? Style Rule 65(d)(2)(C) is unambiguous — the injunction binds anyone acting in concert with a party's officers, etc. Alternative cures are suggested: eliminate "or (B)" from C, expressly limiting the binding effect to a person who acts in concert with a party; or move to the style/substance track. The first alternative changes meaning if, as the suggestion notes, there is substantial authority that an injunction binds a person acting in concert with a party's officers, etc. The suggestion then speculates that if the Style rule expands the court's authority to bind a nonparty, "it might run afoul of the substantive rights limitation of the Rules Enabling Act." Perhaps a rule that contracts the court's authority runs the same risk — it abridges or modifies the underlying substantive rights.

Rule 65(e)

Hon. Thomas S. Zilly, 05-CV-016: Is it necessary to carry forward the descriptions of 28 U.S.C. §§ 2361 and 2284 in (e)(2) and (3)? Those statutes "contain nothing beyond the matters included in the Rule's description."

Rule 66

Alan B. Morrison, Esq., 05-CV-003: The second sentence begins "But." There is no reason of principle to avoid that, but "but" serves no use here.

Burbank-Joseph: In the end, the first suggestion seems to be one of style. It points out that Rule 66 applies only to a receiver appointed by a federal court. The capacity of a state-court receiver to sue or be sued is governed by Rule 17(b). If the Style Rule creates confusion on this score, it should be revised. The first sentence says that these rules govern an action in which a receiver sues or is sued. That is fully consistent with Rule 17(b) applying to a state-court receiver, and no less clear than the final sentence of present Rule 66. The second sentence manifestly applies only to a federal-court receiver. And the third sentence applies only to an action in which a receiver has been appointed — a state-court receiver is not appointed in the action.

The second suggestion relies on decisions that put a fine gloss on the second sentence of present Rule 66: "The *practice in the administration* of estates by receivers * * * 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." It is asserted that "practice" refers to the procedures by which a receiver obtains authority to act as an owner would, while "administration" refers to the receiver's dealings with the property. This distinction leads to the fear that the second sentence of Style Rule 66 blurs this distinction by saying only that a receiver "must *administer* an estate according to the historical *practice* in federal court * * *." The authorities relied upon to support the suggestion clearly confirm the proposition that federal rules govern the decision whether to appoint a receiver, even in a diversity action. 12 FP&P § 2983; 13 Moore's § 66.09. But they do little to support the attribution of a distinction between appointment as "practice" and administration as something else. 12 FP&P § 2982 at p. 18 suggests that appointment "is part of the 'practice in the administration of estates.'" Phelan v. Middle States Oil Corp., 2d Cir.1954, 210 F.2d 360, rules that an accounting in a federal equity receivership is governed by the federal rules, not "local rules." In all, the Style Rule may adequately capture the meaning of the present rule.

Rule 67

Burbank-Joseph: Pure style. The suggestion: "must be deposited and withdrawn in accordance with 28 U.S.C. §§ 2041 and 2042 ~~and~~ or any like statute." The argument: "and" suggests you must comply with all statutes. "or" allows compliance with one or the other. The counterargument: you must comply with any statute that applies — if more than one applies, you must comply with all, while if only one applies there is no problem.

Rule 68

Burbank-Joseph: (1) Points out a real need to revise Style Rule 68(a). The present rule requires an offer to be made "more than 10 days before the trial begins." The Style Rule is "at least 10 days before the trial." Not only is this one day less, but it also has a reverse effect: a period "more than 10 days" escapes the rule that excludes intervening Saturdays, Sundays, and legal holidays in calculating a period less than 11 days. (1.1) In addition, the present rule "before the trial begins" may be different from the Style Rule "before the trial." The suggestion cites a case ruling that for purposes of Rule 68 a trial begins when the court actually commences to hear the case, not with jury selection.

(2) This one is more style, but troubling. Present Rule 68 describes an offer of judgment "for the money or property or to the effect specified in the offer." Style Rule 68(a) shortens this to "judgment on specified terms." The concern is that the present rule is more ambiguous with respect to a defendant's freedom to specify conditions — for example, what are the consequences if the offer is conditioned on acceptance by all plaintiffs, some plaintiffs accept but others do not: can costs be shifted to a plaintiff that did accept? (2.1) The change to "specified terms" makes it more difficult to argue that a Rule 68 offer cannot be made for judgment for equitable relief. The suggestion notes that there is support for using Rule 68, but notes that it seems to be agreed that the court cannot be required to enter an equitable decree simply because a Rule 68 offer is accepted. (2.2) Similarly, it is noted that although recent authority rejects use of Rule 68 in a class action, the matter is not free from doubt, but at the same time an accepted offer can be made a judgment only if the court approves it as a settlement under Rule 23(e). The upshot of these several concerns is the suggestion to add language at the end of Style Rule 68(a): "Except in cases where court approval of the judgment is required, ~~T~~the clerk must then enter judgment."

(3) A supersession concern specific to Rule 68 is expressed. There are conflicting decisions, but the current trend is to rule that a defendant cannot moot a class action by making a precertification offer of judgment for the full relief available to the individual class-representative plaintiffs. This conclusion may rely in part on finding that a specific statute contemplates class remedies. The fear is that a Style Rule 68 will supersede the implications of such statutes.

(4) Another specific supersession concern is addressed to Style Rule 68(d). It carries forward verbatim the language of present Rule 68: the offeree must pay the costs incurred after" [the making of the offer][the offer was made]." Nonetheless, the general supersession concern is offered: adoption of the Style Rule will supersede statutes enacted in the interval between adoption of the original and adoption of the new. A case is cited for a statute that invokes Rule 68 but also includes an exception

— to that extent the statute supersedes Rule 68, and the supersession tables might be turned by adopting a Style Rule 68.

Rule 68(c)

Hon. Thomas S. Zilly, 05-CV-016: "~~It~~ The offer of judgment must be served * * *." The first sentence refers to things other than the offer of judgment; the change improves clarity.

Rule 69(a)

Hon. Thomas S. Zilly, 05-CV-016: Present Rule 69(a) calls for enforcement by writ of execution "unless the court *directs* otherwise." Style Rule 69(a)(1) changes "directs" to "orders." "In the bankruptcy rules, we use 'directs' as a broader term that covers standing orders and local rules, so that stylistic choice may be significant if applied to our rules." Although the Civil Rules Committee generally prefers "orders," the change here may leave open some question about the application of local rules or other directives by courts when the rule refers only to orders as compared to the language in the existing version of Rule 69(a)(1)."

Burbank-Joseph: Rule 69(a)(1): The suggestion: "must follow the procedure of the state where the court is located, but the court need not follow state procedure that would prevent enforcement of the judgment, and a federal statute governs to the extent it applies." The argument: present Rule 69(a) says procedure on execution "shall be in accordance with" state practice and procedure. But this is interpreted to require only substantial compliance — technical state requirements should not prevent enforcement of a federal judgment. Style Rule 69(a)(1) threatens to diminish flexibility, increasing the risk that unwise state procedure will thwart enforcement of a federal judgment, by saying that the procedure on execution "must follow" state procedure. This seems a question of style — does "must follow" imply greater fealty to the details of state practice than "be in accordance with"?

Rule 71

Burbank-Joseph: The suggestion: "When an order ~~grants relief for~~ is made in favor of a nonparty * * *." The argument: The present rule says "is made in favor of." "It is not obvious * * * that orders in favor of purchasers, witnesses, or masters constitute 'relief,' at least as that term is used in Rule 8."

Rule 71.1(b)

Gregory R. Mowe, 05-CV-: "No matter who owns them" may seem to imply disregard of the substantive rules that a state cannot condemn federally owned property, some owners such as cemeteries are generally exempt, and so on. It would be safer to say "whether or not in common ownership."

Rule 71.1(c)

Burbank-Joseph: Rule 71.1(c)(4): The suggestion: "order any distribution of ~~the~~ a deposit * * *." The argument: There may not be a deposit. See Style Rule 71.1(j).

Rule 71.1(e)(3)

Gregory R. Mowe, 05-CV-: When more than one person has an interest in the condemned property, the hearings progress in two stages. First is a hearing on the total to be paid for the taking. Next is a hearing on allocation among the defendants with interests in the same property. This distinction would be better reflected by restoring three words: "evidence on the amount of compensation to be paid for the property and may share * * *."

Rule 71.1(h)(2)(A)

Gregory R. Mowe, 05-CV-: The court has power to appoint a commission whether or not a jury has been demanded. Subparagraph (A) should begin: "Whether or not a party has demanded a jury, the court may appoint a three-person commission * * *."

Rule 71.1(i)

EDNY: The subheading for subdivision (i) should be revised to correspond to the present rule: "(1) ~~By the Plaintiff~~ As of Right." The change will "make it clear that the plaintiff has this right and that it is not subject to the discretion of the court."

Rule 71.1(j)(2)

Gregory R. Mowe, 05-CV-: It would help to preserve the standard phrase by restoring "just" in the first sentence: "so as to distribute the deposit and pay just compensation." And the second and third sentences should be revised "to retain identification of the party in whose favor money judgments run."

Rule 72(a)

Alan B. Morrison, Esq., 05-CV-003: The next-to-last sentence ends in "to." That can be avoided by deleting the sentence and incorporating it in the last sentence: "~~A party may not assign as error a defect in the order not timely objected to.~~ The district judge ~~in the case~~ must ~~consider timely objections and~~ modify or set aside any part of the order that is clearly erroneous or is contrary to law, provided that a timely objection to the order was made to the magistrate judge." [If we go this way, the conclusion should be revised — the objection is addressed to the district judge, not to the magistrate judge. Something like: "must modify or set aside any part of the order to which timely objection was made and that is clearly erroneous * * *." Or, if we stick by using "to" at the end, "any part of the order {that was} timely objected to and that is clearly erroneous * * *."]

Burbank-Joseph: The suggestion: "referred to a magistrate judge to hear and ~~decide~~ determine * * * and * * * issue a written order stating the ~~decision~~ disposition." The argument: Rule 72 is intended to track the statute. § 636(b)(1)(A) is "hear and determine"; (b)(1)(B) is recommendations "for the disposition, by a judge of the court." It is better to retain the statute's words. (This question was actively discussed in the Style process. This independent reaction warrants further consideration.)

Rule 72(b)

Alan B. Morrison, Esq., 05-CV-003: As with Rule 72(a), protests the conclusion of the first sentence in (b)(3) with "to."

Burbank-Joseph: Rule 72(b)(1), (b)(3): These suggestions mirror the Style Rule 72(a) suggestion, apparently suggesting that in (b)(1) "recommended disposition" be changed to "recommendation for disposition," and in (b)(3) "disposition" be changed to "recommendation for disposition." As compared to Style Rule 72(a), this is a suggestion for improving on the language of the present rule, which uses "recommended disposition" and "disposition" in the same places that those words are used in the Style Rule.

Rule 73(a)

Alan B. Morrison, Esq., 05-CV-003: Raises the perennial question whether it is useful to cross-refer to a statute that governs of its own force. Rule 73(a) concludes with a reminder of the statute that requires a record of the proceedings.

Burbank-Joseph: The suggestion: "a magistrate judge may, if the parties consent, conduct ~~the~~ any or all proceedings in a civil action * * *." The argument: "any or all" is the language of § 636(c)(1) and the present rule.

Prof. Bradley Scott Shannon, 05-CV-009: Rules 1 and 2 establish that these rules apply only to civil actions: " * * * may * * * conduct the proceedings in an ~~civil~~ action * * *."

Rule 73(b)

Alan B. Morrison, Esq., 05-CV-003: (b)(2): "may ~~again advise~~ remind the parties of the magistrate judge's availability * * *." "Again advise" carries the possibility of coercion by repeated advice.

Rule 73(c)

Alan B. Morrison, Esq., 05-CV-003: As with Rule 73(a), questions the need to cross-refer to the statute authorizing appeal to the court of appeals from a judgment entered at a magistrate judge's direction.

Rule 77(a)

Jack E. Horsley, Esq., 05-CV-002: "Every district court is considered always open on any business day for filing any paper * * *."

Rule 77(c)

Alan B. Morrison, Esq., 05-CV-003: Questions the need for (b)(2), reminding of the clerk's responsibility to enter a default under Rule 55(a). [The separation of (b)(2)(B) and (C) was deliberate; it is useful to reinforce the sharp distinction between the initial default and the subsequent default judgment.]

Burbank-Joseph: Rule 77(c)(2): The suggestion: "the clerk ~~may~~ shall as of course grant motions and applications to * * *." The argument: Present Rule 77(c) begins "All motions and applications," and concludes "are grantable of course by the clerk." That describes ministerial duties requiring that the clerk must act on a motion or application that is properly presented, and must not act on one that is not properly presented. "may" implies an improper degree of discretion. 12 FP&P, § 3083, sheds no light. (I think this question was discussed at some point in the Style process and that it was concluded that discretion should be reflected in the Style Rule. At any event, the point should be researched.)

Rule 78

Burbank-Joseph: Present Rule 78 says that each district court "shall" establish regular times and places to hear and dispose of motions, "unless local conditions make it impracticable." Although that seems closer to "must" than "should" or "may," Style Rule 78(a) translates "shall" as "may." The reduction was chosen purposefully, from a feeling that this command (or near-command) is obsolete. The suggestion is that the change should be put on the Style-Substance Track.

Rule 79(a)

Alan B. Morrison, Esq., 05-CV-003: This is essentially a suggestion that Present Rule 79(a) has it wrong. The present rule, carried forward in Style Rule 79(a)(3), directs the clerk to enter "jury" on the docket "[w]hen in an action trial by jury has been properly demanded or ordered." The objection is that the clerk should not be charged with determining whether a jury demand is proper — the rule should provide that the clerk note "jury" on the docket whenever a jury demand is made, leaving it to the parties to object and the court to decide. [This may or may not be right. The demand may be obviously untimely, or made in an action that clearly does not include jury trial. In any event, a change is warranted in the Style Project only if the present rule is uniformly read against its meaning.]

