ADVISORY COMMITTEE
ON
CIVIL RULES

Washington, D.C.
April 15-16, 2004
Volume II

AGENDA
ADVISORY COMMITTEE ON CIVIL RULES
APRIL 15-16, 2004

1. Report on Judicial Conference Session

2. **ACTION** — Approving minutes of October 2-3, 2003, committee meeting

3. **ACTION** — Approving proposed amendments to Rules 6, 24, 27, 45, and new Rule 5.1 and proposed amendments to Admiralty Rules B and C and transmitting them to the Standing Rules Committee

4. **ACTION** — Approving publication of proposed amendments to Rules 16, 26, 33, 34, 45 and Form 35 dealing with discovery of electronically stored information

5. **ACTION** — Approving publication of new Admiralty Rule G and proposed amendments to Admiralty Rules A, C, and E consolidating forfeiture provisions

   A. Civil Forfeiture Reform Act of 2000 (CAFRA)

   B. Notes of conference calls and meeting

   C. Correspondence from the Department of Justice

   D. Correspondence from the National Association of Criminal Defense Lawyers

   E. Analysis of "standing" issues

6. Consideration of proposed new rule governing privacy and security concerns arising from public access to electronic court records in accordance with the E-Government Act

7. Consideration of Style Project

   A. **ACTION** — Approving publication of proposed restyled Rules 38 - 63 (except Rule 45, which was acted on earlier)

   B. **ACTION** — Approving publication of noncontroversial style-substantive amendments to Civil Rules arising from style project

   C. **ACTION** — Approving proposed amendments resolving noncontroversial "global" issues arising from style project

8. **ACTION** — Approving publication of proposed amendments to Rule 50 regarding procedures governing a motion for judgment as a matter of law

   - Consideration of proposed amendments to Rule 15

9. Report on Federal Judicial Center survey of class actions

10. Report on Federal Judicial Center study of sealed settlement agreements

11. Next meeting in Charleston, South Carolina, on October 28-29, 2004

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March 30, 2004

MEMORANDUM TO ADVISORY COMMITTEE ON CIVIL RULES

SUBJECT: *Proposed Rule Implementing E-Government Act*

Section 205(a) of the E-Government Act requires the Supreme Court to prescribe federal rules of procedure governing the privacy and security concerns arising from public access to electronic court records. The Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Procedure have been asked to prepare proposed uniform amendments to their respective set of rules implementing the statutory directive for publication next year in August 2005.

Professor Cooper prepared the attached paper proposing a new rule and describing the time line and steps taken by the Standing Rules Committee to coordinate drafting of uniform rules among the advisory rules committees. It includes a "template" rule drafted by the reporter to the Advisory Committee on Evidence Rules, Professor Daniel Capra, which had been circulated earlier as a model to all the advisory committee reporters. The template rule is based on model local rules developed after several years of study by the Committee on Court Administration and Case Management (CACM). The model local rules were approved by the Judicial Conference.

Professor Patrick Schiltz, the reporter to the Advisory Committee on Appellate Rules, has drafted a new rule located on pages 8 and 9 of his memorandum for consideration of the Appellate Rules Committee. The memorandum contains background materials, including: (1) a memorandum describing CACM's study and development of privacy model local rules; (2) a Federal Judicial Center report on privacy concerns arising from public access to electronic criminal case records; (3) a staff memorandum on a "rules-based approach to privacy and public access"; (4) a pertinent excerpt from the E-Government statute; (5) minutes of the January 2004 Standing Committee's E-Government Subcommittee meeting; and (6) a staff memorandum on state court privacy court rules

John K. Rabiej

Civil Rule Implementing the E-Government Act

The Direction to Prescribe A Civil Rule

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

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

> (A)(i) The Supreme Court shall prescribe rules, in accordance with sections 2072 and 2075 of title 28 * * * to protect privacy and security concerns relating to electronic filing of documents and the public availability under this subsection of documents filed electronically.
>
> (ii) Such rules shall provide to the extent practicable for uniform treatment of privacy and security issues throughout the Federal courts
>
> (iii) Such rules shall take into consideration best practices in Federal and State courts to protect private information or otherwise maintain necessary information security.
>
> (iv) To the extent that such rules provide for the redaction of certain categories of information in order to protect privacy and security concerns, such rules shall provide that a party that wishes to file an otherwise proper document containing such information may file an unredacted document under seal, which shall be retained by the court as part of the record, and which, at the discretion of the court and subject to any applicable rules issued in accordance with chapter 131 of title 28, United States Code, shall be either in lieu of, or in addition[,sic] to, a redacted copy in the public file.

Standing Committee E-Government Subcommittee

The Standing Committee has appointed an E-Government Subcommittee, chaired by Judge Sidney A. Fitzwater, to coordinate study of E-Government Act rules by the several advisory committees. Minutes of the Subcommittee meeting on January 14, 2004, are attached. Professor Daniel J. Capra, Reporter of the Evidence Rules Committee, has been designated Lead Reporter for the Subcommittee. Professor Capra has prepared a "template" rule and Committee Note for consideration by the advisory committees. Copies are attached. A variant form has been prepared by Professor Patrick J. Schiltz, Reporter for the Appellate Rules Committee; that proposal and a supporting memorandum also are attached.

Each advisory committee has been asked to study the template rule at its Spring 2004 meeting and to suggest any desirable changes or variations. The Subcommittee, in consultation with the advisory committee reporters, will consider the advisory committee reactions in June The next step will be an attempt to generate a uniform rule that may be adopted in uniform — or nearly uniform — terms for each of the Appellate, Bankruptcy, Civil, and Criminal Rules. Some variations may prove suitable for the different circumstances faced by the different procedure systems.

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

Rule 5.2. Privacy in Court Filings

> **(a) Limits on Disclosing Personal Identifiers.** A party[49] that files an electronic or tangible paper that includes any of the following personal identifiers may disclose only these elements:
>
> > **(1)** the last four digits of a person's social-security number;[50]
> >
> > **(2)** the initials of a minor child's[51] name;[52]
> >
> > **(3)** the year of a person's date of birth;
> >
> > **(4)** the last four digits of a financial-account number; and
> >
> > **(5)** the city and state of a home address.

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

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

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

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

(b) Exception for a Filing Under Seal. A party may include complete personal identifiers [listed in subdivision (a)] in a filing made under seal. But the court may require the party to file a redacted copy for the public file.[53]

(c) Social Security Appeals; Access to Electronic Files.[54] In an action for benefits under the Social Security Act[55], access to an electronic file is permitted only[56] as follows, unless the court orders otherwise:

> **(1)** the parties and their attorneys may have remote electronic access to any part of the case file, including the [an?] administrative record; and
>
> **(2)** [a person who is not a party or a party's attorney]{other persons} may have remote electronic access to:
>
> > **(A)** the docket maintained under Rule 79(a); and
> >
> > **(B)** an opinion, order, judgment, or other written disposition, but not any other part of the case file or the administrative record.

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[53]With the addition of the bracketed words, this tracks the Appellate Rule. It may leave open the question whether there is a right file under seal. The Template clearly says that a party who wishes to file complete personal identifiers may file an unredacted document under seal; it goes on to provide that the court may require a redacted copy for the public file The result seems unintentional — it establishes a right file under seal by simply including a complete personal identifier, and then leaves it up to the court to direct filing a public copy More thought is needed.

[54]The Template does not include this subdivision The Appellate Rule does Failure to include a parallel provision in the Civil Rule would essentially moot the Appellate Rule

[55]The Appellate Rule formulation is: "In an appeal involving the right to benefits under the Social Security Act * * * " This language may fit the Civil Rules if the only actions we wish to reach are appeals from benefit denials Actions by the government to recover overpayments may not involve the same level of private information It would help to have advice from someone familiar with the various forms of social-security benefit actions that may come to the district courts

[56]The Appellate Rule is "authorized as follows." That seems to mean the same as "permitted only " If so, there is no gap the rule does not mean to distinguish between "access" in the introduction and "remote electronic access" in paragraphs (1) and (2). The distinction, however, may be important· do we mean to close off electronic access from a public terminal in the clerk's office?

~~**(d) Judicial Conference Standards.** A party must comply with all policies and interim rules adopted by the Judicial Conference to protect privacy and security concerns related to the public availability of court filings.~~[57]

Committee Note

(A Committee Note can be adapted from the Template, Appellate Rules, and any other model.)

Parallel Civil Rules Changes

Each Advisory Committee is to determine whether existing rules should be changed to reflect the new circumstances created by electronic access to materials filed with the court. Several Civil Rules may be candidates for future amendment; some of the more obvious possibilities are described briefly below. It may be premature, however, to consider amendments before gaining any experience with electronic access. Anticipated problems may not arise, and unanticipated difficulties are almost inevitable.

Rule 5(d). The statute requires that any document filed electronically be made available online. Paper documents converted to electronic form also must be made available online. Rule 5(d) now requires filing of "[a]ll papers after the complaint required to be served upon a party." Rule 5(d) was recently amended to forbid filing of discovery papers until they are used in the proceeding or the court orders filing. Rule 5(d) might be amended further to except other papers from filing.

Rule 5, whether in subdivision (d) or otherwise, also might be the place to add provisions on sealing filed papers. Rule 26(c)(6) already authorizes a protective order sealing a deposition. Section 205(c)(2) of the E-Government Act provides that a filed document shall not be made available online if it is "not otherwise available to the public, such as documents filed under seal."

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[57] This provision in the Template raises a familiar concern. A recent illustration in the Civil Rules is shown by Rule 7 1. Rule 7 1 requires much less corporate disclosure than had been required by many local rules Some drafts included a provision that would require additional disclosures as required by the Judicial Conference Doubts were expressed about this attempt to delegate Enabling Act authority, despite the Rule 5(e) precedent that authorizes Judicial Conference standards for electronic filing Doubts also were expressed about the practical availability of Judicial Conference standards, those doubts may dwindle as reliance on the Judiciary website becomes universal There is a separate difficulty with requiring reliance on "interim rules", initial interim rules will be superseded by adoption of Enabling Act rules Section 205(c)(3)(B)(i) seems to contemplate interim rules only for the period before adoption of the first set of Enabling Act rules Unless the Judicial Conference can adopt "interim rules" to bridge gaps between adoption and amendment of Enabling Act rules, the reference to interim rules should be dropped The Appellate Rule draft omits this subdivision entirely

The reference to interim rules raises a separate point Section 205(c)(3)(A)(i) contemplates rules that protect not only privacy but also "security " Nothing in any of the drafts addresses "security" concerns

Rule 5(d) also may be used to anticipate a pervasive problem. Filing discovery materials, when that happens, invokes all the limits of the proposed E-Government Act rule. Apparently depositions, responses to interrogatories, documents (including computer-generated information), requests for admission, and perhaps even reports of Rule 35 examinations, must be redacted. Rule 5(d) might be amended to provide a reminder of the duties imposed by Rule "5.2."

Amendments designed to limit filing requirements or to expand sealing practices must be approached with great care. It does not seem likely that these topics should be made part of the initial E-Government Act rules process, unless it seems appropriate to amend Rule 5(d) to refer to the Rule 5.2 duty to redact discovery materials when filed.

Rule 10. Rule 10(a) provides that "the title of the action shall include the names of all the parties." This provision is at odds with subdivision (a)(2) of the proposed rule, which permits only the initials of a "minor child." It might be desirable to add a cross-reference to Rule "5.2." (The E-Government Act might provide an occasion for reconsidering the question of pseudonymous pleading. There has not been any enthusiasm in recent years for considering an amendment that would attempt to guide this practice. But electronic access may suggest further consideration, particularly if it is easily possible to search court filings along with all other online materials that refer to a named person.)

Special problems arise from Rule 10(c), which indirectly reflects the practice of attaching exhibits to a complaint. The exhibit must be redacted to conform to Rule "5.2." It is difficult to guess whether this requirement will impose significant burdens in effecting the redaction, or whether there may be practical difficulties. If Rule "5.2(b)" survives, permitting filing of the complete complaint and exhibits under seal, these difficulties may be substantially reduced.

Again, it is difficult to frame amendments beyond a possible reference to Rule 5.2 in Rule 10(a).

Rule 11. The Minutes of the E-Government Subcommittee meeting reflect discussion of the question whether Rule 11 should be "amended to contemplate violations of the privacy/access rules. Judge [Jerry A. Davis] noted that CACM had reviewed this issue and determined that Rule 11 already covers any arguable violation of these policies and that it is better to leave it to the discretion of the courts as to how to deal with violations or abuse of any new rule regarding electronic filing. The Subcommittee agreed with this assessment."

Rule 11(b)(1) states that an attorney or party presenting a paper to the court certifies that it is not presented for any improper purpose If it is desirable to use Rule 11 or any other rule of procedure to reach liability for such acts as purposefully filing a defamatory pleading, the present language seems adequate. The determination whether to bend Rule 11 to this purpose at all will be difficult — it at least approaches substantive questions of defamation liability, the right to petition courts, and privilege. It would not be wise to take on these issues by amending Rule 11, unless it be to disclaim any attempt to answer them.

Rule 12(f). The agenda includes a pending question addressed to the effect of a Rule 12(f) order to strike "from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Is the stricken material physically or electronically expunged? Or is it preserved to maintain a complete record, for purposes of appeal or otherwise, but sealed? Electronic access to court files may make this question more urgent, but there is no apparent change in the principles that will guide the answer.

Rule 12(f) could be amended to refer directly to an order to strike information that violates Rule "5.2." Authority to strike seems sufficiently supported, however, both by present Rule 12(f) and by the implications of Rule "5.2."

Rule 16. Rule 16(b) or (c) might be amended to include scheduling-order directions or pretrial-conference discussion of electronic-filing issues. The most apparent subjects would be limiting filing requirements or permitting filing under seal. Care would need to be taken to avoid interference with the purposes of the E-Government Act. But there may be an advantage, particularly in early years, from assuring that parties and court think of the privacy and security issues that may arise from electronic access.

Rule 26 or Other Discovery. Rule 5(d) limits on filing discovery materials are noted above. It is conceivable that a reminder of E-Government Act access — and the need to redact filed documents to comply with Rule "5 2" — should be added somewhere in the discovery rules as well.

The protective-order provisions of Rule 26(c) do not seem to need amendment. They provide ample authority to respond on a case-specific basis "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense * * *."

Rule 56. Summary-judgment affidavits are among the papers covered by Rule "5.2." It would be possible to add a cross-reference to Rule 56.

Rule 80(c). Rule 80(c) — inevitably part of the future project to reconcile the Civil Rules with the Evidence Rules — states that whenever stenographically reported testimony is admissible in evidence at a later trial, it may be proved by the transcript. Although the proof might include filing, and a corresponding need to redact under Rule "5.2," there is no apparent need to amend Rule 80(c) to refer back to Rule "5.2."

MEMORANDUM

DATE: February 17, 2004

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item No. 03-10

Section 205 of the E-Government Act of 2002 (Public Law 107-347) requires every federal court to maintain a website (§ 205(a)) and to make specific information available through that website, including "[a]ccess to docket information for each case" (§ 205(a)(4)), "[a]ccess to the substance of all written opinions issued by the court" (§ 205(a)(5)), and "[a]ccess to documents filed with the courthouse in electronic form" (§ 205(a)(6)). The Act also provides that "each court shall make any document that is filed electronically publicly available online" (§ 205(c)(1)), and the Act authorizes a court to "convert any document that is filed in paper form to electronic form" (§ 205(c)(1)). Any document that is so converted must "be made available online" (§ 205(c)(1)).

The Act thus establishes broad access to documents that are filed in or converted to electronic form, but the Act recognizes that access cannot be unlimited. The Act provides that documents that "are not otherwise available to the public, such as documents filed under seal, shall not be made available online" (§ 205(c)(2)). Moreover, the Act directs that the Rules Enabling Act process be used to "prescribe rules . . . to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically" (§ 205(c)(3)(A)(i)). These privacy rules are to "provide to the extent practicable

for uniform treatment of privacy and security issues throughout the Federal courts" (§ 205(c)(3)(A)(ii)), and those charged with drafting such rules — including this Committee — are instructed to "take into consideration best practices in Federal and State courts to protect private information or otherwise maintain necessary information security" (§ 205(c)(3)(A)(iii)).

Except as I have already described, the Act contains only one specific directive about the privacy rules. The Act provides that:

> To the extent that such rules provide for the redaction of certain categories of information in order to protect privacy and security concerns, such rules shall provide that a party that wishes to file an otherwise proper document containing such information may file an unredacted document under seal, which shall be retained by the court as part of the record, and which . . . shall be either in lieu of, or in addition[] to, a redacted copy in the public file. (§ 205(c)(3)(A)(iv).)

This last provision was included in the Act at the insistence of the Department of Justice, and over the objection of the Judicial Conference. The Department and the Conference have subsequently negotiated a compromise agreement and have jointly proposed legislation to amend this last provision to implement that compromise agreement. That legislation is pending in Congress.

Background materials — including the full text of § 205 of the E-Government Act of 2002 and information about the "best practices" of various states — are attached to this memorandum. I will not summarize those materials further.

In response to the Act's directive that the Rules Enabling Act process be used to implement privacy rules, Judge David F. Levi, the Chair of the Standing Committee, appointed an E-Government Subcommittee chaired by Judge Sidney A. Fitzwater. The Subcommittee includes liaisons from each of the five Advisory Committees (Judge John G. Roberts, Jr.,

represents this Committee), as well as liaisons from other Judicial Conference committees. The Reporters to the Advisory Committees serve as consultants to the Subcommittee.

The Subcommittee met on January 14 in Scottsdale, Arizona. The minutes of that meeting are attached. As you will see, the Subcommittee reviewed the significant amount of work that has already been done on privacy-related issues by the Committee on Court Administration and Case Management ("CACM"). That work culminated in CACM issuing model local rules regarding access to electronic files in civil and criminal cases.

At its January meeting, the Subcommittee agreed after much discussion that work on privacy-related amendments to the rules of practice and procedure would proceed as follows:

1. Prof. Daniel J. Capra, Reporter to the Evidence Rules Committee, and Lead Reporter to the E-Government Subcommittee, will draft a "template" privacy rule patterned after the model rules drafted by CACM.

2. That template will be provided to the Reporters to the Appellate, Bankruptcy, Civil, and Criminal Rules Committees. Each of those Reporters will then use the template to draft privacy amendments to his respective set of rules. Those amendments will follow the template as closely as possible.

3. The Advisory Committees will consider these draft amendments at their Spring 2004 meetings and provide input to the Chairs and Reporters.

4. In the summer of 2004 — most likely in connection with the June meeting of the Standing Committee — the Chairs and Reporters will confer about the draft amendments and the reactions of the Advisory Committees to those amendments. The Chairs and Reporters will

attempt to work out any problems that have been identified and to modify the draft amendments so that they are as consistent as possible.

5. At their fall 2004 meetings, the Advisory Committees will be asked to approve privacy amendments for publication. If all Advisory Committees do so, the Standing Committee will consider those amendments at its January 2005 meeting. If problems arise and one or more Advisory Committees do not approve amendments, those Advisory Committees will be asked to approve amendments at their spring 2005 meetings, and the Standing Committee will take up the matter at its June 2005 meeting. In any event, the goal is to publish all privacy amendments for comment in August 2005.

As directed by the Subcommittee and Judge Alito, I have prepared a draft privacy amendment to the Appellate Rules for your consideration. I want to draw your attention to three issues:

1. I considered two options for the placement of these privacy provisions: incorporating them as a new subsection (5) to Rule 25(a) or setting them forth in a new Rule 25.1. As you will see, I decided on the latter. I did this because I feared that, given the length of the privacy provisions, sticking them in Rule 25(a) would make Rule 25 ungainly. I also did this in order to draw attention to the provisions, which will take practitioners some getting used to. That said, I could easily redraft the provisions as a new Rule 25(a)(5).

2. At the Subcommittee meeting, we talked about the possibility that the Appellate Rules could simply incorporate by reference the privacy provisions of the Civil and Criminal Rules. The Appellate Rules could provide, for example, that "In an appeal in a civil case, the parties

must comply with Federal Rule of Civil Procedure xx," or that "In an appeal in a criminal case, the parties must comply with Federal Rule of Criminal Procedure xx."

I rejected this approach for a couple of reasons. First, I generally dislike incorporating other rules by reference; as much as possible, I think that an appellate practitioner should be able to find the rules that govern appellate proceedings in the Appellate Rules. Second, we have talked at great length about the difficulty of distinguishing "civil" appeals from "criminal" appeals; this approach would aggravate that problem. Finally, many proceedings are neither appeals in civil cases nor appeals in criminal cases; those proceedings include, for example, petitions to review agency orders under Rule 15 or petitions for extraordinary relief under Rule 21. The privacy provisions of the Appellate Rules must apply to those proceedings as well.

On balance, it seems to me preferable to adopt a straightforward rule that would apply to all appellate proceedings — whether civil, criminal, or something else — and that would simply list the information that should be redacted. That list would include everything that must be redacted in civil cases under the Civil Rules and everything that must be redacted in criminal cases under the Criminal Rules. I do not believe that there will be major differences between the Civil Rules and the Criminal Rules, but, even if there are, I don't think that combining their provisions into a single Appellate Rule will cause any harm.

3. Finally, drafting the rule was made more complicated by the fact that CACM has suggested a number of changes to the Capra template, and the Style Subcommittee has thoroughly rewritten the template. At this point, each Advisory Committee is being left to decide for itself to what extent the recommendations of CACM and the Style Subcommittee should be adopted. (Again, the Chairs and Reporters will compare notes in June.) To assist this

Committee in that endeavor, I have attached three documents: (a) "Template Drafted By Prof. Capra"; (b) "CACM's Comments on Capra Template": and (c) "Capra's Responses to CACM's Comments."

You will see that, in drafting a proposed Rule of Appellate Procedure, I have used the Style Subcommittee's version of the template and generally agreed with the substantive suggestions made by CACM. My reasoning was as follows:

a. I agree with CACM that we should strike the Judicial Conference provision. You may recall that when we were in the process of amending Rule 26.1 (regarding corporate disclosure statements), this Committee proposed a similar "Judicial Conference" provision. That provision was strongly opposed by the commentators and by members of the Standing Committee and the other Advisory Committees — even though it was arguably narrower than the one in Prof. Capra's template. I also do not think that we should enshrine "interim rules" in the rules of practice and procedure. That reference is unnecessary (in that the interim rules to which it refers already have the force of law by virtue of § 205(c)(3)(B)(i)) and confusing (in that those same interim rules will "cease to have effect" as soon as the rule referring to them becomes law).

b. As CACM notes, Judicial Conference policy is to exclude the files in Social Security appeals from being accessible online. Unless this Committee strongly disagrees with that policy, it seems to me that the policy should be reflected in the rule.

c. Like CACM, I would be inclined to remove the seven principles from the Note, both because inclusion of the principles is somewhat confusing (in that the typical practitioner may wonder what force these "general principles" have and how they relate to the rule) and because it lengthens the Committee Note for no compelling reason.

d. Finally, I think that adding at the end of the Note the sentence suggested by CACM would be helpful. It seems to me that the sentence suggested by CACM is as much implied by the text of the rule as the sentence that precedes it.

These are, of course, merely my recommendations. I can easily redraft the proposed rule to take into account whatever the Committee decides.

Rule 25.1 Privacy in Court Filings

(a) Limits on Disclosing Personal Identifiers. If a party includes any of the following personal identifiers in an electronic or paper filing, the party is limited to disclosing:

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

(2) only the initials of a minor child's name;

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

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

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

(b) Exception for a Filing Under Seal. A party may include complete personal identifiers in a filing if it is made under seal. But the court may require the party to file a redacted copy for the public file.

(c) Social-Security Appeals; Access to Electronic Files. In an appeal involving the right to benefits under the Social Security Act, access to an electronic file is authorized as follows, unless the court orders otherwise:

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

(2) a person who is not a party or a party's attorney may have remote electronic access to:

(A) the docket maintained under Rule 45(b)(1); and

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

Committee Note

This rule is adopted in compliance with § 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." This rule goes further than the E-Government Act in protecting personal identifiers, as this rule applies to paper as well as electronic filings. Paper filings in many districts are scanned by the clerk and made part of the electronic case file. As such they are as available to the public over the internet as are electronic filings, and therefore they raise the same privacy and security concerns when filed with the court.

This 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 provides that — with the exception of Social Security appeals — documents in civil case files 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. Because case files are available over the internet through PACER, they are no longer protected by the "practical obscurity" that existed when the files were available only at the courthouse. Both the Judicial Conference policy and this rule take account of this technological development by preventing the widespread dissemination of personal data identifiers that otherwise would be included in court filings and by altogether prohibiting electronic access to the files in Social Security cases by members of the general public. (Social Security appeals are unique in their great number, their extensive records, and their focus on medical records and other intensely private information.)

Parties should not include sensitive information in any document filed with the court unless it is necessary and relevant to the case. Parties must remember that any personal information not otherwise protected will be made available over the internet through PACER. 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.

Subdivision (b) allows parties to file an unredacted document under seal. This provision is derived from § 205(c)(3)(iv) of the E-Government Act.

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.

TEMPLATE DRAFTED BY PROF. CAPRA

Rule [ ] Filing and Privacy

(a) Personal Data Identifiers In Court Filings. Subject to (b) of this rule, a party filing any information or material with the court– whether electronically or in paper – must comply with the following procedures:

> **(1) Social Security Numbers.** If a person's social security number must be included, the first five numbers must be deleted.
>
> **(2) Names of Minor Children.** If the name of a minor child must be included, only the child's initials may be disclosed.
>
> **(3) Dates of Birth.** If a person's date of birth must be included, only the year of birth may be disclosed.
>
> **(4) Financial-Account Numbers.** If a financial-account number must be included, only the last four digits may be disclosed.
>
> **(5) Home Address.** If a home address must be included, only the city and state may be disclosed.

(b) Unredacted Filing Under Seal. A party wishing to file an otherwise proper document containing the personal identifiers listed in (a) may file an unredacted document under seal. That document must be retained by the court as part of the record. The court may require the party to file a redacted copy for the public file.

(c) Judicial Conference Standards. A party must comply with all policies and interim rules adopted by the Judicial Conference to protect privacy and security concerns related to the public availability of court filings.

Template 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 protecting personal identifiers, as it applies to paper as well as electronic filings. Paper filings in

most districts are scanned by the clerk and made part of the electronic case file. As such they are as available to the public over the internet as are electronic filings, and therefore raise the same privacy and security concerns when filed with the court.

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 sets forth seven general principles:

> 1. There should be consistent, nationwide policies in federal courts in order to ensure that similar privacy protections and access presumptions apply regardless of which federal court is the custodian of a particular case file.
>
> 2. Notice of these nationwide policies should be given to all litigants in federal court so that they will be aware of the fact that materials which they submit in a federal court proceeding could become available on the Internet.
>
> 3. Members of the bar must be educated about the policies and the fact that they must protect their clients by carefully examining the documents that they file in federal court for sensitive, private information and by making the appropriate motions to protect documents from electronic access when necessary.
>
> 4. Except where otherwise noted, the policies apply to both paper and electronic files.
>
> 5. Electronic access to docket sheets through PACERNet and court opinions through court websites will not be affected by these policies.
>
> 6. The availability of case files at the courthouse will not be affected or limited by these policies.
>
> 7. Nothing in these recommendations is intended to create a private right of action or to limit the application of Rule 11 of the Federal Rules of Civil Procedure.

The Judicial Conference policy further provides that documents in [civil] case files 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. Because case files are available over the internet through PACERNet, they are no longer protected by the "practical obscurity" that existed when the files were available only at the courthouse. Both the Judicial Conference policy and this rule take account of this technological development by preventing the widespread dissemination of personal data identifiers that otherwise would be included in court filings.

Parties should not include sensitive information in any document filed with the court unless it is necessary and relevant to the case. Parties must remember that any personal information not

otherwise protected will be made available over the internet through PACERNet. 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.

Subdivision (b) allows parties to file an unredacted document under seal. This provision is derived from section 205(c)(3)(iv) of the E-Government Act.

The clerk is not required to review documents filed with the court for compliance with this rule.

CACM'S COMMENTS ON CAPRA TEMPLATE

Note: Proposed deletions are stuck through, additions are in bold, and general comments and explanations are in italics.

Rule [ ] Filing and Privacy

(a) Personal Data Identifiers In Court Filings. Subject to (b) of this rule, a party filing any information or material with the court– whether electronically or in paper – must comply with the following procedures:

> **(1) Social Security Numbers.** If a person's social security number must be included, ~~the first five numbers must be deleted.~~ **only the last four digits may be disclosed.** *This change would make (1) parallel with (4).*
>
> **(2) Names of Minor Children.** If the name of a minor child must be included, only the child's initials may be disclosed.
>
> **(3) Dates of Birth.** If a person's date of birth must be included, only the year of birth may be disclosed.
>
> **(4) Financial-Account Numbers.** If a financial-account number must be included, only the last four digits may be disclosed.
>
> **(5) Home Address.** If a home address must be included, only the city and state may be disclosed.

If HR 1303 is passed by the Senate and signed by the President, we will need to consider whether to include its provisions regarding a party's ability to file a "reference list" of the complete versions of the identifiers and the corresponding shortened versions that the court shall maintain under seal and allow to be amended. This procedure would only apply to documents created by a party so as not to impact the evidentiary value of exhibits. These procedures were agreed to by the Department of Justice.

(b) Unredacted Filing Under Seal. A party wishing to file an otherwise proper document containing the personal identifiers listed in (a) may file an unredacted document under seal. That document must be retained by the court as part of the record. The court may require the party to file a redacted copy for the public file.

~~**(c) Judicial Conference Standards.** A party must comply with all policies and interim rules adopted by the Judicial Conference to protect privacy and security concerns related to the public availability of court filings.~~

This is confusing given the statement in (b) above, which is contradictory to the Judicial Conference Policy, yet required by the E-Government Act. In any event, the reference to "interim rules" should be removed because pursuant to Section 205 (c)(3)(B)(i) of the E-Government act, any interim rules cease to be effective once this rule becomes effective. Further, we really do not have any "interim rules" other than the policy itself. Thus, the use of that phrase would likely be confusing to the reader.

If the current exemption for Social Security appeals is to remain part of the rule, such would need to be specifically mentioned in the civil and appellate rules.

Template 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 protecting personal identifiers, as it applies to paper as well as electronic filings. Paper filings in ~~most~~ **many** districts are scanned by the clerk and made part of the electronic case file. As such they are as available to the public over the internet as are electronic filings, and therefore raise the same privacy and security concerns when filed with the court.

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 sets forth seven general principles:

1. There should be consistent, nationwide policies in federal courts in order to ensure that similar privacy protections and access presumptions apply regardless of which federal court is the custodian of a particular case file.

2. Notice of these nationwide policies should be given to all litigants in federal court so that they will be aware of the fact that materials which they submit in a federal court proceeding could become available on the Internet.

3. Members of the bar must be educated about the policies and the fact that they must protect their clients by carefully examining the documents that they file in federal court for sensitive, private information and by making the appropriate motions to protect documents from electronic access when necessary.

4. Except where otherwise noted, the policies apply to both paper and electronic files.

5. Electronic access to docket sheets through PACERNet and court opinions through court websites will not be affected by these policies.

6. The availability of case files at the courthouse will not be affected or limited by these policies.

7. Nothing in these recommendations is intended to create a private right of action or to limit the application of Rule 11 of the Federal Rules of Civil Procedure.

Including all of the 7 principles here may be too much for the Committee Note. A reference to the policy, together with the paragraph that comes after the recitation of the principles may be enough. Also, with the possible changes in access to paper files that may result in some courts due to the operational guidelines that are being developed in the criminal privacy context, principle 6 may no longer be accurate in all courts.

The Judicial Conference policy further provides that documents in [civil] case files 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. Because case files are available over the internet through PACER~~Net~~, they are no longer protected by the "practical obscurity" that existed when the files were available only at the courthouse. Both the Judicial Conference policy and this rule take account of this technological development by preventing the widespread dissemination of personal data identifiers that otherwise would be included in court filings.

Parties should not include sensitive information in any document filed with the court unless it is necessary and relevant to the case. Parties must remember that any personal information not otherwise protected will be made available over the internet through PACER~~Net~~. 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.

Subdivision (b) allows parties to file an unredacted document under seal. This provision is derived from section 205(c)(3)(iv) of the E-Government Act.

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.**

CAPRA'S RESPONSES TO CACM'S COMMENTS

Katıe,

I will send the suggestions to all the reporters for their respective Committee meetings in the spring. I wanted to give my observations on the reasoning behınd some of the language on which suggestions were made.

1. The reference to Judicial Conference Policy came from suggestions at the meetıng that from time to tıme the Judicial conference may wısh-- in the future--to establish certain guidelines in this area. Perhaps a compromıse would be an introductory phrase saying, "Except as inconsistent with this rule . . . "

2. We agreed at the meeting to leave social security out of the template. Civil and Appellate will decide how to treat those cases.

3. We do plan to incorporate the reference list "solution" if it ıs enacted. I hope that you will keep me apprısed of developments.

4. I thought that ıt would be helpful to practitıoners, at least as a starting point, to include all of the general principles in the Committee Note, as they would not be expected to find it elsewhere. I am not sure what the other reporters think, but that will be a topic of discussion at their meetings.

5. I thought the language on responsibility of the parties might be outside the scope of a committee note, as the Standing Committee is currently looking at it. But again, the other reporters might have a different view.

Thanks so much for the comments.

Dan Capra

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief

Rules Committee Support Office

January 6, 2004

MEMORANDUM TO E-GOVERNMENT SUBCOMMITTEE

SUBJECT: *Materials for January 14 Subcommittee Meeting*

For your information, I have attached background materials for the E-Government Subcommittee meeting. The meeting will be held at 8:30 am on Wednesday, January 14, in the Boardroom at the Hermosa Inn in Scottsdale, Arizona.

Under section 205(c) of the E-Government Act of 2002 (Pub. Law No. 107-347), the Supreme Court must prescribe rules governing the security and privacy concerns arising from public access to electronic case records. The E-Government Subcommittee was formed by Judge David Levi to develop proposed rules for the consideration of the pertinent advisory rules committees and review by the Standing Rules Committee, in accordance with the Rules Enabling Act.

In June 1999, several years before the enactment of the E-Government Act of 2002, the Committee on Court Administration and Case Management (CACM) began a study of privacy issues regarding public access to electronic case files in appellate, civil, bankruptcy, and criminal cases. CACM published proposed privacy policies for public comment. It conducted a series of meetings and public hearings. After extensive work and debate spanning four years, the committee developed a set of recommendations that were adopted by the Judicial Conference as the judiciary's electronic-case-files privacy policy.

The attached materials include:

- Five-page staff memorandum from the Committee on Court Administration and Case Management describing the history of the committee's actions in developing the present Judicial Conference privacy policy regarding public access to electronic case files. The memorandum contains six attachments, including: (1) A chart identifying and summarizing 242 comments submitted on CACM's initial proposed privacy policy. (2) A list of speakers testifying at the public hearing on CACM's proposed privacy policy. (3) CACM's report to the Judicial Conference recommending adoption of a judiciary-wide privacy policy regarding appellate, civil, criminal, and bankruptcy case files. (4) A revised proposed model notice of

E-GOVERNMENT ACT OF 2002

PUBLIC LAW 107-347

SECTION 205

Public Law 107–347
107th Congress

An Act

To enhance the management and promotion of electronic Government services and processes by establishing a Federal Chief Information Officer within the Office of Management and Budget, and by establishing a broad framework of measures that require using Internet-based information technology to enhance citizen access to Government information and services, and for other purposes.

Dec. 17, 2002
[H.R. 2458]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

E-Government Act of 2002.

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "E-Government Act of 2002".

44 USC 101 note.

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

Sec. 1. Short title; table of contents.
Sec. 2. Findings and purposes.