Rule 80

Burbank-Joseph: The suggestion is that Rule 80 not be restyled at all, and that the question be referred to the Evidence Rules Committee. Many reasons are advanced; it is better to read them than to summarize. Some seem to read the reference to trial and hearing in both the present rule and the Style Rule as including a deposition. And several point to several ways in which a transcript may come into

existence, apparently on the assumption that Rule 80 somehow requires a separate transcript — or, perhaps, on the assumption that unnecessary duplication will result from the requirement that the transcript be certified by the person who recorded [reported] the testimony. There also is a specific supersession argument that involves the long-delayed effort to undertake a joint reconciliation of all of the Civil Rules evidence provisions with the Evidence Rules — most of the Evidence Rules carry on in the form initially adopted by statute, making this a specific variation on the general supersession concern addressed to all of the Style Project.

National Court Reporters Assn., 05-CV-013: The Style rule works if a stenographic reporter took testimony. "However, in trials or hearings where the testimony is recorded electronically, oftentimes the individual who takes/records the testimony will not be the individual to transcribe and certify the record. The proposed changes to Rule 80 do not reflect these realities and may cause unintentional issues with compliance."

Rule 81(a)

Burbank-Joseph: Rule 81(a)(6)(B): A nice style point. Rule 81(a)(6) begins by applying the Civil Rules to "proceedings under the following *laws*." Subparagraph (B) is "9 U.S.C., relating to arbitration." The suggestion is that "9 U.S.C." is not a "law"; it is a Title in the U.S. Code. The specific recommendation is to say "all laws codified in 9 U.S.C. relating to arbitration." [Perhaps this could be "all those in 9 U.S.C. relating to arbitration."]

Rule 81(d)

Burbank-Joseph: Rule 81(d)(1): The suggestion is to abrogate the analogous part of present Rule 81(e). Present 81(e) says that when a Civil Rule refers to state law, the reference "includes the statutes of that state and the state judicial decisions construing them." Recognizing that this was drafted before Erie, Style Rule 81(d)(1) changes this to include state statutes and state judicial decisions. The concern is that "includes" does not exclude other manifestations of state law such as court rules or state constitutional provisions. The rule is unnecessary and potentially misleading. [This is a fair question. The point of Rule 81(d)(1) is to provide interpretive guidance to the Rules. It is not an attempt to restate Erie. But a Civil Rule that incorporates state law surely may incorporate a state court rule, as noted in the Committee Note, and state constitutional provisions as well. Possibly someone could be misled. And perhaps there is no need to describe the sources of state law. Abrogation may be within reach of the Style Project.]

Prof. Bradley Scott Shannon, 05-CV-009: As Burbank-Joseph, urges that Rule 81(d)(1) be deleted — expanding the definition of state law to include all the state's judicial decisions "is arguably substantive and in any event remains underinclusive (and perhaps also somewhat overinclusive)."

Rule 82

Prof. Bradley Scott Shannon, 05-CV-009: Rule 4(k)(2) clearly affects personal jurisdiction. Rule 82 should be: "These rules do not extend or limit the subject-matter jurisdiction of the district courts * * *."

Rule 86

Prof. Bradley Scott Shannon, 05-CV-009: "opinion" in (2)(B)is not the right word, although it appears in Present Rule 86(a): "~~in~~ the district court~~'s opinion,~~ determines that applying them in a particular action would be infeasible or work an injustice." [This suggestion points up another question: Present Rule 86(a) reads "in the opinion of the court." That should include the opinion of an appellate court — we do not want to establish an unreviewable district-court discretion, nor should we seek to broaden whatever discretion is now read into Rule 86(a). Why not "the ~~district~~ court determines * * *."?

Style-Substance Track

Rule 8(a)(3)

Burbank-Joseph: It seems better to restore "relief in the alternative." The suggested tie to Form 10 illustrates the point: the plaintiff seeks relief against one defendant, the other defendant, or both defendants as the facts may justify. That is relief in the alternative; it is not at all clear that it is an "alternative form[] * * * of relief." To be sure, at least Rules 8(e)(2), 18(a) [and perhaps (b)], and 20(a) clearly authorize joinder and pleading of demands for relief in the alternative. That may be all the more reason for a clear reflection in 8(a)(3).

Rule 11(a)

Burbank-Joseph: It is equally true that not everyone has a telephone number or an address. Restoring "if any" may be useful to reassure pro se litigants that they can file even though they lack one or more of these means of contact. (It seems a bit more than style-substance can bear to try to add something that requires a homeless person to designate a means of service other than Rule 5(b)(2)(C) (leaving it with the court clerk).)

EDNY: Rather than "electronic-mail address," say "e-mail address." This is current usage, and corresponds with the expression in the Committee Note.

Rule 16(c)

EDNY: Rule 16(c)(1): restore "telephone": "* * * be present or reasonably available by telephone or other means." "This would make clear that the telephone is a reasonable and acceptable means."

Rule 26(g)(1)

Burbank-Joseph: See Rule 11 above. But note that present Rule 26(g)(1) requires only an address and does not say "if any." At least at first blush, it seems desirable to say "if any" in both rules or in neither.

EDNY: Rule 26(g)(1): as with Rule 11: " * * * must state the signer's address, e-mail address, and telephone number~~, and electronic-mail address~~."

EDNY: Rule 26(g)(1)(B)(i): To make this consistent with Style Rule 11(b)(2): " * * * for extending, modifying, or reversing existing law, or for establishing new law."

Rule 30(b)(3)(A)

National Court Reporters Assn., 05-CV-013: The pure Style rule, tracking Present Rule 30(b)(2), says that the noticing party bears the recording costs, and that any party may arrange to transcribe a deposition *that was taken nonstenographically*. The Style-Substance Track version deletes "that was taken stenographically." This may change the impact of the rule for a deposition taken stenographically by obliging "the noticing party to pay attorney's fees as well as pay the cost of an original even if they don't want the transcript simply because the other party orders a copy." [This was not the intended meaning; the change was designed only to make it clear that any party should be able to arrange transcription of a deposition recorded stenographically as well as of one recorded by other means. The thought was that "recording costs" means just that — the party who notices the deposition pays the stenographic reporter for recording. Whichever party wants a transcript pays the cost of a transcript. Is there room for misreading?]

Rule 30(b)(6)

EDNY: The caption should be expanded: " * * * to an Organization or Entity." In each of the three places where "organization" appears after the first sentence, it should be supplemented by adding "or entity." "We make this suggestion because the terms 'organization' and 'entity' are not coterminous, and we agree * * * that the coverage of Rule 30(b)(6) should encompass both."

Rule 31(c)

Burbank-Joseph: We had difficulty with this one from the beginning. We cannot say "transcript" because the deposition may have been recorded by audio or visual means. But "completed" is made ambiguous by its use in Style Rule 30(e)(1), which uses it to refer to completion of the original testimony; the deponent's review and changes come after that. Perhaps, with suitable changes in the tag lines, Style 30(c)(1) could read:

> **(1)** ***Notice of receipt***. The party who noticed the deposition must notify all other parties when it ~~is completed~~ receives the deposition under Rule 31(b)(3).

(This may be rough. What happens under 31(b)(3) is that the officer taking the deposition sends it; literally, receipt is not "under" 31(b)(3). But we are not allowed to say "pursuant to." We cannot tell the party to notify other parties that the deposition was sent because the party may not know of the sending and may not receive it.)

Rule 36(b)

Burbank-Joseph: This comment is puzzling. Perhaps it inadvertently relies on present Rule 16(d). Style Rule 16(d) does say that any pretrial order "controls the course of the action unless the court modifies it." That does not describe a standard for modification, but it does state controlling effect and it does authorize modification. The suggestion is not persuasive. [The suggestion was amplified at the November 18 hearing. The problem is that Style Rule 16(d) says only that a pretrial order controls unless it is modified; it does not make sense to say that a Rule 36 admission controls unless it is modified without providing any standard that permits but also limits modification. The Rule 36 standard should govern modification of any Rule 36 admission except one that is incorporated in a final pretrial order. If incorporated in a final pretrial order, the demanding Rule 16(e) standard for modification should control.]

Rule 71.1(d)(2)(B)

EDNY: As with Rules 11 and 26(g), change "electronic-mail address" to "e-mail address."

Rule 78

EDNY: Revise the Caption: "Hearing Motions; ~~Advancing an Action~~ Submission on Briefs The provision for advancing an action is being deleted. And subdivision (b) is devoted to submission on briefs.

Style Forms

General

Jack E. Horsley, Esq., 05-CV-006: Looks with favor on these materials.

United States Department of Justice, 05-CV-031: "The draft forms represent a careful and thoughtful analysis of the existing forms * * * [T]he revisions should help simplify and clarify the forms * * *." The restyled Appellate and Criminal Rules seem to work well. "The Department strongly supports the current initiative to restyle the civil forms and believes that Committee has done valuable work."

Form 3

*Linda M. Schuett, Esq., 05-CV-005: "(Use 60 days if the defendant is the United States, ~~or~~ a United States agency, or ~~is~~ an officer or employee of the United States ~~allowed 60 days by~~ sued in the capacities provided for in Rule 12(a)(3)(A) ~~or~~ and (B).)" **NOTE** we must delete "(A) or (B)." Style Rule 12(a)(3) does not have subparagraphs. [Capacity is not the best emphasis in referring to 12(a)(3) — the focus is on suit for an act or omission occurring in connection with duties performed on the United States' behalf. Going back to the Rule text is necessary under either version.]

Form 5

Burbank-Joseph: Several comments are provided with Style Rule 5.

(1) Style Rule 4(d)(1) states a duty "to avoid unnecessary expenses of serving the summons." The second paragraph of Style Form 5 twice refers to avoiding "costs." This should be "expenses" not only because that conforms to Style Rule 4, but also because "expenses" better conveys the idea.

(2) Style Rule 4(d)(4) says that when the plaintiff files a waiver of service "these rules apply as if a summons and complaint had been served at the time of filing the waiver." Style Form 5 draws from present Rule 4(d)(4) in saying that "the action will then proceed as if you had been served on the date the waiver is filed." The suggestion seems to be that Form 5 should be revised to track Rule 4. But this may be a case where the more colloquial expression works better in the form, while the more precise expression works better in the rule.

(3) The fourth paragraph says "I will arrange for formal service" and ask for an order that the defendant pay "costs." "Formal service" may be puzzling. "Expenses" should be substituted for "costs": "I will arrange to have the summons and complaint served on you and ask the court to require you, or the entity you represent, to pay the expenses of making service." (This looks like an improvement.)

(4) Drawing from present Form 1A, the fifth paragraph asks the defendant to read the enclosed statement about the duty to waive formal service. This invokes Style Form 6, which includes two parts — a waiver of service and an attached statement of the duty to avoid unnecessary "costs." The statement is described in Form 6 as the Duty to Avoid Unnecessary Costs. The reference here should invoke that description, changing "costs" to "expenses": "Please read the enclosed statement about the duty to avoid unnecessary expenses." (This seems right.)

Burbank-Joseph: See item (4) in the comments on Form 5: The statement of duty should be "to Avoid Unnecessary ~~Costs~~ Expenses of Serving * * *."

Form 6

Linda M. Schuett, Esq., 05-CV-005: Suggests a different arrangement of the paragraphs and a deletion:

> * * * A * * * defendant * * * who fails to return a signed waiver * * * will be required to pay the costs of service, unless the defendant shows good cause for the failure. [here brings up the first sentence of the next paragraph:] "Good cause" does not include a belief that the lawsuit is groundless, or that it has been brought in an improper venue, or that the court has no jurisdiction over this matter or over the defendant or the defendant's property. [here breaks the paragraph]

If the waiver is signed and returned, you can still make ~~these and other~~ all defenses and objections * * *.

Form 10

Linda M. Schuett, Esq., 05-CV-005: Two general observations. (1) "[I]t is time to delete all or most of the complaint forms. The forms sanction a method of pleading that may not comply with existing pleading rules," and that in any event is "out of sync with existing practice." (2) Overall, the manner of dealing with interest in the forms is appropriate. It is better not to add a phrase such as "as available under existing law."

Form 11

Linda M. Schuett, Esq., 05-CV-005: Today it sounds odd to say that the defendant drove a motor vehicle "against" the plaintiff. "into" might be better.

Form 17

Linda M. Schuett, Esq., 05-CV-005:

Therefore, the plaintiff demands that:

(a) ~~that~~ the defendant ~~now~~ be required to specifically perform the agreement and pay damages of $____, plus interest and costs; or

(b) ~~that~~ the defendant be required to pay damages of $____, plus interest and costs, if specific performance is not ordered ~~, the defendant pay damages of $____, plus costs~~.

Form 18

Linda M. Schuett, Esq., 05-CV-005: Delete a comma " * * * notice * * * on all electric motors it manufactures and sells; and has given * * *." In addition:

Therefore, the plaintiff demands: * * *

(c) ~~an assessment of~~ interest and costs ~~against the defendant~~.

Form 19

Linda M. Schuett, Esq., 05-CV-005: In the demand for relief, bring up "that" before the colon and delete it from each of (a), (b), (c), (d), and (e): "the plaintiff demands that: (a) ~~that~~ until this case * * *," etc. Also would delete a comma in (b): " * * * all profits * * * in selling the defendant's book; and all profits * * *."

Form 20

Linda M. Schuett, Esq., 05-CV-005: (1) Bring up "that" before the colon and delete it from (a){recommends deleting all of (c), so no need to delete "that" separately}: "plaintiff demands that: (a) ~~that~~ each defendant be restrained * * *." [If this is done, (b) will have to be rewritten to accommodate the "that" introduction; see (2).] (2) revise (b): "a judgment, plus costs, be entered declaring that no defendant is entitled to the proceeds of the policy or any part of it; but if the court determines * * *." The comma is thought to introduce an ambiguity — "Without the comma, it is clear that a discharge of the plaintiff occurs only if the court has determined that the policy was [sic — means was not] in effect at the time of the insured's death. [The comma seems to have the intended effect, clearly separating the alternative requests for judgment.]