TITLE I—OFFICE OF MANAGEMENT AND BUDGET ELECTRONIC GOVERNMENT SERVICES

Sec. 101. Management and promotion of electronic government services.
Sec. 102. Conforming amendments.

TITLE II—FEDERAL MANAGEMENT AND PROMOTION OF ELECTRONIC GOVERNMENT SERVICES

Sec. 201. Definitions.
Sec. 202. Federal agency responsibilities.
Sec. 203. Compatibility of executive agency methods for use and acceptance of electronic signatures.
Sec. 204. Federal Internet portal.
Sec. 205. Federal courts.
Sec. 206. Regulatory agencies.
Sec. 207. Accessibility, usability, and preservation of government information.
Sec. 208. Privacy provisions.
Sec. 209. Federal information technology workforce development.
Sec. 210. Share-in-savings initiatives.
Sec. 211. Authorization for acquisition of information technology by State and local governments through Federal supply schedules.
Sec. 212. Integrated reporting study and pilot projects.
Sec. 213. Community technology centers.
Sec. 214. Enhancing crisis management through advanced information technology.
Sec. 215. Disparities in access to the Internet.
Sec. 216. Common protocols for geographic information systems.

TITLE III—INFORMATION SECURITY

Sec. 301. Information security.
Sec. 302. Management of information technology.
Sec. 303. National Institute of Standards and Technology.
Sec. 304. Information Security and Privacy Advisory Board.
Sec. 305. Technical and conforming amendments.

TITLE IV—AUTHORIZATION OF APPROPRIATIONS AND EFFECTIVE DATES

Sec. 401. Authorization of appropriations.

7

SEC. 205. FEDERAL COURTS.

44 USC 3501 note.

(a) INDIVIDUAL COURT WEBSITES.—The Chief Justice of the United States, the chief judge of each circuit and district and of the Court of Federal Claims, and the chief bankruptcy judge of each district shall cause to be established and maintained, for the court of which the judge is chief justice or judge, a website that contains the following information or links to websites with the following information:

(1) Location and contact information for the courthouse, including the telephone numbers and contact names for the clerk's office and justices' or judges' chambers.

(2) Local rules and standing or general orders of the court.

(3) Individual rules, if in existence, of each justice or judge in that court.

(4) Access to docket information for each case.

(5) Access to the substance of all written opinions issued by the court, regardless of whether such opinions are to be published in the official court reporter, in a text searchable format.

(6) Access to documents filed with the courthouse in electronic form, to the extent provided under subsection (c).

(7) Any other information (including forms in a format that can be downloaded) that the court determines useful to the public.

(b) MAINTENANCE OF DATA ONLINE.—

(1) UPDATE OF INFORMATION.—The information and rules on each website shall be updated regularly and kept reasonably current.

(2) CLOSED CASES.—Electronic files and docket information for cases closed for more than 1 year are not required to be made available online, except all written opinions with a date of issuance after the effective date of this section shall remain available online.

(c) ELECTRONIC FILINGS.—

Public information.

(1) IN GENERAL.—Except as provided under paragraph (2) or in the rules prescribed under paragraph (3), each court shall make any document that is filed electronically publicly available online. A court may convert any document that is filed in paper form to electronic form. To the extent such conversions are made, all such electronic versions of the document shall be made available online.

(2) EXCEPTIONS.—Documents that are filed that are not otherwise available to the public, such as documents filed under seal, shall not be made available online.

Regulations.

(3) PRIVACY AND SECURITY CONCERNS.—(A)(i) The Supreme Court shall prescribe rules, in accordance with sections 2072 and 2075 of title 28, United States Code, to protect privacy and security concerns relating to electronic filing of documents and the public availability under this subsection of documents filed electronically.

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

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

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

(B)(i) Subject to clause (ii), the Judicial Conference of the United States may issue interim rules, and interpretive statements relating to the application of such rules, which conform to the requirements of this paragraph and which shall cease to have effect upon the effective date of the rules required under subparagraph (A).

(ii) Pending issuance of the rules required under subparagraph (A), any rule or order of any court, or of the Judicial Conference, providing for the redaction of certain categories of information in order to protect privacy and security concerns

arising from electronic filing shall comply with, and be construed in conformity with, subparagraph (A)(iv).

(C) Not later than 1 year after the rules prescribed under subparagraph (A) take effect, and every 2 years thereafter, the Judicial Conference shall submit to Congress a report on the adequacy of those rules to protect privacy and security. Deadlines. Reports.

(d) DOCKETS WITH LINKS TO DOCUMENTS.—The Judicial Conference of the United States shall explore the feasibility of technology to post online dockets with links allowing all filings, decisions, and rulings in each case to be obtained from the docket sheet of that case.

(e) COST OF PROVIDING ELECTRONIC DOCKETING INFORMATION.—Section 303(a) of the Judiciary Appropriations Act, 1992 (28 U.S.C. 1913 note) is amended in the first sentence by striking "shall hereafter" and inserting "may, only to the extent necessary,".

(f) TIME REQUIREMENTS.—Not later than 2 years after the effective date of this title, the websites under subsection (a) shall be established, except that access to documents filed in electronic form shall be established not later than 4 years after that effective date. Deadlines.

(g) DEFERRAL.—

(1) IN GENERAL.—

(A) ELECTION.—

(i) NOTIFICATION.—The Chief Justice of the United States, a chief judge, or chief bankruptcy judge may submit a notification to the Administrative Office of the United States Courts to defer compliance with any requirement of this section with respect to the Supreme Court, a court of appeals, district, or the bankruptcy court of a district.

(ii) CONTENTS.—A notification submitted under this subparagraph shall state—

(I) the reasons for the deferral; and

(II) the online methods, if any, or any alternative methods, such court or district is using to provide greater public access to information.

(B) EXCEPTION.—To the extent that the Supreme Court, a court of appeals, district, or bankruptcy court of a district maintains a website under subsection (a), the Supreme Court or that court of appeals or district shall comply with subsection (b)(1).

(2) REPORT.—Not later than 1 year after the effective date of this title, and every year thereafter, the Judicial Conference of the United States shall submit a report to the Committees on Governmental Affairs and the Judiciary of the Senate and the Committees on Government Reform and the Judiciary of the House of Representatives that— Deadline.

(A) contains all notifications submitted to the Administrative Office of the United States Courts under this subsection; and

(B) summarizes and evaluates all notifications.

REMOTE PUBLIC ACCESS TO ELECTRONIC CRIMINAL CASE RECORDS: A REPORT ON A PILOT PROJECT IN ELEVEN FEDERAL COURTS

Prepared for the Court Administration and Case Management Committee of the Judicial Conference

May 7, 2003

Federal Judicial Center

David Rauma
Project Director

This report was undertaken in furtherance of the Federal Judicial Center's statutory mission to provide research and planning assistance to the Judicial Conference of the United States and its committees. The views expressed are those of the author and not necessarily those of the Judicial Conference, the Committee, or the Federal Judicial Center.

REMOTE PUBLIC ACCESS TO ELECTRONIC CRIMINAL CASE RECORDS
A REPORT ON A PILOT PROJECT IN ELEVEN FEDERAL COURTS

THE QUESTION AND A SUMMARY OF FINDINGS

The Question Before the Committee and the Purpose of the Report

The Court Administration and Case Management Committee (Committee) recommended to the Judicial Conference of the United States in 2001 that the Conference prohibit remote public access to electronic criminal case files. The Judicial Conference agreed, and agreed that it would reconsider the policy in two years, during which time the Committee would study the implications of allowing remote public access. The Committee asked the Federal Judicial Center (Center) to conduct an evaluation of a pilot project authorizing ten district courts and one circuit court to make available remote public access to electronic criminal case documents. This report summarizes the results of that evaluation, with the purpose of providing information to the Committee as it re-examines the policy prohibiting remote public access to electronic criminal case files.

Summary of Major Findings

Study Design. The pilot project began in the spring of 2002. Ten district courts and one court of appeals were granted exemptions to the Judicial Conference policy that "public remote electronic access to documents in criminal cases should not be available at this time [September 1, 2001]."[1] The Committee selected four additional districts to serve as comparison courts for purposes of this evaluation. These comparison courts had made electronic images available prior to 2001 but were not granted exemptions by the Judicial Conference to continue allowing remote public access during the pilot. The Administrative Office (AO) issued a set of operational guidelines for the pilot courts that specified which documents could not be displayed under any circumstances and what information was to be redacted from all criminal filings (see the Appendix for the exact text of the operational guidelines).

The goal of the pilot project evaluation was to generate answers to a set of questions, agreed to by the Committee, the AO, and Center. The evaluation questions address these areas of concern: (1) what rules and procedures did the courts promulgate for remote public access; (2) what advantages and/or disadvantages are there to parties, judges, and court staff of such access;

[1] JCUS-SEP 01, p. 49

and (3) what harm and potential harm of remote public access to criminal case documents did the Center's evaluation of the pilot program identify? This report is organized around these questions.

In addition to harm or potential harm from remote public access, the Committee asked the Center to study the potential harm posed by online criminal dockets, which contain entries such as hearings, filings of motions, and issuance of orders for a given criminal case. These entries are accompanied by descriptions of the entries, regardless of whether electronic images of documents are available. The question is whether these descriptions can contain harmful information. The Committee selected six additional districts to serve as comparison courts for the supplemental study of docketing information.

The sources of information for this report are: 1) telephone interviews with chief judges, clerks of court, federal defenders, CJA panel attorneys and U.S. Attorneys in the eleven pilot courts and four comparison courts; 2) a survey of district and magistrate judges in the ten pilot district courts; 3) a study of defense attorney location relative to the federal courthouses in the ten pilot district courts; and 4) a study of docket sheets in the six additional comparison courts. Results from U.S. Attorney interviews are reported separately and any information obtained from U.S. Attorneys is identified as coming from that source.

Modes of Access. The pilot courts' most common means of accessing online case information is PACER (Public Access to Court Electronic Records). Less common is the use of RACER (Remote Access to Court Electronic Records).

Court Practices. The actual practices of the pilot courts cannot be easily summarized and compared, as these practices vary considerably. Most of the pilot courts had allowed remote public access before the formal pilot program began, and each court had a different set of criminal case documents that it made available in electronic form online. The pilot courts that had offered remote access to criminal case documents before the pilot project sought to conform their practices to the AO's operational guidelines on document availability and redaction, but with varying results. The variation in the adoption of the operational guidelines is most apparent when these practices are considered in terms of the number and types of documents the courts make available via remote public access.

The operational guidelines prohibit remote public access to certain documents such as pretrial and presentence investigations, Statements of Reasons, and sealed documents. As respondents in the district courts often noted, the prohibited documents were not made available

online before the pilot project and, therefore, posed no implementation issues for the pilot district courts.

The pilot district courts that make a limited subset of other criminal case documents available online adopted the operational guidelines with few or no reported problems. Respondents in the district courts with greater numbers of documents available online often reported concerns about the operational guidelines and the need to balance competing demands of document availability (to meet the needs of users), document redaction, and monitoring of guideline compliance by filing parties. Several of the courts with more extensive online offerings found that they had to make changes in their practices to comply with the operational guidelines. These changes included one or more of the following: changes to document formats, special document scanning procedures, exemptions to the redaction rules, and removal of certain documents from remote public access. Virtually every pilot court respondent, however, whether they were judges, clerks, or defense attorneys, agreed that redaction had to be the responsibility of the filing parties. And they were in agreement as to why: clerks' offices have neither the personnel nor the training and experience to redact each filed document.

The Eighth Circuit reported no problems in implementing the operational guidelines.

Local Rules. None of the pilot courts had instituted new local rules for the pilot project at the time this report was prepared. Some courts had working or advisory groups address the issue of redaction, with input from the U.S. Attorney's office and the defense bar. One court, which makes virtually all unsealed documents available online, turned the task over to its local rules committee. However, that committee did not reach an agreement on a new rule for document availability and redaction, and that court has not implemented the operational guidelines. While this report was being prepared, another of the pilot courts had proposed an amendment to its local rules that specified how identifying information in pleadings and other filed documents would be made available to the court but not to the public.

Advantages/Disadvantages to Parties. Interview respondents in the pilot courts reported four categories of advantages of remote access to parties (and attorneys): access to information; case tracking; organizational/operational benefits; and general public benefits.

Most interview respondents extolled the advantages of access for attorneys and, to a lesser extent, for defendants and the general public. When asked about possible advantages to the public of remote access, the most common response was that it created or reinforced the concept of the courts as an open, public institution. This response came from chief judges, clerks, and defense attorneys. Respondents reported few disadvantages of remote public access. The only

disadvantage reported by more than one respondent was the potential misuse of criminal case documents, in the form of identity theft or the identification of cooperating defendants.

Advantages/Disadvantages to Judges and Staff. Respondents reported four categories of advantages to judges and court staff:

- savings of time and money;
- remote access by judges;
- organizational benefits (separate from time and money savings); and
- highlighting of the open and public nature of the court.

Respondents described few disadvantages to the court. Those mentioned fall into three categories:

- the court must take on a gate-keeping function, deciding which documents are available via remote public access;
- the organizational burden of scanning documents and ensuring that only selected documents are available to the public; and
- loss of control over publicly available documents and the information therein.

Sealed Documents. When asked if requests by government or defense attorneys in the pilot courts to seal documents might increase, to prevent document availability via remote access, most respondents were not concerned that it would become a widespread practice. Several defense attorneys said that they rely on judges to make reasonable decisions about requests to seal any portion of a case or the entire case.

Harm. For the period of the pilot project, interview respondents reported no instances of harm resulting from remote public access in any of the pilot courts.[2]

The majority of the pilot courts and all of the comparison courts made criminal case documents available through remote public access prior to September 2001. For the period before the pilot project, interview respondents reported no verifiable instances of harm resulting from remote public access in any of the pilot court or comparison courts. A CJA Panel attorney in a comparison court reported a threat to a client who was cooperating with the government.

[2] During the pilot project there was a case of alleged identity theft filed in federal court in the Middle District of Florida, a non-pilot court. The defendants targeted prominent and wealthy individuals who had been charged with crimes in federal court, used the Internet and publicly available federal court records to gather identifying information about these individuals, and with that information, established credit cards and lines of credit. According to investigators, the case does not involve the misuse of documents available via remote public access. The defendants allegedly used PACER to track the progress of their victims' criminal cases, but obtained by mail copies of documents filed in federal courts around the country.

However, the source of the information behind the threat could not be traced directly to remote public access to online documents. The information could have been obtained from other sources that include co-defendants, the online docket (without accessing criminal case documents) and the paper file kept in the clerk's office. This was the only reported incident in any of the comparison courts.

U.S. Attorney Interviews. The views of the U.S. Department of Justice (DOJ) on remote public access are contained in the Department's formal comment to the AO on privacy and public access to electronic case files as to public access to electronic criminal case files[3] DOJ urges the Judicial Conference to consider during its policy deliberations the potential for harm to individuals or to criminal investigations and prosecutions of widespread public dissemination of criminal case information. Our interviews of U.S. Attorneys or their designees revealed no specific instances of harm to individuals, such as cooperating defendants, from remote public access nor did they report problems with investigations or prosecutions, but the pilot district courts are a small sample of all 94 districts, whose experiences may not be representative of what would happen across all federal districts.

Survey Results. The survey results confirmed many of the findings of the interviews. The district and magistrate judges we surveyed saw more advantages than disadvantages to allowing remote public access to criminal case files. This was especially the case with judges who used remote access to electronic criminal case files. When judges were asked about restrictions on access to criminal case documents, 57 percent of the district judges and 56 percent of the magistrate judges responded that there should be unlimited remote public access to criminal case documents (excluding sealed documents). Only 4 percent of the district judges and 6 percent of the magistrate judges responded that there should be no public access. The judges were asked whether, to their knowledge, any harm had resulted from remote public access in their district. The response was 100 percent no.

THE REPORT: STUDY CONTEXT AND DESIGN

Context

At its September 2001 meeting, the Judicial Conference adopted recommendations by the Committee concerning remote public access to electronic civil, criminal, bankruptcy and

[3] U.S. Department of Justice, Comments Regarding the Privacy and Security Implications of Public Access to Electronic Case Files, February 2001.

appellate case files. With regard to criminal case files, the Judicial Conference adopted this recommendation:[4]

> Public remote electronic access to documents in criminal cases should not be available at this time, with the understanding that the policy will be reexamined within two years of adoption by the Judicial Conference.

At its March 2002 meeting, the Judicial Conference endorsed a recommendation by the Committee to create a pilot project to study the impact of remote public access to electronic criminal case files. The Center conducted the evaluation of the first year of the pilot project, May 2002 to March 2003), under the guidance of the Committee's Subcommittee on Privacy Policy Implementation.

The evaluation was designed to answer five general questions.

1. **Description of Court Practices.** What kinds of documents and information are the courts making available electronically?
2. **Rules.** What rules and procedures have the courts promulgated?
3. **Party Advantages/Disadvantages.** What is the utility of remote public access and electronic filing to parties in criminal cases?
4. **Judge and Staff Advantages/Disadvantages.** What effect does a policy that limits public access have on judges and court staff?
5. **Harm.** Has anyone been harmed or threatened with harm because of information contained in case documents that were obtained through remote public access?

The pilot courts were asked by the AO to implement operational guidelines, which specified that certain documents and certain information could not be made available via remote public access. Consequently, the rules and procedures implemented by the courts largely concern which documents and information are made available and how these restrictions are effected. Therefore, the first two questions will be answered together.

Study Design

The study has four parts that will help answer the evaluation questions: interviews with chief judges, clerks of court, federal defenders, CJA panel attorneys, and U.S. Attorneys in the pilot courts and a set of comparison courts; a survey of district and magistrate judges in the pilot

[4] JCUS, *supra* note 1.

district courts; a study of defense attorney location relative to the federal courthouse in the pilot district courts; and a study of docket information in a second set of comparison courts. This section describes the pilot and comparison courts and the purposes and data sources for these parts of the study.

Selection of Courts. To answer the study questions, the Committee selected three categories of courts. These categories of courts represent a range of experiences with public access and include courts that are currently making case documents available electronically to the public as well as courts that did so before September 2001. The courts in each category are listed in Table 1. The first category, the Pilot Courts, consists of ten district courts and one court of appeals, to all of which the Judicial Conference granted an exemption to the policy prohibiting remote public access to electronic images of criminal case documents. Nine of the district courts offered remote public access to criminal case documents before September 2001, and as a result have considerable experience with such access. Therefore, these courts can speak to many of the study questions and speak more authoritatively than other courts about the impact of permitting remote public access. Two other courts were added to the list: the District of the District of Columbia and the Eighth Circuit. At the time of the Committee's recommendation, the District of the District of Columbia planned to begin making documents available online and the court of appeals made briefs available online in electronic form before September 2001.

The second category of courts in Table 1 displayed electronic images of criminal case documents prior to September 2001, but were not granted an exemption to the Judicial Conference policy (Comparison Courts, Group I). These courts have prior experience with electronic public access and therefore can speak to many of the study questions. These courts can also speak about the impact of not permitting remote public access to criminal case documents. The third category in Table 1 consists of courts that have never made criminal case documents available online to the public (Comparison Courts, Group II). We used this third set of courts for a study of online criminal dockets (see below).

Table 1

Pilot Courts	Comparison Courts Group I	Comparison Courts Group II
S.D. Cal.	S.D. Iowa	D. Colo.
D. D.C	W.D. N.C.	M.D. Fla.
S.D. Fla.	W.D. Okla.	S.D. N.Y.
S.D. Ga.	D. Vt.	M.D. Tenn.
D. Idaho		W.D. Va.
N.D. Ill.		W.D. Wisc.
D. Mass.		
N.D. Okla.		
D. Utah		
S.D. W.Va.		
Eighth Circuit		

Interviews. Between September 2002 and April 2003, Center staff conducted interviews in the pilot courts and Group I of the comparison courts. In the pilot courts, the chief judges and clerks of court were interviewed at the beginning of the study and at the end of the study to inquire about changes in court policies or procedures since the first interview. In the pilot district courts, federal defenders[5] or assistant federal defenders, CJA panel attorneys, and U.S. Attorneys or their designees were interviewed once. In the Group I comparison courts, chief judges, clerks of court, and federal defenders were interviewed once.

For various reasons, not all of these individuals were interviewed in every pilot court. For example, in six of the ten pilot courts and the court of appeals, the chief judge chose not to be interviewed, deferring to the clerk instead. One of the pilot courts does not have a federal defender; the CJA panel attorney representative was interviewed instead. The District of the District of Columbia has not yet implemented the pilot project because of the time and resources required to do so. This court did not have remote public access before September 2001 and, after the pilot project began, devoted its resources to the implementation of the Case Management and Electronic Case Filing System (CM/ECF). As a result, only the chief judge of the District of the District of Columbia was interviewed; no other interviews were conducted in that district.

[5] Several of the pilot district courts have Community Defenders. For purposes of this report, the terms "federal defender" and "defender" will refer to Community Defenders as well as Federal Defenders.

Finally, interviews could not be scheduled with two of the remaining nine U.S. Attorneys by the time this report was prepared.

The interviews dealt with the questions listed earlier: harm, advantages and/or disadvantages to parties, judges, court staff, and the public, court practices, and rules. Respondents were also asked about document availability and redaction and the operational guidelines. A basic set of questions was asked of all respondents, with more in-depth questions tailored to the respondent. For example, chief judges and clerks were asked about court practices and rules; attorneys were asked about their everyday use of remote access. In addition, the interviews in the Group I comparison courts included questions about the impact of ending remote public access to electronic criminal case documents at the conclusion of the pilot study.

Pilot Court Survey. The Center sent a questionnaire to 62 magistrate judges and 133 district judges in the ten pilot district courts. The questions dealt with a subset of the issues covered in the interviews, with a focus on advantages and disadvantages of remote public access, document availability, and redaction. Questionnaires were returned by 32 of the 62 magistrate judges (52 percent) and 64 of the 133 district judges (48 percent). The range of responses from both groups was substantial and we are confident that they are representative of the views of magistrate and district court judges in the pilot courts.

Distance of Attorney Offices from the Federal Courthouse. To better gauge the advantages of remote access to parties, a study was conducted of defense attorneys in a sample of criminal cases filed in the ten pilot district courts during fiscal year 2001. The purpose was to obtain information about: 1) the proportion of cases in which the defense attorney is a private attorney (as opposed to a federal defender), and 2) the location of defense attorneys' offices relative to the federal courthouse. Federal defenders are typically located in or near the federal courthouse, whereas private attorneys may or may not be located in the same city as the courthouse. Remote access to electronic criminal case files is likely to be of greater value to attorneys who do not have easy access to the federal courthouse.

Criminal Docket Sheets. The electronic docket, which is publicly available regardless of whether electronic criminal case documents are available, contains a significant amount of information and entries about a criminal case: initial charges, pretrial release status, final charges, trial information, plea, sentence disposition, and other information. We were especially interested in determining whether there is information in the docket that is potentially harmful, whether to defendants, victims, witnesses, or 3rd parties. The interviews addressed this question, but to supplement the interview data, we undertook a modest analysis of docketing information in the Group II Comparison Courts (see Table 1). Docket sheets were downloaded for a random sample

of 100 cases filed in fiscal year 2001 from each of these six comparison courts. Our examination of the docketed information was guided by information we obtained during the interviews about potentially harmful docket entries.

FINDINGS FROM THE PILOT COURTS

The majority of findings reported in this section come from the interviews with chief judges, clerks, federal defenders and assistant federal defenders, and CJA panel attorneys. As a reporting convention, the term federal defender will refer to both federal defenders and assistant federal defenders,[6] and defense attorney will refer to both federal defenders and CJA panel attorneys. In general, interview results will not be reported in terms of the numbers or proportions of respondents expressing a view or reporting a piece of information. The number of interviews is too small to give meaning to frequencies, proportions, or percentages. Results from U.S. Attorney interviews are reported separately and any information obtained from U.S. Attorneys is identified as coming from that source.

The Pilot Courts

As context for the discussion of findings, Table 2 gives some information about the pilot district courts. This information is taken from tables published in Judicial Business of the United States Courts.[7] Note that the range of criminal filings is quite large, from less than 200 to almost 4,000 criminal filings per year.

[6] See Footnote 5.
[7] Judicial Business of the United States Courts, 2001 Annual Report of the Director.

TABLE 2
2001 FILINGS IN THE PILOT DISTRICTS

District	Authorized Judgeships[a]	Criminal Filings[b]	Civil Filings[c]
S.D. Cal.	8	3,853	2,618
D. D.C	15	464	2,958
S.D. Fla.	17	1,841	8,961
S.D. Ga.	3	418	1,128
D. Idaho	2	161	697
N.D. Ill.	22	647	10,340
D. Mass.	13	403	2,884
N.D. Okla.	3.5	121	1,001
D. Utah	5	745	1,158
S.D. W.Va.	5	235	1,253

[a] Table X-1A
[b] Table D-1
[c] Table C-3

Court Practices and Rules

The pilot project began in May 2002 when the pilot courts were sent the AO's operational guidelines on document availability and redaction (see Appendix). Upon receipt of the guidelines, the courts were authorized to allow remote public access to criminal case documents. Six of the eleven pilot courts had never stopped remote public access to criminal case documents. Four of the remaining five courts re-established remote public access (one of these courts had implemented remote access for the U.S. attorney's and federal defender's offices after September 2001). The remaining court, the District of the District of Columbia, has not yet implemented the pilot project because of the time and resources required to do so. This court did not have remote public access before September 2001 and, after the pilot project began, devoted its resources to the implementation of the Case Management and Electronic Case Filing System (CM/ECF). Therefore, this court is not included in the interview results reported here. The court is included in the results of the survey and the attorney distance study.

Mode of Access. The most common means of accessing online case information is PACER. PACER is an electronic public access service available in most federal courts. It allows a user to request information about a particular individual or case in the participating districts. It is supported through the PACER Service Center, the judiciary's centralized registration, billing,

and technical support center. Members of the public can register online for PACER accounts by providing their name, address, phone number, and e-mail address. Users are billed for their usage. The individual courts maintain their own PACER databases.

Nine of the ten pilot courts with access to criminal case documents use PACER, although in three of these courts criminal case documents are accessible only through RACER, an alternative system for requesting case information. RACER does not have a centralized system and can be set up so that it either does or does not require an ID and password. The tenth court uses RACER exclusively.

Court Practices. The guidelines prohibit remote public access to certain documents such as pretrial and presentence investigations, Statements of Reasons, and sealed documents (see the Appendix for a complete list of documents). The guidelines also require the redaction of certain information from all criminal filings: Social Security Numbers, financial account numbers, dates of birth, names of minor children, and home addresses. Redaction is the responsibility of the filing parties, with the possibility of sanctions by the court for failure to comply.

The Eighth Circuit reported no problems implementing the operational guidelines. Attorneys are sent a notice with the guideline information on redaction when a case is docketed. That notice also instructs attorneys not to include Presentence Reports and Statements of Reasons in their briefs.

The pilot district courts described varied experiences implementing the operational guidelines. As respondents often noted, the prohibited documents were not made available online before the pilot project and, therefore, posed no implementation issues for the pilot courts. However, the redaction requirements produced a variety of experiences among the pilot district courts. Several courts reported no problems implementing the redaction requirements. Several other courts described significant problems that had to be resolved before and after the guidelines were put into effect. A chief judge in one pilot district described the redaction requirements as a "disaster" when applied to certain types of pretrial documents (*e.g.*, bail surety documentation) that, of necessity, contain identifying information on the list of information to be redacted. A clerk in another pilot district said that he would have opposed participation in the pilot project had he known about the redaction requirements beforehand. Another pilot district could not reach an agreement about a local rule for redaction and, consequently, never implemented that portion of the operational guidelines. From the beginning of the pilot project to the time this report was prepared, there has been no redaction of documents filed in and available via remote public access from this court.

Based on the interviews and examination of the courts' online dockets, much of the variation in implementation experiences seems to be associated with the number and variety of criminal case documents the district courts make available online. The courts that offer more criminal case documents online tended to report more issues with implementation than did the courts with fewer types of documents available. If there was an effect of the number or variety of documents on the implementation, it may have been enhanced by the fact that document availability was also associated with the number of criminal filings. Courts with larger numbers of filings also tended to offer more documents online. However, any associations should be viewed cautiously in a sample of nine district courts.

There is no typical list of criminal case documents available online among the pilot district courts. At a minimum, a pilot district court might have indictments, informations, motions, orders, and the Judgment and Commitment Order (less the Statement of Reasons). The districts that offer more documents online have, in addition to those cited above, one or more of the following: warrants, supporting documents for bond applications, magistrate information sheets, financial affidavits, petitions in supervised release violation cases, sentencing memoranda, plea agreements, and transcripts. Many of these documents contain information that the operational guidelines require be redacted.

One of the pilot district courts makes every unsealed document publicly available online (except transcripts and documents on the prohibited list). The clerk of this court stated that attorneys rely heavily on the availability of these documents in the course of their work. This court proposed a local rule for redaction, but the local rules committee could not come to an agreement on the rule. A member of the local rules committee was specific in stating that the U.S. attorney's office did not want to redact any of its filings and sought exemptions to any redaction requirements. The committee could not reach agreement and the redaction portion of the operational guidelines had not been implemented at the time this report was prepared.

Another court established a working group to implement the operational guidelines; the group included representatives from the U.S. attorney's office, the federal defender's office, and the local defense bar. This court also has an extensive list of documents available to the public online. The clerk of this court described PACER as a "workhorse" and an important factor in keeping their high volume of criminal cases moving. The court had issued a general order at the beginning of the pilot project that was modeled on the operational guidelines. Based on the working group's efforts, a revised general order was issued, adding a number of documents to the prohibited list that it decided could not be redacted easily.

Somewhere in the middle of these varied experiences is the pilot district that has taken a measured approach to making documents available online. Although it does extensive scanning of documents for internal use, only indictments, informations, and orders are publicly available on the court's web site. A working group, with representatives from the U.S. Attorney's office and the local bar, has met to make decisions about which documents to make available. But, according to the clerk, they have moved slowly, and intentionally so.

Several districts had a more specific implementation matter: 18 USC § 3612(b)(1)(A) requires that a "judgment or order imposing, modifying, or remitting a fine or restitution order of more than $100 shall include the name, social security account number, and residence address of the defendant." Several courts interpreted this statute as a prohibition on redacting Judgment and Commitment Orders. This interpretation led to various solutions. One district simply blocked the social security number and date of birth with opaque tape before scanning the documents. Another district moved these identifiers to the Statement of Reasons. This same district was also concerned about the identifiers in the petition filed in supervised release violation cases. The clerk did not want to produce two versions of the petition (or of the Judgment and Commitment Order)—redacted and unredacted—and these petitions are now filed under seal. A third district decided to not make Judgment and Commitment Orders available online.

Compliance and Monitoring. The operational guidelines put the responsibility for redaction of criminal filings on the filing parties. Based on the guideline's recommended language for notice to the bar of the pilot project and its redaction requirements (see Appendix), the courts were not obligated to check each document for compliance. In fact, one clerk read the guidelines to mean that the court was not obligated to do anything different than what it had been doing. Apart from the district courts' redaction of internally-generated criminal case documents, the courts did not seem to monitor compliance, or monitor it closely. Several clerks expressed the concern that the volume of documents processed by their courts made monitoring difficult, particularly monitoring of private defense attorneys unfamiliar with the redaction requirements. At the same time, defense attorneys in several districts reported receiving assurances from their respective courts that they would not be sanctioned for inadvertent failures to redact.

Advantages and Disadvantages to Parties

In the interviews, most respondents extolled the advantages of access for attorneys and, to a lesser extent, for defendants and the general public. Defense attorneys were generally very positive about the benefits to them and their staffs of remote access. The advantages cited in the interviews can be grouped generally into four categories: access to information; case-tracking; organizational/operational benefits; and general public benefits.

Access to information. Remote access provides immediate, remote, and simultaneous access to case information and documents, 24 hours a day. In other words, attorneys can access case documents from their offices, any time of the day, regardless of who else might be accessing the documents. Everything—the docket and filed documents—is in one place (depending on the documents a court makes available online). And access to all of the filed cases creates a research tool for attorneys (as well as for law students and academics). These were the most common responses, and they came from judges, clerks, and attorneys. Several respondents noted that this is a form of equal access that helps "level the playing field" for defense attorneys who might be located some distance from the court and for whom trips to the clerk's office could be burdensome.

Case tracking. With remote access, attorneys, defendants, defendants' families, and other members of the public can track cases. U.S. attorneys and defense attorneys can check for new filings in their cases, without waiting for documents to be sent to them by the court or by opposing counsel.

Organizational/Operational Benefits. Attorneys can print documents as they are needed or, if documents are not available online, they can determine which documents to request from the clerk's office. Federal defenders can use online charging documents to assign cases in their offices. In response to questions, the clerk's office can direct the media to cases online for more information.

General Public. When asked about possible advantages to the public of remote access, the most common response was that it created or reinforced the concept of the courts as an open, public institution. This response came from every type of respondent: chief judges, clerks, and defense attorneys. In fact, this served as the basis for many respondents to state that there should be remote public access to all or most unsealed documents and that as little redaction as possible should take place.

The chief judges, clerks, and defense attorneys cited few disadvantages of remote public access to attorneys, defendants, or to the general public. The only disadvantage cited more than once was harm caused by misuse of documents or the information therein (*e.g.*, identity theft). The most commonly cited concern was identity theft, followed by the identification of and possible harm to cooperating defendants, informants, witnesses, or victims. In a typical criminal case, identifying information about a defendant might be scattered throughout the range of filed documents—indictments and informations, documents in support of bond applications, financial affidavits, and Judgment and Commitment Orders contain or may contain identifying, information such as social security numbers, financial account numbers, dates of birth, and home

addresses. As a counterpoint, several respondents stated that criminal defendants do not represent good targets for identity thieves (but see footnote 2). As for cooperating defendants, some respondents were skeptical that documents posed much of a threat. Several respondents said that they assume a defendant is cooperating if a case does not go to trial. One defense attorney said that information about cooperation "gets around the street" and that the last place anyone would look for it is online.

Other disadvantages, each reported by no more than one respondent, are:

- easy access by jurors or witnesses to criminal case documents;
- remote access requires a certain level of technology—a computer, Internet service, and a PACER account—that may be beyond the reach of some individuals; and
- inconsistency within and between districts as to the number and types of documents available—remote public access is no guarantee that certain documents and information are available in this format.

Advantages and Disadvantages to Judges and Court Staff

Only chief judges and clerks of court in the eleven pilot courts were asked about advantages and disadvantages to judges and court staff. They reported advantages that can be grouped into four categories: savings of time and money; remote access by judges; organizational benefits (separate from time and money savings); and enhancements to the public nature of the court.

Savings. Most of the chief judges and clerks discussed the time and money savings to the court of remote public access. These savings stem from the fact that staff spend less time pulling files, making copies of documents, and answering questions. One clerk did point out that these savings are assumed to occur; no empirical assessment of the savings in time and money has been made.

Remote Access by Judges. With remote public access, judges have access to information and documents from their cases regardless of location. If a judge travels to another place of holding court, docket and case file information are still readily available. Remote access is particularly valuable for court of appeals judges, who are located throughout their respective circuits.

Organizational Benefits. Respondents cited several organizational benefits apart from savings of time and money: less traffic in the clerk's office; errors are more likely to be detected, and detected earlier because attorneys and others have fast and ready access to documents; the media and the general public can be referred to the online docket for answers to questions; scanning of documents facilitates fax notification of attorneys of newly filed documents; and the use of a new technology positions the court to take advantage of future technological changes.

Public Nature of the Court. Many of the chief judges and clerks cited this as an advantage of remote public access. The courts are a public institution, and ready access to information highlights and reinforces that quality.

The chief judges and clerks of court identified few disadvantages to the court of remote public access. Those reported were of three types generally: gate keeping function; organizational; and loss of control over information. Several respondents reported that there were no disadvantages to judges nor to the court of remote public access.

Gate keeping. Remote public access forces the court to make decisions about which documents and what information in those documents the public can and cannot view online.