Form 21

Linda M. Schuett, Esq., 05-CV-005: "Therefore, the plaintiff demands that: * * * (b) the conveyance to defendant name be declared void and ~~that~~ any judgment granted be a lien on the property.

Form 30

*Linda M. Schuett, Esq., 05-CV-005: (1) "(Set forth any counterclaim against an opposing party in the same way that a claim is pleaded * * *.)" (2) "Set forth ~~the~~ any crossclaim against a ~~defendant~~ coparty in the same way a claim is pleaded * * *.)" [Both of the revisions in (2) should be adopted.]

Form 31

Linda M. Schuett, Esq., 05-CV-005: "Therefore, the defendant demands that: * * * (d) the defendant recover ~~its~~ costs and attorney's fees."

Form 50

Linda M. Schuett, Esq., 05-CV-005: The form begins with a blank, allowing the requesting party to specify the number of days allowed to respond. So does present Form 24. But here, and in Form 51, it should be "respond within the time provided in Rule 34." [Rule 34(b)(1)(B) says that the request must specify a reasonable time for inspection and for performing the related acts. That seems to fit better with a blank to be filled in by the requesting party.]

Form 51

Linda M. Schuett, Esq., 05-CV-005: As with Form 50, suggests that the blank for the number of days to respond should be replaced by a specified period. This is different from Form 50 and Rule 34 because Rule 36 sets 30 days for a written answer or objection. But it also says that "A shorter or longer time for responding may be stipulated to under Rule 29 or be ordered by the court." Perhaps a blank works here as well. But Professor Marcus also has suggested that "the time periods provided in the rule should always be inserted," quoting from 8A FP&P § 2257, pp. 540-541. The treatise suggests that present Form 25 should have been revised in 1970 when Rule 36 was amended. Before 1970, Rule 36(a) required a response "within a period designated in the request, not less than 10 days after service * * *." The treatise also expresses the fear that a requesting party might ignorantly attempt to set a time shorter than the 30-days set by Rule 36, or innocently set a longer time with the result that the longer time is viewed as binding in the way that a Rule 29 stipulation is binding.

Form 70

Linda M. Schuett, Esq., 05-CV-005: Two suggestions:

> (1) "[the plaintiff name recover from the defendant name the amount of $____ with pre-judgment interest at the rate of _%, ~~along with~~ post-judgment interest, and costs.] Looking only to Maryland law, explains that the rate of pre-judgment interest varies according to the nature of the case, while post-judgment interest is set by statute.
> (2) "[the plaintiff recover nothing, ~~the action be dismissed on the merits~~ a judgment be entered in favor of the defendant, and the defendant name recover costs from the plaintiff name.]" [This depends on actual practice; if courts continue to enter judgment that the plaintiff take nothing, rather than a judgment that the defendant "wins," the change should not be made.]

Global Style Issues

Burbank-Joseph: "On its own [initiative]." The first appearance is in the comment on Rule 4(m). The comment suggests that the strong custom of adding "initiative" to this expression should prevail — lawyers will waste time puzzling whether there is a difference. It also is suggested that everything a court does is its "own" act, even when there is a motion; that there is a reason for the tradition. See also Rule 11(c)(3) and (5); 12(f)(1); and many others.

Burbank-Joseph: Cross-references: The first time this is raised is with Style Rule 8(d)(3), where it is suggested that we should restore "Subject to the obligations set forth in Rule 11." The importance of cross-references to Rule 11 has been discussed vigorously. It may deserve further thought.

Burbank-Joseph: Romanet "items": This suggestion first appears with Rule 12(a)(1)(A). It is that the practice of dividing and insetting should not go beyond the subparagraph level: (a)(1)(A), but no further parts that we have called "items." The comment recognizes that using "bullets" is even less attractive — "fifth bullet" is harder than "(v)," easier to miscount, and harder to search. So it recommends more comprehensive subparagraphs. This is a style choice. The Criminal Rules use items; the style choice may be well entrenched. And some of us like it.

Burbank-Joseph: "Written" Stipulation: Considerable energy was spent in deciding that it was proper to reduce "written stipulation" in several rules to "stipulation." The comment is that the present rules do not authorize oral stipulations, while the Style Rules do. "[T]his restyling is more than mere simplification or clarification * * *." The change is identified in Rules 29(b), 30(a)(2)(A), 30(b)(4), 31(a)(2)(A), 33(a)(1), 33(b)(2), 36(a)(3), and 59(c).

Prof. Bradley Scott Shannon, 05-CV-009: "may": Suggests that "may" should be "might" when it is used to express probability or likelihood -- Rules 14(a)(1), 24(a)(2), and 26(a)(1)(A), (2)(A), and (3)(A) are offered as examples. In Rule 33(a), "may" should become "can." (Of these, "might" deserves serious consideration in 24(a)(2).)

Prof. Shannon: "action"/"case": "Action" should be used consistently throughout; other terms — most notably "case" — should not be substituted when there is no difference of meaning. Style Rules 26(b)(1)(B)(iii) and 50(a)(2) and (b) are particularly troubling. But "case" is acceptable when there is a different concept, as in Style Rule 9(h)(3)'s reference to an "admiralty case." And a different word should be substituted when "action" is used as a verb or in reference to other steps — see Rules 16(d), 23.1(b)(3); 26(c); 37(a)(5)(A)(i); 37(d)(1)(B); 53(f); 54(d)(1); 77(c)(2). 16(d) and 23.1(b)(3) are particularly annoying because they use "action" in two different senses.

Prof. Shannon: "court"/"judge"/"clerk": generally it is better to refer to the court as an institution, not to individuals such as the judge or clerk. See Rules 16(b), to be compared to 16(a); 23(f).

Prof. Shannon: "Issue" as a verb: As a noun, "issue" has a well-established meaning in the Rules. It should not be used as a verb. The choice to avoid "enter" and "make" seems reasonable, but "render" would be a better choice.

Prof. Shannon: "Claim" as a verb: "Claim" also has a well-established meaning as a noun. It should be used as a verb only in the same context. Better choices might be "assert" or "argue." See Rules 26(b)(5), 37(b)(2)(A)(i); 45(d)(2).

Prof. Shannon: "Shall" to "must": "[I]t is not at all clear that 'shall,' as used throughout the Current Rules, has any meaning other than "must." In every Rule, present "shall" must be rendered as "must." E.g., Rules 1; 15; 16(d); 25; 33(a)(1); 54(d)(1); 56. The change to "should" in Rule 56 is particularly suspect in light of the 1986 Supreme Court decisions on summary judgment.

PLAIN, 05-CV-010: Passive Verbs: Still more verbs should be changed from passive to active. Examples: 26(e)(2) could begin "The party must disclose"; Rule 39(b) could be "The court tries any issues"; Rule 52(a)(6) could be "The court must not set aside findings of fact."

PLAIN: Nominalizations: Words are wasted when verbs are turned into nouns. Examples: Rule 16(e) could be "facilitate admitting evidence"; Rule 24(b)(3) could be "the court must consider whether intervening will"; Rule 49(a)(3) could be "the party demands that it be submitted to the jury."

PLAIN: "is commenced": Should be "is begun," see Rules 3, (4)(1), 17(a), 63, "elsewhere."

PLAIN: "Knowledge and information": Should be simply "information." For example, Rules 8(b)(5), [11(a)], 26(g)(1).

PLAIN: "so": In Rule 5(b)(3), "if a local rule ~~so~~ authorizes it; in Rule 8(b)(5), "must say so ~~state~~."

PLAIN: "statute": "statute" should be "law" — as in Rules 38(a), 45(b)(2)(C), 54(d)(2)(B)(ii), and elsewhere.

PLAIN: "Compensation": "compensation" should be "payment" — Rules 43(d),53(b)(2)(E), 71.1(d)(2)(A)(iv), and elsewhere.

PLAIN: Long Sentences: A few long sentences slipped through, as in Rules 13(b) and 14(c)(1).

The Civil Rules Advisory Committee met and held a public hearing on November 18, 2005, at the University of Chicago Law School. The meeting was attended by Judge Lee H. Rosenthal, Chair; Judge Michael M. Baylson; Judge David G. Campbell; Frank Cicero, Jr., Esq.; Professor Steven S. Gensler; Daniel C. Girard, Esq.; Judge C. Christopher Hagy; Hon. Peter D. Keisler; Judge Paul J. Kelly, Jr.; Judge Thomas B. Russell; and Chilton Davis Varner, Esq.. Former Committee Member Judge Schira Ann Scheindlin also attended. Dean Mary Kay Kane, member of the Standing Committee and the Style Subcommittee, was present. Professor Edward H. Cooper was present as Reporter, Professor Richard L. Marcus was present as Special Reporter, and Professor Thomas D. Rowe, Jr., was present as Consultant. Professor R. Joseph Kimble, Style Consultant, attended. Elizabeth Shapiro, Esq., Department of Justice, also attended. Professor Stephen B. Burbank and Gregory P. Joseph, Esq., appeared to present the work of a team of 21 professors and practicing lawyers that worked together under their leadership to study the Style Rules and the Style Forms published for comment in 2005. John K. Rabiej, James Ishida, and Jeffrey Barr represented the Administrative Office. Thomas Willging represented the Federal Judicial Center.

SUMMARY OF HEARING

Judge Rosenthal opened the hearing. She noted that the several hearings on the recent proposals to amend Rule 23 and to adapt the discovery rules to developing practice in discovering electronically stored information elicited testimony from a great many witnesses. The subject of this hearing, the Style Project, provides a marked contrast. Only true believers in the importance of finegrained rule language are interested. They understand the difficulty of the challenges posed by a project designed to make the rules clearer, simpler, more consistent, without changing their meaning.

The importance of the Style Project arises in part from the observation that too many lawyers fail to read rule text with the careful attention required to master often complex meaning. Indeed some skeptics would assert that too many lawyers fail to read the rules at all. Redrafting to achieve greater clarity, to bring meaning home more readily to those who read on the run, will help. Those who have mastered the meaning of present rule language will have no difficulty in finding the same meaning translated into better language and structure. And those who have not bothered to read the present rules carefully will benefit to the extent that they recognize the need to read the rules at least once again after they have been restyled. As Professor Gensler put it, "it's like falling in love for the second time."

The Style Project began in 1991. After a tentative beginning with the Civil Rules, it switched focus. First the Appellate Rules and then the Criminal Rules were restyled. Those projects are widely viewed as successfully. Now the Civil Rules are taking their turn.

Professor Burbank and Mr. Joseph have performed a great service to the Rules Committees and to the profession by putting together their working group. Their collected comments show close examination of the published draft "at the cellular level." Their willingness to come to this hearing for further discussion of the comments is deeply appreciated. They are the sole occasion for holding the hearing; the other two scheduled hearings have been cancelled for want of anyone interested in appearing.

Discussion will begin with general comments, turn to exploration of the rules that seem to raise the most significant questions, open up to discussion of many finer points, and conclude with remarks on the overall enterprise.

Professor Burbank opened the discussion by noting that the memorandum summarizing the working group's recommendations is in some ways an understatement. He and Gregory Joseph

edited the body of recommendations extensively. Many comments that seemed to be matters of style only were left on the cutting room floor. But the recommendations do retain style issues that seem to involve meaning and style suggestions for improving the rule headings as cues to content. Nor was an attempt made to identify every instance of changes that would be made if the "global" recommendations were adopted; for example, acceptance of the recommendation to avoid substructuring the rules down to the level of romanet "items" below the subparagraph level would require many more changes than listed. The overall approach reflected the guiding rule that a change that arguably affects meaning falls outside the boundaries set for the Style Project. And if there is a close question whether a style change also affects meaning, or generates a risk of unintended supersession effects, the change should be separated out from the Style Project for independent treatment.

Judge Rosenthal welcomed law students who had appeared for the hearing. She then noted that it will be profitable to consider the large questions first. The Advisory Committee has discussed the question of how best to avoid any risk that a restyled rule might be read to expand the effects of the present rule in superseding inconsistent statutes enacted before the effective date of the Style amendments. The intent is clear: each rule should have the same supersession effect the day it was adopted as the present rule had the day before. In restyling the Criminal Rules this issue was approached primarily through Committee Note language. What is the best way to ensure that there is no supersession effect?

Professor Burbank responded that supersession is not an easy question "because intent does not trump the statute." A later-enacted rule supersedes a statute enacted before the rule was adopted. An example is provided by the Private Securities Litigation Reform Act. The statute, adopted in 1995, includes several provisions inconsistent with present Rule 11. Readoption of Rule 11 without change makes it later in time, so that it might come to replace the inconsistent statutory provisions. One approach would be to do what the original Advisory Committee did, expressing the lack of supersession intent in Committee Notes. But that is no more than a "pious hope." Since 1938, indeed, many courts have become less and less inclined to look to Committee Notes for guidance. Another approach would be to express the Committees' intent in a rule, but that could not supersede § 2072(b) — it would be circular to attempt to rely on the supersession power to supersede supersession. Or there might be a rule provision stating that no new inconsistency should be deemed to arise between the rule provisions adopted on December 1, 200X and any statute as it existed on the same day.

In response to a question, Professor Burbank suggested that probably no thought was given to the parallel supersession issues that might have been thought to arise from the sweeping amendments of almost all the Civil Rules when they were made gender-neutral in 1987. He was separately asked why the 2003 Rule 23 amendments did not supersede the Private Securities Litigation Reform Act, and responded that there is no serious problem — the rule and statute can be read to find there is no conflict. That cannot be done with Rule 11, which is inconsistent with the PSLRA. The uncertainties about supersession are aggravated because, for whatever reason, there are few reported cases interpreting § 2072(b).

Supersession will, in any event, present archeological problems. To ensure that the restyled rule does not change supersession effects it will be necessary to consult the language of the rule as it was immediately before restyling.

Again, in response to a question, Professor Burbank noted the suggestion in the cover memorandum transmitting the working group's suggestions: one approach may be to include a "no new supersession" provision in Rule 81, preserving the supersession effects of the current rules

without change. At any event, he suggested that the supersession effects will present a "relatively rare" transaction cost in the array of transaction costs presented by the project. Supersession issues do not appear to arise frequently.

Separately, Professor Burbank observed that despite the frequent comments that the restyling of the Appellate and Criminal Rules has been successful, there has been no indication that any data actually support these observations.

Rule 65: Professor Burbank summarized the comments on Rule 65. Professor Edward Hartnett did much of the work on Rule 65. The comments do not reflect all of his research; the balance will be provided to the Committee. Several problems appear.

Present Rule 65(a)(2) begins: "Before or after the commencement of the hearing" on an application for a preliminary injunction. Style Rule 65(a)(2) changes "the" to "a." This is an important and dangerous change. To be sure, rule references to a "hearing" are imprecise. Everyone recognizes that a hearing may not be a live appearance. But the change could have a dramatic impact on the opportunity to be heard. "the" should be restored.

Present Rule 65(b) describes limits on a temporary restraining order granted "without written or oral notice to the adverse party." Style Rule 65(b)(1) shortens this to "without notice." "written or oral" should be restored to emphasize that informal notice is better than no notice.

The Rule 65(c) provisions for security present a set of problems. Although the present rule says that no restraining order or preliminary injunction shall issue except on the giving of security "in such sum as the court deems proper," it is not read to require adequate security. Courts fear that an adequate security requirement would defeat the opportunity to grant important relief to parties who cannot afford security. Some courts rely on a strained reading of the rule to conclude that it is appropriate to order less-than-adequate security, or even to require no security at all. Other courts rely on finding policies in statutes that do not explicitly say that no security is required but that embody protective principles that should not be defeated by requiring security. But it is not clear that requiring security in the amount of $0 is a good interpretation of the present rule, and the Style Rule provision that the court "must require" security "in an amount that the court considers proper to pay the costs and damages sustained" may make this reading even more difficult. The style language seems to confine discretion by directing a focus on an amount that seems reasonably calculated to compensate.

Professor Burbank further observed, in response to a question, that the Style Rule presents a supersession problem with respect to statutes that might be relied upon to show a policy that defeats injunction-bond security. The problem would arise when the statute was enacted between the time of present Rule 65(c) and the adoption of the Style Rule.

It was observed that courts indeed have taken a variety of approaches in concluding that injunction-bond security can be set at a figure that is not calculated to compensate, or even at zero. But the Style Project is not designed to decide whether this is the proper result.

Professor Burbank responded that since these problems are apparent, it may be better to remove Rule 65(c) from the Style Project entirely. Rather than restyle it, or included it in the package of Style Rules without change, it could be omitted entirely. Further consideration would occur in the ordinary process, leading to a substantively revised rule expressed in current Style conventions. We should not risk adopting a rule that requires an indigent or public-interest group to post security. Although courts do not struggle now — they simply evade the apparent command of present Rule 65(c) — and although no court has said that "the rule compels me to require adequate security although I think the rule wrong," the Style language will make it more difficult to achieve

desirable results.

Rule 65(d)(2)(C) points up two ambiguities in present Rule 65(d). The rule says that an injunction "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*." There is no comma after "them," seeming to suggest that actual notice is required only as to persons acting in concert or participation — actual notice is not required as to a party or its officers, et cetera. And "them" is itself ambiguous — does it refer to concert or participation only with a party, or also with a party's officers — even its attorneys?

Professor Rowe noted that he had researched this question in response to the working group's comments and had discovered that this part of Rule 65 was adapted from former 28 U.S.C. § 363, a statute that disappeared with the 1948 codification of the Judicial Code. Section 363 had a comma after "them"; the most likely inference is that the original Advisory Committee simply made a mistake in carrying forward the statutory terms. It was suggested that the comma should be restored, with an explanation. The result is that even a party can be held in contempt only after actual notice of an injunction. There was no conclusion whether this step could be taken as part of the Style Project, so long as the Committee Note explains the restoration. It is important to mark this change and other changes in some manner so that people will be alerted to the fact that they can no longer rely on precedents construing the earlier rule language.

In terms of the Style Rule, the result would be to transpose words from subparagraph (C) to the introduction, something like this:

> **(2)** ***Persons Bound.*** The order binds only the following who receive actual notice of the order by personal service or otherwise:
>
> **(A)** the parties;
>
> **(B)** the parties' officers, agents, servants, employees, and attorneys; and
>
> **(C)** other persons ~~who receive actual notice of the order by personal service or otherwise and~~ who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).

The second question posed by Style Rule 65(d)(2) arises from the final "or (B)." Does the present rule mean that an injunction is binding on a person who acts in concert or participation with a party's officer or like representative? Professor Burbank noted that Professor Hartnett's research will be sent along to the Committee. Professor Rowe noted that initial research had turned up nothing on the question whether an injunction binds a person acting in concert with a party's agent. There is a famous 1972 Fifth Circuit decision, U.S. v. Hall, 472 F.2d 261, 267, that relies on inherent power to bind a stranger to the injunction who is not acting in concert with a party or anyone related to a party. The court found that Rule 65(d) is only a partial codification of the contempt power. Apart from that decision, there is rhetoric in some opinions suggesting that concert with a party's officer is not enough, but no case that actually faces the question in a context that did not involve concert with a party's officer.

Further discussion briefly explored the question of inherent power in relation to an Enabling Act Rule. If a rule takes away a common-law or equitable power, that eliminates reliance on inherent power to thwart the power. But the interpretive question remains whether the rule was intended to do that. The binding reach of an injunction is an important question. It was generally agreed that a person who acts in concert with a party's agents should be bound. If the party is an artificial entity, indeed, the only way to act in concert with the party is through its agents — the distinction between concert with a party and concert with its agents vanishes, at least as to many of

its agents. (It is not as clear whether the distinction vanishes in the more remote reaches of Rule 65(d)(2) — a party's attorney, for example, presents questions quite different from a party's officer.)

Professor Burbank and Mr. Joseph seemed to agree that the Style Rule should say clearly that an injunction binds a person in active concert or participation with a party's agent. The important thing will be to adopt this provision in a way that makes it clear that the Style Rule resolves an ambiguity in the present rule. Resolving an ambiguity eliminates the possibility of divergent interpretations, an important step that should be made explicit.

Rule 66: Present Rule 66 governs administration of an estate by a receiver "appointed by the court." Clearly this applies only to a receiver appointed by the federal court. Style Rule 66 refers to a receiver "or a similar court-appointed officer"; it might be read to say that a state-court receiver must administer an estate according to the historical practice in federal courts or as provided in a local federal-court rule.

More importantly, present Rule 66 uses "practice" as a concept distinct from "administration." When it says that "[t]he practice in the administration of estates by receivers" accords with "the practice heretofore followed in the courts of the United States," it means that federal courts can apply federal standards for appointing a receiver, even in diversity cases. "Administration," on the other hand, refers to the receiver's dealing with the property. The Style Rule confuses this distinction by saying only that a receiver "must administer an estate according to the historical practice in federal courts." The distinction should be restored by falling back on most of the present second sentence: "The practice in the administration of estates by receivers or by other similar officers appointed by the court ~~shall~~ must ~~be in accordance~~ accord with the historical practice ~~heretofore followed~~ in ~~the courts of the United States~~ federal courts or as provided in ~~rules promulgated by the district courts~~ a local rule."

Rule 68: Professor Burbank pointed out that it seems to be agreed that Style Rule 68 inadvertently changed the time allowed for making a Rule 68 offer.

Professor Burbank further pointed out that Style Rule 68 may affect some of the existing uncertainties that surround Rule 68 offers of judgment. Can an offer be accepted without court approval in a class action? Must a court enter whatever equitable relief is proposed by an accepted offer? What happens when an offer is subject to conditions — for example, it is conditioned on acceptance by all plaintiffs, some plaintiffs accept while others reject, and judgment is then entered against all plaintiffs on terms less favorable to them than the offer terms? People will be looking for language that gives them an advantage in maintaining whatever position they prefer on these issues. Rule 68 "affects access to courts. Any change is troubling." Arguable changes of meaning also affect supersession questions with respect to statutes. One improvement might be to change the final sentence of Style Rule 68(a) to read: "Except in cases where court approval of the judgment is required, the court must then enter judgment." These words would make clear that Rule 23(e) still requires court approval to settle a class action, and that a court cannot be compelled through Rule 68 to enter and enforce an equitable decree that it would not approve on its own. Anyone who considers the question would agree that these propositions are correct. The only question, apart from further style attention to the suggested revision, is how to send notice that these questions are addressed by the Style Rule. Beyond those issues, however, the Style Project should not attempt to clarify Rule 68. Some see Rule 68 as a foundering ship. Others prefer a quicksand analogy. The Committee should be wary.

Concern was expressed that the proposed language referring to court approval might be interpreted to mean that a defendant can moot a plaintiff class action by making Rule 68 offers to

representative plaintiffs. We must be careful that the Style language does not affect this question. Professor Burbank suggested that the Committee Note might address this issue. He also noted again that there is a supersession question with respect to statutes that courts have relied upon to oust Rule 68.

Rule 23: Professor Burbank began by noting that the academic member of the team that focused on Rule 23 was Professor Janet Cooper Alexander. Many of her suggestions focus on the concern that such expressions as "class claims," replacing "claims of class members," will tend to focus on the class elements of the claims, as distinguished from the individual claims, with undesirable results. The shift of direction is subtle, but may cause a shift in understanding. One Committee member agreed with the suggestion — "there is a lot of practice" that should be preserved by going back to "members of the class."

It was noted that the restyling of Rule 23 had been approached with great restraint.

The next observation was similar to the "class claims" suggestion. Present Rule 23(a)(2) refers to "questions of law or fact common to the class." This language is not particularly important in (b)(3) classes because of the requirement that common questions predominate over questions affecting only individual class members. But it is important in (b)(1) or (2) classes. And the Style version, "questions of law or fact are common to the class," may invite an interpretation that requires that all questions be common to the class. It would be better to go back to the present language. Professor Burbank agreed.

Another comment agreed with the working group's suggestion that Style Rule 23(c)(4) should restore two words from the present rule: "an action may be brought or maintained as a class action with respect to particular issues." Additional agreement was expressed for this restoration.

A new issue was raised by the further suggestion that Style Rule 23(d)(1)(B) should change the form of "conduct." In the present rule, notice may be ordered "for the fair conduct of the action." "fairly conduct" in the Style Rule may not fully capture this. "fairly conducting" or some other form might be better.

Style Rule 23(d)(1)(B)(iii) refers to notice to class members of the opportunity "to inform the court" about representation. It would be better to revert to "signify to the court," drawing from the present language. A class member can signify by not opting out, by refraining from challenges or objections, and so on.

Style Rule 23(d)(2) was addressed by a similar comment. The present rule says that a Rule 23(d) order may be altered "from time to time." Although these words may seem redundant, they add a temporal dimension that should not be dropped.

A question of pure style also was asked: present Rule 23(c)(2)(B) refers to the best notice practicable. Style Rule 23(c)(2)(B) refers to the best notice "*that is* practicable." Do we need to add "that is"? Professor Kimble responded that there is no difference of meaning, but that the added words make it more readable.

Rule 26: Mr. Joseph began the report on Rule 26 by raising two global themes. The practice of subdividing Style rules down to romanet items as a level below subparagraphs was criticized, along with the practice of using bullets, as making citation and abbreviation unnecessarily difficult. This problem arises in many of the Style Rules. In addition, the structure is changed from the present rule — what was Rule 26(a)(1)(A) has become 26(a)(1)(A)(i), and so on. Although the new structure may be more satisfying in some ways, the redesignations will make computer searches more difficult.

Style Rule 26(a)(1)(A)(ii) was offered as an illustration of the failure to achieve exactly parallel wording in related provisions. Initial disclosure here includes "data compilations"; some of the parallel discovery rules do not.

The next specific point Mr. Joseph raised addresses Style Rule 26(a)(1)(A)(iv). The present rule requires disclosure of insurance agreements to "satisfy part or all of a judgment which may be entered in the action." The Style rule refers only to "a possible judgment." This change may invite disputes. A plaintiff will assert that it should see all of the defendant's policies so it can decide for itself whether it can argue that any of them cover the possible judgment. On the other hand, "a possible judgment" may be understood to refer only to a judgment on the claim in the present action. Such matters of style are raised to illustrate the ways in which seemingly innocuous changes may lead to unfounded assertions. "I don't want to get the phone calls."

Present Rule 26(a)(5), slated for abrogation, serves a real purpose. Although it seems no more than an index of discovery methods, it makes clear the status of Rule 36 and parts of Rule 45 as discovery devices. Several reported cases confirm the prevalence of arguments that Rule 36 requests to admit and Rule 45 subpoenas are not discovery devices and may be pursued after the close of the discovery period. Those are stupid arguments, but Rule 26(a)(5) helps to fend them off. It should be restored. It seems a matter of indifference whether it should be redrafted to refer to the discovery rules only by number, or instead should carry forward in its present word descriptions.

Mr. Joseph continued by noting that Style Rule 26(a)(2)(B)(vi) changes the meaning of present 26(a)(2)(B). The present rule requires that a trial expert witness's report include "the compensation to be paid for the study and testimony." This includes compensation paid for study by others that is used by the expert. The Style Rule refers only to "the witness's compensation for study and testimony in the case." That does not seem to cover compensation paid to others for studies in aid of the expert's testimony. The present meaning should be restored. One possibility would be to drop "witness's" from the Style Rule, but other adjustments would have be to made.