Organizational. Remote public access requires extra work by the clerk's office, scanning documents and ensuring that the correct documents are made available (*i.e.*, ensuring that sealed documents are not inadvertently made available).

Loss of Control. Once documents are available online, the court no longer has any control over who views them, nor the uses to which they are put.

Harm Resulting From Remote Public Access

The majority of the pilot courts had made documents available online prior to September 2001. These documents were also made available as part of the pilot project, however, the pilot courts were not required to redact the pre-September 2001 documents for the pilot project. These unredacted documents were accessible alongside the redacted documents filed under the operational guidelines of the pilot project. There were exceptions as several courts prohibited access to documents filed during the pilot project that could not be easily redacted (*e.g.*, bond documents, Judgment and Commitment Orders) and, in one district, extended that prohibition to these documents filed before the pilot project. In the majority of pilot districts the documents filed prior to the pilot courts' implementation of the operational guidelines constitute a higher level of risk than do those filed afterwards. Consequently, the availability of both redacted and unredacted documents tests the efficacy of the redaction requirements in the operational guidelines.

For the period of the pilot project, there were no reports of misuse of criminal case documents, nor were there any reports of harm stemming from the availability of these documents via remote public access.

A CJA panel attorney in a Group I comparison court reported threats to a client who had cooperated with the government. However, the source of the information behind the threats

could not be traced directly to online documents (which would have been available in that district before September 2001). The information about this defendant's cooperation could have been obtained from a number of sources that include co-defendants, the online criminal docket (without accessing criminal case documents) and the paper file kept in the clerk's office. Otherwise, for the period prior to the beginning of the pilot projects, there were no documented instances of misuse of online documents nor of harm stemming from their availability online in any of the pilot or comparison courts.

U.S. Attorney Interviews

The views of the U.S. Department of Justice (DOJ) on remote public access are contained in the Department's formal comment to the AO on privacy and public access to electronic case files as to public access to electronic criminal case files"[8] DOJ urges the Judicial Conference to consider during its policy deliberations the potential for harm to individuals or to criminal investigations and prosecutions of widespread public dissemination of criminal case information. Our interviews of U.S. Attorneys or their designees revealed no specific instances of harm to individuals, such as cooperating defendants, from remote public access nor did they report problems with investigations or prosecutions, but the pilot district courts are a small sample of all 94 districts, whose experiences may not be representative of what would happen across all federal districts.

Document Availability and Redaction

The Operational Guidelines. All respondents were asked about the document availability and redaction portions of the operational guidelines. With a few exceptions, respondents agreed with the list of prohibited documents. This result should not surprise, since the documents prohibited by the operational guidelines are treated by the courts as if they were sealed documents. In other words, these documents are not available to the public, even in the clerk's office. The lone exception is the pilot district court that makes Statements of Reasons available to the public. Respondents in that district thought that the Statement of Reasons should not be on the prohibited list. Otherwise, if respondents in the pilot courts proposed changes to the prohibited list, it was to add documents. Proposed additions to the list include: sentencing memoranda by defense attorneys, documents with mental or physical health information, financial statements, CJA vouchers, pretrial diversion information, any document involving departures, grand jury target letters, witness lists, and trial memoranda.

[8] U.S. Department of Justice, Comments Regarding the Privacy and Security Implications of Public Access to Electronic Case Files, February 2001.

Similarly, most respondents agreed with the list of information to be redacted. Only one respondent, a defense attorney, suggested an addition to that list. This respondent would like to see the entire social security number redacted rather than just the first seven digits. Finally, virtually every respondent, whether they were judges, clerks, or attorneys, agreed that redaction had to be the responsibility of the filing parties. And they were in agreement as to why: the clerk's office does not have the personnel nor the training and experience to redact each filed document. Only the parties will be able to redact reliably the documents they file with the court.

Sealed Documents. Many respondent, especially the attorneys, brought up the issue of sealed documents. Most of the defense attorneys said that, if they were concerned about a document or the information therein, they would request that the document be sealed. When asked if requests by government and/or defense attorneys in the pilot courts to seal documents might increase, to counter document availability via remote access, most respondents were not concerned that it would become a widespread practice. Several defense attorneys said that they rely on judges to make reasonable decisions about the need to seal any portion of a case or the entire case.

FINDINGS FROM THE GROUP I COMPARISON COURTS

The four districts in comparison Group I (see Table 1 above) were selected because they had had remote public access before September 2001, for varying lengths of time, but these courts did not receive exemptions to continue that access as part of the pilot project. The chief judges, clerks, and federal defenders in these districts were interviewed after the pilot project had been in operation for approximately eight months. Since these courts were not participating in the pilot project, there was no need for multiple interviews nor for interviews at the beginning of the pilot project.

Access

These courts ended remote public access to criminal case documents when the Judicial Conference approved the policy prohibiting such access. However, three of the four courts developed alternative systems, through PACER or RACER, to allow the U.S. attorneys, federal defenders, and private defense attorneys to access online the documents for their cases. In these districts, the chief judges and clerks reported no complaints or issues resulting from the end of public access. The fourth district did not develop such a system. The clerk of court in that district reported that the U.S. Attorney's office complained about the lack of access and the federal defender reported that the lack of remote access to documents was an inconvenience.

Findings

The interviews with respondents in the comparison courts echoed those reported in the pilot courts. Respondents reported the same types of advantages and disadvantages of remote public access and the same range of views on document availability and redaction. This is not a surprising result since these courts have some history of remote access. If there was one difference that stood out, it was more ambivalence toward unrestricted remote public access, defined as no restriction on who can have remote public access. Almost half of the respondents were either undecided about unrestricted access or favored access limited to parties. The remainder were in favor of unrestricted remote public access.

SURVEY RESULTS IN THE PILOT COURTS

Advantages and Disadvantages

The mail survey of judges included questions about the advantages and disadvantages of remote public access. Judges were presented with separate lists of advantages and disadvantages and asked, for each item in each list, whether they agreed that it was an advantage or disadvantage, respectively. The lists were drawn from the interviews with chief judges, clerks, federal defenders, and CJA panel attorneys. Figure 1 contains a chart of the percentages of magistrate and district judges, separately, who agreed that each item was an advantage. There is one item missing from the chart. Since no judge agreed that there were no advantages, it is omitted from the chart.

The chart in Figure 1 (see below) shows high rates of agreement with the potential of remote public access. The percentages for district judges range from 82 percent for "attorneys can track cases" to 48 percent for "saves case preparation time." The percentages for magistrate judges tend to be lower, ranging from 88 percent for "attorneys can track cases" to 38 percent for "creates a spirit of public openness." When asked whether they access documents online, 73 percent of the judges reported doing it occasionally or regularly. Figure 2 lists the same advantages, but excludes district and magistrate judges who never use remote access. The percentages increase in virtually every category: judges who use remote access are more likely to see advantages to parties, the clerk's office, the court, and to themselves than judges who never use remote access to criminal case documents.

Figure 1
Advantages of Online Public Access

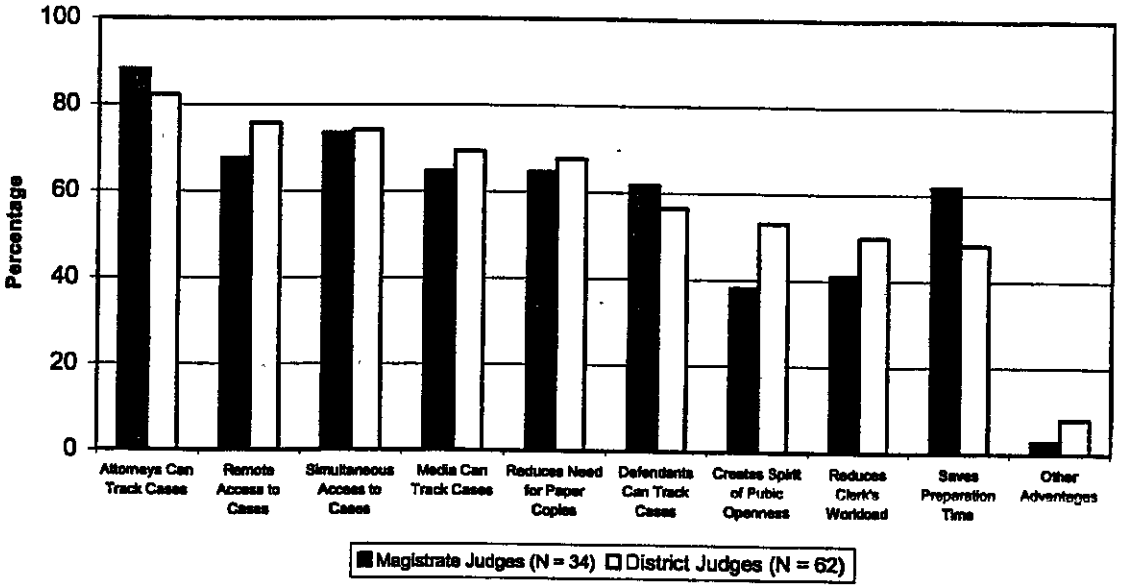
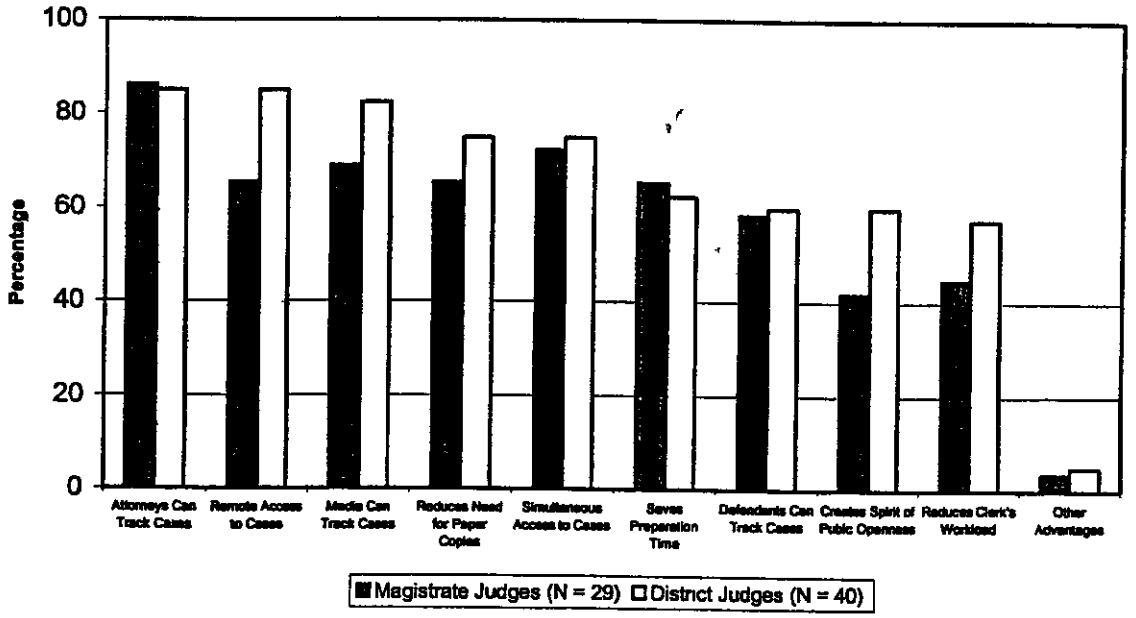


Figure 2
Advantages of Online Public Access
Judges Who Use Online Access



Although high proportions of judges see advantages in remote public access, the chart in Figure 3 shows fewer judges think there are potential disadvantages of remote public access. In Figure 3, the high and low categories are the same for magistrate and district judges: 56 percent and 55 percent for "jurors can access cases," respectively, and 41 percent and 29 percent for "potential of identity theft," respectively. Whereas no judges said there were no advantages of remote access, 21 percent of the magistrate judges and 15 percent of the district judges said there were no disadvantages to remote access. Figure 4 lists the same disadvantages, but for judges who use remote access. The results are more mixed than for advantages, but internally consistent. Judges with remote access are as or slightly more likely to see its risks, and therefore more likely to view danger to cooperating defendants and 3rd parties and identity theft as disadvantages. In the other categories of potential disadvantages, judges with remote access are as or less likely to see these as disadvantages.

Figure 3
Disadvantages of Online Public Access

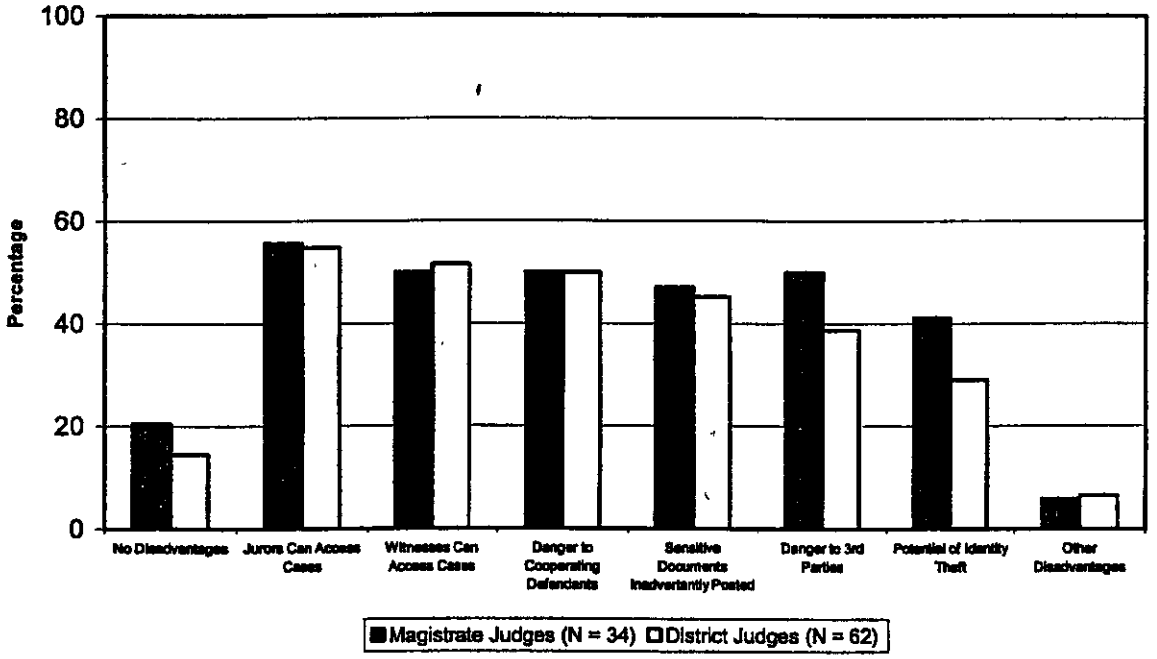
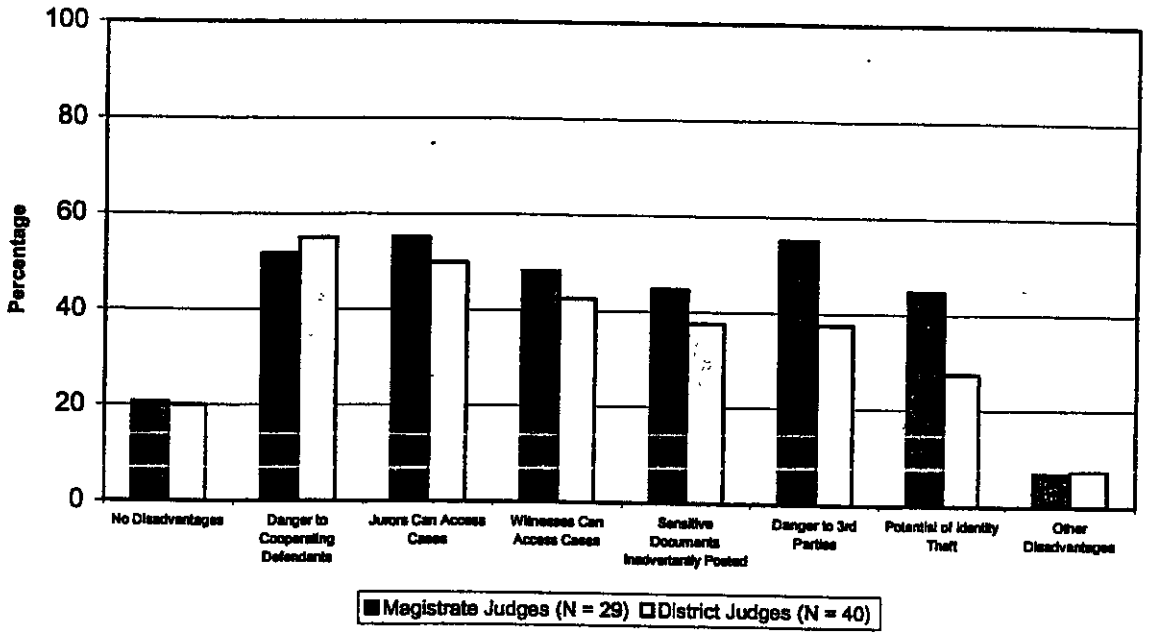


Figure 4
Disadvantages of Online Public Access
Judges Who Use Online Access



Document Availability and Redaction

Judges were asked about the operational guidelines for the pilot project, specifically whether they agreed with list of criminal documents prohibited from remote access and the list of information to be redacted from criminal documents filed with the court. With respect to the documents, 83 percent of the district judges and 88 percent of the magistrate judges agreed with the list. Judges were given an opportunity to name the documents that they would remove from that list; thirteen judges responded and each named the Statement of Reasons in the Judgment and Commitment Order. Seven of these responses were from judges in the pilot district that makes Statements of Reasons available online.

With respect to redacted information, 97 percent of the district judges and 100 percent of the magistrate judges agreed with the list. One judge suggested that "information ... material to a judicial decision" should be exempted from redaction.

When district judges were asked if there were other documents that should be prohibited or information redacted, 27 percent said additional documents should be prohibited and 9 percent said additional information should be redacted. The figures for magistrate judges are 30 percent

and 21 percent, respectively. When asked which documents they would add to the prohibited list, judges gave a variety of responses that ranged from the very general ("any doc[ument] that would endanger the safety or health of others") to the very specific ("motions to seal"), but with no pattern. There was a similar variety of unpatterned responses as to what additional information should be redacted.

Restrictions on Remote Access

When judges were asked about restrictions on access to criminal case documents, 57 percent of the district judges and 56 percent of the magistrate judges responded that there should be unrestricted remote public access to criminal case documents (excluding sealed documents). Only 4 percent of the district judges and 6 percent of the magistrate judges responded that there should be no public access. Of the remaining judges, 19 percent of the district judges and 24 percent of the magistrate judges indicated that access should be restricted to parties and their attorneys.

Harm

The judges were asked whether, to their knowledge, any harm had resulted from remote public access in their districts. The response was 100 percent no.

ATTORNEY LOCATION IN RELATION TO THE FEDERAL COURTHOUSE

To supplement the interview and survey data, a study was conducted of the location of defense attorneys, both federal defenders and private attorneys, relative to the courthouses in their respective districts. The purpose was to determine whether, based on their distance from the court and the clerk's office, remote access to criminal case documents presented a real advantage. Distance to the courthouse was measured by the attorneys' postal Zip Codes, which provides a proximate distance.

Samples of 110 cases were drawn from each of the ten pilot districts. Cases for which addresses were not available were eliminated from the sample, as were a small numbers of cases represented by both federal defenders and private attorneys. If more than one private attorney was listed on the docket, only the first attorney was used. Table 3 contains information about the distribution of the sampled cases for federal defenders and private attorneys.[9]

[9] The data in Table 3 were weighted to adjust for the fact that a fixed size rather than proportionate size sample was drawn from each district.

Table 3
Attorney Distance to the Courthouse

		Distance to the Courthouse (in Miles)		
Attorney	N	Median	75th Percentile	90th Percentile
Federal Defender	382	0.5	0.7	59.3
Private Attorney	649	1.1	16.0	52.2

The median value reported in Table 3 is the mid-point of the distribution of distances to the courthouse—half of the distances are below that value. The 75th and 90th percentiles are similar measures of the distribution of distances—75 percent and 90 percent of the distances are below their respective percentile values. The results show, first, that private attorneys represent more cases than federal defenders. One of the pilot districts—the Southern District of Georgia—has no federal defender; private attorneys represent all cases in this district. If this district is removed from that total, private attorneys still outnumber federal defenders. Second, in the majority of cases, the attorneys are within about one mile of the courthouse. In 75 percent of the cases with a federal defender, that attorney is still located within one mile. But in 75 percent of the cases with a private attorney, the attorney is located within 16 miles of the courthouse. Alternatively, in 25 percent of the cases in their respective categories, federal defenders are located .7 miles or more from the courthouse and private attorneys are located 16 miles or more from the courthouse.

One conclusion to be drawn from this analysis is that the vast majority of defense attorneys are local. Another conclusion is that, given the distances involved, private attorneys can benefit more from remote public access than federal defenders. They are located farther from the courthouse and therefore do not necessarily have ready access to the clerk's office. In the interviews, one federal defender stated that private attorneys gain the most from remote access, for this reason. Two other federal defenders reported that their offices were not in the courthouse, albeit nearby, and that remote access compensated for their more remote location.

FINDINGS FROM THE STUDY OF DOCKET INFORMATION

The final question on which we focused was whether information on the docket sheets could pose a risk to defendants, witnesses, victims, or others, regardless of which criminal case documents are available via remote access. All respondents were asked during the interview about this possibility. The interview information was used to guide a study of this potential risk.

The data source for this study was a sample of docket sheets from the Group II comparison courts.

When asked about the possibility that docket information posed any sort of risk, no interview respondent could name any possibilities except the identification of cooperating defendants. When asked about this possibility, some respondents felt that it was a real risk, but most respondents did not think that the risk would arise solely from docketing information.

How would a cooperating defendant be identified through docketing information? The pilot district courts as well as the Group II comparison courts differ somewhat in how they record information about docket entries. Here are some of the ways in which information about cooperating defendants can be recorded. If the government files a motion for a downward departure based on substantial assistance to the government,[10] for example, there will be entry in the docket describing a government motion, and that motion may be described as a motion by the government for downward departure. If that motion is filed under seal, it may be accompanied by a docket entry that describes a sealed motion. Alternatively, that sealed motion may not be recorded in the online docket. The result is a skip in the numbering of docket entries, which can be taken as evidence that a sealed document was filed with the court. If there is a hearing on that motion, it may be sealed and recorded in the docket in a manner similar to that for the motion. Either way, a sealed document or a sealed hearing prior to sentencing may be evidence of cooperation by the defendant. Regardless of what is or is not sealed, the docket contains information about the original charges and the sentence. These two pieces of information, when compared, may indicate that the defendant received a reduced sentence in exchange for assistance to the government. For example, one defense attorney asserted that he could identify substantial assistance with almost 100 percent accuracy by examining the initial charges, the charges of conviction, the sentencing guideline range for the charges of conviction, and the actual sentence. A defendant rewarded for cooperation will receive a sentence below the guideline range for the charges of conviction, even when that guideline range is proscribed by a mandatory minimum sentence.

Why did interview respondents discount the risk posed by online docketing information? Respondents gave a number of reasons. First, except for sealed documents, any documents filed with the court are available in the clerk's office. Many clerks' offices now have public terminals that access the court's internal system and display not only the docket but also unsealed documents that are not available remotely. No identification is needed to access documents in the clerk's office, and copies may be requested for a fee. Second, remote access requires a computer,

[10] USSG §5K1.2

Internet access, and, in most districts, a PACER account. One defense attorney said that online is the last place he would expect someone interested in detecting cooperation to look. There are alternative sources for this information, including the clerk's office, co-defendants, attorneys, and "word on the street." Third, several respondents made the point that, in multi-defendant cases, cooperation at some level may be the norm. One of these respondents, a defense attorney, said that he assumes cooperation occurred if a defendant in a multi-defendant case did not go to trial. Finally, several respondents argued that a certain level of knowledge and sophistication is required to read and interpret docketing information that does not clearly report that the government moved for a downward departure based on substantial assistance.

A random sample of 100 criminal cases filed in Fiscal Year 2001 was selected from each of the six Group II comparison courts (see Table 1 above) for the docketing information study. The docket sheets for these cases were downloaded and examined. We do not report exact numbers because they would give a false sense of precision. We found sufficient variance in how docket entries are written within and between districts to conclude that the results of the docket study should be viewed cautiously. This result is not limited to these six courts. A clerk in one of the pilot courts felt that periodic reminders to the docketing clerks of the court's guidelines for composing docket entries was a good practice.

The results of docket sheet study from the Group II comparison courts are consistent with the information obtained from interviews. In three of the six districts, we found a few docket entries describing government motions for downward departures, sometimes with a notation that the motion was sealed. But not all of the motions were sealed. In the other districts, we found docket entries that described sealed documents, and sealed hearings on these documents, following a guilty plea and preceding sentencing. In these instances, it would take a sophisticated observer to guess that the defendants were cooperating with the government.

APPENDIX

Operational Guidelines for Courts Participating in the Study of Public Remote Electronic Access to Criminal Case Files

Your court has agreed to participate in a study of remote public electronic access to criminal case file documents. As part of this study, your court will be granted an exemption to the Judicial Conference policy prohibiting remote public access to electronic criminal case files and will be allowed to provide such access, within certain parameters. This document is intended to establish those parameters.

Each court will be allowed to return to the level of remote public access to criminal case files that it was providing before September 19, 2001, the date on which the Judicial Conference adopted the policy prohibiting such access. If your court was not providing remote public access to electronic criminal case file documents at that time, as part of the study, you may provide remote public access to all criminal case file documents, except those documents described below. It is important to note that the Judicial Conference policy on privacy and public access to criminal case files does not prohibit public remote electronic access to orders or opinions.

No court should provide remote public access to the following documents under any circumstances:

- unexecuted warrants of any kind (*e.g.*, search warrants, arrest warrants);
- pretrial bail or presentence investigation reports;
- statements of reasons in the judgment of conviction;
- juvenile records; and
- sealed documents

The following personally identifying information should also be redacted by the filing party from all criminal filings as follows:

- Social Security numbers to the last four digits (*e.g.*, redact the Social Security number on a Judgment and Commitment form);
- financial account numbers to the last four digits;
- dates of birth to the year only;
- names of any minor children to initials; and

- the home address of any individual (*e.g.*, victims).

You should make every effort to inform all filers and other court users that documents filed in criminal cases will be available to the general public on the Internet and that the filer has the obligation to redact the specified identifying information from the document prior to filing. It is recommended that you include a notice of electronic availability of criminal case file documents on your court's website, in the clerk's office and through the normal means used by your court to disseminate critical information to the bar and the public. Such notice might state:

> Please be informed that this court is participating in a pilot program pursuant to which, for a limited period of time, certain documents filed in criminal cases will be electronically available to the general public via the Internet.
>
> You should not include certain types of sensitive information in any document filed with the court unless such inclusion is necessary and relevant to the case in which it is filed. If sensitive information must be included, certain personal and identifying information, *e.g.*, Social Security numbers, financial account numbers, dates of birth and the names of minor children, must be redacted in the document.
>
> Counsel is strongly urged to share this information with all clients so that an informed decision about the inclusion, redaction and/or exclusion of certain information may be made. It is the sole responsibility of counsel, the parties, and any other person preparing or filing a document to be sure that the document complies with this redaction requirement. The clerk will not review each document for redaction. Counsel, the parties and any other person preparing or filing a document are cautioned that failure to redact personal identifiers and/or the inclusion of irrelevant personal information in a document or exhibit filed with the court may subject them to the full disciplinary and remedial power of the court.

Thank you for agreeing to participate in this study regarding public remote electronic access to criminal case files. Your assistance and experiences will provide valuable information that will make it possible to assess the current state of electronic access to criminal case file information and to develop appropriate levels of access to this information in the future. If you have any questions regarding this document or your participation in the study, please contact Katie Simon, Attorney-Advisor, Court Administration Policy Staff via e-mail at Katie_Simon@ao.uscourt.gov , phone at 202-502-1560, or fax at 202-502-1022.

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

Memorandum of Action

CAROLYN DINEEN KING
CHAIRMAN, EXECUTIVE COMMITTEE

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Executive Committee
United States Judicial Conference

June 17, 2003

The Executive Committee took action by mail ballot concluded June 17, 2003, on the following matters:

(1) E-Government Act of 2002

Subsection 205 of the E-Government Act of 2002 (Public Law No. 107-347) mandates the development of national rules addressing the protection of personal identifying information and states that the Judicial Conference may issue interim guidance pending the development of formal rules. An earlier version of the legislation did not require the development of formal rules and allowed the Judicial Conference to establish its own rules to protect privacy and security concerns relating to court records. With Conference endorsement, a bill has been introduced in the House of Representatives, H.R. 1303, 108th Congress, that is consistent with the earlier version of the legislation. At the request of the Department of Justice, which apparently favored the use of formal rules, markup of H.R. 1303 was delayed, and staff of the House Judiciary Committee requested that the judiciary and the Department of Justice work together to find a solution agreeable to both. To that end, Administrative Office staff and DOJ staff developed a compromise proposal to which both sides agreed.

The Committee on Court Administration and Case Management endorsed the joint proposal and, because markup of the bill was imminent, sought its approval by the Executive Committee on behalf of the Judicial Conference. By mail ballot concluded on June 17, 2003, the Executive Committee approved the joint proposal, a copy of which is attached.

(2) The Proposed Involuntary Bankruptcy Improvement Act of 2003

On June 10, 2003, the House passed H.R. 1529 (108th Congress), the Involuntary Bankruptcy Improvement Act of 2003, which was introduced by Representative F. James Sensenbrenner, Jr. (R-WI). The legislation would amend section 303 of the Bankruptcy Code to require a bankruptcy court, on motion of an individual involuntary debtor (1) to expunge from court records the petition and all records and references relating to the petition, if the petition initiating the case is false or contains any materially false, fictitious, or fraudulent statement; and (2) to permit a bankruptcy court to enter an order prohibiting all credit reporting agencies from issuing a consumer report containing information relating to the individual debtor's dismissed involuntary bankruptcy case.

While recognizing the laudable intent of the legislation (*i.e.*, to prevent the victim's credit rating and reputation from being harmed), the Bankruptcy Committee believed that this goal would best be achieved if the court were to retain tangible proof of the bad faith filing and subsequent dismissal, to assist with any subsequent prosecution and help reinstate the victim's pre-petition credit rating. Because Senate consideration of the legislation could occur at any time, the Bankruptcy Committee asked the Executive Committee to consider the matter on an expedited basis on behalf of the Conference.

The Executive Committee, by mail ballot concluded on June 17, 2003, approved the recommendation of the Bankruptcy Committee that the Judicial Conference express concern regarding legislation that would expunge case records in an involuntary bankruptcy case filed in bad faith against an individual and instead support a policy and procedure to retain case records upon dismissal of such cases with a notation, flag, or other means to signal to the public the nature of the dismissal.

Carolyn Dineen King

Committee: Gregory W. Carman
Joel M. Flaum
Thomas F. Hogan
D. Brock Hornby
Boyce F. Martin, Jr.
Leonidas Ralph Mecham
John M. Walker, Jr.

Attachment

June 20, 2003

Joint Proposal of Judicial Conference and Department of Justice
for Amendment of Section 205 of the E-Government Act

Change subsection (c)(3) of the E-Government Act of 2002 to read as follows:

(3) **Privacy and security concerns.–**

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

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

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

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

(II) Such rules may require the use of appropriate redacted identifiers in lieu of such protected information in any pleading, motion, or other paper filed with the court (except with respect to a paper that is an exhibit or other evidentiary matter, or with respect to a reference list described in this subclause), or in any written discovery response--

(aa) by authorizing the filing under seal, and permitting the amendment as of right under seal, of a reference list that (i) identifies each item of unredacted protected information that the attorney or, if there is no attorney, the party, certifies is relevant to the case and (ii) specifies an appropriate redacted identifier that uniquely corresponds to each item of unredacted protected information listed; and

(bb) by providing that all references in the case to the redacted identifiers in such reference list shall be construed, without more, to refer to the corresponding unredacted item of protected information.

(B) (i) Subject to clause (ii), the Judicial Conference of the United States may issue interim rules, and interpretive statements relating to the application of such rules, which conform to the requirements of this paragraph and which shall cease to have effect upon the effective date of the rules required under subparagraph (A).

(ii) Pending issuance of the rules required under subparagraph (A), any rule or order of any court, or of the Judicial Conference, providing for the redaction of certain categories of information in order to protect privacy and security concerns arising from electronic filing or electronic conversion shall comply with, and be construed in conformity with, subparagraph (A)(iv).

(C) Not later than 1 year after the rules prescribed under subparagraph (A) take effect, and every 2 years thereafter, the Judicial Conference shall submit to Congress a report on the adequacy of those rules to protect privacy and security.

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS
Memorandum

DATE: December 15, 2003

FROM: Bob Deyling, Office of Judges Programs

SUBJECT: Rules-based approach to privacy and public access: an initial outline

TO: Judge Fitzwater
Professor Capra

This outline presents potential overall rule topics first, and then reviews some issues regarding specific types of cases. It is not intended to be a rule proposal, but rather, as Prof. Capra suggested, my "insights on what a set of privacy rules might look like."

I. Potential "General" Rule Topics.

A. Scope (and/or Purpose) of Rule(s).

There are several threshold questions to be addressed. Does the rule govern public access to case files? In electronic and/or paper form? Is the rule only about protecting privacy or security interests? Does the rule specify the contents of the public file? Is it directed to the public, the bar, the courts, or all three? Is there a need for separate civil, criminal, bankruptcy, and appellate rules – with parallel general provisions?

The Judicial Conference privacy policy states several "general principles." Some of these may assist the E-Government Subcommittee in determining the appropriate scope of federal rules. These principles, taken directly from the privacy policy, are addressed in greater detail later in this memo:

- There should be consistent, nationwide policies in federal courts in order to ensure that similar privacy protections and access presumptions apply regardless of which federal court is the custodian of a particular case file.

- Notice of these policies should be given to all litigants in federal court so that they will be aware of the fact that materials which they submit in a federal court proceeding could become available on the Internet.

- Members of the bar must be educated about the policies and the fact that they must protect their clients by carefully examining the documents that they file in federal court for sensitive, private information and by making the appropriate motions to protect documents from electronic access when necessary.

- Except where otherwise noted, the policies apply to both paper and electronic files.

- Electronic access to docket sheets and court opinions will not be affected by these policies.

- The availability of case files at the courthouse will not be affected or limited by these policies.

- Nothing in the policy is intended to create a private right of action or to limit the application of Rule 11 of the Federal Rules of Civil Procedure.

Several state court systems have recently developed public access rules that may be helpful to answer some of the questions posed above. Most state court rules or policies begin with an affirmation or statement of the presumption of public access to court records, and an explanation of the records to which the rules will apply. Some state court rules also list "purposes" of the rule.

B. Definition(s).

Assuming that a federal rule would only address "the case file" – and not judicial branch administrative records as some state rules address – it may be important to define at least the term "case file." One proposal may be: "The case file (whether electronic or paper) consists of the collection of documents officially filed by the litigants or the court in the context of litigation, the docket entries that catalog such filings, and transcripts of judicial proceedings. The case file generally does not include other case-related information, including: non-filed discovery material, trial exhibits that have not been admitted into evidence, and drafts or notes by judges or court staff. Sealed material, although part of the case file, is accessible only by court order."

Terms defined in state court public access rules include, for example: court record, electronic record, electronic access, case record, administrative record, bulk distribution, compiled information, public, record custodian, and judicial branch record.

C. Information that is not subject to public access because it is not (must not be?) part of the public case file.

In addition to confirming the general presumption of public access to filed material, a federal rule might include a comprehensive list of public access restrictions. One approach would be to list items that are not [or, should not be] part of the public case file. Another approach would be a simple statement that only documents in the public case file are subject to public access (unless sealed, see section D below). The Vermont state court rules and the proposed Indiana state court rules provide particularly comprehensive models.