The Rule 26(e) duty to supplement disclosures and discovery responses now extends only to information "thereafter acquired." Deleting this limit from the Style Rule glosses over the distinction between the duty to correct and the duty to supplement. The duty to correct a response incorrect when given arises from Rule 26(g)(2). "Discovery always happens over time." The Style Rule "can be an invitation to produce at a later time," rather than produce at the first occasion a party recognizes the relevance and responsiveness of information. These problems arise constantly. One expression of agreement was that it is helpful to be able to point to "thereafter acquired" to show that a tardy response is not acceptable.

Mr. Joseph then pointed to Style Rule 26(g)(1)(B)(ii) as an example of a problem that occurs elsewhere as well, as in Rule 11. The present rule refers to increases "in the cost of litigation." The Style Rule refers to an increase of "the litigation costs." It is not clear that "cost of litigation" carries the same meaning as "litigation cost." Professor Rowe agreed that both phrases are used variably in statutes and in other settings. Professor Kimble noted that there is no semantic difference between these modes of expression, and asked whether the shorter formula would lead to misinterpretations. It was suggested that if the Style Rules continue to refer to litigation costs, the Committee Notes might note that usage is variable and that — at least for the Civil Rules — there is no difference of meaning.

Mr. Joseph noted a separate problem with Rule 26(g)(2). The final part of the present rule says that a party "shall not be obligated to take any action with respect to" an unsigned discovery

request, response, or objection. The Style Rule changes that to "has no duty to respond." "[R]espond" fairly covers the obligation to react to a discovery request. But it does not clearly cover action with respect to a discovery objection or response. The unsigned objection or response should be treated as a nullity; if, for example, there is a time limit to reply to an objection, the limit is not triggered by an unsigned objection.

Written Stipulation: Professor Burbank and Mr. Joseph then presented another global issue. At many points the Style Rules substitute "stipulation" for "written stipulation." There is a difference. People stipulate orally. And there may later be disagreement as to the existence of any stipulation, or as to the terms of the stipulation. It is good to require a writing to reduce transaction costs that arise both from good-faith disagreements and from deliberate maneuvering. In response to a question, they agreed that an e-mail message is a writing. The recommendation was that although there are a lot of variations in the present rules, it is better to stick to the present rule, whatever it may be. But perhaps if a rule requires that something be filed, it is unnecessary to remind that it need be a writing.

Rule 30(b)(5): There is no need to refer to camera or sound-recording techniques in Style Rule 30(b)(5); it is better to say that appearance or demeanor "must not be distorted through ~~camera or sound~~ recording techniques."

Rule 30(f): Rule 30(f) presents two questions. One inheres in the present rule, which requires the officer to send the deposition "to the attorney who arranged for the transcript or recording." The Style Rule does not change this, but it does not work. Should it be sent to the attorney or to the party? What happens if a party arranges for a different mode of recording than that designated by the party who noticed the deposition — which recording is the deposition? Mr. Joseph answered that the deposition is the recording made by a court officer — there has to be someone who administers the oath. In his experience, video depositions are always transcribed; the transcription is considered the record — indeed, the reporter watches the video and produces a better transcript than emerges from a stenographically recorded deposition. A separate problem arises from the adoption of present Rule 5(d), which prohibits filing discovery materials until ordered by the court or used in the action, without changing the requirements in Rules 30 and 31 that the party taking a deposition give prompt notice of its filing.

Rule 30(a)(2): Present Rule 33(c) says that an interrogatory is "not necessarily" objectionable merely because an answer involves an opinion or contention. Style Rule 30(a)(2) says that it "is not" objectionable merely because. Having raised the issue, Mr. Joseph suggested that "maybe" the change is proper within the Style Project.

Rule 36(a)(5) and (6): As a matter purely of style, it was suggested that these two paragraphs should be combined into a single paragraph in order to reduce the proliferation of paragraphs.

Rule 37(b)(2)(A)(i): Mr. Joseph noted that other rules present the same issue. One of the sanctions for disobeying a discovery order under present Rule 37(b)(2)(A) is an order that facts are taken as established "in accordance with the claim of the party obtaining the order." The Style Rule changes this to "as the prevailing party claims." In context no one could actually misread this to refer to the party who ultimately prevails in the final judgment. "But they will argue anything." It is better to refer to the party who prevails on the motion.

Rule 37(c)(1): Two issues were identified. One is a problem simply carried forward from the present rule — "disclosed" is used twice in the first sentence to refer to different things. In the first appearance it refers to Rule 26(a) disclosures, while in the second appearance it refers both to Rule 26(a) disclosures and also to failure to supplement a discovery response. Various drafting solutions are possible; some have been suggested already. The other issue also carries forward from the

present rule. One sanction bars use as evidence on a motion, at a hearing, or at trial. Care must be taken in drafting to ensure that the information may be used at a hearing to determine whether a Rule 37(c)(1) sanction should be imposed and to decide what the sanction should be.

Rule 45(a)(3): The present rule authorizes an attorney to issue a subpoena "on behalf of" a court. The Style Rule says "from" a court. "From" may suggest that the attorney must persuade the court to issue it, contrary to the rule's purpose. It was pointed out that "in" behalf of the court has a different meaning from "on" behalf of the court. "For" was suggested, but resisted on the ground that it sounds awkward to say that the attorney is acting for the court.

Rule 45(b)(1): This Rule raises the general issue of cross-references. The present rule calls for service "in the manner prescribed by Rule 5(b)." Rule 5 itself makes clear that it governs service; the cross-reference is not necessary. But the cross-reference saves time by answering a question that otherwise might require a search.

Rule 45(c)(2)(B)(ii): The present rule says that when a person commanded by a subpoena to produce materials objects, the party serving the subpoena is "not entitled to inspect and copy" until it obtains a court order. Style Rule 45(c)(2)(B)(ii) says that "inspection and copying may be done only as directed in the order." That may carry an implication that the parties cannot resolve the dispute by agreement. One acceptable change would be: "(ii) ~~Inspection and copying may be done only~~ The serving party is not entitled to inspect or copy except as directed in the order * * *."

Rule 7(a)(7): Present Rule 7(a) characterizes the pleading that responds to a counterclaim as a "reply." It authorizes a court to order a "reply" to an "answer," but does not authorize an order to reply to a reply. By changing the characterization of the response to a counterclaim to "answer," the Style Rule authorizes the court to order a reply to the response to the counterclaim. This is a change of practice. It is not "earth-shaking."

Rule 8(a): A Committee member observed that present Rule 8(a) applies to a pleading that "sets forth a claim for relief," while Style Rule 8(a) applies to a pleading that "states a claim for relief." "sets forth" may sound old-fashioned, but "states" invites confusion with the Rule 12(b)(6) focus on failure to "state a claim upon which relief can be granted." Some other word should be found; perhaps "makes a claim" would do.

Rule 8(a)(3): Professor David Shapiro, who was the academic on the team that reviewed Rule 8, believes that "for judgment" should be restored from the present rule: "a demand for judgment for the relief sought. Judgment is what counts. Separately, he believes the Style-Substance change is a mistake. "relief in the alternative" is a term of art that encompasses an important proposition that should not be reduced to "alternative forms * * * of relief."

Rule 8(c)(2): Mr. Joseph pointed out that the 19 enumerated affirmative defenses are set out by so many "bullets," and expressed abhorrence for bullet designations.

Rule 8(d)(3): Professor Burbank urged that the reference to Rule 11 should be retained. It is particularly important to have this reminder in a rule that authorizes inconsistent claims or defenses.

Rule 9(a)(2): The first suggestion was that "denial" is not a good choice for a pleading that raises the question of an adversary's capacity, authority to sue in a representative capacity, or legal existence. The initial pleading need not plead these things, so there is nothing to "deny." The present rule describes the response as a "specific negative averment." Beyond that, Professor Shapiro is clear that the rule should recognize that the party questioning any of these elements may not have any supporting facts. The proposed solution: "must do so by a specific ~~denial, which must state~~ statement setting out any supporting facts that are peculiarly within the party's knowledge."

A Committee member raised a pure style question. Style Rule 9(a)(1) lists a number of matters that need not be alleged. (a)(2) then says "to raise any of *those* issues." "those" requires the reader to go back to (1); it may be better to repeat the list in (2). "This" and "those" are inherently ambiguous. An alternative might be to cross-refer to (1), but that too makes the reader go back.

Rule 10(c): The present rule refers to a writing "which is an exhibit." Mr. Joseph suggested that "exhibit" should be restored, and noted the difficulty of discerning what is "attached" to a pleading in electronic filing.

Rule 11(c)(3): Mr. Joseph raised another global style issue: the Style Rules refer to action taken by the court without motion as "on its own," deleting the common "initiative." It would be better to restore "initiative." But it was observed that in most of the Style Rules the phrase is "on motion or on its own," leaving no doubt about the meaning. In the end it was agreed that this is a style choice.

Rule 12(h)(2): The present rule clearly preserves only an objection of failure to join a party indispensable under Rule 19(b); the Style Rule faithfully carries that forward. But Professor Burbank observed that at least one treatise says that this is a mistake — that failure to join any Rule 19 party should be preserved despite omission from a motion or responsive pleading. Perhaps this question should be added to the "reform" agenda.

Rule 12(h)(3): Professor Burbank suggested that present Rule 12(h)(3) is a mess; the mess is carried forward in the Style Rule. It does not recognize the doctrines that permit jurisdiction to be established even though it could not be supported at the time of the initial filing or removal. It implies that an improperly removed action should be dismissed, not remanded. Professor Shapiro suggested that the Style Rule may raise supersession issues, but Professor Burbank thinks not — Enabling Act Rules cannot affect jurisdiction, as recognized by Rule 82. Perhaps the Committee Note could recognize that there are problems not addressed by the Style Project. A response was that it might be better to note these problems in the memorandum transmitting the Style Project — Committee Notes ordinarily are not used to describe problems that are not addressed by the associated rule amendment.

Rule 13(b): The working group comment suggests that Style Rule 13(b), by stating that a pleading may state any claim as a counterclaim, may undermine the compulsory counterclaim provisions of Rule 13(a). Neither Professor Burbank nor Mr. Joseph share this concern.

Rule 15(c)(3): Professor Burbank noted that there are real problems with Rule 15(c)(3), but that they likely are beyond the reach of the Style Project.

Rules 61, 80: Mr. Joseph noted that Rules 61 and 80 present problems of the relationships between the Civil Rules and statutes. Both address evidence issues. But the Evidence Rules are for most part statutes, originally enacted by Congress. So Evidence Rule 103(a) says that error may not be predicated on a ruling unless a "substantial right" is affected. Style Rule 61 begins by stating that no error in admitting or excluding evidence is a ground for relief "[u]nless justice requires otherwise." It is only the second sentence of Style Rule 61 that says that the court must at every stage disregard all errors "that do not affect any party's substantial rights." There are linguistic differences, even if there is no intended change of meaning. So too, Evidence Rule 103(d) embodies a "plain error" standard that is not referred to in present or Style Rule 61. One Committee member suggested that Criminal Rule 52, a plain-error rule, may have looked to Evidence Rule 103(d) in restyling. Mr. Joseph concluded by observing that the working group was simply identifying the issue.

Mr. Joseph then suggested that Style Rule 80 really does not work. The person who recorded the testimony may not be competent to certify the transcript. There is no real need for this provision.

Rather than revert to the present rule, which refers only to stenographic reporting, there would be no harm in simply dropping Rule 80. Others suggested that perhaps Rule 80 should be retained, to be reconsidered in the context of a broader project to review the Civil Rules provisions on evidence for better integration with the Evidence Rules. It was further noted that Rule 80 should not be confused with possible evidentiary uses of deposition testimony — it addresses only testimony "at a trial or hearing." That might include an administrative hearing, or a state-court trial or hearing. The problems of various recording methods may not be as acute as they would be if deposition testimony were included. At the end, Mr. Joseph suggested that Style Rule 80 would be appropriate if it refers only to stenographically recorded testimony.

Rules 72, 73: Professor Burbank noted that Professor Linda Silberman, who was involved in drafting the original versions of Rules 72 and 73, was directed to follow the language of the magistrate-judge statute, and still thinks that is a good idea. Perhaps style conventions should not trump fealty to the statutory language here. To be sure, it was a new statute at the time, and one purpose of adhering to the statutory language may have been to serve a "teaching" purpose. They may have wanted to be sure they were not changing anything. That purpose may not be as important now. If we can be sure that there are no possible changes of meaning, and no significant transaction costs arising from transitional confusion or efforts to create confusion, the Style changes may be appropriate. So, it was noted, the Criminal Rules have adhered to the Civil Style drafts.

Rule 36(b): Professor Burbank noted that the Style-Substance proposal to amend Rule 36(b) presents a problem. The present rule permits amendment of an admission "[s]ubject to the provisions of Rule 16 governing amendment of a pre-trial order." Present Rule 16(e) states two different things about amending a pretrial order. First it provides generally that an order reciting the action taken at a Rule 16 conference "shall control the subsequent course of the action unless modified by a subsequent order." That provision does not establish any standard for modification; it simply recognizes that modification may occur. The second provision is that an order following a final pretrial conference "shall be modified only to prevent manifest injustice." The Style Rules divide these two provisions between Style Rule 16(d) and (e). The Style-Substance proposal is to limit Rule 36(b) to an order permitting withdrawal or amendment of an admission "that has not been incorporated in a pretrial order." The result is that there is no standard for withdrawal or amendment of an admission that has been incorporated in a pretrial order before the final pretrial order. The appropriate rule instead should be that the Rule 36(b) standard governs withdrawal or amendment except as to an admission that has been incorporated in a final pretrial order. Withdrawal or amendment of an admission incorporated in a final pretrial order should be governed by the more demanding standard of Style Rule 16(e).

Overall Evaluation: A Committee Member asked Professor Burbank and Mr. Joseph to comment on their written summary of the working group's views on the wisdom of undertaking the Style Project. Professor Burbank replied that the group was divided. Fourteen members participated in the final conference call. Of them, nine believed that the project should not be carried to a conclusion, while five believed that the advantages of adopting the Style Rules outweigh the costs that will be entailed. The strength of their convictions varied. Some thought the goals of the project are admirable, but were concerned that there are not insignificant problems even in light of the perception that the Styled Appellate Rules and Criminal Rules work. The problems that can be identified now can be fixed now. But there will be other problems that are not identified. And there will be transaction costs as lawyers attempt to bend the Style Rules by arguing for unintended changes of meaning. In addition, there is an opportunity cost in losing the occasion for addressing the entire corpus of rules by asking whether the present Federal Rules of Civil Procedure embody the right procedure for the 21st Century.

Mr. Joseph added that the transaction costs include even such mundane things as changes in the designations of rule subparts — every time there is a search, there is an extra cost in connecting the search to the former designations.

A first response was that the Style Project was sensitive to the problems of changing designations. The numbers of the rules were left unchanged, even though that means retaining decimal numbers, and the most famous designations — such as Rule 12(b)(6) — were retained. And an effort was made to ensure that such changes as were made were justified. Those changes will continue to be reviewed as the Project carries forward.

In response to a question, Professor Burbank said that the opportunity cost of the Style Project is loss of the resources to consider the adequacy of the Civil Rules as a whole. The loss is not merely a loss of Committee time and energy. The bar cannot be asked to adapt to a complete rewriting of the rules more than once in a generation. Adoption of the Style Project will foreclose the opportunity to engage in a second massive rewriting, this time for substantive reasons, in the close-term future. Of course that is not a cost if such a broad project would not be undertaken in any event.

Judge Rosenthal concluded the hearing by noting that the immediate task is to make the Style Rules as good as can be. The best possible product can then be compared to the concerns about implementation costs and a judgment made whether the improvements are so clear as to justify the costs. She repeated that the Committee is immensely grateful to the working group, and particularly to Professor Burbank and Mr. Joseph, for the immense work they have devoted to this project.

RECOGNITION OF JUDGE SCHEINDLIN

Judge Rosenthal presented to Judge Scheindlin a plaque recognizing and appreciating her service as an Advisory Committee member. Committee members regularly live up to and earn these expressions of appreciation, but Judge Scheindlin has earned them as completely as anyone can.

NOTES ON COMMITTEE MEETING

Judge Rosenthal opened discussion of the approach to be taken in adapting the published Style Rules to public comments. The comments provided by the working group organized by Professor Burbank and Gregory Joseph are likely to be at least as complete and thorough as any. Only a few other comments have been provided at present. A bar group in New York is working on the rules and may provide a comprehensive report. Other comments may appear as well, but it remains difficult to predict their sources or character.

It remains necessary to adapt the Style Rules to incorporate the rules changes that are now pending in the Supreme Court, on track to take effect on December 1, 2006. Professor Marcus did this for the electronic discovery rules as they stood in the early stages, and will be responsible for the first draft that adjusts for the rules that were transmitted to the Court.

A tentative schedule for further work by the Reporter and consultants was discussed, recognizing that the schedule will be affected by the final choice of the dates for the spring meeting. If the spring meeting is scheduled for late April or early May, it may be possible to go as late as January 30 to get a comprehensive draft to the Style Subcommittee. The next step, by mid-February, will be transmission to the Advisory Committee Subcommittees A and B. By mid-March the Subcommittee reports and the research that may remain to be done by Professors Marcus and Rowe should be delivered to the Reporter, for preparation of a final package for the Advisory Committee by the beginning of April. The hope will be to prepare a package that will leave few issues to be resolved by the full Advisory Committee, and to leave enough time before the spring meeting to

gather reactions on the issues that remain to be resolved. A final timetable will be prepared after setting the date for the spring meeting.

A cover memorandum must be prepared to address the larger issues, exploring the balance between the advantages of clearly written rules and the cost of adjusting to clarity. The arguments for and against proceeding toward final adoption of the Style Package must be developed in full and weighed with care.

Many of the working group comments on the Style Rules suggested that some issues should be taken out of the general Style package and included in the "Style-Substance" track. Discussion began by asking just what would this move affect? The two tracks have been published, but for simultaneous public comment. As the project moves forward, the value of separate presentation will diminish continually. There would be a real difference if a rule or subdivision were withdrawn entirely from the Style Project, leaving it for separate development later in the ordinary course of rules amendments. There also might a difference if distinctions were to be drawn by some device that identifies the Style Rules amendments as changes that do not affect the supersession consequences of any of the rules. It would be possible to say that the pure Style Rules do not affect supersession, while the Style-Substance Rules do. But there is no point in saying it. The Style-Substance Rules are not intended to affect supersession, and there is no plausible reason to suspect that they might. These changes were proposed now primarily because they seemed so simple and insignificant that they would not be likely to be addressed separately in the future. The practice with the Criminal Rules was to combine the separate tracks into a single package after the Judicial Conference approved the rules for transmission to the Supreme Court. It was agreed that nothing is likely to be gained now by transferring proposals originally made in the Style Rules into the Style-Substance package for consideration in tandem as part of what in any event will become a single package.

The work of the other Subcommittees appointed after the October meeting also was discussed. It seems likely that they will begin work in January, aiming toward reports to the Committee at the spring meeting. The reports, however, need not be in the form of draft rules proposed for publication in 2006. The questions often present difficult issues, whether as focused as Rule 15 or as general as summary judgment and notice pleading. It may prove that publishable proposals can be developed on some of these issues by spring, but the immediate task is to develop a better-focused sense of the issues that are likely to support workable proposals.

It was noted that various bar groups will be consulted for views on the possible need to revise the Rule 30(b)(6) provisions for deposing an organization.

B. RULES RECOMMENDED FOR PUBLICATION

1. Rule 6(a)

Rule 6(a) is recommended for publication after the time required for each Advisory Committee to complete the work of reviewing all of the time periods set out in each set of Rules.

PROPOSED AMENDMENT TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 6. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any time period specified in these rules or in any local rule, court order, or statute.

(1) ***Period Stated in Days.*** When the period is stated in days,

(A) exclude the day of the act, event, or default that triggers the period;

(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(C) 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 weather or other conditions make the clerk's office inaccessible. When the last day is excluded, the

period continues to run until the end of the next day that is not a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible.

(2) ***Period Stated in Hours.*** When the period is stated in hours,

(A) begin counting immediately on the occurrence of the act, event, or default that triggers the period;

(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(C) if the period would end at a time on a Saturday, Sunday, legal holiday, or — if the act to be done is filing a paper in court — a day on which weather or other conditions make the clerk's office inaccessible, then continue the period until the same time on the next day that is not a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible.

(3) ***"Legal Holiday" Defined.*** "Legal holiday" means:

(A) the day set aside by statute for observing 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, or Christmas Day; and

(B) any other day declared a holiday by the President, Congress, or the state where the district court is located.

Committee Note

Subdivision (a). Subdivision (a) has been amended to simplify and clarify the provisions that describe how deadlines are computed. Subdivision (a) governs the computation of any time period found in a Federal Rule of Civil Procedure, a local rule, a court order, or a statute. A local rule may not direct that a deadline be computed in a manner inconsistent with subdivision (a). See Rule 83(a)(1).

The time-computation provisions of subdivision (a) apply only when a time period needs to be computed. They do not apply when a fixed time to act is set. If, for example, a rule or order requires that a paper be filed "no later than November 1, 2007," then the paper is due on November 1, 2007. But if a rule or order requires that a paper be filed "within 10 days" or "within 72 hours," subdivision (a) describes how that deadline is computed.

Subdivision (a)(1). New subdivision (a)(1) addresses the computation of time periods that are stated in days. (It also applies to the rare time periods that are stated in weeks, months, or years. See, e.g., Fed. R. Evid. 901(b)(8).)

Under former Rule 6(a), a period of 11 days or more was computed differently than a period of 10 days or less. Intermediate Saturdays, Sundays, and legal holidays were included in computing the longer periods, but excluded in computing the shorter periods. Former Rule 6(a) thus made computing deadlines unnecessarily complicated and led to counterintuitive results. For example, a 10-day period and a 14-day period that started on the same day usually ended on the same day — and, not infrequently, the 10-day period actually ended later than the 14-day period. See Miltimore Sales, Inc. v. Int'l Rectifier, Inc., 412 F.3d 685, 686 (6th Cir. 2005).

Under new subdivision (a)(1), all deadlines stated in days (no matter the length) are computed in the same way. The day of the act, event, or default that triggers the deadline is not counted. Every other day — including intermediate Saturdays, Sundays, and legal holidays — is counted, with only one exception: If the period ends on a Saturday, Sunday, or legal holiday, then the deadline is extended to the next day that is not a Saturday, Sunday, or legal holiday. (When the act to be done is filing a paper in court, a day on which the clerk's office is not accessible because of the weather or another reason is treated like a Saturday, Sunday, or legal holiday.) Thus, a paper that must be filed within 10 days after the entry of an order on Tuesday, August 21, 2007, is due on Friday, August 31, 2007. But a paper that must be filed within 10 days after the entry of an order on Wednesday, August 22, 2007, is not due until Tuesday, September 4, 2007, because the tenth day (September 1) is a Saturday and Monday (September 3) is Labor Day.

The Federal Rules of Civil Procedure contain both forward-looking time periods and backward-looking time periods. A forward-looking time period requires something to be done within a period of time *after* an act, event, or default. See, e.g., Rule 59(b) (motion for new trial "shall be filed no later than 10 days after entry of the judgment"). A backward-looking time period requires something to be done within a period of time *before* an act, event, or default. See,

e.g., Rule 56(c) (summary judgment motion "shall be served at least 10 days before the time fixed for the hearing"). In determining what is the "next" day for purposes of subdivision (a)(1)(C) (as well as for purposes of subdivision (a)(2)(C)), one should continue counting in the same direction — that is, forward when computing a forward-looking period and backward when computing a backward-looking period. If, for example, a paper is due within 10 days *after* an event, and the tenth day falls on Saturday, March 15, then the paper is due on Monday, March 17. But if a paper is due 10 days *before* an event, and the tenth day falls on Saturday, March 15, then the paper is due on Friday, March 14.

Periods previously expressed as 10 days or less will be shortened as a practical matter by the decision to count intermediate Saturdays, Sundays, and legal holidays in computing all periods. Many of those periods have been lengthened to compensate for the change. See, e.g., [CITE].

Subdivision (a)(2). New subdivision (a)(2) addresses the computation of time periods that are stated in hours. No such deadline currently appears in the Federal Rules of Civil Procedure. But some statutes contain deadlines stated in hours, see, e.g., 28 U.S.C. § 3771(d)(3), as do some court orders issued in expedited proceedings.

Under new subdivision (a)(2), a deadline stated in hours starts to run immediately on the occurrence of the act, event, or default that triggers the deadline. The deadline generally ends when the time expires. If, however, the deadline ends at a specific time (say, 2:00 p.m.) on a Saturday, Sunday, or legal holiday, then the deadline is extended to the same time (2:00 p.m.) on the next day that is not a Saturday, Sunday, or legal holiday. (Again, when the act to be done is filing a paper in court, a day on which the clerk's office is not accessible because of the weather or another reason is treated like a Saturday, Sunday, or legal holiday.)

Subdivision (a)(3). New subdivision (a)(3) defines "legal holiday" for purposes of the Federal Rules of Civil Procedure, including the time-computation provisions of subdivisions (a)(1) and (a)(2).

Discussion

Rule 6(a) is the Rule chosen by the Time-Computation Subcommittee to illustrate the template developed for each of the rules that governs the computation of time periods. A central purpose of the Time-Computation Project is to achieve a uniform method of computing time. Simplicity is as important as uniformity. To that end, the template eliminates the "eleven-day" rule that excluded intermediate Saturdays, Sundays, and legal holidays in calculating periods shorter than eleven days. The template also adds a provision for calculating periods expressed in hours. It carries forward the familiar rule that the day from which a period starts to run is excluded, and the final day is included, and seeks to clarify application of this rule to periods that run "backward" from a stated event. The Civil Rules Committee approves all of these recommendations.

Abolition of the eleven-day rule will require each Advisory Committee to reconsider all of the time periods set at less than eleven days. The Civil Rules include many examples, ranging from one day to several periods set at ten days. Every period now set at five days or longer is effectively shortened by the direction to count Saturdays, Sundays, and legal holidays. Shorter periods may or may not be affected, depending on the day that starts the period. Abolition also may require reconsideration of local rules that set time periods at ten days or less. The Appellate Rules Committee has pointed out that there is no easy answer to the questions raised by statutes that set time periods at ten days or less. The Civil Rules Committee discussion of statutory time periods, as described in the draft Minutes, identified difficulties more than solutions.

The Time-Computation Subcommittee sought advice on two questions that should be resolved before eventual publication of Rule 6(a).

One of these questions addresses the Rule 6(a) provisions that extend the period for filing a "paper" in court if the period ends on "a day on which weather or other conditions make the clerk's office inaccessible." Adaptation of this rule to electronic filing is not easy. The court's system may become unable to accept electronic filings. Or a party may rely on electronic filing at the final minute, only to find that its own system has failed. The Civil Rules Committee recommends that the Technology Subcommittee consider these questions. Pending further guidance, the tentative approach to Rule 6(a) will be to adopt open terms that are not limited to physical inaccessibility but that do not directly address e-filing mishaps. The reference to filing a "paper" will be changed to neutral "filing." Nothing will be said about problems with the filer's system. Further elaboration is set out in the draft Minutes.

The other question identified by the Time-Computation Subcommittee arises from Rule 6(e)'s provision that adds three days to respond after service by any means other than personal service. This provision began with the need to recognize the time required to deliver traditional physical mail in conjunction with the rule that service is effective on mailing. It has been extended to modes of service speedier than traditional mail, including electronic service. These modes of service do not invariably provide instantaneous or even next-day delivery, but that consideration may not of itself justify an additional three days to respond. The decision whether to allow additional time, however, is also affected by the fear that some lawyers choose the mode of service for the tactical purpose of minimizing the time available to respond. The Civil Rules Committee reached no recommendation on this question.