To develop this section of a rule, it would be helpful to:

1) Review and catalog existing statutes, rules, policies and procedures that require, prohibit, or restrict public access to information that is part of the case file or docket.

2) Identify and discuss sensitive information that is normally permitted to be placed on the public record, and consider whether there are alternatives that would allow for the protection of privacy interests without adversely affecting the adjudication process. (Alternatives might include presumptive sealing, use limitations, or segregation for use only by litigants or the court);

3) Identify gaps in existing statutes, rules, policies and procedures; and

4) Identify issues that do not require (or are not appropriate for) a rules-based approach and recommend pursuing solutions to those issues as a complement to the rulemaking process.

D. Information that is filed, but is not available for public access because it must be filed under seal.

This section would confirm that sealed information is not subject to public access. It might also list any items that must be presumptively sealed. In contrast to state courts, which may be required to seal certain categories of cases or sensitive information (for example, family law, mental health, or probate), very few items are presumptively sealed in federal courts. (Note, however, that the CACM subcommittee on implementation of the criminal case file privacy policy may make recommendations concerning the routine need to seal certain criminal case file documents).

Section 205 of the E-Government Act provides for presumptive filing under seal of information that would otherwise be redacted or truncated under the Judicial Conference privacy policy. Thus, the E-Government Act, in effect, amends the Judicial Conference privacy policy to allow a litigant to file unredacted documents under seal. The court may still require the filing of

a redacted document for public access purposes. Section 205 requires that this procedure must be made a part of any national rule. The judiciary has sponsored a bill that would partially amend Section 205 by allowing litigants to file a sealed "reference list" (see section E below) of information that would be protected under the privacy policy. Thus, both sealing requirements and the "reference list" concept would be appropriate topics for federal rules.

E. [H.R. 1303 – a procedure for filing sensitive private information on a sealed "reference list" and/or the use of "sensitive information forms"].

The Judicial Conference supports legislation (H.R. 1303) that would allow litigants to file a sealed "reference list" containing information that otherwise would be subject to the Judicial Conference privacy policy. (Note: The Senate Judiciary Committee Report on H.R. 1303 explains this in greater detail).

Several state courts now require – or new rules will require – the filing of certain sensitive information on special forms that are not subject to routine public access. The Washington state courts, for example, require parties in family law cases to use a "Confidential Information Form" to provide the court with financial account numbers, Social Security numbers, income tax information, telephone numbers and birth dates of children. These forms will be sealed in both the paper and electronic file system. With respect to the federal courts, the "Study of Financial Privacy in Bankruptcy" suggested a similar approach to make selected financial information available only to creditors and other "parties in interest."

There are other potential benefits of the use of reference lists or sensitive information forms. Courts may need to collect information for case management purposes that is not (or should not be) made part of the public record. Rules might provide that information collected on such forms could be used for court purposes only, and/or be made available to the litigants as appropriate.

Related to the rules issue is a technology issue: Certain privacy protections would be easier to implement if court filings were to be created on established electronic forms. For example, private information on bankruptcy schedules might be easier to segregate electronically if the schedules could be filed as database-type forms, allowing some information to become part of the public file while other information to be made available only to parties in interest. This "database" model may have promise with respect to other sensitive information or types of cases.

F. Judges' case-by-case discretionary authority.

Should there be an explicit rule section concerning the discretionary authority of judges to allow or deny public access notwithstanding any new rules? The protection of privacy interests relating to federal court case files, in the absence of specific statutory protections, historically has

been addressed by judges on a case-by-case basis. Except for a few case types, the Judicial Conference privacy policy retains the tradition of case-by-case analysis of privacy issues. That approach may, of course, complement a rule that defines categories of information to be presumptively sealed or maintained separately from the public file.

G. Remote electronic access / courthouse-only access.

The Judicial Conference privacy policy adopts the default presumption that remote electronic public access, if available, will mirror access at the courthouse. But the policy also prohibits electronic public access to Social Security case files and criminal case files (until implementation of the September 2003 Judicial Conference decision permitting access to criminal case files). Moreover, certain personal identifiers either should not be filed, or should be filed only in truncated form.

Most state court rules limit remote electronic access to certain case types or information. The California rules, for example, bar *remote* electronic access to family, criminal, mental health, juvenile, guardianship/conservatorship, and civil harassment proceedings, "because of the personal and sensitive nature of the information parties are required to provide to the court in these proceedings." However, the rules permit electronic access to these records *at the courthouse*. The "Guidelines for Public Access to Court Records," developed by the National Center for State Courts in conjunction with the Conference of Chief Justices and the Conference of State Court Administrators, states: "The nature of certain information in some court records, however, is such that remote public access to the information in electronic form may be inappropriate, even though public access at the courthouse is maintained."

H. Notice of electronic public access.

It may be appropriate for a national rule to address the question of notice to litigants, including the development of a consistent method to provide such notice. The Judicial Conference policy suggests that litigants should be given "notice" of the presumption of public access to documents filed in litigation, and, if appropriate, should be informed that case file documents will be made available on the Internet. CACM has developed a model notice that many courts have adopted. A similar notice has been incorporated into several local rules.

I. Requirements relating to attorneys.

Certain issues relating to the bar may be appropriate for federal rules, while other issues may be implementation issues relating to electronic filing, or matters more appropriate for individual courts to address.

The Judicial Conference privacy policy states that the bar should be educated about access and privacy issues. If rules on access and privacy are developed, the rules should assist attorneys to understand what information is to be filed under presumptive seal or other access restrictions. It may also be appropriate to specify by rule a standard process to remind attorneys how to treat private or sensitive information in the context of electronic filing. One possibility would be to make the access/privacy issue a topic at the first meeting before the judge.

J. Docket sheet and case management information.

Although the Judicial Conference privacy policy states that "electronic access to docket sheets will not be affected by these policies," docketing practices may affect the development and implementation of federal rules on public access. Some personal identifiers may, for example, appear on the docket itself, either in the caption, docket entries, or other required elements of the docket. Court practices also vary with respect to filing requirements for certain documents, or the timing of filing. This consideration may be especially relevant in criminal cases, where it is the detailed nature of some docket entries – or even the existence of certain entries – that has raised some of the "security" concerns that motivated the (initially) restrictive public access policy for criminal files.

K. Treatment of "bulk" information.

Most state court policies and rules address the topic of access to "bulk" or "compiled" case file data. Such policies usually distinguish between bulk access to public information, which is generally permitted if it does not burden the court, and access to confidential or non-public case file information, which is allowed only subject to significant restrictions.

The E-government Subcommittee may wish to consider whether there is a need to address this issue in federal rules.

II. Potential Case-or-Court-Specific Rule Topics

Civil case files

The Judicial Conference policy provides: "that documents in civil case files should be made available electronically to the same extent that they are available at the courthouse with one exception (Social Security cases should be excluded from electronic access) and one change in policy (the requirement that certain "personal data identifiers" be modified or partially redacted by the litigants). These identifiers are Social Security numbers, dates of birth, financial account numbers and names of minor children."

A federal rule might specify additional documents and/or case types that should be sealed, or should be presumed to be protected from unlimited public access (*see* discussion sections C and D above).

Criminal case files

The Criminal Law, Defender Services, and Court Administration and Case Management Committees have formed a subcommittee to determine how to implement the recent Judicial Conference decision to allow remote electronic access to criminal case files. That subcommittee expects to make a recommendation to the Judicial Conference for action at its March 2004 meeting.

Bankruptcy case files

The Judicial Conference privacy policy recommends: "that documents in bankruptcy case files should be made generally available electronically to the same extent that they are available at the courthouse, with a similar policy change for personal identifiers as in civil cases; that § 107(b)(2) of the Bankruptcy Code should be amended to establish privacy and security concerns as a basis for the sealing of a document; and that the Bankruptcy Code and Rules should be amended as necessary to allow the court to collect a debtor's full Social Security number but display only the last four digits."

Amendments to the Bankruptcy Rules to implement the Judicial Conference policy became effective December 1, 2003. The suggested amendment to § 107(b)(2) of the Bankruptcy Code has not yet been accomplished.

Other options for rules relating to bankruptcy cases might include segregating certain sensitive information for filing on separate forms (like the "reference lists" contemplated in H.R. 1303) that would be protected from unlimited public access. Information to be filed in this manner might include items that are used only for administration of the estate by the case trustee and/or United States Trustee. The executive branch "Study of Financial Privacy and Bankruptcy" recommended limiting public access to schedules and statements in consumer bankruptcy cases to parties in interest. In developing the privacy policy, however, CACM recommended against limiting public access to such information.

Appellate cases

The privacy policy requires "that appellate case files be treated at the appellate level the same way in which they are treated at the lower level." Privacy issues at the appellate level have been reviewed by a CACM subcommittee chaired by Judge Sandra Lynch. I assisted with that analysis, which identified several issues for further review or monitoring. Those issues include:

1. Considering whether to treat administrative agency case records "in the same manner they were treated by the agency." Doing so would represent, in some situations, a change in current policy or practice because a document may be protected in agency litigation, but would be publicly accessible in federal court litigation. The need to protect private information may be especially relevant with respect to individual benefits cases. The legal principles of the Privacy Act and the Freedom of Information Act, although not directly applicable to the judicial branch, also may support protecting privacy interests in agency records that are filed in federal courts.

2. Continuity of sealing. The Judicial Conference policy includes the implicit assumption that courts of appeals will maintain the sealed status of material sealed at the district court level. That assumption may not apply to certain courts of appeals that have local rules about the need to justify continuation of sealing orders at the appellate level.

3. Treatment of specialized courts. Certain appeals from decisions of the Court of Federal Claims and/or the Court of International Trade may present special access or privacy issues that would affect the Court of Appeals for the Federal Circuit.

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS
Memorandum

DATE: December 30, 2003

FROM: Abel J. Mattos

SUBJECT: Background Materials on the Judicial Conference Policy on Privacy and Public Access to Electronic Case Files

TO: Subcommittee on E-Government and Privacy Rules

This memorandum is intended to provide you with general background regarding the process by which the Judicial Conference, on the recommendation of its Committee on Court Administration and Case Management (CACM), developed approved, and is implementing its Policy on Privacy and Public Access to Electronic Case Files.

Historically, courts have made case file documents available at courthouses and, upon request, by mail or other similar delivery to members of the public. In recent years though, both courts and the public (lawyers and nonlawyers alike) have created a demand for the availability of court documents electronically, either on court websites or through the judiciary's Public Access to Court Electronic Records (PACER) system which issues each registered user a login and password that must be entered before case file documents can be accessed. Four years ago, the CACM Committee formed a Privacy Subcommittee to study what implications such electronic public access to case files would have on the privacy interests in the federal court process. The Privacy Subcommittee included four CACM Committee members as well as a member from the Committee on the Rules of Practice and Procedure, the Information Technology Committee, the Bankruptcy Committee, and the Committee on Criminal Law.

The Privacy Subcommittee's work was extensive. In its first year, it held numerous meetings and worked with experts and academics in the privacy arena, court users (including judges, and court clerks) and government agencies. In May 2000, the Privacy Subcommittee presented several initial policy options for the creation of a judiciary-wide electronic access privacy policy. These options were presented to the CACM Committee, and the four liaison committees at their Summer 2000 meetings.

Using the comments received from the Committees, the Privacy Subcommittee further refined the policy options and, in November 2000, produced a document entitled "Request for Comment on Privacy and Public Access to Electronic Case Files." This document was published in the Federal Register and posted on a specially-created website to solicit comments from the public. Over 242 comments were received from a wide variety of interested persons including private citizens, privacy advocacy groups, journalists, attorneys, government agencies, private investigators, data re-sellers and members of the financial services industry. Attachment 1 is a chart that summarizes the comments received. You may access the full text of any comment by visiting the Privacy Policy website at www.privacy.uscourts.gov , clicking on the "comments

received" box and selecting the comment you wish to view.

Subsequently, in March 2001, the Privacy Subcommittee held a public hearing during which individuals representing a wide spectrum of public, private and government interests made oral presentations and answered questions from Privacy Subcommittee members. It was clear from the comments submitted and presentations made, that remote electronic access to public case file information provides numerous benefits. For example, several speakers noted that such access would provide citizens with the opportunity to see and understand the workings of the court system, thereby fostering greater confidence in government. The argument that electronic access "levels the geographic playing field" by allowing individuals not located in proximity to the courthouse easy access to what is already public information was also frequently mentioned. Others noted that providing the same access to this public information through the Case Management/Electronic Case Files (CM/ECF) system by way of PACER as well as at the courthouse would discourage the creation of a "cottage industry" by individuals who could go to the courthouse, copy and scan the information, download it to a private website and charge for access, thus profiting from the sale of public information and undermining restrictions intended to protect privacy. Attachment 2 is a list of the individuals who testified at the hearing. The materials used by members of the Privacy Subcommittee to prepare for this hearing will be available to Subcommittee members upon request.

After much thought and debate, the Privacy Subcommittee recommended to the CACM Committee and the liaison committees the adoption of a uniform, nationwide policy to address issues relating to privacy and public access to electronic case file information. The involved committees endorsed the proposed policy and the CACM Committee recommended it to the Judicial Conference. The Conference adopted the policy in September 2001 (JCUS-SEP/OCT 01, pp. 48-50). Attachment 3 is a copy of the CACM Committee report adopted by the Conference.

The policy contains seven general principles and continues to establish a general privacy and access policy for civil, bankruptcy, criminal and appellate cases separately. For civil case files, the policy is that documents be made available electronically to the same extent that they are available at the courthouse with one exception (Social Security cases should be excluded from electronic access) and one change in policy (the requirement that certain "personal data identifiers" be modified or partially redacted by the litigants). These identifiers are Social Security numbers, dates of birth, financial account numbers and names of minor children.

For criminal case files, the policy was that public remote electronic access to documents not be available at this time, with the understanding that the Judicial Conference will reexamine the policy within two years.

For bankruptcy case files, the policy is that documents be made generally available electronically to the same extent that they are available at the courthouse, with a similar policy

change for personal identifiers as in civil cases; that § 107(b)(2) of the Bankruptcy Code be amended to establish privacy and security concerns as a basis for the sealing of a document; and that the Bankruptcy Code and Rules be amended as necessary to allow the court to collect a debtor's full Social Security number but display only the last four digits.

For appellate case files, the policy is that documents be treated the same way in which they are treated at the lower level.

Following Conference adoption of the policy, the CACM Committee formed and implementation subcommittee which was further divided into subgroups to focus on the implementation of the policy in civil, criminal and bankruptcy cases. In April 2002, the CACM Committee informed all district courts that the privacy policy for civil cases was to be in effect for all courts that make electronic version or images of documents available to the public on line. The Committee provided the courts with a model notice and guideline for a model local rule to assist in implementing this change for civil cases. These documents are included at Attachment 4.[1]

As noted in the policy, implementation for bankruptcy cases required amending the bankruptcy code and official forms and rules. The CACM subgroup on bankruptcy implementation worked with the Advisory Committee on Bankruptcy Rules to draft proposed amendments to the bankruptcy rules and forms. As part of this process, the Advisory Committee on Bankruptcy Rules held a hearing where it received testimony from interested parties, particularly those in the credit industry.

The Committee on Rules of Practice and Procedure endorsed the rules and forms changes

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[1] Specific provisions of the E-Government Act of 2002 relating to redaction of person information from court files went into effect on April 16, 2003. The Act's requirements regarding redaction differ from the Judicial Conference policy in that the Act requires that a court allow a party to file an unredacted version of a document under seal and keep that version of the document as the official record. It permits a court to require the filing of a redacted version of the document for inclusion in the public file. The Judicial Conference sought to amend these provisions, as well as the requirement that national rules be developed to address privacy and security concerns. In an effort to achieve this amendment, the Administrative Office negotiated with the Department of Justice, which was the author of the problematic provisions. These negotiations resulted in an amendment that would still require the development of national rules but would also permit the use of a sealed "reference list" for most filings that would contain the complete version of personal identifiers, thereby allowing only the redacted version to be used in public filings while still preserving the evidentiary integrity of a document. This compromise is included in HR 1303, and amendment to the E-Government Act that has passed the House. It is currently with the Senate Committee on Governmental Affairs.

suggested by the Advisory Committee on Bankruptcy Rules and recommended them for approval by the Judicial Conference. The Conference approved the amendments to the rules at its September 2002 session (JCUS-SEP 02, p. 59). The amendments to Rules 1005, 1007, 2002 and 2003 were then approved by the Supreme Court and forwarded to Congress. Congress took no action and the amendments became effective on December 1, 2003. In general, these amendments require only the last four digits of Social Security numbers of debtors to be included in the bankruptcy case file. With theses amendments, the policy should be in effect for all bankruptcy cases. In November 2003, the CACM Committee sent a memorandum to all bankruptcy courts informing them that they should be in compliance with the policy by December 1, 2003 and providing them with guidance for a model local rule and notice to assist with implementation. A copy of these documents is Attachment 5.

At the request of the CACM Committee, the Judicial Conference has included in the most recent version of the court improvements bill, the request to amend two sections of Title 11 to allow for further implementation of the privacy policy in bankruptcy cases. The first request is to amend 11 U.S.C. § 107 to explicitly add privacy and security concerns as grounds for sealing information. The second is to amend, 11 U.S.C. § 342(c) require only the last four digits of the number in order to be consistent with the policy and the rules and forms amendments.

For criminal cases, the implementation subgroup focused on the best way to fulfill the Conference's requirement that the prohibition on criminal access be reexamined within two years. As part of this process, the CACM Committee made two recommendations to the Conference regarding the criminal policy, both of which were adopted in March 2002. The first was the creation of a pilot program to allow selected courts to provide remote public access to criminal case file documents. The Federal Judicial Center was asked to study these courts and provide a report to the Committee on the impact of electronic access to criminal case files. The purpose of the study was not to weigh the benefits versus the possible drawbacks. The potential benefits were well documented in the public feedback received in 2000 and 2001. The study was aimed at ascertaining whether any evidence could be gathered that would confirm or dispel concerns about potential drawbacks, particularly with regard to threats to the personal security of co-operating individuals. The Criminal Law Committee was consulted regarding this study. The second was creation of a "high profile" exception that would permit remote public access to criminal case file information in certain cases. (JCUS-MAR 02, pp. 10-11).

The results of the FJC study were presented to the CACM Committee and the Committee on Criminal Law at their Summer 2003 meetings. It revealed no instances of harm based on the enhanced access and found that the majority of those participating in the study, including judges, court personnel and attorneys, were in favor of the increased access. Nonetheless, some members of the Committee on Criminal Law expressed serious reservations about allowing remote public access to criminal case files. After careful consideration and debate, the CACM

Committee, with the concurrence of the Committee on Criminal Law, recommended that the Conference amend the prohibition on remote public electronic access to criminal case files and permit public access to the same documents electronically as at the courthouse with the requirement that specific personal identifiers be partially redacted by the filer whether the document is filed in paper or electronically. In addition, it was recommended that this amendment not become effective until the Conference approved specific guidance – developed by this Committee, the Committee on Criminal Law, and the Defender Services Committee – for the courts to use in implementing the new policy. The Conference adopted this recommendation. (JCUS-SEP 03, p._).

To assist in developing this guidance, the Committee established its Criminal Privacy Files Implementation Subcommittee, with members from each of the three participating committees. The subcommittee has conducted several meetings via conference call and has agreed upon a draft of the guidance that would go to the courts regarding implementation of the new criminal case files access policy. The draft guidance was reviewed by the three committees at their Winter 2003 meetings and a copy of the most recent draft is included at Attachment 6. The Subcommittee is now working on drafting a model local rule for public access to electronic criminal case files.

Attachments

E-Government Subcommittee

Minutes of the meeting of January 14, 2004
Scottsdale, AZ

The E-Government Subcommittee (the "Subcommittee") met on January 14, 2004, at the Hermosa Inn in Scottsdale, Arizona.

The following members of the Subcommittee were present:

Hon. Sidney A. Fitzwater, Chair
Hon. Robert L. Hinkle, Liaison from the Evidence Rules Committee
Hon. John G. Roberts, Jr., Liaison from the Appellate Rules Committee
Hon. Shira A. Scheindlin, Liaison from the Civil Rules Committee
Hon. A. Thomas Small, Liaison from the Bankruptcy Rules Committee
Hon. Reta M. Strubhar, Liaison from the Criminal Rules Committee
Hon. David F. Levi, Chair, Standing Committee *(ex officio)*
Hon. Jerry A. Davis, Liaison from the Committee on Court Administration and Case Management
Hon. James B. Haines, Jr., Liaison from the Committee on Court Administration and Case Management
Professor Daniel R. Coquillette, Reporter to the Standing Committee *(ex officio)*
Professor Daniel J. Capra, Lead Reporter and Reporter to the Evidence Rules Committee *(consultant)*
Professor Edward H. Cooper, Reporter to the Civil Rules Committee *(consultant)*
Professor Jeffrey W. Morris, Reporter to Bankruptcy Rules Committee *(consultant)*
Professor Patrick J. Schiltz, Reporter to the Appellate Rules Committee *(consultant)*
Professor David H. Schlueter, Reporter to the Criminal Rules Committee *(consultant)*

The following individuals participated via teleconference:

Hon. Donetta W. Ambrose, Liaison from the Criminal Law Committee
Hon. James S. Gwin, Liaison from the Information Technology Committee
Abel J. Mattos, Administrative Office of the Federal Courts/Committee on Court Administration and Case Management
Katie Simon, Administrative Office of the Federal Courts/Committee on Court Administration and Case Management

Also present were:

Robert Deyling, Esq., Attorney Advisor, Administrative Office of the Courts
Professor Steven Gensler, Supreme Court Judicial Fellow
Peter G. McCabe, Esq., Secretary, Standing Committee on Rules of Practice and Procedure
John K. Rabiej, Esq., Chief, Rules Committee Support Office
Al Cortese, Esq.
Brook D. Coleman, Esq.

Welcome and Introduction:

Judge Levi extended a welcome to the Subcommittee and thanked all in attendance for coming. Those attending the meeting introduced themselves.

Business of the Subcommittee Meeting:

Judge Fitzwater welcomed the Subcommittee members and other individuals in attendance. He briefly outlined the charge of the Subcommittee and began by focusing the discussion on where e-government issues have been, where those issues currently stand, and where the Subcommittee should focus going forward. Beginning with where e-government issues have been, Judge Fitzwater explained that an incredible amount of work had already been done by the Committee on Court Administration and Case Management ("CACM"). Judge Fitzwater asked Judge Davis to explain CACM's role and progress on this issue to the Subcommittee.

CACM Report:

Judge Davis reported to the Subcommittee that CACM began its involvement in e-government with a study regarding the effect electronic court filings would have on the privacy of litigants and what, if any, policies should be adopted to deal with any privacy issues. During CACM's study, a number of government agencies became involved and provided input to CACM. In the summer of 2000, CACM presented a number of policy options and solicited feedback from court file users. CACM received over 150 comments from a wide spectrum of users (e.g., media, data resellers, financial services). Judge Davis referred the Subcommittee to attachment 1 of the meeting materials, which contained a summary of these comments.

Judge Davis further explained that in March 2001, CACM conducted a public hearing regarding the various policy options. The prior research and this hearing further clarified the fact that there were huge benefits to electronic access to court files. However, it was also clear that there were looming concerns about privacy and how to balance the two.

CACM decided that its recommendations to the Judicial Conference regarding electronic filings would be based on the premise that there should be a consistent and uniform nationwide policy. With that in mind, CACM recommended the following:

- Civil Cases. CACM recommended that civil case files be available electronically to the same extent that they are available as paper files. However, CACM made one exception to this recommendation for social security cases. It reasoned that those cases should not be available electronically since there are a high number of such cases, and the cases contain a large amount of private information. Finally, CACM recommended that certain personal identifiers such as social security numbers and names of minor children should not be included in the electronically available civil files.

- Criminal Cases. CACM decided that criminal cases presented more daunting issues since safety concerns regarding informants and other parties may require certain precautions. In order to examine this issue, CACM delayed a position on criminal cases for two years in order to allow for a FJC study to be completed.

- Bankruptcy Cases. CACM determined that it was appropriate to treat bankruptcy cases like civil cases.

- Appellate Cases. Similarly, CACM determined that cases on appeal should be treated as they were at the lower court level.

Judge Davis went on to explain that in the spring of 2002, certain district courts informed CACM that their filings were online. CACM distributed model notice provisions and local rules accordingly. Later that year, the President signed the E-Government Act of 2002, which as the Subcommittee knows, requires the federal courts to put their court files online. Some of the E-Government Act provisions were inconsistent with the model rules that CACM had formulated so CACM modified those provisions to comply.

With respect to the position of CACM on criminal cases, its concerns basically turned on protecting certain vulnerable parties involved in criminal cases. When the FJC completed its study, these concerns did not appear to bear out. The study convinced CACM and others that the benefits of public access outweighed the seemingly low amount of risk to these parties. This position was further reinforced by the commitment of any criminal file access policy to the value of sealing certain sensitive documents from public access.

In fall 2002, CACM recommended to the Judicial Conference that, like civil cases, criminal cases should be available electronically to the same extent that they are publicly available at the courthouse. However, CACM further recommended that this change not go into effect until all aspects of implementation were settled. The model rule was drafted and sent to the Department of Homeland Security and other agencies for their feedback.

Judge Haines added that the bankruptcy courts had been slightly ahead in the process, as they had a rule regarding truncated social security numbers that went into effect this past December. He added that the bankruptcy courts are canaries in the mine on this issue because bankruptcy involves a lot of personal information. This forced the bankruptcy courts to be innovative in how they should balance the concerns of privacy and access. Finally, the bankruptcy courts experienced the implementation issues connected to the recently enacted rule on truncating social security numbers. He advised that, in his opinion, allowing for ample notice and planning had been invaluable to the success of that implementation.

Judge Davis concluded by noting that he had provided only a rough overview of what CACM has done and asked if the Subcommittee members had any questions for him. Finally, he noted that

the key to successful adoption and implementation is to educate the bar regarding these rules and about their role in implementation. Judge Ambrose echoed this assertion and added that another key was to avoid the problem of inconsistency (i.e. what is contained in a criminal case file should be the same from district to district).

The members of the Subcommittee then discussed the CACM recommendations with the members of CACM who were present. Professor Capra asked if consideration had been given to adding to the list of privacy items in a criminal case. Judge Davis responded that CACM had considered adding plea agreements and other similar documents. However, Judge Davis stated that CACM concluded that it should leave those determinations to each of the courts by giving the courts and the attorneys involved the discretion regarding what to seal from the public, if anything. Judge Ambrose pointed out that the initial draft policy did have a list of documents for which public access would not be allowed. But, at the end of the day, CACM determined that a better policy was to keep the list simple and allow the courts to make their own determinations regarding what to seal on a case by case basis.

Section 205(c) of the E-Government Act of 2002 – Potential Amendments:

Professor Capra requested that John Rabiej update the subcommittee regarding the proposed amendments to § 205(c) of the E-Government Act. Mr. Rabiej explained that currently, § 205(c)(iv) states that a party can submit an unredacted version of a filed document if it wishes. The provision mandates that a party would have to submit two copies of a document, one with the private provisions redacted, and one with the full text of the document unredacted. He explained that this provision was made at the behest of the Department of Justice, as the Department felt it was a necessary provision to preserve the integrity of original evidence. The Judicial Conference has opposed this provision and has been working with the DOJ on compromise legislation. The compromise reached would allow parties to file a separately sealed document that contains a complete list of the data that has been redacted in the publicly filed document(s). This "reference list" would not be publicly available, but would be available to the court so that it can take notice of the redacted information. This compromise amendment has passed the House of Representatives and is currently in the Senate Government Reform Committee. The Subcommittee discussed this proposed legislation and how it would affect the rulemaking process.

Court Transcripts:

Professor Capra asked if there had been any developments regarding the treatment of court transcripts within the scope of the E-Government Act. Professor Davis responded that it was the position of CACM that when a transcript is filed with the court, it becomes a part of the case file and should, therefore, be electronically available. CACM's general policy is to require that the lawyers take on the responsibility for redacting any private information before any document is filed. Ms. Simon added that the Judicial Conference adopted a policy that states that if a transcript is going to be filed electronically, the court reporter must initially provide the transcript to the parties in hard copy. The parties then have to notify the court reporter that they intend to submit redactions within

five days of that hard filing. The parties then have an additional 21 days to submit any such redactions. The transcript is filed electronically once those redactions are made.

Ms. Simon further explained that the Judicial Conference adopted this policy in principle, but has delayed implementation in order to determine the impact, if any, on court reporter income. A pilot program is being conducted to study this impact, but Ms. Simon noted that most of the districts being studied in the pilot program are already complying with the Judicial Conference policy of making transcripts publicly available. Judge Davis pointed out that there will be issues for court reporters in districts where there has not been compliance with the Judicial Conference policy. The Subcommittee agreed that court reporter compensation could be an explosive issue once the transcripts are all electronically available as mandated by the Conference and now the E-Government Act.

General Discussion:

The Subcommittee discussed the general importance of educating the bar with respect to all of these changes. For example, Judge Haines noted that, with respect to transcripts, attorneys need to start thinking about why they are asking personal questions of witnesses during trial (such as home address information). Given the potential availability of this information over the internet once made part of the transcript, lawyers may need to change their standard procedures. In addition, attorneys will need to be educated regarding their responsibility for their client's personal information. Judge Fitzwater asked Judge Small how the bankruptcy courts were handling the recent changes. Judge Small noted that it was early, but that he believed that the changes had been well-received. Judge Small added that he thought the process was going well due in most part to the well-communicated notice of the changes to the bench and bar. The Subcommittee again discussed how to best notify members of the bar regarding these impending changes and policies.

On another note, the representatives from CACM were asked why special provision had been made for Social Security cases, but not for other cases where privacy issues were arguably just as important. Judge Davis responded that the issue had been fiercely debated within CACM and that a compromise had been made primarily because social security cases are solely individual matters involving a government agency. Therefore, the cases require a meaningful amount of personal information to be included in court filings. Judge Davis acknowledged that, as Judge Levi stated, ERISA cases and other similar cases have a high frequency of personal information, but Judge Davis pointed out that the option to seal documents still exists in those cases. Ms. Simon also explained that there are a high number of social security appeals filed, and that requesting the sealing of documents in each case would be burdensome -- while ERISA cases, for example, are not appealed with the same frequency. In addition, Ms. Simon noted that the administrative record involved in social security cases would be too burdensome to scan in electronically for every case since those records are not currently available electronically.

State Law Best Practices Survey:

Judge Fitzwater informed the Subcommittee that Mr. Deyling had conducted an overview of best practices in state courts with respect to privacy and access issues. He asked Mr. Deyling to discuss his findings.

Mr. Deyling stated that following his review of state court practices, he determined that the Subcommittee may want to consider the following issues when drafting rules implementing § 205(c):

- Scope or Purpose Provision. Mr. Delying noted that several states have a statement regarding the purpose of their privacy provisions -- ranging from succinct statements of purpose to more detailed statements of the public policy governing the rule. Mr. Deyling noted that some state provisions also set out whether the rule should be about privacy, access, or both. Finally, he noted that some states have determined whether the rules are about paper, electronic availability, or both.

- Uniformity. Mr. Deyling observed that notice to the litigants and their attorneys was important and that location neutrality -- whether that be desk vs. courthouse or one district vs. another district -- was pivotal for the success of any privacy and access provision.

- Definitions. Mr. Deyling noted that many states had attempted to define everything in a case file, while other states had defined what was not considered part of the file or had left it ambiguously defined. In addition, some states had provisions that stated that certain categories of documents were presumptively sealed.

- Reference List. Mr. Deyling explained that many states, like the currently proposed national amendment, had a system where the private information at issue could be put in a separate document where it was not accessible to the public.

- Education. Mr. Deyling observed that some states provided attorneys with a list of documents that they should consider attempting to seal.

- Directions to Clerk of Court. Many state court rules provided instructions to the clerk of the court regarding, for example, what goes on the electronically available docket sheet.

- Bulk Information. Mr. Deyling explained that some states had provisions governing the practice of downloading and manipulating bulk information from the court websites.

The Subcommittee discussed Mr. Deyling's presentation regarding best practices in the state courts.

The members of the Subcommittee observed that a fundamental question exists as to whether the rules to be implemented are simply for court records, or whether the scope is expanded to things not filed such as exhibits, judges' notes, etc. However, it was noted that if the Subcommittee starts venturing into this realm as opposed to just determining that what is currently available at the court house to the public should also be available electronically, the Subcommittee is taking on a lot more than what it is charged with doing by virtue of § 205(c). Judge Fitzwater agreed, and noted that § 205(c) speaks to making what is "filed" electronically available; therefore, limiting the spectrum of what any rule should cover. Committee members were in general agreement that any national rule should remain simple and should apply only to court filings that are electronically available over the internet.

The Subcommittee also discussed whether the rules should list documents that the Subcommittee believes should be sealed. Professor Schlueter noted that the Subcommittee needed to determine for whom these rules were being drafted. He further suggested that perhaps the rules should refer practitioners to the Judicial Conference policy guidelines -- that way, the Subcommittee would not be prescribing attorney conduct, but would be aiding their conversion to this new system. The Subcommittee discussed the advantages of this approach and likened it to current Fed.R.Civ.P. 5 Professor Capra also suggested that the rule could read like the Eleventh Circuit's model rule, which provides some mandatory information that should be redacted, along with suggestions for other information in a note to the rule.

Judge Levi noted that the respective Advisory Committees may have different issues to address, and the focus of the Subcommittee should be to determine how each of the Advisory Committees can efficiently address each of their specific issues and concerns. The Subcommittee members agreed that the Advisory Committees should take a common approach to the extent possible, with variations as necessary to accommodate particular issues that will arise in civil, criminal, bankruptcy, and appellate proceedings.

Finally, the Subcommittee discussed the general commercial interest in court information. Members noted that a number of databases were being created and sold online. Mr. [Gwynn] also noted that the fees obtained from PACER, which included fees paid by these commercial companies, were important to the various courts' information technology budgets.

Access Issues:

The Subcommittee discussed the practical effects of electronic filing on access. Judge Sheindlin asked whether complete versions of redacted documents were available to the judges electronically if they needed to see them. Judge Hinkle stated that on CM/ECF in his district, he has access to the unredacted document, while the public and lawyers do not. Ms. Simon noted that the most recent version of CM/ECF does allow for judges to view redacted and sealed documents in camera via electronic means.

Judge Levi inquired as to whether CACM had reviewed the official forms used, for example,

in judgments. He noted that a practitioner in his district had informed him that the criminal judgment form provided the individual's entire social security number. Judge Davis noted that the forms were generally reviewed. Ms. Simon added that the criminal judgment form had been reviewed in September 2003, and the social security information had been moved to the statement of reason, which is not publicly filed.

The Subcommittee generally discussed the fact that PACER currently provides a gateway to access to these documents via the requirement to pay to use the service. This gateway allows public access to be monitored if necessary to protect privacy interests. The members questioned, however, whether this would always be the case or whether there would be a movement to provide cost-free access.

Template Rule Regarding § 205(c):

The Subcommittee then discussed what the template rule that the advisory committees would modify should look like. Professor Capra noted that CACM had done a lot of really important work and perhaps the rule should build on that foundation. The Subcommittee discussed whether the rule should provide an exhaustive list of categories for redaction, whether the rule should provide a brief list of main categories, and if so, whether reference should be made to further categories via the Judicial Conference policies. A discussion ensued regarding the pros and cons of referencing the Judicial Conference policies, including, but not limited to, a discussion of whether such policies were accessible enough to practitioners.

Members of the Subcommittee further discussed how to approach drafting the rules. Some members suggested that each of the advisory committees should consider what issues are specifically important to them, and draft a rule accordingly. Other members were concerned that this would create four inconsistent rules. Professor Capra suggested that he could draft a template rule that all of the advisory committees could then take and modify as they saw fit. The advisory committees could then compare their versions to be sure that there was not too much variation as between all of the rules. The Subcommittee members agreed with that approach.