Three other general questions were raised in discussing the general provisions of Rule 6.

Rule 6(a) excludes the last day of a period if it is a legal holiday, and includes in the exclusion a day declared a holiday by the state where the district court is located. The district court may well be open on such a day. On the other hand, the cases show the difficulties that arise when a district court closes on a day that is not a legal holiday within any part of the Rule 6(a) definition. Local directives may close the court on a day next to a legal holiday — the Friday after Thanksgiving is one illustration. It might be useful to change this rule to account for days on which the clerk's office is closed. At the same time, it is important to remember that a widely observed local holiday may be so ingrained that lawyers will not pause to ask whether it is also observed by the federal courts.

A second question asks whether it is possible to define the end of the "day" in the national rules. Many courts accept electronic filing up to midnight. As electronic filing becomes universal, it might be possible to address this issue in the national rules. Some courts also accept paper filings after the clerk's office is closed, relying on a "drop box." That practice does not seem as likely to be suitable for a national rule — local circumstances may affect the feasibility of this practice. Perhaps the Time-Computation Subcommittee can help the advisory committees address this common question.

A third question arises from the Rule 6(b) direction that the court cannot extend the times set for a number of post-judgment motions. This provision responds to important needs and probably should not be revised. It must be recognized, however, that it continues to cause not only loss of the opportunity to seek post-judgment relief but also may cause loss of the right to appeal when combined with the rule that only a timely motion suspends appeal time. This question will be considered. Other Advisory Committees may wish to participate in the process.

The Advisory Committee has divided into two subcommittees to consider the individual time periods set in the Civil Rules. It has concluded that the task should be approached without any general assumption that the periods are generally too short or too long. The focus instead will be on the practical realities attached to each rule. In refining the periods, however, a preference will be given to setting time in multiples of seven days. This approach will reduce the occasions on which it is necessary to exclude a final day that is a Saturday or Sunday.

2. Rules 13(f) and 15(a)

Related amendments of Rules 13(f) and 15(a) are recommended for publication at some time after August, 2006 — most likely as part of a larger package in August, 2007. The changes are shown in the Style Rule form:

Rule 13. Counterclaim and Crossclaim

* * * * *

~~**(f) Omitted Counterclaim.** The court may permit a party to amend a pleading to add a counterclaim if it was omitted through oversight, inadvertence, or excusable neglect or if justice so requires.~~

Committee Note

Rule 13(f) is deleted as largely redundant and potentially misleading. An amendment to add a counterclaim will be governed by Rule 15. Rule 15(a)(1) permits some amendments to be made as a matter of course or with the opposing party's written consent. When the court's leave is required, the reasons described in Rule 13(f) for permitting amendment of a pleading to add an omitted counterclaim sound different from the general amendment standard in Rule 15(a)(2), but seem to be administered — as they should be — according to the same standard directing that leave should be freely given when justice so requires. The independent existence of Rule 13(f) has, however, created some uncertainty as to the availability of relation back of the amendment under Rule 15(c). See *6 C. Wright, A. Miller & M. Kane, Federal Practice & Procedure: Civil 2d, § 1430*. Deletion of Rule 13(f) ensures that relation back is governed by the tests that apply to all other pleading amendments.

Rule 15. Amended and Supplemental Pleadings

(a) Amendments Before Trial.

(1) Amending as a Matter of Course. A party may amend its pleading once as a matter of course ~~within~~:

(A)~~before being served with a responsive pleading;~~ 21 days after serving it, or

(B) ~~within 20 days after serving the pleading if a responsive pleading is not allowed and the action is not yet on the trial calendar~~ if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

* * * * *

Committee Note

Rule 15(a) is amended to make three changes in the time allowed to make one amendment as a matter of course.

Former Rule 15(a) addressed amendment of a pleading to which a responsive pleading is required by distinguishing between the means used to challenge the pleading. Serving a responsive pleading terminated the right to amend. Serving a motion attacking the pleading did not terminate the right to amend, because a motion is not a "pleading" as defined in Rule 7. The right to amend survived throughout the time required to decide the motion and indeed

survived beyond decision of the motion unless the decision expressly cut off the right to amend.

The distinction drawn in former Rule 15(a) is changed in two ways. First, the right to amend once as a matter of course terminates 21 days after service of a motion under Rule 12(b), (e), or (f). This provision will force the pleader to consider carefully and promptly the wisdom of amending to meet the arguments in the motion. A responsive amendment may avoid the need to decide the motion or at least reduce the number of issues to be decided, and will expedite determination of issues that otherwise might be raised seriatim. It also should advance other pretrial proceedings.

Second, the right to amend once as a matter of course is no longer terminated by service of a responsive pleading. The responsive pleading may point out issues that the original pleader had not considered and persuade the pleader that amendment is wise. Just as amendment was permitted by former Rule 15(a) in response to a motion, so the amended rule permits one amendment as a matter of course in response to a responsive pleading. The right is subject to the same 21-day limit as the right to amend in response to a motion.

The 21-day periods to amend once as a matter of course after service of a responsive pleading or after service of a designated motion are not cumulative. If a responsive pleading is served after one of the designated motions is served, for example, there is no new 21-day period.

Finally, amended Rule 15(a) extends from 20 to 21 days the period to amend a pleading to which no responsive pleading is allowed and omits the provision that cut off the right if the action is on the trial calendar. Rule 40 no longer refers to a trial calendar,* and many courts have abandoned formal trial calendars. It is more effective to rely on scheduling orders or other pretrial directions to establish time limits for amendment in the few situations that otherwise might allow one amendment as a matter of course at a time

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* This statement anticipates adoption of Style Rule 40 — or Style-Substance Rule 40 — on December 1, 2007.

that would disrupt trial preparations. Leave to amend still can be sought under Rule 15(a)(2), or at and after trial under Rule 15(b).

Abrogation of Rule 13(f) establishes Rule 15 as the sole rule governing amendment of a pleading to add a counterclaim.

Discussion

Rule 15 has been on the Committee agenda for several years. Several possible amendments have been considered by two subcommittees. The current recommendations result from careful work by a subcommittee chaired by Judge Michael Baylson. The Committee Notes provide most of the discussion needed to explain the proposed amendments. The decision to go no further deserves brief separate discussion.

Present Rule 15(a) presents a clear distinction between the events that cut off the right to amend once as a matter of course a pleading to which a responsive pleading is required. Service of a responsive pleading terminates the right to amend. Service of a motion that attacks the pleading does not. Instead the right to amend survives the motion, argument of the motion, deliberation by the court, and — on terms that vary somewhat among the courts — even a decision granting the motion. The reasons that might justify this distinction remain a puzzle. The proposed amendment eliminates the distinction. The pleader may amend once as a matter of course within 21 days after service of a responsive pleading or of a motion under Rule 12(b), (e), or (f). No matter which method is used to challenge the pleading, the pleader is given an opportunity to recognize the cogency of the challenge and to make an amendment. This opportunity is not likely to create additional work for the adversary or courts — to the contrary, it is likely that a motion for leave to make the same amendment would simply add unnecessary work because most such motions will be granted. Nor is it likely that pleaders will respond with thoughtless amendments — after a first amendment has been made, the burden of winning leave for a second amendment will be greater.

Rule 13(f) now provides that the court may permit a party to "amend a pleading to add a counterclaim." The Style Project considered deleting this rule as redundant with Rule 15, but concluded that the change might be challenged as substantive. Despite the different language, however, there is no apparent reason to believe that courts apply different standards when an amendment seeks to add a counterclaim than when an amendment seeks to add a claim or crossclaim, or to make other changes. Nor is there any apparent reason to apply different standards. The existence of this provision, moreover, generates uncertainty whether a Rule 13(f) amendment is eligible for relation back under Rule 15(c). Abrogation will bring all pleading amendments within Rule 15.

The Subcommittee divided on the question whether to propose amendments to Rule 15(c). Close textual analysis reveals a host of problems with the rule as written. But there is no indication in the reported cases that any of these problems have caused difficulties in practice. Work on Rule

15(c), further, would reopen serious questions. The first provision allows an amendment to relate back to the date of the pleading being amended when applicable limitations law allows relation back. The following provisions allow relation back despite the fact that applicable limitations law does not allow relation back. Relation back still can be justified to cure errors that are fairly characterized as procedural. But the line between providing ameliorative procedure and creating new limitations rules is thin. After exploring both narrow and broad proposals to amend the provisions that now appear in Rule 15(c)(2) and (3) (Style Rule 15(c)(1)(B) and (C)), the Committee decided to decline further work on Rule 15. The discussion is elaborated in the draft Minutes.

3. Rule 48: Jury Polling

Rule 48(c) is recommended for publication at the same time as the amendments proposed for Rule 13(f) and 15, and as new Rule 62.1:

Rule 48. Number of Jurors; Verdict; Polling

(a) Number of Jurors. A jury must begin with at least 6 and no more than 12 members, and each juror must participate in the verdict unless excused under Rule 47(c).

(b) Verdict. Unless the parties stipulate otherwise, the verdict must be unanimous and must be returned by a jury of at least 6 members.

(c) Polling. After a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually. If the poll reveals a lack of unanimity or assent by the number of jurors required by the parties' stipulation, the court may direct the jury to deliberate further or may order a new trial.

Committee Note

Jury polling is added as new subdivision (c), which is drawn from Criminal Rule 31(d) with minor revisions to reflect Civil Rules Style and the parties' opportunity to stipulate to a nonunanimous verdict.

Discussion

Consideration of adding a provision for jury polling was suggested during Standing Committee discussion a few meetings ago. Criminal Rule 31(d) provides a good model that is adopted for this recommendation. One departure is required to account for the parties' opportunity to stipulate to a nonunanimous verdict. And a style departure was made by referring to ordering a new trial rather than declaring a mistrial and discharging the jury. The Civil Rules consistently refer to a new trial; the closest illustration in rules sequence is Rule 49(b), which deals with the similar problem of inconsistencies when a general verdict is supplemented by interrogatories.

Jury polling is occasionally resisted on the ground that it may lead to frequent retrials. The Federal Judicial Center gathered figures on more than 100,000 jury trials over the 25 years from 1980 to 2004. Fewer than 1% of these trials resulted in a hung jury. This figure suggests that the likely risk is not great.

4. Rule 62.1: "Indicative Rulings"

New Rule 62.1 is recommended for adoption:

Rule 62.1 Indicative Rulings

(a) Motion For Relief Pending Appeal. If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may:

(1) defer consideration of the motion;

(2) deny the motion; or

(3) indicate that it [might][would] grant the motion if the appellate court should remand for that purpose.

(b) Notice to Appellate Court. The movant must notify the clerk of the appellate court when the motion is filed and when the district court acts on the motion.

(c) Remand. If the district court indicates that it [might][would] grant the motion, the appellate court may remand the action to the district court.

Committee Note

This new rule adopts and generalizes the practice that most courts follow when a party makes a Rule 60(b) motion to vacate a judgment that is pending on appeal. After an appeal has been docketed and while it remains pending, the district court cannot on its own reclaim the case to grant a Rule 60(b) motion. But it can entertain the motion and either deny it or indicate that it [might] [would] grant the motion if the action is remanded.

This clear procedure is helpful whenever relief is sought from an order that the court cannot revise because the order is the subject of a pending appeal. Rule 62.1 does not attempt to define the circumstances in which an appeal limits or defeats the district court's authority to act in face of a pending appeal. The rules that govern the relationship between trial courts and appellate courts may be complex, depending in part on the nature of the order and the source of appeal jurisdiction. Rule 62.1 applies only when those rules, as they are or as they develop, deprive the district court of authority to grant relief without appellate permission. If the district court concludes that it has authority to grant relief without appellate permission, it can act without falling back on the "indicative ruling" procedure.

To ensure proper coordination of proceedings in the district court and in the appellate court, the movant must notify the clerk of the appellate court when the motion is filed in the district court and again when the district court rules on the motion. If the district court indicates that it might grant the motion, the movant may ask the appellate court to remand the action so that the district court can make its final ruling on the motion. Remand is in the appellate court's discretion. The appellate court may remand all proceedings, or may remand for the sole purpose of ruling on the motion while

retaining jurisdiction to proceed with the appeal after the district court rules if any party wishes to proceed. [The district court is not bound to grant the motion after indicating that it might do so; further proceedings on remand may show that the motion ought not be granted.]

Discussion

New rule 62.1 responds to a suggestion made by the Solicitor General to the Appellate Rules Committee. The Appellate Rules Committee concluded that any new rule provision would be better included in the Civil Rules because the underlying question involves district court authority to act while an appeal is pending.

The basic approach recommended in this proposal is borrowed from the procedure followed when a Rule 60(b) motion is made for relief from a judgment while an appeal from the judgment is pending. The courts of appeals recognize that the appeal defeats district-court "jurisdiction" to grant the motion. But they all rule that the district court can consider the motion. Most agree that the district court retains jurisdiction to deny the motion. But all agree that the district court lacks "jurisdiction" to grant the motion. If the district court concludes that the motion should be granted, it can indicate that it would do so if the case is remanded for that purpose. (At least one circuit also requires a remand to establish authority to deny the motion after the district court indicates that it would deny if the case is remanded. And another court at times chooses to vacate the judgment with leave to reinstate the appeal after the district court acts on remand.)

The common Rule 60(b) procedure is satisfactory. It honors the wisdom of the rule that only one court should have control of a case at one time. It recognizes that the time to move under Rule 60(b) is not suspended by a pending appeal, so that the motion often must be made or lost before the appeal is decided. The refusal to suspend the time to move in turn rests on the importance of prompt inquiry into many of the issues that may be raised by such motions.

Although it is well established, the procedure incident to a Rule 60(b) motion made pending appeal is often overlooked by lawyers. Some district judges have been unaware of its existence. It would be useful to write this procedure into Rule 60(b) to make it well known, to make it consistent across all courts, and to provide some useful procedural incidents such as the movant's duty to inform the court of appeals both when the motion is made and again when the district court acts on the motion.

The proposal goes beyond Rule 60(b) motions, generalizing the procedure to embrace any order that the district court lacks authority to revise because of a pending appeal. The orders most likely to be caught up in the broader rule will be interlocutory orders with respect to injunctions. Civil Rule 62(c) and Appellate Rule 8(a)(1)(C) seem to establish district-court authority to act despite a pending appeal, and indeed seem to indicate that relief should be sought first in the district

court. Several courts of appeals, however, do not read those rules as they seem to be written. See 16 Federal Practice & Procedure: Jurisdiction 2d, § 3921.2. pp. 59-64. Rule 62.1 will provide an alternative path to district-court action in those circuits. And it will provide a clear source of authority for more exotic combinations of appeals taken while the district court continues to proceed with respect to matters not subject to the appeal.

Rule 62.1 does not attempt the difficult task of defining the circumstances in which a pending appeal ousts district-court power to act on a motion. It is drafted to apply only when an independent source of authority establishes the district court's lack of power.

The recommendation contemplates publication in a form that seeks comment on alternative wording. The question is whether the district court should be able to indicate that it believes the case should be remanded without committing itself to revise the order. One rule text version allows the district court to indicate that it "might" grant relief. The other version requires the district court to indicate that it "would" grant relief. The argument for insisting that the district court indicate that it "would" grant relief is that a case should be remanded, interrupting the progress of the appeal, only after the district court has invested the time and energy — and imposed the burden on the parties — required to reach final decision on the motion. The argument for recognizing authority to indicate that the district court "might" grant relief is that this approach better integrates the resources of both courts. Initial consideration may persuade the district court that the motion raised important questions, but that final resolution will require a heavy investment that should not be made without assurance that the court of appeals will not decide the appeal — perhaps mooting or changing the inquiry — before the inquiry is complete, or else refuse to remand after the district court indicates that it would grant the motion. Once the district court indicates that it might grant the motion, and explains the reasons why the issues seem important but too difficult to pursue to completion without a remand, the court of appeals has control. The court of appeals can balance the district court's statement of the reasons that support remand against the progress of the appeal and its own deliberations. These arguments would be summarized in the message transmitting the proposal for publication, with a request for comment on the choice.

II Information Items

A. Civil Rules 54(d)(2), 58(c)(2), and Appellate Rule 4

In *Wikol ex rel. Wikol v. Birmingham Public Schools*, 6th Cir.2004, 360 F.3d 604, 610, the court bewailed the complex interplay of the rules that integrate motions for attorney fees with the rules that govern appeal time. The Appellate Rules Committee asked the Civil Rules Committee to consider amendment of the Civil Rules "to impose a deadline by which a judge must exercise his or her authority to order that a motion for attorney's fees [under Civil Rule 54(d)(2)] have the same effect under Appellate Rule 4(a)(4) as a timely motion under Civil Rule 59." Few readers outside the Rules Committees are likely to be able to understand that suggestion without a trip to the rules books. The Civil Rules Committee has concluded that it is better to live with the complexity of the present rules than to run the risk of unintended consequences — and perhaps still greater complexity — by attempting to address the one identified gap in the present rules.

Summary explanation is difficult. The setting is clear enough. A decision that resolves all of the claims among all the parties is a final decision. Appeal time starts to run when it is set forth in a separate document under Rule 58 (or not later than 150 days after entry in the civil docket, notwithstanding failure to comply with the separate document requirement). A timely motion for attorney fees does not suspend appeal time. Without more, the result would be that the parties must proceed with any appeal on the merits before disposition of the fee motion. If the district court is able to dispose of the fee motion before the appeal is decided, it may be possible to consolidate separate appeals on the merits and on the fee issues. But there is a risk that two appeals must be considered where one would be better. Rule 58(c)(2) establishes a flexible procedure to address this risk. After a timely fee motion is filed, the district court, in the language of Style Rule 58(e), "may act before a notice of appeal has been filed and become effective to order that the Rule 54(d)(2)

motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59." Translated, that means that the district court can order that appeal time is suspended until a notice of appeal has transferred jurisdiction of the appeal on the merits to the court of appeals.

Reading together four rules set out in two different sets of rules is not an easy task. The difficulty of the task is augmented by the complexity of the rules involved, particularly Appellate Rule 4(a). The complexities, however, have accumulated in responding to important needs. The time for post-judgment motions must be brief, and must be integrated with appeal times. Many combinations of filings are possible. The rules must address as many combinations as can be foreseen. Responses to the present problem that reduce complexity would come at a cost. The most likely simplifying solutions would be to rule that appeal time is never suspended by a timely fee motion, or that it is always suspended. Neither alternative seems attractive.

Apart from simplification, the present rule text could be read to support a nonsensical interpretation. Because the district court can act "before a notice of appeal has been filed and become effective," it could be argued that expiration of appeal time does not cut off the right to extend appeal time. Imagine judgment on Day 1. A timely fee motion on Day 10. No further action until an order granting or denying the fee motion on Day 150. An appeal can then be taken from the order on the fee motion. But what of the judgment on the merits? Appeal time has expired long since. But no notice of appeal on the merits has been filed or become effective. Can the district court then act to order that the fee motion suspends time to appeal on the merits? The possibility that this argument might succeed seems too low to justify an attempt to enter the thicket to find a correction that does not increase complexity or invite unintended consequences.

The Committee asked the Federal Judicial Center to undertake a study to determine whether this part of Rule 58 seems to be causing problems in practice. A summary appears in the draft Minutes for the May meeting. The conclusion is clear. There is no apparent reason to believe that the present rules are creating significant problems, or even that they are being much used.

The Committee will transmit this report to the Appellate Rules Committee. If the Appellate Rules Committee believes that further work is desirable, the Committee is willing to join in the project.

B. Discovery Projects

A subcommittee chaired by Judge David Campbell is studying the operation of Rules 26(a)(2)(B) and 30(b)(6).

Rule 30(b)(6) allows a litigant to name an organization as deponent. The notice must specify the subjects of inquiry. The organization must then designate people to testify for it, specifying the subjects on which each will testify. The designated witnesses must be educated to "testify as to matters known or reasonably available to the organization."

The Rule 30(b)(6) project has advanced further than the Rule 26(a)(2)(B) project. The study of Rule 30(b)(6) was first requested by the New York State Bar Association Committee on Federal Procedure. The subcommittee solicited advice from bar groups that had commented on the e-discovery amendments and received more than a dozen thoughtful replies. Study of the responses suggests that many of the dissatisfactions with Rule 30(b)(6) are similar to general dissatisfactions with discovery. Inquiring parties believe they are subjected to run-arounds and stonewalling. Responding parties believe they are being subjected to overreaching and poorly defined demands. Addressing these dissatisfactions by amending Rule 30(b)(6) is not likely to prove profitable. But other questions remain that deserve serious further study. One question is whether there is a need to protect against efforts to extract an organization's legal contentions from a deposition witness rather than by interrogatory or request to admit. A closely related question is whether the deposition testimony establishes a judicial admission, or whether the organization can contradict the testimony at trial, subject to the usual use of the deposition to impeach. Another closely related question goes to the protection of work product and privilege against questions as to the sources of information

relied upon by the witness to convey the "matters known or reasonably available to the organization." All of these questions may be affected by the question whether an organization should be obliged to supplement the deposition testimony under Rule 26(e), distinguishing an organization deposition from all other depositions save those of an expert trial witness. The duty to supplement, finally, might easily become an opportunity to defer answering at the deposition in reliance on an assertion that the information is not yet available but will be supplied by written supplementation later.

Rule 30(b)(6) responds to important needs. It can facilitate speedy and lower-cost discovery. This project will be approached with care.

The study of Rule 26(a)(2)(B) began with the provision that a party need not disclose a report of an employee who will be an expert trial witness unless the employee's duties as an employee regularly involve giving expert testimony. Many courts ignore the distinction between types of employees, requiring a disclosure report as to all employee expert trial witnesses. The subcommittee will explore the reasons that led to adopting the current rule and seek to decide whether the rule should be revised or somehow reinvigorated.

Broader questions have been directed to Rule 26(a)(2)(B) by the Litigation Section of the American Bar Association. The Section identified two major areas of concern. The first involves disclosure of information discussed between the attorney and the trial expert witness. The 1993 Committee Note that explained adoption of Rule 26(a)(2)(B) noted that the rule requires disclosure of data and other information considered by the expert. The Note went on: "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." The Section directly challenges compelled disclosure of privileged and work-product information. In addition, the Committee notes that a party who can afford to devote great resources to litigation retains two sets of experts. One set, used to consult but not to present trial testimony, helps to prepare with full access to privileged and work-product information. The other set, used as trial witnesses, are prepared by means calculated to protect privileged and work-product information. This expense is a waste when all parties are able to afford it, and unfair when one party can afford it and others cannot.

The concern with disclosure is counterbalanced by the spirit that moved the Committees in developing the expert disclosure rule. Expert testimony is seen as a collaborative process between counsel and witness, yielding testimony that cannot be appraised effectively without knowing the extent of counsel's influence.

The Litigation Section's other concern focuses on discovery of draft expert reports. Discovery is said to have several undesirable effects. The efficiency of expert preparation is impeded when experts avoid discovery by simply refusing to prepare draft reports. Preparation is left to thought and unrecorded exchanges with counsel. The fairness of discovery may be undermined when some experts automatically destroy drafts before discovery, perhaps repeatedly scrubbing computer drives to ensure against forensic recapture.

The subcommittee will consider these questions. The 1993 innovations in disclosure were revised in part in 2000, and there should be enough experience with expert trial witness disclosure to justify examination of the way it has worked out in practice.

C. Summary Judgment and Notice Pleading

Since 1938 the Civil Rules have been framed by the structure of notice pleading, discovery, and summary judgment. The discussion above reflects the experience that discovery has continually occupied the Advisory Committee for some forty years. Summary judgment was studied in depth in the late 1980s, leading to a proposal that would have completely overhauled Rule 56. That proposal was rejected by the Judicial Conference in 1992. During these same years, lower courts began to develop "heightened pleading" requirements for particular types of litigation. The Supreme Court has responded by ruling that heightened pleading can be required only when provided by specific rule provisions, such as Rule 9(b), or by statute, such as the Private Securities Litigation Reform Act. Explicit requirements for heightened pleading have declined markedly in the wake of these Supreme Court decisions, but many observers believe that lower courts frequently manage to exact much greater detail under the rubric of "notice" pleading than might be guessed from the "Rule 8" Forms adopted to illustrate pleading requirements.

Rules 56 and the pleading rules are being studied together to determine whether new approaches might, when combined with wise management of discovery, advance pretrial disposition of actions that continue to impose unnecessary cost and delay. The study has been advanced by Administrative Office work with local rules on summary judgment and with recent pleading decisions.

Tentative directions are beginning to emerge, but they remain tentative. For pleading, several possible approaches are being subordinated for the time being. It would be possible — although highly controversial — to replace notice pleading with some form of "fact" pleading. Short of that, an effort might be made to reinvigorate the Rule 8 provision that the short and plain statement of a claim must show that the pleader is entitled to relief. Or particularized pleading requirements might be adopted for specific substantive claims. The difficulties to be encountered in developing any of these approaches have focused attention on a different approach. Rather than attempt wholesale revision of pleading standards, the more definite statement procedure of Rule 12(e) might be developed in ways that somewhat resemble the bill of particulars procedure abandoned in 1948. A more definite statement of claim or defense could be required on a case-by-case basis when more specific pleading may support disposition on the pleadings or focus discovery and facilitate more effective summary judgment procedures.

Summary judgment practice involves both the standards for deciding whether there is a genuine issue of material fact and the procedures for reaching that decision. Although many practitioners believe that the actual working of the summary judgment standard varies among the circuits, and even among different judges in a single district, it would be difficult to draft rule text that would achieve greater uniformity in practice. For that matter, it is difficult to imagine a standard that would depart usefully and validly from the standard for judgment as a matter of law in a jury trial. Rather than focus on the standard for summary judgment, the Committee will focus on summary judgment procedures. Some of the questions are small. The time periods provided in Rule 56 seem woefully short; they will be addressed as part of the Time Computation Project. Other questions are more important. As a conceptual matter, the most important questions may surround the proper response when an opposing party fails to respond at all to a motion for summary judgment or opposes in a manifestly inadequate way. Can the court grant the motion by default? Or should it examine the supporting materials offered by the movant to determine whether they establish the absence of a genuine issue? As a practical matter, the most important question may be whether Rule 56 should draw on a host of local rules to spell out requirements to identify specific issues said to be established beyond genuine dispute and to support the argument by citing to specific record sources. A variety of other issues will be explored as well.

D. Evidence Rule 502

At this meeting the Evidence Rules Committee is presenting a new Evidence Rule 502 for approval for publication. Rule 502 addresses some questions of waiving attorney-client privilege

and work-product protection. These questions have proved troubling in dealing with the civil discovery rules. Draft Rule 502 deals with many of the discovery problems, addressing particularly waiver through inadvertent production, enforcing party agreements that prevent waiver, and adopting party agreements by court order. It also adopts a standard for subject-matter waiver, a problem that many lawyers identify as a major source of cost and delay in responding to discovery. Several members of the Civil Rules Committee attended a conference on Rule 502 at the Fordham Law School and participated in the ensuing Evidence Rules Committee meeting. The Civil Rules Committee is grateful for this cooperative approach to developing an Evidence Rule that is so deeply entwined with discovery issues and looks forward to hard work with the Evidence Rules Committee as the draft is refined into a final proposal for enactment by Congress.