The question then turned to timing on the implementation of these rules. The members of the Subcommittee agreed that the advisory committees should review the template rule to be prepared by Professor Capra at their respective spring meetings. They should have their rules finalized for presentation to their advisory committees by their fall 2004 meetings. The Standing Committee can then review the various rules at its January 2005 meeting, or at its June 2005 meeting at the latest. The Subcommittee agreed on this schedule and noted that, barring any problems, the rules would then become effective on December 1, 2007.

The Subcommittee also discussed the possibility that § 205(c) would implicate other rules. For example, in Fed.R.Civ.P. 16, the Advisory Committee on Civil Rules may want to consider adding a discussion of § 205(c) to the pre-trial conference phase.

In addition, the Subcommittee discussed whether Fed.R.Civ.P. 11 should be amended to contemplate violations of the privacy/access rules. Judge Davis noted that CACM had reviewed this issue and determined that Rule 11 already covers any arguable violation of these policies and that it was better to leave it to the discretion of the courts as to how to deal with violations or abuse of any new rule regarding electronic filing. The Subcommittee agreed with this assessment.

Finally, Judge Fitzwater reminded each advisory committee of its obligation to continue to consider best practices of the state courts. He encouraged the advisory committees to call on Mr. Deyling and the work he has already done in this area.

Conclusion of Meeting:

Judge Fitzwater thanked the members of the Subcommittee for their input and thought on these matters. He gave special thanks to the members of CACM, who had worked so hard and provided so much guidance to the Subcommittee on this issue. He reviewed the plan of action for the Subcommittee and adjourned the meeting at 11:30 a.m.

Respectfully submitted,

Brook D. Coleman, Esq.

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS
Memorandum

DATE: February 25, 2004

FROM: Robert Deyling, Office of Judge Programs

SUBJECT: State Court Privacy Rules and Policies (excerpts)

TO: Judge Fitzwater
Professor Capra
Professor Coquillette
Professor Cooper
Professor Morris
Professor Schiltz
Professor Schlueter

As you requested at the first meeting of the Subcommittee on E-Government, I have compiled the attached excerpts from state court rules on privacy and public access to court records. I have organized this material by topic, as follows:

(1) Scope (and/or Purpose) of Rule;
(2) Definitions
(3) Information (or documents) not available for public access
(4) Segregation of information on "sensitive information forms"
(5) Judicial discretion (and procedures for requesting or denying access)
(6) Notice (to persons accessing records)
(7) Remote access / courthouse-only access
(8) Access to information maintained by the court (including dockets)
(9) Access to "bulk" information

These excerpts are drawn from the approved state court rules of California, Indiana, Maryland and Vermont, and the proposed rules for the Arizona and Minnesota courts.

	1) Scope (and/or Purpose) of Rule
California Rule 2070; 2071	Rule 2070. Statement of purpose. (a) [Intent]: The rules in this chapter are intended to provide the public with reasonable access to trial court records that are maintained in electronic form, while protecting privacy interests. ... Rule 2071. Authority and applicability. ...(c) [Access by parties and attorneys] The rules in this chapter apply only to access to court records by the public. They do not limit access to court records by a party to an action or proceeding, by the attorney of a party, or by other persons or entities that are entitled to access by statute or California Rules of Court.
Indiana Rule 9(A)	(A) Scope and Purposes. (1) Pursuant to the inherent authority of the Indiana Supreme Court and pursuant to Indiana Code §5-14-3-4(a)(8), this rule governs public access to, and confidentiality of, court records. Except as otherwise provided by this rule, access to court records is governed by the Indiana Access to Public Records Act (Indiana Code §5-14-3-1, et. seq.). (2) The purposes of this rule are to: (a) Promote accessibility to court records; (b) Support the role of the judiciary; (c) Promote governmental accountability; (d) Contribute to public safety; (e) Minimize the risk of injury to individuals; (f) Protect individual privacy rights and interests; (g) Protect proprietary business information; (h) Minimize reluctance to use the court system; (i) Make the most effective use of court and clerk of court staff; (j) Provide excellent customer service; and (k) Avoid unduly burdening the ongoing business of the judiciary....

	1) Scope (and/or Purpose) of Rule
Vermont Rule 1, 2	§ 1. Purpose; Construction. These rules govern access by the public to the records of all courts and administrative offices of the Judicial Branch of the State of Vermont, whether the records are kept in paper or electronic form. They provide a comprehensive policy on public access to Judicial Branch records. They shall be liberally construed in order to implement the policies therein. § 2. Scope. (a) *In General.* These rules govern access to judicial branch records where the right of access is solely that of a member of the public. (b) *Specific Right of Access.* If, based on a statute, judicial rule or other source of law, a person, or an authorized officer or member of the Executive or Legislative Branch, claims a right of access greater than that available to a member of the public, the record custodian shall act in conformity with the applicable statute, rule or other source of law....
Maryland R 16-1002	Rule 16-1002. General Policy (a) Presumption of Openness Court records maintained by a court or by another judicial agency are presumed to be open to the public for inspection. Except as otherwise provided by or pursuant to these Rules, the custodian of a court record shall permit a person, upon personal appearance in the office of the custodian during normal business hours, to inspect such a record....

	2) Definitions
California Rule 2072	Definitions. (a) [Court record] As used in this chapter, "court record" is any document, paper, or exhibit filed by the parties to an action or proceeding; any order or judgment of the court; and any item listed in subdivision (a) of Government Code section 68151, excluding any reporter's transcript for which the reporter is entitled to receive a fee for any copy. The term does not include the personal notes or preliminary memoranda of judges or other judicial branch personnel. (b) [Electronic record] As used in this chapter, "electronic record" is a computerized court record, regardless of the manner in which it has been computerized. The term includes both a document that has been filed electronically and an electronic copy or version of a record that was filed in paper form. The term does not include a court record that is maintained only on microfiche, paper, or any other medium that can be read without the use of an electronic device. (c) [The public] As used in this chapter, "the public" is an individual, a group, or an entity, including print or electronic media, or the representative of an individual, a group, or an entity. (d) [Electronic access] "Electronic access" means computer access to court records available to the public through both public terminals at the courthouse and remotely, unless otherwise specified in these rules.
Indiana Rule 9(C)	(C) Definitions. For purpose of this rule: (1) "Court Record" means both case records and administrative records. (2) "Case Record" means any document, information, data, or other item created, collected, received, or maintained by a court, court agency or clerk of court in connection with a particular case. (3) "Administrative Record" means any document, information, data, or other item created, collected, received, or maintained by a court, court agency, or clerk of court pertaining to the administration of the judicial branch of government and not associated with any particular case.... (6) "Public access" means the process whereby a person may inspect and copy the information in a court record. (7) "Remote access" means the ability of a person to inspect and copy information in a court record in electronic form through an electronic means. (8) "In electronic form" means any information in a court record in a form that is readable through the use of an electronic device, regardless of the manner in which it was created. (9) "Bulk Distribution" means the distribution of all, or a significant subset of the information in court records in electronic form, as is, and without modification or compilation. (10) "Compiled Information" means information that is derived from the selection, aggregation or reformulation of some of all or a subset of all the information from more than one individual court record in electronic form.

	3) Information (or documents) not available for public access
Maryland R 16-1006, R 16-1007	Rule 16-1006. Required Denial of Inspection – Certain Categories of Case Records Except as otherwise provided by law, these Rules, or court order, the custodian shall deny inspection of: ... (3) In any action or proceeding, a case record concerning child abuse or neglect.... (5) The following case records in criminal actions or proceedings: (a) A case record that has been ordered expunged pursuant to Md. Rule 4-508. (b) The following court records pertaining to search warrants: (i) The warrant, application, and supporting affidavit, prior to execution of the warrant and the filing of the records with the clerk. (ii) Executed search warrants and all papers attached thereto filed pursuant to Md. Rule 4-601. (c) The following court records pertaining to an arrest warrant: (i) A court record pertaining to an arrest warrant issued under Md. Rule 4-212(d) and the charging document upon which the warrant was issued until the conditions set forth in Md. Rule 4-212(d)(3) are satisfied. .... (e) A pre-sentence investigation report prepared pursuant to Md. Code, Correctional Services Article, § 6-112..... (8) The following case records containing medical information: (a) A case record, other than an autopsy report of a medical examiner, that (i) consists of a medical or psychological report or record from a hospital, physician, psychologist, or other professional health care provider, and (ii) contains medical or psychological information about an individual.... (9) A case record that consists of the Federal or Maryland income tax return of an individual.... Rule 16-1007. Required Denial of Inspection --Specific Information in Case Records. Except as otherwise provided by law, these Rules, or court order, a custodian shall deny inspection of a case record or a part of a case record that would reveal: ... (3) Any part of the social security or Federal Identification Number of an individual, other than the last four digits....

	3) Information (or documents) not available for public access
Vermont Rule 6	§ 6. Case Records. (a) *Policy.* The public shall have access to all case records, in accordance with the provisions of this rule, except as provided in subsection (b) of this section. (b) *Exceptions.* The public shall not have access to the following judicial branch records:... (4) Records of the family court in juvenile proceedings governed by Chapter 55 of Title 33, except as provided in 33 V.S.A. § 5536; (5) Records of the court in mental health and mental retardation proceedings under Part 8 of Title 18, not including an order of the court, except where the court determines that disclosure is necessary for the conduct of proceedings before it or that failure to make disclosure would be contrary to the public interest; (6) A presentence investigation report as provided in Chapter 5 of Title 28 and Rule 32(c) of the Vermont Rules of Criminal Procedure;.. (8) Records containing a description or analysis of the DNA of a person if filed in connection with a family court proceeding, (9) Records produced or created in connection with discovery in a case in court, including a deposition, unless used by a party (i) at trial or (ii) in connection with a request for action by the court; (10) Records containing financial information furnished to the court in connection with an application for an attorney at public expense pursuant to 13 V.S.A. § 5236(d) and (e), not including the affidavit submitted in support of the application; (11) Records containing financial information furnished to the court in connection with an application to proceed in forma pauperis, not including the affidavit submitted in support of the application;... (13) Any federal, state or local income tax return, unless admitted into evidence;... (15) Records of the issuance of a search warrant, until the warrant is executed and (i) property seized pursuant to the warrant is offered in a proceeding, or is subject to a motion to suppress; or (ii) a person, fetus or corpse searched for pursuant to the warrant has been located; (16) Records of the denial of a search warrant; (17) Records created as a result of treatment, diagnosis, or examination of a patient by a physician, dentist, nurse or mental health professional;... (24) Records filed in court in connection with the initiation of a criminal proceeding, if the judicial officer does not find probable cause to believe that an offense has been committed and that defendant has committed it, pursuant to Rule 4(b) or 5(c) of the Vermont Rules of Criminal Procedure;... (29) Records containing a social security number of any person, but only until the social security number has been redacted from the copy of the record provided to the public; (30) Records with respect to jurors or prospective jurors as provided in the Rules Governing Qualification, List, Selection and Summoning of All Jurors;... (32) Any evidence introduced in a proceeding to which the public does not have access; and (33) Any other record to which public access is prohibited by statute.

	4) Segregation of information on "sensitive information forms"
Minnesota [proposed]	**Rule 313.01. Definitions.** For purposes of this rule, the following definitions shall apply: (10) "Restricted identifiers" shall mean the social security number [and/or employer identification number] and financial account numbers of a party or party's child. (11) "Financial source documents" means income tax returns, W-2s and schedules, wage stubs, credit card statements, financial institution statements, check registers, as well as other financial information deemed financial source documents by court order. **Rule 313.02. Restricted Identifiers.** (a) Pleadings and Other Papers Submitted by a Party. No party shall submit restricted identifiers on any pleading or other paper that is to be filed with the court except: 1) on a separate form entitled Confidential Information Form (see Form 11 appended to these rules) filed with the pleading or other paper; or 2) on Sealed Financial Source Documents under Rule 313.03. The parties are solely responsible for ensuring that restricted identifiers do not otherwise appear on the pleading or other paper filed with the court. The court administrator will not review each pleading or document filed by a party for compliance with this rule. The Confidential Information Form shall not be accessible to the public. (b) Records Generated by the Court. Restricted identifiers maintained by the court in its register of actions (i.e., activity summary or similar information that lists the title, origination, activities, proceedings and filings in each case), calendars, indexes, and judgment docket shall not be accessible to the public. Courts shall not include restricted identifiers on their judgments, orders, decisions, and notices except on the Confidential Information Form (Form 11), which form shall not be accessible to the public. **Rule 313.03. Sealing Financial Source Documents.** Financial source documents shall be submitted to the court for filing under a cover sheet designated "Sealed Financial Source Documents" and substantially in the form set forth as Form 12 appended to these rules. Financial source documents submitted with the required cover sheet are not accessible to the public except to the extent that they are formally admitted into evidence in a hearing or trial. The cover sheet or copy of it shall be accessible to the public. Financial source documents that are not submitted with the required cover sheet and that contain restricted identifiers are accessible to the public, but the court may, upon motion or on its own initiative, order that any such financial source documents be sealed.

	4) Segregation of information on "sensitive information forms"
Arizona [proposed policy]	**Sensitive Data** 1. The courts should protect from remote electronic public disclosure the following sensitive data from case files: Social Security Numbers Credit Card Numbers Debit Card Numbers Other Financial Account Numbers Victim contact information (address and phone number) Names of juvenile victims Rule 123(c)(3) already prohibits public access to financial account and social security numbers appearing in administrative files. Every court should review its forms and processes to ensure that this information is not being gathered unnecessarily. 2. To protect the data listed in Recommendation Number 1 above, the Supreme Court should develop a sensitive data form and require its use where applicable. The sensitive data form shall be maintained by the clerk as a confidential record accessible by the general public only on a showing of good cause pursuant to the process set forth in Rule 123. Good cause may include access by a media representative for purposes of researching a news story. 3. The Supreme Court should educate judges, attorneys and the public that case records are publicly accessible and may be available via the Internet.

	5) Judicial discretion (and procedures for requesting or denying access)
Vermont Rule 2(b) Rule 7	**§ 2. Scope.** .... (b) *Specific Right of Access*. If, based on a statute, judicial rule or other source of law, a person, or an authorized officer or member of the Executive or Legislative Branch, claims a right of access greater than that available to a member of the public, the record custodian shall act in conformity with the applicable statute, rule or other source of law. If a person, or an authorized officer or member of the Executive or Legislative Branch, claims a right of access greater than that available to the public as a whole, but not based on a specific statute or rule, that claim shall be determined by the court administrator for administrative records or the presiding judge of the court involved for case records. In making that determination, the court administrator or judge shall be guided by these rules and any other relevant rules or statutes and shall weigh the special interest of the person or officer or member seeking the record against the interests protected by the restriction on public access. An appeal from such a determination may be made to the Supreme Court. **§ 7.** Exceptions. (a) *Case Records*. Except as provided in this section, the presiding judge by order may grant public access to a case record to which access is otherwise closed, may seal from public access a record to which the public otherwise has access or may redact information from a record to which the public has access. All parties to the case to which the record relates, and such other interested persons as the court directs, have a right to notice and hearing before such order is issued, except that the court may issue a temporary order to seal or redact information from a record without notice and hearing until a hearing can be held. An order may be issued under this section only upon a finding of good cause specific to the case before the judge and exceptional circumstances. In considering such an order, the judge shall consider the policies behind this rule. If a statute governs the right of public access and does not authorize judicial discretion in determining to open or seal a record, this section shall not apply to access to that record. ... ©) *Appeals*. Appeals from determinations under this section shall be made to the Supreme Court.

	5) Judicial discretion (and procedures for requesting or denying access)
Indiana Rule 9(H)	(H) Prohibiting Public Access to Information In Court Records. (1) A verified written request to prohibit public access to information in a court record, may be made by any person affected by the release of the information. The request shall demonstrate that:(a) The public interest will be substantially served by prohibiting access; (b) Access or dissemination of the information will create a significant risk of substantial harm to the requestor, other persons or the general public; (c) A substantial prejudicial effect to on-going proceedings cannot be avoided without prohibiting public access, or; (d) The information should have been excluded from public access under section (G) of this rule. The person seeking to prohibit access has the burden of providing notice to the parties and such other persons as the court may direct, providing proof of notice to the court or the reason why notice could not or should not be given, demonstrating to the court the requestor's reasons for prohibiting access to the information. A party or person to whom notice is given shall have twenty (20) days from receiving notice to respond to the request. (2) A court may deny a request to prohibit public access without a hearing. If the court does not initially deny the request, it shall post advance public notice of the hearing. A court may grant a request to prohibit public access following a hearing if the requestor demonstrates by clear and convincing evidence that any one or more of the requirements of (H)(1)(a) through (H)(1)(d) have been satisfied. An order prohibiting public access to information in a court record may be issued by the court having jurisdiction over the record. An order prohibiting public access to information in bulk or compiled records, or in records under the jurisdiction of multiple courts may be issued only by the Supreme Court. (3) The court shall balance the public access interests served by this rule and the grounds demonstrated by the requestor. In its order, the court shall state its reasons for granting or denying the request. If the court prohibits access, it will use the least restrictive means and duration. When a request is made to prohibit public access to information in a court record at the time of case initiation, the request and the case information will remain confidential for a reasonable period of time until the court rules on the request. When a request is made to prohibit public access to information in court records that are already publicly accessible, the information may be rendered confidential for a reasonable period of time until the court rules on the request. (4) This section does not limit the authority of a court to seal court records pursuant to Ind. Code § 5-14-3-5.5. *[Indiana Rule 9(I) is entitled "Obtaining Access to Information Excluded from Public Access." Its provisions are similar to Rule 9(H) above.]*

	5) Judicial discretion (and procedures for requesting or denying access)
Maryland R 16-1009	RULE 16-1009. Court Order Denying or Permitting Inspection of Case Record (a) Motion (1) Any party to an action in which a case record is filed, including any person who has been permitted to intervene as a party, and any person who is the subject of or is specifically identified in a case record may file a motion: (A) to seal or otherwise limit inspection of a case record filed in that action that is not otherwise shielded from inspection under these Rules; or (B) to permit inspection of a case record filed in that action that is not otherwise subject to inspection under these Rules. (2) The motion shall be filed with the court in which the case record is filed and shall be served on: (A) all parties to the action in which the case record is filed; and (B) each identifiable person who is the subject of the case record. ... (d) Final Order (1) After an opportunity for a full adversary hearing, the court shall enter a final order: (A) precluding or limiting inspection of a case record that is not otherwise shielded from inspection under these Rules; (B) permitting inspection, under such conditions and limitations as the court finds necessary, of a case record that is not otherwise subject to inspection under these Rules; or (C) denying the motion. (2) In determining whether to permit or deny inspection, the court shall consider: (A) if the motion seeks to preclude or limit inspection of a case record that is otherwise subject to inspection under these Rules, whether a special and compelling reason exists to preclude or limit inspection of the particular case record; and (B) if the petition or motion seeks to permit inspection of a case record that is otherwise not subject to inspection under these Rules, whether a special and compelling reason exists to permit inspection. (3) Unless the time is extended by the court on motion of a party and for good cause, the court shall enter a final order within 30 days after a hearing was held or waived. ... (f) Non-Exclusive Remedy This Rule does not preclude a court from exercising its authority at any time to enter an order that seals or limits inspection of a case record or that makes a case record subject to inspection.

	6) Notice (to persons accessing records)
California Rule 2074	Rule 2074. Limitations and conditions ... (c) [Conditions of use by persons accessing records] A court may condition electronic access to its records on (1) the user's consent to access the records only as instructed by the court and (2) the user's consent to the court's monitoring of access to its records. A court must give notice of these conditions, in any manner it deems appropriate. The court may deny access to a member of the public for failure to comply with any of these conditions of use. (d) [Notices to persons accessing records] A court must give notice of the following information to members of the public accessing its electronic records, in any manner it deems appropriate: (1) The court staff member to contact about the requirements for accessing the court's records electronically. (2) That copyright and other proprietary rights may apply to information in a case file absent an express grant of additional rights by the holder of the copyright or other proprietary right. The notice should indicate that (A) use of such information is permissible only to the extent permitted by law or court order and (B) any use inconsistent with proprietary rights is prohibited. (3) Whether electronic records constitute the official records of the court. The notice should indicate the procedure and any fee required for obtaining a certified copy of an official record of the court. (4) Any person who willfully destroys or alters any court record maintained in electronic form is subject to the penalties imposed by Government Code section 6201. (e) [Access policy] A court must post a privacy policy on its public-access Web site to inform members of the public accessing its electronic records of the information it collects regarding access transactions and the uses that the court may make of the collected information.

	7) Remote access / courthouse-only access
California Rule 2073	Rule 2073. Public access (a) [General right of access] All electronic records must be made reasonably available to the public in some form, whether in electronic or in paper form, except those that are sealed by court order or are made confidential by law. (b) [Electronic access required to extent feasible] A court that maintains the following records in electronic form must provide electronic access to them, both remotely and at the courthouse, to the extent it is feasible to do so. (1) Register of actions (as defined in Gov. Code, § 69845), calendars, and indexes; and (2) All records in civil cases, except those listed in (c). (c) [Courthouse electronic access only] A court that maintains the following records in electronic form must provide electronic access to them at the courthouse, to the extent it is feasible to do so, but may provide remote electronic access only to the records governed by (b)(1): (1) Any record in a proceeding under the Family Code, including, but not limited to, proceedings for dissolution, legal separation, and nullity of marriage; child and spousal support proceedings; and child custody proceedings; (2) Any record in a juvenile court proceeding; (3) Any record in a guardianship or conservatorship proceeding; (4) Any record in a mental health proceeding; (5) Any record in a criminal proceeding; and (6) Any record in a civil harassment proceeding under Code of Civil Procedure section 527.6....

	8) Access to information maintained by the court (including dockets)
Minnesota [proposed] R 313.02	**Rule 313.02. Restricted Identifiers.** .... (b) Records Generated by the Court. Restricted identifiers maintained by the court in its register of actions (i.e., activity summary or similar information that lists the title, origination, activities, proceedings and filings in each case), calendars, indexes, and judgment docket shall not be accessible to the public. Courts shall not include restricted identifiers on their judgments, orders, decisions, and notices except on the Confidential Information Form (Form 11), which form shall not be accessible to the public....
California Rule 2077	Rule 2077. Electronic access to court calendars, indexes, and registers of actions **(a) [Intent]** The intent of this rule is to specify information to be included in and excluded from the court calendars, indexes, and registers of actions to which public access is available by electronic means under rule 2073 (b). To the extent it is feasible to do so, the court must maintain court calendars, indexes, and registers of actions available to the public by electronic means in accordance with this rule..... **(c) [Information that must be excluded from court calendars, indexes, and registers of action]** The following information must be excluded from a court's electronic calendar, index, and register of actions: (1) Social security number; (2) Any financial information; (3) Arrest warrant information; (4) Search warrant information; (5) Victim information; (6) Witness information; (7) Ethnicity; (8) Age; (9) Gender; (10) Government-issued identification card numbers (i.e., military); (11) Driver's license number; and (12) Date of birth.

	9) Access to "bulk"information
California Rule 2073	Rule 2073. Public access ...(e) [Access only on case-by-case basis] A court may only grant electronic access to an electronic record when the record is identified by the number of the case, the caption of the case, or the name of a party, and only on a case-by-case basis. This case-by-case limitation does not apply to a calendar, register of actions, or index. (f) [Bulk distribution] A court may provide bulk distribution of only its electronic calendar, register of actions, and index. "Bulk distribution" means distribution of all, or a significant subset, of the court's electronic records....
Arizona [policy proposal]	7. Remote electronic access to case information should be afforded on a case-by-case basis only; bulk data should not be electronically accessible via the Internet. Electronic access should be limited to prevent the wholesale downloading of case files or case management databases via the Internet.
Indiana Rule 9(f)	(F) Bulk Distribution and Compiled Information. (1) Upon written request as provided in this section (F), bulk distribution or compiled information that is not excluded by Section (G) or (H) of this rule may be provided. (2) Requests for bulk distribution or compiled information shall be made to the Executive Director of the Division of State Court Administration or other designee of the Indiana Supreme Court. The Executive Director or other designee may forward such request to a court exercising jurisdiction over the records, and in the instance of records from multiple courts, to the Indiana Supreme Court, for further action. Requests will be acted upon or responded to within a reasonable period of time. (3) With respect to requests for case record information not excluded from public access by Sections (G) or (H) of this rule, the request for bulk distribution or compiled information may be granted upon determination that the information sought is consistent with the purposes of this rule, that resources are available to prepare the information, and that fulfilling the request is an appropriate use of public resources. The grant of said request may be made contingent upon the requestor paying reasonable costs of responding to the request.... *[this rule continues with process for obtaining bulk access to information that is excluded from general public access]*

7-A

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

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EVIDENCE RULES

MEMORANDUM

To. Civil Rules Committee

From: Judge Lee H. Rosenthal

Re: Single Publication of the Style Rules Package

Date: March 17, 2004

At the Style Subcommittee meetings held in February 2004, we discussed publishing the entire Style Rules Package at one time, rather than in the two stages originally proposed. The primary benefit of single publication is that it is a much clearer and less confusing way to present the Style Project.

The original plan to publish in stages arose from concern that the pace of the careful and deliberate style work would be too slow for a single release. Thanks to the dedication of all involved and the careful design of the work flow, progress is faster than anticipated. The Standing Committee has approved for publication Rules 1-37 and 45. This Committee has Rules 38 to 63 on the agenda for this April meeting, with some of the "global issues" and "style-plus" proposals. This Committee will ask the Standing Committee in June 2004 to approve Rules 38 to 63 for publication. In July 2004, the Style Subcommittees will meet to work on Rules 64 to 86. The full Committee will consider those rules in the Fall of 2004, with the remaining "global" issues and "style-plus" proposals. This Committee will ask the Standing Committee in January 2005 to approve for publication Style Rules 64 to 86; the Rules Committee's resolution of the "global" issues; and the

"style-plus" proposals. That meeting will afford the Standing Committee an opportunity to examine the entire set of Style Rules as a whole.

This timetable contemplates the publication of the entire Style Package, Rules 1 to 86, together with the "style-plus" proposals, in February 2005. This timetable permits a single comment period longer than the comment period planned in the staged publication approach. An extended single comment period is likely to allow more participation by members of the bench, bar, and academy, and more considered reaction by the Committees. This timetable would also permit the Rules Committee to work on the Style Forms, examining them at the Spring 2005 meeting and recommending in June 2005 that the Standing Committee publish them for public comment.

If the public comment period for the entire Style Package and Forms ended in January-February 2006, the Rules Committee would anticipate seeking the Standing Committee's approval for transmission to the Judicial Conference in June 2006. That would permit transmission to the Supreme Court on the original schedule, in the fall of 2006, for transmission to Congress in the spring of 2007. On this timetable, the single publication would not delay completion of the Style Project.

The Standing Committee, and its Style Committee, have agreed to the one-publication timetable. I am grateful for the hard work by all the participants in this project – the Civil Rules Committee and its Style Subcommittees, the Standing Committee Style Subcommittee, the dedicated reporters and consultants, and the Rules Support Office – which has brought the Style Project to this point We are ahead of schedule. A successful end is not near, but it is in sight Thanks to you all.

L.H.R.

Style Draft of Rules 38 through 63 of the Federal Rules of Civil Procedure

As revised by Subcommittees A and B of the Advisory Committee on Civil Rules and further revised by the Style Subcommittee of the Committee on Rules of Practice and Procedure

[Additions are underlined, deletions are ~~overstruck~~]

[with boldface/bracketed material to indicate Style Subcommittee revisions in response to Loren Kieve's comments]

[and with annotations by Professor Cooper and draft Committee Notes]

March 29, 2004

VI. TRIALS Rule 38. Jury Trial of Right	TITLE VI. TRIALS Rule 38. Right to Jury Trial; Demand
(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate	**(a) Right Preserved.** The right of trial by jury as declared by the Seventh Amendment to the Constitution — or as **[provided ~~given~~]**[1] by a federal statute — is preserved to the parties inviolate
(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by (1) serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue, and (2) filing the demand as required by Rule 5(d) Such demand may be indorsed upon a pleading of the party	**(b) Demand.** On any issue triable of right by a jury, a party may demand a jury trial by **(1)** serving the other parties with a written demand — which may be **[made ~~stated~~]**[2] in a pleading — no later than 10 days after the last pleading directed to the issue is served, and **(2)** filing the demand as required by Rule 5(d)
(c) Same: Specification of Issues. In the demand a party may specify the issues which the party wishes so tried, otherwise the party shall be deemed to have demanded trial by jury for all the issues so triable If the party has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action	**(c) Specifying Issues.** In its demand, a party may specify the issues that it wishes to have tried by a jury, otherwise, it is deemed to have demanded a jury trial on all the issues so triable If the party has demanded a jury trial on only some issues, any other party may — within 10 days of being served with the demand or within a ~~any~~ **[shorter ~~lesser~~]**[3] 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 ~~trial by jury~~ unless its demand is properly served and filed A demand **[that complies with this rule]**[4] may be withdrawn only if the parties consent

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1 [The Style Subcommittee made this change based on the Kieve suggestion]

2 [Kieve/Kimble and Cooper agree on this change The Style Subcommittee agrees]

3 [Kieve/Kimble and Cooper agree on this change The Style Subcommittee agrees]

4 **[Kimble:** Kieve suggested taking out "that complies with this rule " I have thought more about this and now realize that we have created an inconsistency Ed and I had argued for "a proper demand" in the second sentence Note that in the first sentence we use "properly" instead of "as required by this rule " Shouldn't we do the same thing in the second sentence to replace "as herein provided" in the current rule? Dean Kane noted that "proper" would "create the negative implication that improper [demands] cannot be withdrawn " See Style 468 But then at our meeting in Phoenix we apparently realized that that's what the current rule says it refers to a demand "made as herein provided [i e , that complies with this rule, i e , a proper demand] So we changed to "a demand that complies with this rule " I see no difference between that and "a proper demand " I know it's late, but I think we should fix the inconsistency between the first and second sentences Also, note Ed's comment on 39(b)

Cooper: I am sympathetic to Joe's persistent desire "A proper demand ~~that complies with this rule~~ may be withdrawn only * * * " But I think it was Dean Kane who led the charge to defeat this change It may be a bit late to reopen the discussion]

[The Style Subcommittee does not recommend deleting "that complies with this rule "]

(e) Admiralty and Maritime Claims. These rules shall not be construed to create a right to trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9(h)	**(e) Admiralty and Maritime Claims.** These rules do not create a right to a jury trial on issues in an admiralty or maritime claim within the meaning of Rule 9(h)

COMMITTEE NOTE

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

Rule 39. Trial by Jury or by the Court	Rule 39. Trial by Jury or by the Court
(a) By Jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or of all those issues does not exist under the Constitution or statutes of the United States	**(a) After a Demand.** When trial by jury has been demanded under Rule 38, the action must be designated on the docket as a jury action The trial on all issues so demanded must be by jury unless **(1)** the parties or their attorneys file a written stipulation to a nonjury trial or so stipulate on the record, or **(2)** the court, — on motion or on its own, — finds that on some or all of those issues there is no right to a jury trial under the Constitution or federal statutes
(b) By the Court. Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court, but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues	**(b) When No Demand Is Made** Issues on which a jury trial is not [properly] demanded [~~under Rule 38~~][1] 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 ~~but was not~~
(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~~requires~~ 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.

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1 [Kimble/Kieve would delete "under Rule 38" The Style Subcommittee agrees]

Cooper: How about a compromise, parallel to the discussion of Rule 38(d) — perhaps it is easier to reopen the question here? "Issues on which a jury trial is not properly demanded ~~under Rule 38~~ are to be tried * * *"? The Style Subcommittee agrees]

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~~after~~ notice to the other parties~~, or without request in a manner that the court considers expedient~~ The court must give priority to actions entitled to priority by federal statute [1]

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.

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1 [Kieve suggested that the rules require that every request to the court be served on all parties, so it is not necessary to add "notice to the other parties " Kimble responded that if Ed agrees, we need a global check on this]

Cooper: Three things First, the Style-Substance Track will propose a simplified Rule 40 that avoids any reference to notice Second, as a global matter I do not understand Rule 5(a), in its present form or as styled I would not assert that it requires service of everything, indeed, "similar paper" impliedly excludes dissimilar papers Third, we have the intensifier problem in a different guise Often it seems useful to remind of the notice duty But if we do that sometimes, failure to do so always may create puzzling negative implications The only satisfactory global resolution would be to state notice obligations comprehensively in Rule 5 and to say nothing of notice anywhere else I doubt that is within the legitimate reach of the Style Project, and expect that it would draw much anguished comment (and enhance the inevitable attempted rebellions) to make the attempt]

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 [~~**at any time**~~]1/ before the adverse party serves either an answer or a motion for summary judgment, or **(ii)** a stipulation of dismissal signed by all parties who have appeared **(B)** *Effect* Unless the notice or stipulation states otherwise, the dismissal is without prejudice But if the plaintiff previously dismissed any action in federal or state court based on or including the same claim, a notice of dismissal operates as an adjudication on the merits
(2) By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice	**(2)** ***By Court Order; Effect.*** Except as provided in (1), an action may be dismissed at the plaintiff's [**request** ~~**instance**~~]2/ only by court order, on terms that the court considers proper If a defendant has pleaded~~served~~ a counterclaim before being served with the plaintiff's motion to dismiss, the action must not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication 3/ Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice

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1 **Cooper:** This is another intensifier problem Loren and Joe are right — the meaning is not changed by saying "a notice of dismissal ~~at any time~~ before the adverse party serves * * * " But the emphasis is familiar Deletion will cause some distress

[The Style Subcommittee recommends deleting "at any time" based on the Kieve suggestion]

2 [Kieve/Kimble and Cooper agree on this change The Style Subcommittee agrees]

3 **Cooper:** The present draft repeats "unless," albeit in two sentences Would it be better style to say "the action ~~must not~~ may be dismissed against [over?] the defendant's objection ~~unless~~ only if the counterclaim can remain pending for independent adjudication Unless * * *"?
Kimble response: I think this is a good change In addition to Ed's point, it converts the double negative to positive form And I agree with changing "against" to "over "

(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 **[~~thean~~]**[4] action or any claim against it Unless the dismissal order specifies otherwise, a dismissal under this subdivision (b) and any dismissal not provided for in this rule — except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19 — operates as an adjudication on the merits
(c) Dismissal of Counterclaim, Cross-Claim, or Third-Party Claim. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim A voluntary dismissal by the claimant alone pursuant to paragraph (1) of subdivision (a) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing	**(c) Dismissing a Counterclaim, Crossclaim, or Third-Party Claim.** This rule applies to a dismissal of any counterclaim, crossclaim, or third-party claim A claimant's voluntary dismissal under (a)(1)(A)(i) must be made before a responsive pleading is served or, if there is none, before evidence is introduced at the trial or hearing

4 [Kieve/Kimble and Cooper agree on this change The Style Subcommittee agrees]

(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 ~~may~~ (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].**[5]

COMMITTEE NOTE

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

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

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5 [Kieve suggested deleting "complied" and substituting "has done so "

Cooper: This may sound silly Is it possible to "comply with" an order by means that are not the same as "done so"? Suppose the plaintiff makes arrangements to pay — is that the same as paying? On balance, I am nervous about this change The present rule is "complied with the order " "has complied" in the Style draft clearly makes no change "has done so" might change the meaning

The Style Subcommittee does not recommend deleting "complied "]

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

COMMITTEE NOTE

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

Rule 43. Taking of Testimony	Rule 43. Taking Testimony
(a) Form. In every trial, the testimony of witnesses shall be taken in open court, unless a federal law, these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court provide otherwise The court may, for good cause shown in compelling circumstances and upon appropriate safeguards, permit presentation of testimony in open court by contemporaneous transmission from a different location	**(a) In Open Court.** [At trial ~~In every trial~~],[1] the witnesses' testimony must be taken in open court unless a federal law, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise In compelling circumstances and with appropriate safeguards, the court may allow testimony in open court by contemporaneous transmission from a different location
(b) [Abrogated.]	**(b)**
(c) [Abrogated.]	**(c)**
(d) Affirmation in Lieu of Oath. Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof	**(b) Affirmation Instead of Oath.** When these rules require an oath, a solemn affirmation suffices
(e) Evidence on Motions. When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or deposition	**(c) Evidence on a Motion.** When a motion relies on facts outside the record, the court may hear the matter on affidavits~~. But the court may direct that the matter~~or may order that it be heard wholly or partly on oral testimony or on depositions
(f) Interpreters. The court may appoint an interpreter of its own selection and may fix the interpreter's reasonable compensation The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court	**(d) Interpreter.** The court may appoint an interpreter of its choosing, fix reasonable compensation to be paid from funds provided by law or by one or more parties, and tax the compensation as costs

COMMITTEE NOTE

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

1 **Kimble:** (See Garner) [Cooper agrees with this change] [The Style Subcommittee agrees]

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 ~~Authentication~~.** **(1)** ***Domestic Record.*** The following evidences ~~authenticates~~[1] an official record — or an entry in it — that is **[otherwise]**[2] admissible and is kept within the United States, any state, district or commonwealth, or any territory subject to the administrative or judicial jurisdiction of the United States **(A)** an official publication of the record, or **(B)** a copy attested by the officer with legal custody of the record — or by the officer's deputy — and accompanied by a certificate that the officer has custody The certificate must be made under seal **(i)** by a judge of a court of record of the district or political subdivision where the record is kept, or **(ii)** by any public officer with a seal of office and with official duties in the district or political subdivision where the record is kept

1 Professor Rowe was asked to research whether there is a substantive difference between using "authenticates" in Rule 44(a)(1) and (b) on proving official records, or using some form of the word "evidence" as a verb as in the current rule He reported that the treatises "use the ideas of evidence, authentication, and proof interchangeably, although that doesn't mean they're identical " He did not find any case annotations that seemed to bear on the question Based on Garner's statement in his second edition at 333 that "evidence" and "proof" "are not synonymous," and concerns expressed at the meeting of Subcommittee A, Professor Rowe suggests using "evidence" in some verb form in 44(a)(1) and (a)(2), and also in (a)(2)(C)(ii)

2 [**Kimble:** On Rule 44(a)(1) and (2), I was uncertain about Kieve's suggestion to delete "otherwise," but raised them for consideration

Cooper: I share Joe's uncertainty Present Rule 44(a)(1) tells how to "evidence" an official record "when admissible for any purpose " The Style Draft is "that is otherwise admissible " The Style Draft is subtly different from the present rule — it gives greater emphasis to the proposition that proper evidence of (or "authenticating") an official record does not of itself make the record admissible I like the Style Draft as an improvement Deleting "otherwise" removes the emphasis At risk of identifying it as an intensifier, I would keep it The same holds for Style 44(a)(2)(A)]

[The Style Subcommittee does not recommend deleting "otherwise "]

(2) **Foreign.** A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof, or a copy thereof, attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position (i) of the attesting person, or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation	(2) ***Foreign Record.*** **(A)** *In General* The following evidences ~~authenticates~~ a foreign official record — or an entry in it — that is **[otherwise]**[3] admissible **(i)** an official publication of the record, **(ii)** a copy attested by an authorized person and accompanied by a final certification of genuineness~~, as described in (B), or~~ **(iii)** a record and attestation certified as provided in a treaty or convention to which the United States and a country where the record is located are parties, or **(iv)~~(iii)~~** other means ordered by the court under (C)
A final certification may be made by a secretary of embassy or legation, consul general, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (i) admit an attested copy without final certification or (ii) permit the foreign official record to be evidenced by an attested summary with or without a final certification The final certification is unnecessary if the record and the attestation are certified as provided in a treaty or convention to which the United States and the foreign country in which the official record is located are parties	**(B)** *Final Certification of Genuineness* A final certification must certify the genuineness of the signature and official position of the attester or of any foreign official whose certificate of genuineness relates to the attestation or is in a chain of certificates of genuineness relating to the attestation A final certification may be made by a secretary of a United States embassy or legation, by a consul general, vice consul, or consular agent of the United States, or by a diplomatic or consular official of the foreign country assigned or accredited to the United States ~~Final certification is unnecessary if the record and attestation are certified as provided in a treaty or convention to which the United States and the foreign country where the record is located are parties~~ **(C)** *Other Means of Proof* If all parties have had a reasonable opportunity to investigate a foreign record's authenticity and accuracy, the court may, for good cause, either **(i)** admit an attested copy without final certification, or **(ii)** allow the record to be proved[4] by an attested summary with or without a final certification

3 See p 11, note 2

4 **Cooper** Should this be "evidenced," see note 1? **Kimble response:** Probably so

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

COMMITTEE NOTE

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

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

COMMITTEE NOTE

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

Rule 46. Exceptions Unnecessary	Rule 46. Objecting to a Ruling or Order
Formal exceptions to rulings or orders of the court are unnecessary, but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which the party desires the court to take or the party's objection to the action of the court and the grounds therefor, and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice the party	A formal exception to a ruling or order is unnecessary When the ruling or order is requested or made, a party need only state ~~— and give the grounds for —~~ 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[1/] 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.

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1 **Kimble note:** As an aside, I am starting to lean toward using "that" with "party" throughout the rules See Garner under "Who (D) " Possible exception When another "that" appears in the sentence

Cooper: This is Style But my inclination begins with Garner's report under "Who (D) " He tells us that we can use "that" when referring to persons, but "Editors tend * * * to prefer" "who " Joe's position reflects the fact that a party may be either a person or an entity "That" is permissible for a real person and preferred for an entity My inclination is to prefer to dignify persons as "who," paying a slight price in promoting entities also to "who" status But whatever the choice, this is a global question to be given a uniform answer

[The Style Subcommittee suggests adding this to the list of global drafting issues]

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 ~~examine prospective jurors or may allow the parties or their attorneys to do so~~ If the court examines the jurors, it must permit~~allow~~ the parties or their attorneys to ask **[any~~such~~]** additional questions **[~~as~~ it]** considers proper,[1/] or must itself ask those questions
(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.

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1 [Kieve/Kimble and Cooper agree on these two changes The Style Subcommittee agrees]

Cooper: I am not disposed to do anything about it now, but note that present Rule 47(a) provides somewhat more guidance than Style (a) on one question Style (a) says the court must allow the parties to ask any additional questions it considers proper, or must itself ask those questions How is the court to decide whether the questions are proper? Under the Style version, the only apparent way is to have the parties tell the court the very questions they wish to have put to the jury Under the present rule, the court shall permit the parties to supplement the examination by "further inquiry," not "further questions " That suggests that the court may authorize a general line of inquiry, without first reviewing each proposed question The Style draft avoids repeating "it considers proper," but we may pay a price

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

COMMITTEE NOTE

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

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

1 **Cooper:** I would keep "several " This makes it clear that all available alternatives must be covered when the jury is given prepared form findings, not questions to answer [I wonder how often this practice is actually used?]

[The Style Subcommittee agrees with the Kieve suggestion to delete "several "]

2 **Kimble:** "so it can" is what I had I still like it better

Cooper: I am among those who resisted "so it can " But I am not enamored of "as needed for it to " Do we have a rule that forbids this "To enable the jury to make its findings, the court must instruct it on each submitted issue"? [Cf the edit that Joe accepts in 53(b)(1) "Before appointing a master, the court must give * * * "] If not that, "must instruct the jury ~~as needed for~~ to enable it to make its findings * * *"? "Enable" is the word of the present rule, and it is not archaic Let's keep it

{The Style Subcommittee agrees with "so it can "]

3 [Kieve/Kimble and Cooper agree on this change The Style Subcommittee agrees]

(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 w~~W~~ith Answers to Interrogatories.** **(1)** ***In General*** The court may submit to the jury [~~**appropriate**~~][1] forms for a general verdict, together with written interrogatories on one or more issues of fact that must be decided The court must instruct the jury as needed for it to render a general verdict and answer the interrogatories in writing, and must direct the jury to do both **(2)** ***Verdict and Answers Consistent.*** When the general verdict and the answers are consistent, the court must approve, for entry under Rule 58~~(a)(2)~~, 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~~(b)(2)~~, 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.

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1 **Cooper:** I am inclined to agree with deleting "appropriate " Who would think we authorize submission of inappropriate verdict forms?
[Kieve/Kimble and Cooper agree on this change The Style Subcommittee agrees]

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

1 [Kimble and Cooper agree on this change The Style Subcommittee agrees]

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

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

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

COMMITTEE NOTE

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

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

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

Rule 51. Instructions to Jury; Objections; Preserving a Claim of Error	**Rule 51. Instructions to the Jury; Objections; Preserving a Claim of Error**
(a) Requests (1) A party may, at the close of the evidence or at an earlier reasonable time that the court directs, file and furnish to every other party written requests that the court instruct the jury on the law as set forth in the requests **(2)** After the close of the evidence, a party may **(A)** file requests for instructions on issues that could not reasonably have been anticipated at an earlier time for requests set under Rule 51(a)(1), and **(B)** with the court's permission file untimely requests for instructions on any issue	**(a) Requests.** **(1)** ***Before or at the Close of the Evidence*** At the close of the evidence or at any earlier reasonable time that the court directs, a party may file and furnish to every other party written requests for the jury instructions it wants the court to give **(2)** ***After the Close of the Evidence.*** After the close of the evidence, a party may **(A)** file requests for instructions on issues that could not reasonably have been anticipated by an earlier time that the court set for requests, and~~or~~ **(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 **[after the trial begins and]**[1] before the jury is discharged

1 [Kieve suggested deleting "after the trial begins and "]

Kimble: If we can, delete "after the trial begins and "

Cooper: Literally, we may change meaning if we delete "after the trial begins and " Without those words, the court could instruct the jury after the jury is sworn but before trial begins in any other way It might be argued that the instructions begin the trial, but the argument would have to be made and defended Apart from that, the rule was written this way to emphasize that courts have this authority It was hoped to teach a lesson — to encourage consideration of something that otherwise might disappear without thought Let's not make the change

The Style Subcommittee does not recommend this deletion]

(c) Objections. **(1)** A party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds of the objection **(2)** An objection is timely if **(A)** a party that has been informed of an instruction or action on a request before the jury is instructed and before final jury arguments, as provided by Rule 51(b)(1), objects at the opportunity for objection required by Rule 51(b)(2), or **(B)** a party that has not been informed of an instruction or action on a request before the time for objection provided under Rule 51(b)(2) objects promptly after learning that the instruction or request will be, or has been, given or refused	**(c) Objections.** **(1)** ***How to Make.*** A party who objects to a proposed instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds for the objection **(2)** ***When to Make*** An objection is timely if **(A)** a party objects at the opportunity provided under (b)(2), or **(B)** a party, after not being~~was not~~ informed of an instruction or action on a request before the time to object under (b)(2), ~~and~~[2] objects promptly after learning that the instruction or request will be, or has been, given or refused
(d) Assigning Error; Plain Error. **(1)** A party may assign as error **(A)** an error in an instruction actually given if that party made a proper objection under Rule 51(c), or **(B)** a failure to give an instruction if that party made a proper request under Rule 51(a), and — unless the court made a definitive ruling on the record rejecting the request — also made a proper objection under Rule 51(c) **(2)** A court may consider a plain error in the instructions affecting substantial rights that has not been preserved as required by Rule 51(d)(1)(A) or (B)	**(d) Assigning Error; Plain Error.** **(1)** ***Assigning Error*** A party may assign as error **(A)** an error in an instruction actually given, if that party made a proper objection~~,~~; or **(B)** a failure to give an instruction, if that party made a proper request under (a) and — unless the court rejected the request in a definitive ruling on the record — also made a proper objection under (c) **(2)** ***Plain Error*** A court may consider a plain error in the instructions affecting substantial rights, regardless of whether~~even if~~[3] the error has ~~not~~ been preserved as required by (d)(1)

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.

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2 **Cooper:** It sounds weird to say "a party, after not being informed * * * before the time to object * * * objects promptly after learning * * * " Why not "a party that was not informed * * * before the time to object * * * objects promptly * * *"?
Kimble response: We have labored over this one I see nothing weird about the style version We generally try to avoid long interruptive phrases between the subject ("party") and verb ("objects") See Garner's Guideline 2 4(C) Here, it's unavoidable But we at least signal the interruption with a pair of commas, so the reader knows that the verb is now showing up

3 **Cooper:** "regardless of whether"? This formulation has the same problem as "even if " The whole point of the plain error doctrine is to reach only those cases in which the error was not properly preserved To say "regardless of whether" implies that plain error doctrine also applies when the error was properly preserved This should be "A court may consider a plain error in the instructions affecting substantial rights that was not preserved as required by (d)(1) "
Kimble response: I don't see the implication that Ed sees Seems to me that "regardless of whether" means just that preserving the error has nothing to do with the plain-error doctrine Isn't the meaning here readily apparent? Also, the proposed change creates a remote relative pronoun--the "that" is remote from the word it modifies, "error " See Garner's Guideline 4 3(C)

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

1 **Cooper:** This is the global "considered" - "deemed" question If our convention is to use "deemed" when creating an artificial presumption, "deemed" fits here Why not bypass the choice "A master's findings, to the extent adopted by the court, ~~must be considered~~ are the court's findings"?
Kimble response: I don't have a strong sense of fiction here because the court is adopting the findings Close call, but I think I'd leave it as is

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

COMMITTEE NOTE

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

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

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

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

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

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

2 [Kieve/Kimble and Cooper agree on this change The Style Subcommittee agrees]

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

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

1 **Kimble:** "give" – see Rule 53(b)(1) [Cooper agrees with this change] [The Style Subcommittee agrees]

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

COMMITTEE NOTE

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

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

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

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

COMMITTEE NOTE

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

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

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1 [Kieve suggested deleting "relating to "]

Cooper: The choice between "relating to" and "concerning" does not seem guided by anything in Garner's Dictionary or American Usage To my eye, "relating to" is a bit more openended I would stick with the Style draft as it is

Kimble: I don't see any appreciable difference And there's a style gain it eliminates the first "to" so that the second "to" connects better with "refer "

[The Style Subcommittee agrees with Kieve's suggestion to delete "relating to" and substitute "concerning "]

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

1 [Kieve suggested deleting "as these rules provide "]

[Cooper: I would not delete "as these rules provide " Suppose the defendant does something not authorized by the rules, and argues that it amounts to otherwise defending? One example might be filing a parallel action in another court]

[The Style Subcommittee recommends deleting "as these rules provide " **Dean Kane notes** I disagree with Cooper The courts in interpreting "otherwise defend" have not limited actions taken "under the rules" despite that language in the current rule Sometimes they have utilized the provision (which is designed to limit the clerk's authority to enter a default) to note that (b) must be invoked because of things that occur during settlement talks, for example For numerous examples, see the discussion in sec 2686 of F, P & P treatise Thus, the deletion would be consistent with what courts actually are doing]

(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)	~~**(d) Parties Entitled to a Default Judgment.** This rule applies whether the party entitled to a default judgment is a plaintiff, a third-party plaintiff, a crossclaimant, or a counterclaimant~~
(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)~~(e) **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.

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~~made~~ at any time after 20 days from commencement of the action or after the adverse party serves a motion for summary judgment

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof	**(b) By a Defending Party.** A party against whom relief is sought may move **[at any time]**, with or without supporting affidavits, for summary judgment on all or part of the claim **[~~The motion may be made at any time.~~]**[1]

1 [Kieve/Kimble and Cooper agree on this change The Style Subcommittee agrees]

(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 hearing day An adverse party may serve opposing affidavits before the hearing day The judgment sought should~~must~~ be rendered ~~promptly~~ 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~~Partial Summary Judgment.~~*** If summary judgment is not rendered on the whole action, the court should, to the extent practicable, determine what material facts are not genuinely at issue The court should so determine by examining the pleadings and evidence before it and by interrogating the attorneys It should then enter an order specifying what facts are not genuinely at issue~~the facts that appear without substantial controversy~~, including ~~the extent to which~~ the amount of damages or other relief ~~is not at issue~~ The facts so specified must be treated as established in the action **(2)** ***Establishing Liability~~Interlocutory Summary Judgment~~*** An interlocutory summary judgment may be rendered on **[~~the~~] liability [~~issue~~]**[1] alone, even if there is a genuine issue on the amount of damages

1 [Kieve/Kimble and Cooper agree on this change The Style Subcommittee agrees]

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party	**(e) Affidavits; Further Testimony.** **(1)** ***In General.*** Supporting and opposing affidavits must be made on personal knowledge, set forth facts that would be admissible in evidence, and **[affirmatively]**[1] show that the affiant is competent to testify on the matters stated If a paper or part of a paper is referred to in an affidavit, a sworn or certified copy must be attached or served with the affidavit The court may permit an affidavit to be supplemented or opposed by depositions, answers to interrogatories, or **[additional ~~further~~]**[2] affidavits **(2)** ***Adverse Party's Obligation to Respond*** ~~***Response by an Adverse Party***~~ When a motion for summary judgment is properly made and supported, an adverse party may not rely merely on allegations or denials in its own pleading, rather, the adverse party's response must — by affidavits or as otherwise provided in this rule — set forth specific facts showing a genuine issue for trial If the adverse party does not so respond, summary judgment should~~may~~, if appropriate, be entered against that party

1 **Cooper:** I would retain "affirmatively " The affidavit must in some way address directly the witness's competence Without this word, lawyers will argue that competence is implicitly shown by the substantive content of the affidavit

Kimble: I had a question mark next to the change I'd just note that we use a bare "show" in other places Is there a difference here?

[The Style Subcommittee recommends retaining "affirmatively "]

2 [Kieve/Kimble and Cooper agree on this change The Style Subcommittee agrees]

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

COMMITTEE NOTE

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

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

Former Rule 56(c), (d), and (e) stated circumstances in which summary judgment "shall be rendered," the court "shall if practicable" ascertain facts existing without substantial controversy, and "if appropriate, shall" enter summary judgment. In each place "shall" is changed to "should." It is established that although there is no discretion to enter summary judgment when there is a genuine issue as to any material fact, there is discretion to deny summary judgment when it appears that there is no genuine issue as to any material fact. *Kennedy v. Silas Mason Co.*, 334 U.S 249, 256-257 (1948) [Many lower court decisions are gathered in 10A Wright, Miller & Kane, Federal Practice & Procedure: Civil 3d, § 2728] "Should" in amended Rule 56(c) recognizes that courts will seldom exercise the discretion to deny summary judgment when there is no genuine issue as to any material fact. Similarly sparing exercise of this discretion is

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1 Kieve asked whether we really need "promptly" here Kimble was not sure

Cooper: I am sympathetic to Joe's question whether we can delete "promptly " Remember we took it out of Rule 56(c), dealing with a far more important matter — entry of summary judgment "Promptly," moreover, is akin to a docket priority The Judicial Conference is opposed to docket priorities Deletion will cause some protest

[The Style Subcommittee recommends deleting "promptly "]

appropriate under Rule 56(e)(2) Rule 56(d)(1), on the other hand, reflects the more open-ended discretion to decide whether it is practicable to determine what material facts are not genuinely at issue.

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

Rule 57. Declaratory Judgments	Rule 57. Declaratory Judgment
The procedure for obtaining a declaratory judgment pursuant to Title 28, U S C , § 2201, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39 The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar	These rules govern the procedure for obtaining a declaratory judgment under 28 U S C § 2201 **A [party may demand a]** jury trial [~~**may be demanded**~~]1/ under Rules 38 and 39 The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate The court may order a speedy hearing of a declaratory-judgment action and may advance it on the calendar

COMMITTEE NOTE

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

1 [Kieve/Kimble and Cooper agree on this change The Style Subcommittee agrees]

Rule 58. Entry of Judgment	Rule 58. Entering Judgment
(a) Separate Document. **(1)** Every judgment and amended judgment must be set forth on a separate document, but a separate document is not required for an order disposing of a motion **(A)** for judgment under Rule 50(b), **(B)** to amend or make additional findings of fact under Rule 52(b), **(C)** for attorney fees under Rule 54, **(D)** for a new trial, or to alter or amend the judgment, under Rule 59, or **(E)** for relief under Rule 60	**(a) Separate Document.** Every judgment and amended judgment must be set forth in a separate document, but a separate document is not required for an order disposing of a motion **(1)** for judgment under Rule 50(b), **(2)** to amend or make additional findings of fact under Rule 52(b), **(3)** for attorney's fees under Rule 54, **(4)** for a new trial, or to alter or amend the judgment, under Rule 59, or **(5)** for relief under Rule 60

(2) Subject to Rule 54(b) **(A)** unless the court orders otherwise, the clerk must, without awaiting the court's direction, promptly prepare, sign, and enter the judgment when **(i)** the jury returns a general verdict, **(ii)** the court awards only costs or a sum certain, or **(iii)** the court denies all relief, **(B)** the court must promptly approve the form of the judgment, which the clerk must promptly enter, when **(i)** the jury returns a special verdict or a general verdict accompanied by interrogatories, or **(ii)** the court grants other relief not described in Rule 58(a)(2)	**(b) Entering Judgment.** **(1)** ***Without the Court's Direction*** Subject to Rule 54(b) and unless the court orders otherwise, the clerk must, without awaiting the court's direction, promptly prepare, sign, and enter the judgment when **(A)** the jury returns a general verdict,; **(B)** the court awards only costs or a sum certain, or **(C)** the court denies all relief.; **(2)** ***Court's Approval Required*** ~~***After the Court Approves the Form:***~~ Subject to Rule 54(b), the court must promptly approve the form of the judgment, which the clerk must promptly enter, when **(A)** the jury returns a special verdict or a general verdict with answers to interrogatories, or **(B)** the court grants other relief not described in this subdivision (b)

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

1 **Cooper:** Let me break my rule to comment on a change I accept Joe and Loren are right this should be "or "

[The Style Subcommittee agrees]

(d) Request for Entry. A party may request that judgment be set forth on a separate document as required by Rule 58(a)(1)	**(e) Request for Entry.** A party may request that judgment be set forth ~~inon~~ a separate document as required by (a)

COMMITTEE NOTE

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

Rule 59. New Trials; Amendment of Judgments	Rule 59. New Trial; Amending a Judgment
(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States, and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment	**(a) In General** **(1)** ***New Trial.*** The court may, on motion, grant a new trial on all or some of the issues **(A)** after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court, and **(B)** after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court **(2)** ***Further Action After a Nonjury Trial.*** After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct entry of a new judgment

(b) Time for Motion. Any motion for a new trial shall be filed no later than 10 days after entry of the judgment	**(b) Time to File a Motion for a New Trial.** A motion for a new trial must be filed no later than 10 days after the entry of the judgment
(c) Time for Serving Affidavits. When a motion for new trial is based on affidavits, they shall be filed with the motion The opposing party has 10 days after service to file opposing affidavits, but that period may be extended for up to 20 days, either by the court for good cause or by the parties' written stipulation The court may permit reply affidavits	**(c) Time to Serve Affidavits.** When a motion for new trial is based on affidavits, they must be filed with the motion The opposing party has 10 days after service to file opposing affidavits, but that period may be extended for up to 20 days, either by the court for good cause or by the parties' written stipulation The court may allow reply affidavits

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

COMMITTEE NOTE

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

Rule 60. Relief From Judgment or Order	Rule 60. Relief from a Judgment or Order
(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court	**(a) Corrections Based on Clerical Mistakes; Oversights and Omissions.** The court may correct a clerical mistake or a mistake arising from oversight or omission, whenever found in a judgment, order, or other part of the record The court may do so on motion or on its own, with or without notice But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons (1) mistake, inadvertence, surprise, or excusable neglect, (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b), (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party, (4) the judgment is void, (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application, or (6) any other reason justifying relief from the operation of the judgment	**(b) Grounds for Relief From Judgment.** On motion and just terms, the court may relieve a party or **[its ~~party's~~]**[1] legal representative from a final judgment, order, or proceeding for the following reasons **(1)** mistake, inadvertence, surprise, or excusable neglect, **(2)** newly discovered evidence that, with due diligence, could not have been discovered in time to move for a new trial under Rule 59(b), **(3)** fraud (whether intrinsic or extrinsic), misrepresentation, or misconduct by an adverse party, **(4)** the judgment is void, **(5)** the judgment has been satisfied, released or discharged, it is based on an earlier judgment that has been reversed or vacated, or applying it prospectively is no longer equitable, or **(6)** any other reason that justifies relief

1 **Cooper:** Yes, substitute "its" for "party's " But if we do not make the substitution, we should supply something omitted from the Style draft — "a party or a party's legal representative * * * "

[The Style Subcommittee agrees with substituting "its" for "party's" here **Dean Kane notes:** This goes back to the "who" vs "that" when referring to parties I probably would stick with "a party's legal representative " In any event flag this as a global issue]

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 ~~subdivision~~ (b) must be made within a reasonable time — and, for reasons (1), (2), and (3), within a year[2/] after the entry of the judgment or order or the date of the proceeding **(2)** ***Effect on Finality.*** The motion does not affect the finality of a judgment or suspend its operation
This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U S C , § 1655, or to set aside a judgment for fraud upon the court 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	**(d) Independent Action.** This rule does not limit a court's power to entertain an independent action to relieve a party from a judgment, order, or proceeding, to grant relief under 28 U S C § 1655 to a defendant who is not personally notified of the action, or to set aside a judgment for fraud on the court

COMMITTEE NOTE

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

The final sentence of former Rule 60(b) formally "abolished" writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review. That provision is deleted; it is no longer necessary to continue to abolish writs so long abolished. Deletion of the abolition does not expand whatever residual uses may have survived the formal abolition See *Ejelonu v. INS*, 355 F.3d 539, 544-548 (6th Cir.2004) Neither does deletion of the abolition mean that federal courts should adopt state-court uses of these abandoned writs.

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.

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2 **Cooper:** A late thought Careless readers miss the meaning of the present rule — the "reasonable time" for moving for relief under Rule 60(b)(1), (2), or (3) may be less than one year By substituting "within a year" for "not more than one year" we may aggravate the confusion It is all too easy to read the Style draft to say that it must be within a reasonable time, and within a year is a reasonable time for (1), (2), or (3)
Kimble response: If we change, we should use "no more than " See Garner's "Dictionary" under "not more than " We need to look at trying to make our expressions of time as consistent as possible

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 ~~substantial~~ justice requires otherwise, no error in admitting or excluding evidence — or any other error by the court or defect in a party's acts or omissions — is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order At every stage of the proceeding, the court must disregard all errors or defects that do not affect any party's substantial right

COMMITTEE NOTE

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

Rule 62. Stay of Proceedings To Enforce a Judgment	Rule 62. Stay of Proceedings to Enforce a Judgment
(a) Automatic Stay; Exceptions—Injunctions, Receiverships, and Patent Accountings. Except as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action, or a judgment or order directing an accounting in an action for infringement of letters patent, shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal The provisions of subdivision (c) of this rule govern the suspending, modifying, restoring, or granting of an injunction during the pendency of an appeal	**(a) Automatic Stay; Exceptions for Injunctions, Receiverships, and Patent Accountings.** Except as stated in this rule, no execution may issue on a judgment, nor may proceedings be taken for its enforcement, until 10 days have passed after its entry But unless the court orders otherwise, the following are not automatically stayed after being entered, even if an appeal is taken **(1)** an interlocutory or final judgment in an action for an injunction or ~~for~~ a receivership, or **(2)** a judgment or order that directs an accounting in an action for patent infringement

(b) Stay on Motion for New Trial or for Judgment. In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60, or of a motion for judgment in accordance with a motion for a directed verdict made pursuant to Rule 50, or of a motion for amendment to the findings or for additional findings made pursuant to Rule 52(b)	**(b) Stay Pending the Disposition of a Motion.** On appropriate conditions for the adverse party's security, the court may stay the execution of a judgment — or any proceedings to enforce it — pending disposition of any of the following motions **(1)** under Rule 50, for judgment as a matter of law, **(2)** under Rule 52(b), to amend the findings or for additional findings, **(3)** under Rule 59, for a new trial or to alter or amend a judgment, or **(4)** under Rule 60, for relief from a judgment or order
(c) Injunction Pending Appeal. When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party If the judgment appealed from is rendered by a district court of three judges specially constituted pursuant to a statute of the United States, no such order shall be made except (1) by such court sitting in open court or (2) by the assent of all the judges of such court evidenced by their signatures to the order	**(c) Injunction Pending an Appeal.** After an appeal is taken from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that **[~~the court considers proper to~~]**[1/] secure the adverse party's rights If the judgment appealed from is rendered by a statutory three-judge district court, the order must be made either **(1)** by that court sitting in open session, or **(2)** by the assent of all its~~three~~ judges, as evidenced by their signatures[2/]~~each of whom must sign the order~~
(d) Stay Upon Appeal. When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be The stay is effective when the supersedeas bond is approved by the court	**(d) Stay on Appeal.** If an appeal is taken, the appellant may, by supersedeas bond, obtain a stay, subject to the exceptions in (a) The bond may be given upon or after filing the notice of appeal or upon obtaining the order allowing the appeal The stay takes effect when the court approves the bond

1 [Kieve suggested this deletion]

Kimble: I agree with "terms that secure," if the rest is "unnecessary," as Kieve suggests

Cooper: Do not make the change To say "terms that secure" implies that the terms must secure "That the court considers proper to secure" leaves discretion to find proper something that is less than full security **Kimble response:** Then I'd say "that adequately secure" Isn't the court's discretion explicit in "the court may" and implicit in any event Look at 62(b), for instance We don't say "On conditions that the court considers appropriate " Or look at 62(h) We don't say "conditions that the court considers necessary " This comes up time and again

[The Style Subcommittee recommends deleting "the court considers proper to "]

2 **Cooper:** Again a late thought Why not stick with the present rule "by the assent of all its judges~~, as~~ evidenced by their signatures"? **Kimble response:** I'd leave this as is The other way seems too dense, too compressed

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

COMMITTEE NOTE

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

Rule 63. Inability of a Judge To Proceed	Rule 63. Judge's Inability to Proceed[1]
If a trial or hearing has been commenced and the judge is unable to proceed, any other judge may proceed with it upon certifying familiarity with the record and determining that the proceedings in the case may be completed without prejudice to the parties In a hearing or trial without a jury, the successor judge shall at the request of a party recall any witness whose testimony is material and disputed and who is available to testify again without undue burden The successor judge may also recall any other witness	If the judge who commenced a hearing or trial cannot proceed, any other judge may proceed with it upon certifying familiarity with the record and determining that the proceedings in the case may be completed without prejudice to the parties In a hearing or trial without a jury, the successor judge must, at a party's request, recall any witness whose testimony is material and disputed, and who is available to testify again without undue burden The successor judge may also recall any other witness

COMMITTEE NOTE

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

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1 Staff notes from the Subcommittee B meeting reflect that there was a style suggestion to change the Rule 63 caption to "When a Judge Cannot Proceed "

Cooper's notes leave no doubt that the change was to be made He notes further "And I think the change is important We discussed whether it was proper to change "unable" in the present rule to "cannot" in the Style rule We agreed to retain "cannot" in the text of the rule It might be argued that carrying forward "inability" in the caption signals that "cannot" means the same thing as "unable " But then why change the rule? If we change the rule, we should change the caption "

Kimble responds: I think the words mean the same thing The form of "When a Judge Cannot Proceed" is not consistent with our other rule titles we don't use clauses I'd almost rather go back to "is unable to " But I really don't think it's a problem

[The Style Subcommittee does not recommend changing the caption]

Style-Substance Proposals: Rules 1 through 63

The Committee's commitment to avoid substantive changes in the Style Project has led to the development of two categories of proposed rule changes in addition to the Style-Only Track. One category, the "reform agenda," consists of substantive changes that may require significant work to determine whether a change is desirable and to develop the change. This category is a rich source of future work, independent of the Style Project. The second category, which has come to be known as "style-plus" or "style-substance," consists of noncontroversial and relatively simple improvements that do, or may, change meaning. The proposed changes in this category improve the rules, but are so small and simple that if they are not done in connection with the style project, they will likely not be done. The Style-Substance Track primarily consists of proposals that might have been put forward on a more aggressive approach to the Style-Only Track, and will be published for comment at the same time, and as a parallel to, the Style-Only Track.

The Rules 1 to 63 candidates for the Style-Substance Track are set out below.

1. Rule 4(k)(1)(C)

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

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

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 United States statute.

2. Rule 8(a)(3)

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

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

Committee Note: "alternative forms * * * of relief" is a style improvement of the present rule's "relief in the alternative." No changed meaning is intended.

3. Rule 8(d)(1)

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

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

4. Rule 9(h)(2)

It would be easy enough to delete this seemingly redundant reference to Rule 15. The question is whether the reference is useful to avoid arguments about sliding into and out of the

Supplemental Rules, and whether that utility outweighs the presumption against redundant references.

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

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 we do not need to use the number "(1)."

5. Rule 11(a)

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

(a) Signature. * * * The paper must state the signer's address, electronic-mail address, and telephone number.~~ if any.~~ * * * [address, e-mail address if any, and telephone number if any]

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

6. Rule 14(b)

Rule 14(b) now, and in the Style version, says only that a plaintiff may bring in a third party when a counterclaim is made. That is incomplete. Subject to the quirks of diversity jurisdiction, one

plaintiff may crossclaim against another — most obviously when a counterclaim is made against them. Third-party practice should be available to a plaintiff just as it is to a defendant.

(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.

7. Rule 16(c)(1)

"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.

8. Rule 24(a)(2)

"claims an interest relating to ~~the property or transaction that is~~ the subject of the action, and * * *."

Committee Note: Rule 19(a)(1)(B) requires joinder, if feasible, of a person who claims an interest relating to the subject of the action. The threshold for intervention should be the same. This change is not entirely beyond dispute. Rule 19(a) looks not only to effect on a nonparty but also to risks that nonjoinder imposes on present parties. Rule 19(a) does not excuse joinder if the nonparty is adequately represented, while Rule 24(a)(2) defeats intervention if adequate representation is shown. The theory that intervention of right should be available on terms at least

equal to Rule 19(a) might be resisted on the ground that if no present party welcomes the intruder, the intervention test might be narrower. But the theory has widespread support.

9. Rule 26(g)(1)

"and must state the signer's address, telephone number, and electronic-mail address."

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.

10. Rule 26(g)(1)(B)(ii)

"and warranted by existing law or a good-faith argument for extending, modifying, or reversing existing law, or establishing new law."

Committee Note: 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.

11. Rule 30(b)(3)(A)

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

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.

12. Rule 30(b)(6)

"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."

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

We have received reports of abusive practices under Rule 30(b)(6), but the possibility that it may be on the reform agenda is not inconsistent with this improvement.

13. Rule 31(c)

(c) Notice of Completion or Filing.

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

(2) Notice of 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.

14. Rule 36(b)

"~~Subject to Rule 16(d) and (e), t~~The court may permit withdrawal or amendment of an admission that has not been incorporated in a pretrial order if it would promote the presentation of the merits of the action and if * * *."

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

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

15. Rule 40

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

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

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

16. Rule 56(c)

"The motion must be served at least 10 days before ~~the hearing day~~ it is submitted for decision. * * *"

Committee Note: It is awkward to refer to the "hearing day" when a motion is decided on the papers without oral argument. The relevant concern is that there be time to respond before the court considers the motion. "Submitted for decision" refers to the court's consideration of the motion, not the time the motion is filed.

Questions: (1) Is there a better phrase than "submitted for decision"? "Consideration" is hard to fit into rule language — we cannot say it must be served 10 days before the court considers it. We could say the court cannot consider it until 10 days after service, but that is not the tone we generally like. (2) Because this is more than style, we are in theory free to recommend a 20- or 30-day period. Ten days is foolishly short. But probably this involves just enough risk of controversy to justify sticking with 10 days.

Style-Substance Track Rejects, Rules 1-63

These notes describe rules changes that have been considered for the "Style-Substance" track but rejected for various reasons. They cover Style Rules 1 through 63. Other candidates have been passed over without mention. Often the reason is that serious work would be required to determine whether a change is desirable and to develop the change. At times the reason is that there is no apparent real-world problem. And perhaps most pervasively, it is important to limit the number of proposals advanced for consideration in parallel with the Style project.

Rule 4(d)(1)(E), 4(f)

These rules highlight the provisions that refer to a defendant "addressed outside any judicial district of the United States," "in a foreign country," and the like. Substantial work failed to resolve the meaning of the present rule phrases. No one had an useful suggestions for improvement. There was no indication of any present problem in application. There is no reason to believe that changes would be so simple as to belong on a Style-Substance track. If these questions are to be approached at all, the proper occasion will be one of the periodic reviews prompted by the gradual accumulation of complaints about Rule 4.

Rule 4(l)(3)

It was noted that Rule 4 does not now provide for contradicting a proof of service. Long ago a sheriff's return was incontrovertible. That rule has not survived. It might be useful to adopt express provisions regulating disproof of a proof of service. But the work extends beyond what may fairly be included in a Style-Substance track.

Rule 5(d)(4)

The question raised here, but better addressed in Rule 7.1 if addressed at all, is whether failure to file a required disclosure statement justifies a clerk's refusal to accept a pleading. The failure seems to be more than a matter of "form prescribed by these rules." It might be nice to have an answer. But Rule 7.1 was adopted in tandem with parallel changes in at least the Appellate and Criminal Rules (memory fails as to the Bankruptcy Rules). If this question is to be taken up, it should be taken up by all of the advisory committees.

Rule 6(a)(3)

Professor Rowe raised several questions not answered by the present rule. Is the clerk's office "inaccessible" if the clerk gets there and opens for business? (Surely it happens that the office is inaccessible from some places but not others; the answer should be clear enough.) What about events that interfere with electronic filing? There is no indication that these questions have caused difficulty in practice, nor reason to believe that they belong on a Style-Substance track.

Rule 6(c)(2)

This rule allows service of an affidavit opposing a motion "at least 1 day before the hearing." That seems to include service by placing the affidavit in the mail. Although that is a bad idea, it would be difficult to find an improving amendment so clear and simple as to fit the Style-Substance track.

Rule 7(a)

Present practice does not treat a counterclaim as a "pleading." It would be easy to add "a counterclaim" as paragraph (3) in Rule 7(a). But the corresponding changes in other rules might prove difficult. Rule 13(a), now and in Style form, says that "a pleading" must state a counterclaim. That embraces the initial answer, the answer to a crossclaim, positions taken among various pairings of parties when a third-party defendant becomes involved, a reply to a counterclaim, and so on "A pleading" describes these events nicely. If a counterclaim becomes a separate pleading, we will need to rework several parts of Rules 13 and 14, perhaps extensively.

Rule 7.1

See Rule 5(d)(4). If we want to address the question, it would be easy to add a new paragraph (c):

> **(c) Failure to File.** If a party fails to file a disclosure statement [when] required under (b)(1), the clerk [may]{must} refuse to accept submissions by that party.

Committee Note: A disclosure statement is essential to ensure that a judge has access to information relevant to possible disqualification. The clerk should refuse to accept any submission by a party who has not filed a disclosure statement [unless exigent circumstances justify filing subject to prompt submission of a disclosure statement].

For the reasons described with Rule 5(d)(4), this amendment should not be attempted on the Style-Substance track. It is not plain that we need a rule — the question did not arise when Rule 7.1 was adopted, either in studying many local rules or in the public comment process. And the other advisory committees must work on the problem.

Rule 8(b)(1)(B)

This is the first appearance of the "global issue" whether "aver" should become "allege," and so on. Here too, the question is whether we should use the Style-Substance track to adopt a change that is proposed as a matter of style only.

Rule 8(c)

Amendment of the affirmative defenses list does not seem appropriate for Style-Substance Even the change from "contributory negligence" might present some difficulties. The safest approach might be to list contributory negligence (still a defense in a few states), comparative negligence, and comparative [or "proportional"] responsibility. Comparative responsibility in all its variations is covered by the catch-all language that opens this subdivisions. Although it seems a shame to carry forward the antique "contributory negligence" phrase without adding more modern relatives, it may be better to bypass this question for now.

Rule 8(d)(2)

The question asked whether Rule 8 should say something about "shotgun," "blunderbuss," or otherwise prolix pleadings. Courts now do dismiss pleadings that are lengthy and confused

beyond reasonable understanding. It is not clear whether this practice needs express support in Rule 8. Whatever might be done, however, seems more important than permitted by the probable limits of the Style-Substance track.

Rule 9(g)

The question is whether to strike Rule 9(g) on the theory that we no longer need to require special statement of an item of special damage. Heim told us that the cases reveal "some wandering around, but there is no big problem." The questions appear to involve determination of what is special damage, not how to plead it. This is not a likely candidate for Style-Substance reform.

Rule 10(c): Adopting Statements

It is a fair question whether the rules should require that a complete new pleading be generated whenever an amendment is made. Similarly, the practice of adopting statements by reference, at least when one pleading adopts a statement in another pleading, may generate unnecessary work. Now that word processing is so easy, it might be better to require complete statement. But these topics seem somewhat beyond the Style-Substance track.

Rule 10(c): Exhibits as Pleading

The Style Rule remains as the present rule: "A copy of a written instrument attached to a pleading is a part of the pleading for all purposes." It might be better to refer to "an exhibit." A videotape of a defamatory telecast would be a good example. But this question becomes tangled with the practice of considering documents that are referred to in a pleading but not attached to it — a complaint on a contract may be dismissed on the basis of a contract provision even though the contract is not attached. It may be better to consider these related topics together for full value. But if we want a Style-Substance amendment:

> **(c) Adoption by Reference; Exhibits.** * * * An exhibit ~~copy of a written instrument~~ attached to a pleading is a part of the pleading for all purposes.

Committee Note: The former rule referred only to a copy of a written instrument attached to a pleading. The amendment opens this provision up to include any exhibit. A videotape of an allegedly defamatory telecast, for example, may properly be considered part of the pleading.

Rule 11(b)

Suggestions were made to establish a parallel between (b)(2), (3), and (4). (3) and (4) require specific identification of fact arguments likely to have evidentiary support and so on. (2) does not require specific identification of arguments to establish new law. One approach would be to delete "specifically so identified" from (3) and (4). Another would be to add it to (2) — either by applying it to anything not warranted by existing law, or by applying it only to an argument for establishing new law. Rule 11 is too sensitive to do either of these things as Style-Substance.

Rule 12

Professor Marcus identified many ways to improve Rule 12. It is possible that one might be found suitable for the Style-Substance track. But the changes often are closely related, if not interdependent. He believes that Rule 12 should be held apart for future reform. Future reform, for that matter, does not seem especially urgent.

Rule 13(a)

The question whether to make a counterclaim an independent pleading is noted with Rule 7. There is little need for the change, and in any event it does not seem suitable for the Style-Substance track.

Rule 13(f)

It may be a good idea to reconsider the relationship between Rule 13(f) and Rule 15. One question is whether the Rule 13(f) standard for amending a pleading to set up an omitted counterclaim is — or should be — different from general Rule 15 standards. Another question is whether all of Rule 15 applies, including provisions for amendment at and after trial and the relation-back provisions. Because limitations doctrine often makes its own accommodations for counterclaims, the relationship to Rule 15(c) may prove particularly tricky. These all are fair questions, but seem outside the Style-Substance track.

Rule 13(i)

Rule 13(i) seems unnecessary to the extent that it simply says that judgment may be entered on a crossclaim or counterclaim under Rule 54(b) It is troubling if it implies that a Rule 54(b) judgment may be entered only after separate trial: suppose, for example, a defendant wins summary judgment on a permissive counterclaim? It also is troubling in the vague implications that arise from "when the court has jurisdiction to do so." But changing any or all of this would stretch the Style-Substance track.

Rule 14(a)(1)

Rule 14 allows third-party claims only against a "nonparty." This limit has created all sorts of unnecessary confusion. Take one simple illustration: The plaintiff sues two defendants. One defendant impleads a nonparty. Literally, the other defendant cannot implead the third-party defendant because it is already a party. But they are not coparties, so a crossclaim seems inappropriate. Nor do they appear to be opposing parties. Courts actually work their way through these problems, but it would be desirable to amend Rule 14. The snag is that the amendments would be complex; they seem well outside the Style-Substance limits.

Similarly, it may be desirable to discard or modify the provision that leave must be obtained to file a third-party complaint later than 10 days after serving the original answer. But identifying the proper change is not easy or beyond controversy.

Rule 14(a)(2)(C)

There was some discussion of the means by which a third-party defendant is to assert against the plaintiff any defense that the third-party plaintiff has to the plaintiff's claim. This does not seem material for the Style-Substance track.

Rule 14(a)(3)

Whether the rule should address a plaintiff's counterclaims against a third-party defendant also seems outside the Style-Substance project.

Rule 14(a)(6)

This is the same as (a)(1): "nonparty" is a problem, but not for the Style-Substance track.

Rule 14(c)(2)

There was a question whether there should be some reference to counterclaims when an admiralty defendant brings in a third party to defend directly against the plaintiff's claim Nothing has been said about this possible problem by the MLA. Rule 14(c)(2) concludes by saying that "the action proceeds as if the plaintiff had sued both the third-party defendant and the third-party plaintiff." That seems an indirect way of saying that the third-party becomes a party defendant, from which Rule 13 obligations flow Probably it is better not to approach this on the Style-Substance track.

Rule 15

A separate Subcommittee is considering many possible Rule 15 revisions, including all of those suggested during the Style project. There is little reason to include Rule 15 in the Style-Substance track unless the subcommittee recommends one or two modest changes as the end of immediate Rule 15 consideration.

Rule 26(a)(1)(D)

Rick Marcus worked diligently, not so long ago, to develop more complex provisions governing initial disclosures by late-added parties. He gave it up as a bad job. There is no apparent reason, much less pressing reason, to reopen the question now. Forget this one.

Rule 26(b)(3)

"A previous statement is either * * * or (ii) a contemporaneous ~~stenographic, mechanical, electrical, or other~~ recording or transcription ~~— or a transcription of it —~~ that recites substantially verbatim the person's oral statement."

Committee Note: What counts for the definition of a statement in Rule 26(b)(3) is that the statement be substantially verbatim. Any mode of recording or transcription that produces such a statement suffices.

On the merits of the current rule, there is little reason to resist this change. But there are two other reasons to go slow.

First, and less painfully, this subject comes close to the topics of computer-based discovery being pursued by the Discovery Subcommittee. It might be better to await the outcome of their recommendations.

Second, there are strong arguments that the current Rule 26(b)(3) definition is backward. A party's statement that does not satisfy this standard is admissible in evidence, and the need for pretrial discovery is still greater because the possibilities of inaccuracy are greater. A nonparty's

statement that does not satisfy this standard is admissible for impeachment, and again the need for pretrial discovery is still greater. Why streamline the expression of a bad idea?

Rule 26(f)(4)(B)

The final sentence of the footnote says it This provision was added to the 2000 amendments to accommodate the E.D.Va. "Rocket Docket." If they are not unhappy, there is little reason to revisit this recent rule.

Some of us wanted to do this as part of the Style-Only track. It should be done.

Rule 30(c)(1)

"the officer must record the testimony by ~~the~~ each method designated under Rule 30(b)(3)~~(A)~~."

Committee Note: The officer taking the deposition is the officer designated in the notice. This officer must direct recording by the method designated in the notice under Rule 30(b)(3)(A), and also by any additional method designated under Rule 30(b)(3)(B).

This one is difficult to call. The suggested drafting resolves one question put in footnote 9: one officer supervises all modes of recording. That may not be the right answer: the notice designates a stenographer; should the stenographer be asked, much less directed, to supervise the videographer brought by another party? But the idea of two or even more "officers" who might disagree with each other is unsettling. The suggested drafting says nothing about the other problem: what happens when the two modes of recording disagree? Nothing in the rules addresses this now, and real work would need to be done to reach a satisfactory answer. We need to think about whether to do this as a possible Style-Substantive Track amendment.

Rule 31(b)(3): send it to the party

"send it to the ~~party~~ attorney who arranged for the transcript or recording, attaching a copy of the questions and of the notice. The attorney must store it under conditions that will protect it against loss, destruction, tampering, or deterioration."

Committee Note: The provision for sending and storing the deposition is made parallel with the provision in Rule 30(f)(1) for a deposition by oral examination.

This one is difficult. The reason for doing it is to achieve a parallel with Rule 30(f)(1). But that leaves us in the unsatisfactory position of Rule 30(f), and perhaps slightly worse. Rule 31 governs depositions on written questions. The purpose of this procedure is to save expense Audio or video recording may save expense; if they are used, the footnote 10 questions do not arise. But what if the deposition is recorded stenographically? Present 31(b) directs the officer to "prepare, certify, and file or mail the deposition." Does "prepare" mean that the officer must transcribe the deposition? Rule 30(c)(1), quoted above, directs the officer to "record the testimony." It does not say that the officer must transcribe it. Perhaps no officer will agree to "record" without a deal to transcribe. But it is uncomfortable to draft a rule on that assumption. In any event, the value of Rule 31 as a money-saving device would be undermined if transcription were required in all cases — the Rule 5(d) change in filing requirements underscores this point. Unless there is evidence of actual confusion in practice, it might be better to avoid this one.

Rule 31(b)(3): attaching a copy of the questions and notice

"send it to the party~~, attaching a copy of the questions and of the notice~~."

Committee Note: The party who noticed the deposition does not need a copy of the questions or notice.

This is a puzzle. If the deposition is not filed, there is little point in attaching a copy of the questions or notice when the deposition is sent to the party who noticed the deposition. If we change the rule to require that the deposition be sent to the attorney who arranged to transcribe the deposition, it may make more sense, although the transcript should show the questions and all parties should have the questions and notice. But if the deposition is filed by court order or incident to use in the action, the questions and notice should be filed as well It seems better to ignore this possible amendment.

Rule 34(a)(1)(A)

The possible addition of "video" recordings has been superseded by the decision to change "phono-records" in the present rule to "recordings." The present Style draft includes video recordings, audio recordings, and whatever ethereal, biological, chemical, or other recording means may be developed.

Any question about addressing "computerized information" falls into the Discovery Subcommittee's ongoing project.

Rule 36(a)(7)

"~~The requesting~~ A party may move to determine the sufficiency of an answer or objection."

or: "The requesting or responding party may move to determine the sufficiency of an answer or objection."

Committee Note: The Committee Note to the 1970 Rule 36 amendments offered excellent reasons why a responding party should be able to move to determine the sufficiency of an answer or objection. There is no reason to inflict the risk of an unintended admission. Rule 36(a)(7) is amended to permit any party to move for the determination.

This seems a very good idea, 33 years overdue and counting. Whether it is so clearly right as to be included in the Style-Substantive track, however, is not so easy to decide. We should undertake this change only if the Discovery Subcommittee is prepared to defend it as beyond reasonable controversy.

Rule 36(b)

"~~Subject to Rule 16(d) and (e), t~~The court may permit withdrawal or amendment of an admission that has not been incorporated in a pretrial order if it would promote the presentation of the merits of the action and if * * *."

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

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

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March 29, 2004

MEMORANDUM TO ADVISORY COMMITTEE ON CIVIL RULES

SUBJECT: *Global Issues and Recent Suggestions from Loren Kieve, American Bar Association Litigation Section*

Judge Rosenthal requested the Standing Style Subcommittee to identify "global" issues in Rules 1 through 63 that appear to be easy and noncontroversial, which could be addressed at the committee's April meeting.

The Style Subcommittee recommends the resolution of 18 global issues The attached summary chart lists each global issue, includes its location, and briefly describes the recommended resolution. A copy of restyled Rules 1 through 63 follows, showing the resolution of the global issues in highlighted text. In addition, the Style Subcommittee has reviewed the recent suggestions and comments on Rules 38 through 63 submitted by Loren Kieve, the representative of the American Bar Association Litigation Section. The subcommittee has proposed revisions to Rules 38-63 in light of them, which are bracketed and highlighted in bold lettering.

John K. Rabiej

Attachments

AO-OJP

March 18, 2004

Civil Rules Style Project — Global Drafting Issues Proposed for Resolution in April, 2004

Issue	Where the Issue Arises in Current Rules	Resolution
"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) "
"in its discretion"	6(b), 16(a), 23(f), 39(b), 43(f), 62(b), 62(c), 71A(h)	Uniformly omit "in its discretion."
"federal statute" / "United States statute" / "Act or act of Congress" Which term(s) should be used to refer to laws enacted by the Congress of the United States?	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)	**Need clarification from Style. Proposal is to uniformly use "federal statute."** *Current Status* • *Style 1-37 & 45 use "United States statute," **except** for 24, which uses "Act of Congress "* • *Style 38-63 use "federal statute."*
"federal law" / "United States law" / "Constitution [and/or] laws of the United States" Which term should be used to refer generally to all federal law regardless of source?	4(e), 4(f), 4(h), 4(k)(2), 4 1(b), 17(b), 28(a), 28(b), 43(a), 71A(h), 83(b)	**Need clarification from Style. Proposal is to uniformly use "federal law."** *Current Status* •*Style 4(e), 4(f), 4(h), 4(k)(2) and 43(a) use "federal law "* •*Style 4(k)(2) and 17(b) use "United States Constitution and laws "* •*Style 4.1(b), 28(a), and 28(b) use "United States law."*

Issue	Where the Issue Arises in Current Rules	Resolution
"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)
"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.
"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
"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)
"minor" / "infant"	*"infant"* – 4(e), 4(f), 4(g), 17(c), 55(b)(1), 55(b)(2) *"minor"*– 27(a)(2)	Uniformly use "minor" (per Rowe)

Issue	Where the Issue Arises in Current Rules	Resolution
"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."
"on motion" / "upon motion"	The issue arises throughout the rules.	Uniformly use "on motion."
"state in which the district court is located" / "state in which the district court is held"	*"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."
"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.)
"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." *Note* 4(d)(2) and 4(m) have minor variants (43(a) omits the reference to good cause.)

Issue	Where the Issue Arises in Current Rules	Resolution
"secure" / "obtain[ed][ing][able]"	*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[] " **Except:** *Rule 1*, because of tradition, and *Rule 62(c) and (h)*, which would either need to retain "secure" or use a different phrasing
"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."
"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 12 still uses "is not obeyed" because the sentence is in passive voice.
"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)	**Need clarification from Style.** Style 1-63 uniformly uses "jury trial," **except for 38 and 39**, which still use both "jury trial" and "trial by jury." It may be that the contents of 38 and 39 defy the uniform phrasing that works elsewhere

STYLE 488

Proposed Amendments to the Federal Rules of Civil Procedure

Restyled Rules 1 through 15

May 23, 2003

[March 23, 2004 version – including the Style Subcommittee's proposed "global issue" resolutions in boldface and underlined, with strikeout text to indicate proposed changes to the May 23, 2003 style draft]

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Current wording	Potential Stylistic Revision
I. SCOPE OF RULES — ONE FORM OF ACTION 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 "actions and proceedings." This change does not affect the question 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).]

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.*** The 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 allow a summons to be amended
(b) Issuance. Upon or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal If the summons is in proper form, the clerk shall sign, seal, and issue it to the plaintiff for service on the defendant A summons, or a copy of the summons if addressed to multiple defendants, shall be issued for each defendant to be served	**(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 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 direct 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 direct 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 costs of serving the summons To avoid costs, 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 filed and be accompanied by a copy of the complaint, two copies of a waiver form, and a prepaid means for returning the form,

(C) inform the defendant, using text prescribed in an official form promulgated under Rule 84, of the consequences of waiving and not waiving service,

(D) state the date when the request is sent,

(E) give the defendant a reasonable time of at least 30 days after the request was sent — or at least 60 days if the defendant is addressed outside any judicial district of the United States[1/] — to return the waiver, and

(F) 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 the costs later incurred in making service, together with the costs, including a reasonable **attorney's fee**, of any motion required to collect these service costs

1 The Style Subcommittee would prefer to say "or at least 60 days if sent to the defendant outside any judicial district of the United States "

(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 that, before being served with process, timely returns a waiver need not serve an answer to the complaint until 60 days after the date when the request was sent — or until 90 days after it was sent if the defendant was addressed outside any judicial district of the United States [2] **(4)** ***Results of Filing a Waiver.*** When the plaintiff files a waiver, proof of service is not required and, except as provided in Rule 4(d)(3), 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 of service 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 of 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

2 The Style Subcommittee would prefer to say "until 90 days after it was sent to the defendant outside any judicial district of the United States."

(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 of service 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 of service or if an international agreement allows other means of service, 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 requiring a signed receipt, addressed and sent by the clerk to the individual, or **(3)** by other means not prohibited by international agreement, as the court directs
(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 service of 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 in a place 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 of service 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 Rule 4(f)(2)(C)(i)

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

(1) Service upon the United States shall be effected

(A) by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court or by sending a copy of the summons and of the complaint by registered or certified mail addressed to the civil process clerk at the office of the United States attorney and

(B) by also sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia, and

(C) in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered or certified mail to the officer or agency

(2) (A) Service on an agency or corporation of the United States, or an officer or employee of the United States sued only in an official capacity, is effected by serving the United States in the manner prescribed by Rule 4(i)(1) and by also sending a copy of the summons and complaint by registered or certified mail to the officer, employee, agency, or corporation

(B) Service on an officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States — whether or not the officer or employee is sued also in an official capacity — is effected by serving the United States in the manner prescribed by Rule 4(i)(1) and by serving the officer or employee in the manner prescribed by Rule 4(e), (f), or (g)

(3) The court shall allow a reasonable time to serve process under Rule 4(i) for the purpose of curing the failure to serve

(A) all persons required to be served in an action governed by Rule 4(i)(2)(A), if the plaintiff has served either the United States attorney or the Attorney General of the United States, or

(B) the United States in an action governed by Rule 4(i)(2)(B), if the plaintiff has served an officer or employee of the United States sued in an individual capacity

(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 the summons and of the complaint 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 an agency or corporation of the United States, or an officer or employee of the United States 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 an officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States (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 an officer or employee of the United States sued in an individual capacity

(j) Service Upon Foreign, State, or Local Governments. **(1)** Service upon a foreign state or a political subdivision, agency, or instrumentality thereof shall be effected pursuant to 28 U S C § 1608 **(2)** Service upon a state, municipal corporation, or other governmental organization subject to suit shall be effected by delivering a copy of the summons and of the complaint to its chief executive officer or by serving the summons and complaint in the manner prescribed by the law of that state for the service of summons or other like process upon any such defendant	**(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 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 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 ~~United States~~ **federal** statute **(2)** ***Federal Claim Outside State-Court Personal Jurisdiction.*** With respect to 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 **federal law** ~~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.*** Failure to prove service does not affect the validity of service The court may allow proof of service to be amended
(m) Time Limit for Service. If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, **upon motion** or **on its own initiative** after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time, provided that if the plaintiff **shows good cause** for the failure, the court shall extend the time for service for an appropriate period This subdivision does not apply to service in a foreign country pursuant to subdivision (f) or (j)(1)	**(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 direct 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 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 ~~**United States**~~ **federal** statute Notice to claimants of the property must be given in the manner specified by the statute or by serving a summons under this rule **(2)** ***State Law.*** Upon a showing that personal jurisdiction over a defendant cannot, in the district where the action is brought, be **obtained** with reasonable efforts by serving a summons under this rule, the court may assert jurisdiction over the defendant's assets found within the district Jurisdiction is acquired by seizing the assets under the circumstances and in the manner provided by ~~**state law in that district**~~ **the law of the state where the district court is located.**

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)(B) 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 ~~United States~~ **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 ~~United States~~ **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 at a location within 100 miles from the place 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.*** Except as 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, service — if required before the filing of an answer, claim, or appearance — must be made on the person who had custody or possession of the property at the time of seizure

(b) Making Service.

(1) Service under Rules 5(a) and 77(d) on a party represented by an **attorney** is made on the **attorney** unless the court orders service on the party

(2) Service under Rule 5(a) is made by

(A) Delivering a copy to the person served by

(i) handing it to the person,

(ii) leaving it at the person's office with a clerk or other person in charge, or if no one is in charge leaving it in a conspicuous place in the office, or

(iii) if the person has no office or the office is closed, leaving it at the person's dwelling house or usual place of abode with someone of suitable age and discretion residing there

(B) Mailing a copy to the last known address of the person served Service by mail is complete on mailing

(C) If the person served has no known address, leaving a copy with the clerk of the court

(D) Delivering a copy by any other means, including electronic means, consented to in writing by the person served Service by electronic means is complete on transmission, service by other consented means is complete when the person making service delivers the copy to the agency designated to make delivery If authorized by local rule, a party may make service under this subparagraph (D) through the court's transmission facilities

(3) Service by electronic means under Rule 5(b)(2)(D) is not effective if the party making service learns that the attempted service did not reach the person to be served

(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,

(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)** the filing of any such pleading and service on the plaintiff or plaintiffs constitutes due 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.*** A party must, within a reasonable time after service, file any paper after the complaint that is required to be served, and must include a certificate of 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 to permit **entry onto land**, and requests for admission **(2)** ***How Made—In General.*** A paper is filed by delivering it **(A)** to the court[1] 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, permit 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 paper filed by electronic means in compliance with a local rule is a written paper for purposes of these rules **(4)** ***Acceptance by Clerk.*** The clerk must not refuse to accept a paper presented for filing solely because it is not in the form prescribed by these rules or by a local rule or practice

1 The Style Subcommittee does not believe that "court" is needed to clarify the meaning of "clerk" in this context

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 6. Time	Rule 6. Computing and Extending Time
(a) Computation. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk of the district court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation As used in this rule and in Rule 77(c), "legal holiday" includes New Year's Day, Birthday of Martin Luther King, Jr , Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the **state in which the district court is held**	**(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)** ***Exclusion 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 ~~**in its discretion**~~ 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 may not extend the time for acting under Rules 50(b) and (c)(2), 52(b), 59(b), (d), and (e), and 60(b), except as those rules permit
(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 period, or **(C)** when a court order — which a party may, **for good cause**, apply for ex parte — sets a different period **(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.** Whenever a party must or may act within a prescribed period after service and service is made under Rule 5(b)(2)(C), (D), (E), or (F), 3 days are added to the period [1]

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

1 The Advisory Committee report to the Standing Committee includes a recommendation to publish a substantive revision of the current Rule 6(e) If the Standing Committee decides to publish the Rule 6(e) proposal, a decision on whether to include the substantive revision in restyled Rule 6(d) should be made at the time when restyled Rules 1-15 are to be published

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[1/], **(6)** an answer to a third-party complaint, and **(7)** if the court orders, a reply to an answer or a third-party answer
(b) Motions and Other Papers. **(1)** An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion **(2)** The rules applicable to captions and other matters of form of pleadings apply to all motions and other papers provided for by these rules **(3)** All motions shall be signed in accordance with Rule 11	**(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	

1 The Style Subcommittee omitted as redundant the qualifying phrase "if a person not an original party is brought in under Rule 14 "

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.** A nongovernmental corporate party must file two copies of a disclosure statement that [1] **(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 for Filing; 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 upon any change in the required information

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

1 In endorsing this change, the Style Subcommittee notes that deleting "in a district court" is inconsistent stylistically (though not substantively) with the disclosure statement provisions of the Appellate Rules and Criminal Rules, which specify the court The subcommittee, however, believes that this kind of inconsistency should be permitted to assure the internal consistency of the Civil Rules (which otherwise assume that the forum is a district court)

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) Claims for Relief.** A pleading that states a claim for relief — whether an original claim, a counterclaim, a **crossclaim**, or a third-party claim — must contain **(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 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 averments[1] asserted against it by an opposing party **(2)** ***Denials — Responding to the Substance.*** A denial must fairly respond to the substance of the averment denied **(3)** ***General and Specific Denials.*** A party that intends in good faith to deny all the averments of a pleading — including the jurisdictional grounds — may do so by a general denial A party that does not intend to deny all the averments must either specifically deny designated averments or generally deny all except those specifically admitted **(4)** ***Denying Part of an Averment.*** A party that intends in good faith to deny only part of an averment 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 averment must so state, and the statement has the effect of a denial **(6)** ***Effect of Failing to Deny*** An averment — other than one relating to the amount of damages — is admitted if a responsive pleading is required and the averment is not denied If a responsive pleading is not required, an averment is considered denied or avoided

1 As a global comment, the Style Subcommittee would prefer to use "allegation" or "allege," rather than "averment" or "aver," wherever the latter appear in the current rules

(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	
(e) Pleading to Be Concise and Direct; Consistency. **(1)** Each averment of a pleading shall be simple, concise, and direct No technical forms of pleadings 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 averment must be simple, concise, and direct No technical form is required **(2)** ***Alternative Statements of a Claim or Defense.*** A party may include 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 substantial 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 aver (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 negative averment,[1] 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, Mistake; Conditions of Mind.** In averring fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake Malice, intent, knowledge, and other conditions of mind of a person may be averred generally
(c) **Conditions Precedent.** In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred A denial of performance or occurrence shall be made specifically and with particularity	(c) **Conditions Precedent.** In pleading conditions precedent, it suffices to aver 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 aver 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 averment 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

1 The Style Subcommittee would prefer to say "a specific denial"

(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 Certain Admiralty and Maritime Claims 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.*** Amending a pleading to add or withdraw a designation is governed by Rule 15 **(3)** ***Designation for Appeal.*** A case that includes an admiralty or maritime claim within this subdivision is an admiralty case within 28 U S C § 1292(a)(3)

COMMITTEE NOTE

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, the title of the action, the file number, and a Rule 7(a) designation In the complaint, the title of the action must include the names of all parties, in other pleadings, the title may name the first party on each side and 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 it 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 attached 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 not represented by an **attorney** 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 or to cause unnecessary delay or expense, **(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, likely will have evidentiary support after a reasonable opportunity for further investigation or discovery, and **(4)** the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief

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

(1) How Initiated.

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

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

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

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

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

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

(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 (subject to the conditions below) 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 may not be filed with or presented to the court if the challenged paper, claim, defense, contention, allegation, 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 party prevailing on the motion the reasonable expenses and **attorney's fees** incurred in presenting or opposing 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 monetary sanctions

(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 — By Pleading or Motion; Motion for Judgment on the Pleadings; Pretrial Hearing; Consolidating and Waiving Defenses
(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 Present a Responsive Pleading.** **(1)** ***In General.*** Except when another time is prescribed by this rule or a ~~**United States**~~ **federal** statute, the time for filing 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 if the defendant was addressed outside any judicial district of the United States [1] **(B)** A party must serve an answer to a counterclaim within 20 days after being served with the pleading that states the counterclaim **(C)** A party must serve an answer to a **crossclaim** within 20 days after being served with the pleading that states the **crossclaim** **(D)** 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 or **crossclaim** — or an answer to a counterclaim — 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 acts or omissions occurring in connection with duties performed on behalf of the United States must serve an answer to a complaint or **crossclaim** — or an answer to a counterclaim — within 60 days after service on the officer or employee or service on the United States attorney, whichever is later

1 The Style Subcommittee would prefer to say "within 90 days after it was sent to the defendant outside any judicial district of the United States "

(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 permitted 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 If a pleading sets forth a claim for relief that does not require a responsive pleading, an adverse party may assert at trial any defense to that claim
(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) **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	*[Present 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 permitted but which is so vague or ambiguous that the party cannot reasonably prepare a response The motion 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 make any other order that it considers appropriate
(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 take this action **on its own** or **on a motion** made by a party either before responding to the pleading or, if not permitted to respond, 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) Consolidating Defenses in a Motion.** **(1)** ***Consolidating Defenses.*** A motion under this rule may include any other motion allowed under 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 may not make another motion under this rule raising a defense or objection that was available to the party at the time of 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 Waived.*** A party waives any defense under Rule 12(b)(2)-(5) by **(A)** omitting the defense from a motion in the circumstances described in Rule 12(g)(2), or **(B)** neither making the defense by motion under this rule nor including it in a responsive pleading or in an amendment permitted by Rule 15(a)(1) as a matter of course **(2)** ***When to Raise Certain Defenses.*** Failure to state a claim upon which relief can be granted, to join an indispensable party under Rule 19, or to state a legal defense to a claim may be raised **(A)** in any pleading permitted or ordered under Rule 7(a), **(B)** by any 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 determined 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) 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 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 of whom[1/] 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 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 any claim against an opposing party
(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 exceeding in amount or differing in kind from that 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

1/ The Style Subcommittee would prefer, on style grounds, to use "over whom" rather than "of whom." The subcommittee cannot conceive of a substantive difference between the two phrases

(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 it orders separate trials under Rule 42(b), a court may render judgment on a counterclaim or **crossclaim** under Rule 54(b) when the court 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	**(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, and the third-party defendant must 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

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	(6) ***Third-Party Complaint In Rem.*** If 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, where appropriate, a person who asserts a right under Supplemental Rule C(6)(b)(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)(b)(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 permitted and the action is not yet on the trial calendar **(2)** ***Other Amendments.*** Except as allowed in Rule 15(a)(1), a party may amend its pleading only with the adverse party's written consent or by leave of court 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)** ***During Trial.*** If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may allow the pleadings to be amended The court should freely allow an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that admitting 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.*** When issues not raised by the pleadings are tried by the parties' express or implied consent, they 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 the unpleaded issues But failure to amend does not affect the result of the trial of these issues

(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 May Relate 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 permits relation back, **(B)** the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set forth — or attempted to be set forth — 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, but for a mistake concerning[1/] the proper party's identity, the action would have been brought against it **(2)** ***Notice to the United States.*** When the United States or a United States agency or officer 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, upon just terms, permit a party to serve a supplemental pleading setting forth 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 And if the court considers it advisable, the court may order that the adverse party plead to the supplemental pleading by a specified time

1 The Style Subcommittee would prefer to use "about" rather than "concerning "

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."

Style Draft of Rules 16 through 22 and 23.1 through 25, Federal Rules of Civil Procedure

As revised by the Advisory Committee on Civil Rules

And further revised and annotated by the Style Subcommittee of the Committee on Rules of Practice and Procedure

(with Committee Notes)

November 13, 2003

[March 23, 2004 version – including the Style Subcommittee's proposed "global issue" resolutions in boldface and underlined, with strikeout text to indicate proposed changes to the November 13, 2003 style draft]

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 direct 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 may also include **(4)** modifications of the times for disclosures under Rules 26(a) and 26(e)(1) and of the extent of discovery to be permitted, **(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 as inappropriate, the district judge — or a magistrate judge when authorized by local rule — must issue a scheduling order **(A)** after receiving the parties' report under Rule 26(f), or **(B)** after consulting with the parties' **attorneys** and any unrepresented parties at a scheduling conference or by telephone, mail, or other suitable means **(2)** ***Time to Issue.*** The judge must issue the scheduling order as soon as practicable, but in any event within 120 days after any defendant has been served with the complaint and within 90 days after any defendant has appeared **(3)** ***Contents of the Order.*** **(A)** *Required Contents* The scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions **(B)** *Permitted Contents* The scheduling order may **(i)** modify the timing of disclosures under Rules 26(a) and 26(e)(1), **(ii)** modify the extent of discovery, **(iii)** 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 by leave of the judge

(c) Subjects for Consideration at Pretrial Conferences. At any conference under this rule consideration may be given, and the court may take appropriate action, with respect to **(1)** the formulation and simplification of the issues, including the elimination of frivolous claims or defenses, **(2)** the necessity or desirability of amendments to the pleadings, **(3)** the possibility of **obtaining** admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence, **(4)** the avoidance of unnecessary proof and of cumulative evidence, and limitations or restrictions on the use of testimony under Rule 702 of the Federal Rules of Evidence, **(5)** the appropriateness and timing of summary adjudication under Rule 56, **(6)** the control and scheduling of discovery, including orders affecting disclosures and discovery pursuant to Rule 26 and Rules 29 through 37,	**(c) Attendance and Matters for Consideration at Pretrial Conferences.** **(1)** ***Attendance.*** A represented party must authorize at least one of its **attorneys** to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a **pretrial conference.** If appropriate, the court may require that a party or its representative be present or reasonably available by telephone to consider possible settlement **(2)** ***Matters for Consideration.*** At any **pretrial conference** under this rule, 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 regarding 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 fixing 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 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)** directing the presentation of evidence early in the trial regarding 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 enter 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 an order made 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.*** The court, **on motion** or **on its own**, may issue any just orders, including those authorized by Rule 37(b)(2)(B), (C), and (D), 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 a scheduling or other **pretrial 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 require 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. The Plaintiff and Defendant; Capacity**
(a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought, and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest, and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest	**(a) Real Party in Interest.** **(1)** ***Requirement and Designation.*** 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**~~**United States 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 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 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 district court is located~~where the court is held~~**, 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 **federal law~~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

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 18. Joinder of Claims and Remedies	Rule 18. Joinder of Claims and Remedies
(a) Joinder of Claims. A party asserting a claim to relief as an original claim, counterclaim, **cross-claim**, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as the party has against an opposing party	**(a) Joinder of Claims.** A party asserting a claim, counterclaim, **crossclaim**, or third-party claim may join, as independent or alternate 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 Remedies; 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 render 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 Reasons for Nonjoinder.** When asserting a claim for relief, a party must state **(1)** the names, if known, of any persons who are required to be joined if feasible but are not joined, and **(2)** the reasons for not joining them
(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 legal or factual question 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 legal or factual question 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 an existing party against embarrassment, delay, expense, or other prejudice arising from the joinder of 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 Any claim against a party may be severed and adjudicated separately

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 permitted by Rule 20 The remedy it provides is in addition to — and does not supersede or limit — the remedy provided by 28 U S C §§ 1335, 1397, and 2361 Actions 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 23.1. 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 that 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) the efforts, if any, made 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 directs

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.** Upon timely motion, the court must permit anyone to intervene who **(1)** is given an unconditional right to intervene by a **federal statute**~~**United States statute**~~, or **(2)** claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposition 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 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.*** Upon timely motion, the court may permit anyone to intervene who **(A)** is given a conditional right to intervene by a **federal statute**~~**United States statute**~~, or **(B)** has a claim or defense that shares a common question of law or fact with the main action **(2)** ***By a Government Officer or Agency.*** Upon 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 forth 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** ~~an Act of Congress~~ 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 must be dismissed with respect to the decedent **(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**, allow 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**, directs 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 an 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.** **(1)** ***Automatic Substitution.*** 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 **(2)** ***Officer's 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 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.

STYLE 490

Style Draft of Rules 26 through 37 and 45, Federal Rules of Civil Procedure

As revised by the Advisory Committee on Civil Rules and further revised by the Style Subcommittee of the Committee on Rules of Practice and Procedure

(with Committee Notes)

November 13, 2003

[March 23, 2004 version – including the Style Subcommittee's proposed "global issue" resolutions in boldface and underlined, with strikeout text to indicate proposed changes to the November 13, 2003 style draft]

V. DEPOSITIONS AND DISCOVERY **Rule 26. General Provisions Governing Discovery; Duty of Disclosure**	**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 Disclosures.*** **(A)** *In General* Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated by the parties 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, 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 — and 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 of damages 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

(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 categories of 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~~counsel~~** 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 sufficiency 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 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 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 completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures

(2) Disclosure of Expert Testimony. **(A)** In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence **(B)** Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor, the data or other information considered by the witness in forming the opinions, any exhibits to be used as a summary of or support for the opinions, the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years, the compensation to be paid for the study and testimony, and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years	**(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 Rules of Evidence 702, 703, or 705 **(B)** *Written Report* Unless otherwise stipulated by the parties 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 whose duties as an employee of the party regularly involve giving expert testimony The report must contain **(i)** a complete statement of all opinions the witness will express and of 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 for 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 for Disclosing Expert Testimony* A party must make these disclosures at the times and in the sequence that the court orders Absent a stipulation by the parties 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 appropriate 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 directs 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 that states 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

(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 the claim or defense of any party — 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)(i), (ii), and (iii)
(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 permitted by these rules or by local rule if it determines that **(i)** the discovery sought is unreasonably cumulative or duplicative, or can be **obtained** from some other source that is more convenient, less burdensome, or less expensive, **(ii)** the party seeking discovery has had ample opportunity by discovery in the action to **obtain** the information, or **(iii)** the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the discovery in resolving the issues **(C)** *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	**(3)** ***Trial Preparation: Materials.*** **(A)** *Documents and Tangible Things* Generally, a party may not discover documents and tangible things otherwise discoverable under Rule 26(b)(1) and 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 the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, **obtain** the substantial equivalent of the materials 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 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

made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded	(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* Generally, 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 **(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)** with respect to discovery under Rule 26(b)(4)(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 things not produced or disclosed — and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection

(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 be 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 The court may, **for good cause**, make any order that justice requires 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)** directing that a deposition be sealed and opened only on court order, **(G)** directing that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way, and **(H)** directing that the parties simultaneously file specified documents or information enclosed 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 categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by order, or by agreement of the parties **(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	**(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 correcting information has not otherwise been made known to the other parties during the discovery process or in writing, and **(B)** as ordered by the court
testimony of an expert from whom a report is required under subdivision (a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert, and any additions or other changes to this information shall be disclosed by the time the party's disclosures under Rule 26(a)(3) are due **(2)** A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing	**(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	**(f) Conference of the Parties; Planning for Discovery.** **(1)** ***Conference Timing.*** Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(B) or when otherwise ordered, the parties must confer as soon as practicable — and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b) **(2)** ***Conference Content; Parties' Responsibilities.*** In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, make or arrange for the disclosures required by Rule 26(a)(1), 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 should be entered by the court under Rule 26(c) or under Rule 16(b) and (c)
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	**(4)** ***Expedited Schedule.*** If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule **(A)** require the conference to occur fewer than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b), and **(B)** require the written report outlining the discovery plan to be filed fewer than 14 days after the conference, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference

(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	**(g) Signing Disclosures, Discovery Requests, Responses, and Objections.** **(1)** ***Signature Required; Effect of Signature.*** Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one **attorney** of record in the **attorney**'s own name — or by the party personally, if unrepresented — and must state the signer's address 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
(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	**(B)** with respect to a discovery request, response, or objection, it is **(i)** not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the litigation costs, **(ii)** consistent with these rules and warranted by existing law or a good-faith argument for extending, modifying, or reversing existing law, and **(iii)** neither unreasonable nor unduly burdensome or expensive, given the needs of the case, prior discovery 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.**	**(2)** ***Failure to Sign.*** The court must strike an unsigned disclosure, request, response, or objection unless the omission is corrected promptly after being 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 is made in violation of 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 caused by the violation, including a reasonable **attorney's fee.**

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.

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."

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.***[1] 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 under Rule 4 If that service cannot be made with due diligence, the court may order service by publication or otherwise The court must appoint an **attorney** for a person not served under Rule 4, the **attorney** may cross-examine the deponent if the person is not otherwise represented Rule 17(c) applies if any expected adverse party is a **minor** or is incompetent
(3) Order and Examination. If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories The depositions may then be taken in accordance with these rules, and the court may make orders of the character provided for by Rules 34 and 35 For the purpose of applying these rules to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed **(4) Use of Deposition.** If a deposition to perpetuate testimony is taken under these rules or if, although not so taken, it would be admissible in evidence in the courts of the state in which it is taken, it may be used in any action involving the same subject matter subsequently brought in a United States district court, in accordance with the provisions of Rule 32(a)	**(3)** ***Order and Examination.*** If satisfied that perpetuating the testimony may prevent a failure or delay of justice, the court must enter 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 according to these rules, and the court may make orders like those authorized by Rules 34 and 35 References in these rules to the court in which an action is pending means, for purposes of this rule, the court in which 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

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1 The following substantive revision of Rule 27(a)(2) was published for public comment in August 2003

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

The published version raises some drafting issues not presented by the style draft For example, the phrase "on the petition" in the first sentence seems unnecessary, and the omission of "that" between "If" and "service" in the third sentence makes the rule less clear, and "not served" appears to be repeated unnecessarily in the fourth sentence This also presents the larger issue of how to deal with pending and recent changes The Style Subcommittee prefers the style-draft version and intends to seek conforming changes to the published draft after public comment has been received

(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 district court in which a judgment has been rendered may, if an appeal has been taken or may be taken, allow a party to depose witnesses to perpetuate their testimony for use in the event of further proceedings in the district court **(2)** ***Motion.*** The party who wants to perpetuate testimony may move in the district court for leave to take the depositions, upon the same notice and service as if the action were pending in that court The motion must show **(A)** the names and addresses of the deponents and the expected substance of each one's testimony, and **(B)** the reasons for perpetuating their testimony **(3)** ***Court Order.*** If the court finds that perpetuating the testimony may prevent a failure or delay of justice, the court may allow the depositions to be taken and may make orders like those authorized by Rules 34 and 35 The depositions may be taken and used as any other deposition taken in an action pending in the district court
(c) Perpetuation by Action. This rule does not limit the power of a court to entertain an action to perpetuate testimony	**(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 the jurisdiction of the United States, a deposition must be taken before **(A)** an officer authorized to administer oaths either by **federal law** ~~**United States law**~~ or by the law in the place of examination, or **(B)** a person appointed by the court in which 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** ~~**United States 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, in an appropriate case, 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.*** A deposition notice or a commission must designate by name or descriptive title the person before whom the deposition is to be taken 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] " **(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, upon any notice, and in the manner specified — and may then 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 ten depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by 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 deponent's 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 forth 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 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 noticing the deposition must state in the notice the method for recording the testimony Unless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means The party noticing the deposition bears the recording costs Any party may arrange to transcribe a deposition that was taken nonstenographically **(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 by the person noticing the deposition That party bears the expense of the additional record or transcript unless the court orders otherwise **(4)** ***By Remote Means.*** The parties may agree in writing — or the court may **on motion** order — that a deposition be taken by telephone or other remote electronic means For the purpose of this rule and Rules 28(a), 37(a)(1), 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 agree 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 set forth 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 describe with reasonable particularity the matters for examination The named organization must then designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and it may set forth the matters on which each person designated will testify A subpoena must advise a nonparty organization of its duty to make this designation The designees must testify about information known or reasonably available to the organization This paragraph does not preclude depositions by any other procedure authorized in these rules

(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, 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 in 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 agreed by the parties or authorized by the court, 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 **(2)** ***Sanction.*** The court may impose an appropriate sanction — including reasonable costs and **attorney's fees** incurred by any party — on any 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 party or deponent 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.*** If requested 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 Officer's Certificate.*** The officer must indicate in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must append any changes the deponent makes during the period allowed

(f) Certification and Delivery by Officer; Exhibits; Copies. **(1)** The officer must certify that the witness was duly sworn by the officer and that the deposition is a true record of the testimony given by the witness This certificate must be in writing and accompany the record of the deposition Unless otherwise ordered by the court, the officer must securely seal the deposition in an envelope or package indorsed with the title of the action and marked "Deposition of [here insert name of witness]" and must promptly send it to the **attorney** who arranged for the transcript or recording, who must store it under conditions that will protect it against loss, destruction, tampering, or deterioration Documents and things produced for inspection during the examination of the witness, must, upon the request of a party, be marked for identification and annexed to the deposition and may be inspected and copied by any party, except that if the person producing the materials desires to retain them the person may (A) offer copies to be marked for identification and annexed to the deposition and to serve thereafter as originals if the person affords to all parties fair opportunity to verify the copies by comparison with the originals, or (B) offer the originals to be marked for identification, after giving to each party an opportunity to inspect and copy them, in which event the materials may then be used in the same manner as if annexed to the deposition Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case	**(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 securely 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 agreed by the parties or ordered by the court, the officer must retain 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 reasonable **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 ten depositions being taken under this rule or Rule 30 by the plaintiffs, or by the defendants, or by 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 deponent's 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 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 **(c) Notice of Filing.** When the deposition is filed the party taking it shall promptly give notice thereof to all other parties	**(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 proceed promptly 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. 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 any trial or hearing, 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 rules of evidence if the deponent were present and testifying, and **(C)** the use is permitted by paragraphs (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 permitted 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 trial or hearing 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 application 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 allow the deposition to be used

A deposition taken without leave of court pursuant to a notice under Rule 30(a)(2)(C) shall not be used against a party who demonstrates that, when served with the notice, it was unable through the exercise of diligence to **obtain counsel** to represent it at the taking of the deposition, nor shall a deposition be used against a party who, having received less than 11 days notice of a deposition, has promptly upon receiving such notice filed a motion for a protective order under Rule 26(c)(2) requesting that the deposition not be held or be held at a different time or place and such motion is pending at the time the deposition is held	**(5)** ***Limitations on Use.*** **(A)** *Deposition Taken on Short Notice* A deposition may not be used against a party that, 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) may not be used against a party that demonstrates 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 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 permitted by the Federal Rules of Evidence

(b) Objections to Admissibility. Subject to the provisions of Rule 28(b) and subdivision (d)(3) of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying	**(b) Objections to Admissibility.** Subject to Rules 28(b) and 32(d)(3), an objection may be made at a trial or hearing 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	(d) **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 it is 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) 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	**(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 **(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	**(C)** *Objection to a Written Question* An objection to the form of a written question under Rule 31 is waived if it is 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 the question **(4)** ***To Completing and Returning the Deposition.*** An objection to how the testimony has been transcribed or how the deposition has been prepared, signed, certified, sealed, endorsed, transmitted, filed, or otherwise dealt with by the officer is waived unless a motion to suppress is made promptly after the defect 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 "at the trial or upon the hearing of a motion or an interlocutory proceeding." The amended rule describes the same events as "any trial or hearing "

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.*** Without leave of court or stipulation by the parties, 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 otherwise proper 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 that is available to the party **(2)** ***Answering Each Interrogatory.*** Each interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath **(3)** ***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 ordered by the court or be stipulated by the parties under Rule 29 **(4)** ***Objections.*** All 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 permitted under the 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, inspecting, 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 permit the interrogating party to locate and identify them as readily as the responding party could, and **(2)** giving the interrogating party a reasonable opportunity to examine, audit, and inspect the records and to make copies, compilations, abstracts, or summaries

COMMITTEE NOTE

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(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(1)(2) embodies the current meaning of Rule 33 by omitting "necessarily "

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

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)** ***Form 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 ordered by the court or stipulated by the parties under Rule 29 **(B)** *Responding to Each Item* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection to the request, including the reasons **(C)** *Objections* An objection to part of a request must specify the part and permit inspection with respect to 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 redundant reminder of Rule 37(a) procedure in the final sentence 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 in which 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 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 The court **on motion** may make an order against a party requiring delivery of a report on	**(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 made 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 made 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 from the person examined

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 a report, and if the examiner's 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) 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 ordered by the court or stipulated by the parties under Rule 29 **(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

a party qualify an answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that the party has made reasonable inquiry and that the information known or readily **obtainable** by the party is insufficient to enable the party to admit or deny A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request, the party may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why the party cannot admit or deny it The party who has requested the admissions may move to determine the sufficiency of the answers or objections Unless the court determines that an objection is justified, it shall order that an answer be served If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served The court may, in lieu of these orders, determine that final disposition of the request be made at a **pre-trial conference** or at a designated time prior to trial The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion	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 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 any objection must be stated (6) ***Matter Presenting a Trial Issue.*** A party who believes that a request concerns a matter presenting a genuine issue for trial must not — on that ground alone — object to the request, subject to Rule 37(c), the party may deny the matter or state why it cannot admit or deny (7) ***Motion Regarding the Sufficiency of Answers and Objections.*** 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 Upon 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 designated time before trial Rule 37(a)(5) applies to the 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(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 for purposes of the pending action only, is not an admission for any other purpose, and cannot be used against the party in any other proceeding

COMMITTEE NOTE

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

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	**(a) Motion For an Order Compelling Disclosure or Discovery.**
(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	**(1)** ***In General.*** On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery
	(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
(2) Motion.	**(3)** ***Specific Motions.***
(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)** *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 The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to make the disclosure in an effort to **obtain** it without court action

(B) If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to **secure** the information or material without court action When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order **(3) Evasive or Incomplete Disclosure, Answer, or Response.** For purposes of this subdivision an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond	**(B)** *To Compel a Discovery Response* A discovering party may move for an order compelling an answer, designation, production, or inspection 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 **obtain** the information or material without court action 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 Rule 37(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 may 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 make 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 may 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 enter any protective order authorized under Rule 26(c) and may, after giving an **opportunity to be heard**, apportion the reasonable expenses incurred regarding 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,	**(b) Failure to Comply with a Court Order.** **(1)** ***Sanctions in the District Where the Deposition Is Taken.*** If a deponent fails to be sworn or to answer a question after being ordered to do so by the court where the discovery is taken, 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 in which the action is pending may make 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,
(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,	**(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 does not 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 Amend an Earlier Response, or to Admit.** **(1)** ***Failure to Disclose or Amend.*** If a party fails to disclose the information required by Rule 26(a), or to provide the additional or correcting information required by Rule 26(e), the party is not permitted to use as evidence at a trial, at a hearing, or on a motion 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 require 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 in which 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* The motion for sanctions must 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** 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 the development and submission of 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

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* Every subpoena must **(i)** state the court from which it issued, **(ii)** state the title of the action, the court in which it is pending, and its civil-action number, **(iii)** command each person to whom it is directed to do the following at a specified time and place attend and testify, or produce and permit the inspection and copying of designated documents or tangible things in that person's possession, custody, or control, or permit the inspection of premises, and **(iv)** set forth the text of Rule 45(c) and (d) **(B)** *Command to Produce Evidence or Permit Inspection* A command to produce evidence or to permit inspection may be included in a subpoena commanding attendance at a deposition, hearing, or trial, or may be set forth 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)**[1] ***Issued from Which Court.*** A subpoena must issue as follows **(A)** for attendance at a trial or hearing, from the **court for the district** where the hearing or trial is to be held, **(B)** for attendance at a deposition, from the **court for the district** where the deposition is to be taken, stating the method for recording the testimony, and **(C)** for production and inspection, 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**, as an officer of the court, may also issue and sign a subpoena from **(A)** a court in which the **attorney** is authorized to practice, or **(B)** a court for a district where a deposition is to be taken or production is to be made, if the **attorney** is authorized to practice in the court in which the action is pending

1 This style draft incorporates the proposed amendment of Rule 45(a)(2) that was published for public comment in August 2003, except that the phrase "in the name of the court" in has been restyled to "from the court " If the proposed amendment is adopted, further style revisions should be made when restyled Rules 26-37 & 45 are published

(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 on a named person requires delivering a copy to that person and, if the subpoena commands that person's attendance, tendering to that person the fees for one day's attendance and the mileage allowed by law Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies If the subpoena commands the production of documents or tangible things or the inspection of premises before trial, then before it is served on the named person, a notice must be served on each party as provided in Rule 5(b)
(2) 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 court from which it is issued, **(B)** outside that district but within 100 miles of the place of the deposition, hearing, trial, production, or inspection specified in the subpoena, **(C)** within the state of the court from which it is issued if a state statute or court rule permits serving a subpoena issued by a state court of general jurisdiction sitting in the place of the deposition, hearing, trial, production, or inspection specified in the subpoena, or **(D)** that the court authorizes, if a **federal statute** ~~**United States statute**~~ so provides, **upon proper application and for good cause.** **(3)** ***Service in a Foreign Country.*** 28 U S C § 1783 governs the issuance and service of a subpoena directed to a United States national or resident who is in a foreign country **(4)** ***Proof of Service.*** Proving service, when necessary, requires filing with the court from which the subpoena issued a statement showing the date and manner of service and the names of the persons served The statement must be certified by the server

(c) 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 must impose on a party or **attorney** who fails to comply with the duty an appropriate sanction, which may include lost earnings and reasonable **attorney's fees**
(2)(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 and permit the inspection and copying of 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* Subject to Rule 45(d)(2), a person commanded to produce and permit inspection and copying 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 court from which the subpoena issued for an order compelling production, inspection, or copying **(ii)** Inspection and copying may be done only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance

(3)(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 court from which a subpoena issued must quash or modify a subpoena that (i) fails to allow a reasonable time to comply, (ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from the place where that person resides, is employed, or regularly transacts business in person — except that, subject to Rule 45(c)(3)(B)(iii), such a person may be commanded to attend a trial by traveling from any place within the state where the trial is held, (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies, or (iv) subjects a person to undue burden
(B) 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 court from which it issued may, on timely motion, quash or modify the subpoena if it requires (i) disclosure of a trade secret or other confidential research, development, or commercial information, (ii) disclosure of an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party, or (iii) travel of more than 100 miles to attend trial by a person who is neither a party nor a party's officer, as a result of which the person will incur substantial expense (C) *Specifying Conditions as an Alternative* In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the party on whose behalf the subpoena was issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and ensures that the subpoenaed person will be reasonably compensated

(d) Duties in Responding to 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 organize and label them according 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 the claim, and **(B)** describe the nature of the documents, communications, or things not produced in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the applicability of the privilege or protection
(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 court from which a subpoena issued may hold in contempt a person who, having been served, **fails** without adequate excuse **to obey** the subpoena A nonparty's **failure to obey~~disobedience~~** must be excused if the subpoena purports to require the nonparty to attend or produce at a place not within the limits of Rule 45(c)(3)(A)(ii)

COMMITTEE NOTE

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.

STYLE 494

Style Draft of Rules 38 through 63 of the Federal Rules of Civil Procedure

As revised by Subcommittees A and B of the Advisory Committee on Civil Rules and further revised by the Style Subcommittee of the Committee on Rules of Practice and Procedure

[Additions are underlined, deletions are ~~overstruck~~]

[with boldface/bracketed material to indicate Style Subcommittee revisions in response to Kieve comments; and boldface/underlined material to indicate proposed resolution of "global issues"]

[and with draft Committee Notes]

March 23, 2004

VI. TRIALS **Rule 38. Jury Trial of Right**	**TITLE VI. TRIALS** **Rule 38. Right to Jury Trial; Demand**
(a) Right Preserved. The right of **trial by jury** as declared by the Seventh Amendment to the Constitution or as given by a **statute of the United States** shall be preserved to the parties inviolate	**(a) Right Preserved.** The right of **trial by jury** as declared by the Seventh Amendment to the Constitution — or as **[provided ~~given~~]**[1] by a **federal statute** — is preserved to the parties inviolate
(b) Demand. Any party may demand a **trial by jury** of any issue triable of right by a jury by (1) serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue, and (2) filing the demand as required by Rule 5(d) Such demand may be indorsed upon a pleading of the party	**(b) Demand.** On any issue triable of right by a jury, a party may demand a **jury trial** by **(1)** serving the other parties with a written demand — which may be **[made ~~stated~~]**[2] in a pleading — no later than 10 days after the last pleading directed to the issue is served, and **(2)** filing the demand as required by Rule 5(d)
(c) Same: Specification of Issues. In the demand a party may specify the issues which the party wishes so tried, otherwise the party shall be deemed to have demanded **trial by jury** for all the issues so triable If the party has demanded **trial by jury** for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action	**(c) Specifying Issues.** In its demand, a party may specify the issues that it wishes to have tried by a jury, otherwise, it is deemed to have demanded a **jury trial** on all the issues so triable If the party has demanded **a jury trial** on only some issues, any other party may — within 10 days of being served with the demand or within ~~any~~ **[~~shorter lesser~~]**[3] 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** ~~trial by jury~~ unless its demand is properly served and filed A demand **[that complies with this rule]**[4] may be withdrawn only if the parties consent

1 [The Style Subcommittee made this change based on the Kieve suggestion]

2 [Kieve/Kimble and Cooper agree on this change The Style Subcommittee agrees]

3 [Kieve/Kimble and Cooper agree on this change The Style Subcommittee agrees]

4 [**Kimble:** Kieve suggested taking out "that complies with this rule " I have thought more about this and now realize that we have created an inconsistency Ed and I had argued for "a proper demand" in the second sentence Note that in the first sentence we use "properly" instead of "as required by this rule " Shouldn't we do the same thing in the second sentence to replace "as herein provided" in the current rule? Dean Kane noted that "proper" would "create the negative implication that improper [demands] cannot be withdrawn " See Style 468 But then at our meeting in Phoenix we apparently realized that that's what the current rule says it refers to a demand "made as herein provided [i e , that complies with this rule, i e , a proper demand] So we changed to "a demand that complies with this rule " I see no difference between that and "a proper demand " I know it's late, but I think we should fix the inconsistency between the first and second sentences Also, note Ed's comment on 39(b)

Cooper: I am sympathetic to Joe's persistent desire "A proper demand ~~that complies with this rule~~ may be withdrawn only * * * " But I think it was Dean Kane who led the charge to defeat this change It may be a bit late to reopen the discussion]

[The Style Subcommittee does not recommend deleting "that complies with this rule "]

(e) Admiralty and Maritime Claims. These rules shall not be construed to create a right to **trial by jury** of the issues in an admiralty or maritime claim within the meaning of Rule 9(h)	**(e) Admiralty and Maritime Claims.** These rules do not create a right to a **jury trial** on issues in an admiralty or maritime claim within the meaning of Rule 9(h)

COMMITTEE NOTE

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

Rule 39. Trial by Jury or by the Court	Rule 39. Trial by Jury or by the Court
(a) By Jury. When **trial by jury** has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action The trial of all issues so demanded shall be by jury, unless (1) the parties or their **attorneys** of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court **upon motion** or **of its own initiative** finds that a right of **trial by jury** of some or of all those issues does not exist under the Constitution or **statutes of the United States**	**(a) After a Demand.** When **trial by jury** has been demanded under Rule 38, the action must be designated on the docket as a jury action The trial on all issues so demanded must be by jury unless **(1)** the parties or their **attorneys** file a written stipulation to a nonjury trial or so stipulate on the record, or **(2)** the court, — **on motion** or **on its own**, — finds that on some or all of those issues there is no right to a **jury trial** under the Constitution or **federal statutes**
(b) By the Court. Issues not demanded for **trial by jury** as provided in Rule 38 shall be tried by the court, but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court **in its discretion upon motion** may order a trial by a jury of any or all issues	**(b) When No Demand Is Made** Issues on which a **jury trial** is not **[properly]** demanded **[~~under Rule 38~~]**[1] 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 ~~but was not~~
(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~~requires~~ 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.

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1 [Kimble/Kieve would delete "under Rule 38" The Style Subcommittee agrees]

Cooper: How about a compromise, parallel to the discussion of Rule 38(d) — perhaps it is easier to reopen the question here? "Issues on which a jury trial is not properly demanded ~~under Rule 38~~ are to be tried * * *"? The Style Subcommittee agrees]

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~~after~~ notice to the other parties~~, or without request in a manner that the court considers expedient~~ The court must give priority to actions entitled to priority by **federal statute.**[1]

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

1 [Kieve suggested that the rules require that every request to the court be served on all parties, so it is not necessary to add "notice to the other parties " Kimble responded that if Ed agrees, we need a global check on this]

Cooper: Three things First, the Style-Substance Track will propose a simplified Rule 40 that avoids any reference to notice Second, as a global matter I do not understand Rule 5(a), in its present form or as styled I would not assert that it requires service of everything, indeed, "similar paper" impliedly excludes dissimilar papers Third, we have the intensifier problem in a different guise Often it seems useful to remind of the notice duty But if we do that sometimes, failure to do so always may create puzzling negative implications The only satisfactory global resolution would be to state notice obligations comprehensively in Rule 5 and to say nothing of notice anywhere else I doubt that is within the legitimate reach of the Style Project, and expect that it would draw much anguished comment (and enhance the inevitable attempted rebellions) to make the attempt]

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 **[~~at any time~~]**[1] before the adverse party serves either an answer or a motion for summary judgment, or **(ii)** a stipulation of dismissal signed by all parties who have appeared **(B)** *Effect* Unless the notice or stipulation states otherwise, the dismissal is without prejudice But if the plaintiff previously dismissed any action in federal or state court based on or including the same claim, a notice of dismissal operates as an adjudication on the merits
(2) By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice	**(2)** ***By Court Order; Effect.*** Except as provided in (1), an action may be dismissed at the plaintiff's **[request ~~instance~~]**[2] only by court order, on terms that the court considers proper If a defendant has pleaded**~~served~~** a counterclaim before being served with the plaintiff's motion to dismiss, the action must not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice

1 **Cooper:** This is another intensifier problem Loren and Joe are right — the meaning is not changed by saying "a notice of dismissal ~~at any time~~ before the adverse party serves * * * " But the emphasis is familiar Deletion will cause some distress

[The Style Subcommittee recommends deleting "at any time" based on the Kieve suggestion]

2 [Kieve/Kimble and Cooper agree on this change The Style Subcommittee agrees]

(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 **[thean]**[3] action or any claim against it Unless the dismissal order specifies otherwise, a dismissal under this subdivision (b) and any dismissal not provided for in this rule — except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19 — operates as an adjudication on the merits
(c) Dismissal of Counterclaim, Cross-Claim, or Third-Party Claim. The provisions of this rule apply to the dismissal of any counterclaim, **cross-claim**, or third-party claim A voluntary dismissal by the claimant alone pursuant to paragraph (1) of subdivision (a) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing	**(c) Dismissing a Counterclaim, Crossclaim, or Third-Party Claim.** This rule applies to a dismissal of any counterclaim, **crossclaim**, or third-party claim A claimant's voluntary dismissal under (a)(1)(A)(i) must be made before a responsive pleading is served or, if there is none, before evidence is introduced at the trial or hearing

3 [Kieve/Kimble and Cooper agree on this change The Style Subcommittee agrees]

(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 ~~may~~ **(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].**[1]

COMMITTEE NOTE

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

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

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1 [Kieve suggested deleting "complied" and substituting "has done so "

Cooper: This may sound silly Is it possible to "comply with" an order by means that are not the same as "done so"? Suppose the plaintiff makes arrangements to pay — is that the same as paying? On balance, I am nervous about this change The present rule is "complied with the order " "has complied" in the Style draft clearly makes no change "has done so" might change the meaning

The Style Subcommittee does not recommend deleting "complied "]

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

COMMITTEE NOTE

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

Rule 43. Taking of Testimony	Rule 43. Taking Testimony
(a) Form. In every trial, the testimony of witnesses shall be taken in open court, unless a **federal law**, these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court provide otherwise The court may, **for good cause shown** in compelling circumstances and upon appropriate safeguards, permit presentation of testimony in open court by contemporaneous transmission from a different location	**(a) In Open Court.** [**At trial** ~~**In every trial**~~],[1] the witnesses' testimony must be taken in open court unless a **federal law,** the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise In compelling circumstances and with appropriate safeguards, the court may allow testimony in open court by contemporaneous transmission from a different location
(b) [Abrogated.]	**(b)**
(c) [Abrogated.]	**(c)**
(d) Affirmation in Lieu of Oath. Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof	**(b) Affirmation Instead of Oath.** When these rules require an oath, a solemn affirmation suffices
(e) Evidence on Motions. When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or deposition	**(c) Evidence on a Motion.** When a motion relies on facts outside the record, the court may hear the matter on affidavits~~But the court may direct that the matter~~or may order that it be heard wholly or partly on oral testimony or on depositions
(f) Interpreters. The court may appoint an interpreter of its own selection and may fix the interpreter's reasonable compensation The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs, **in the discretion of the court.**	**(d) Interpreter.** The court may appoint an interpreter of its choosing, fix reasonable compensation to be paid from funds provided by law or by one or more parties, and tax the compensation as costs

COMMITTEE NOTE

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

1 **Kimble:** (See Garner) [Cooper agrees with this change] [The Style Subcommittee agrees]

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 ~~Authentication~~. (1) *Domestic Record.* The following evidences ~~authenticates~~[1] an official record — or an entry in it — that is **[otherwise]**[2] admissible and is kept within the United States, any state, district or commonwealth, or any territory subject to the administrative or judicial jurisdiction of the United States **(A)** an official publication of the record, or **(B)** a copy attested by the officer with legal custody of the record — or by the officer's deputy — and accompanied by a certificate that the officer has custody The certificate must be made under seal **(i)** by a judge of a court of record of the district or political subdivision where the record is kept, or **(ii)** by any public officer with a seal of office and with official duties in the district or political subdivision where the record is kept

1 Professor Rowe was asked to research whether there is a substantive difference between using "authenticates" in Rule 44(a)(1) and (b) on proving official records, or using some form of the word "evidence" as a verb as in the current rule He reported that the treatises "use the ideas of evidence, authentication, and proof interchangeably, although that doesn't mean they're identical " He did not find any case annotations that seemed to bear on the question Based on Garner's statement in his second edition at 333 that "evidence" and "proof" "are not synonymous," and concerns expressed at the meeting of Subcommittee A, Professor Rowe suggests using "evidence" in some verb form in 44(a)(1) and (a)(2), and also in (a)(2)(C)(ii)

2 [**Kimble:** On Rule 44(a)(1) and (2), I was uncertain about Kieve's suggestion to delete "otherwise," but raised them for consideration

Cooper: I share Joe's uncertainty Present Rule 44(a)(1) tells how to "evidence" an official record "when admissible for any purpose " The Style Draft is "that is otherwise admissible " The Style Draft is subtly different from the present rule — it gives greater emphasis to the proposition that proper evidence of (or "authenticating") an official record does not of itself make the record admissible I like the Style Draft as an improvement Deleting "otherwise" removes the emphasis At risk of identifying it as an intensifier, I would keep it The same holds for Style 44(a)(2)(A)]

[The Style Subcommittee does not recommend deleting "otherwise "]

(2) Foreign. A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof, or a copy thereof, attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position (i) of the attesting person, or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation	**(2)** ***Foreign Record.*** **(A)** *In General* The following evidences ~~authenticates~~ a foreign official record — or an entry in it — that is **[otherwise]**[3] admissible **(i)** an official publication of the record, **(ii)** a copy attested by an authorized person and accompanied by a final certification of genuineness~~, as described in (B), or~~ **(iii)** a record and attestation certified as provided in a treaty or convention to which the United States and a country where the record is located are parties, or ~~(iv)~~**(iii)** other means ordered by the court under (C)
A final certification may be made by a secretary of embassy or legation, consul general, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, **for good cause shown**, (i) admit an attested copy without final certification or (ii) permit the foreign official record to be evidenced by an attested summary with or without a final certification The final certification is unnecessary if the record and the attestation are certified as provided in a treaty or convention to which the United States and the foreign country in which the official record is located are parties	**(B)** *Final Certification of Genuineness* A final certification must certify the genuineness of the signature and official position of the attester or of any foreign official whose certificate of genuineness relates to the attestation or is in a chain of certificates of genuineness relating to the attestation A final certification may be made by a secretary of a United States embassy or legation, by a consul general, vice consul, or consular agent of the United States, or by a diplomatic or consular official of the foreign country assigned or accredited to the United States ~~Final certification is unnecessary if the record and attestation are certified as provided in a treaty or convention to which the United States and the foreign country where the record is located are parties~~ **(C)** *Other Means of Proof* If all parties have had a reasonable opportunity to investigate a foreign record's authenticity and accuracy, the court may, **for good cause**, either **(i)** admit an attested copy without final certification, or **(ii)** allow the record to be proved by an attested summary with or without a final certification

3 See p 11, note 2

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

COMMITTEE NOTE

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

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

COMMITTEE NOTE

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

Rule 46. Exceptions Unnecessary	Rule 46. Objecting to a Ruling or Order
Formal exceptions to rulings or orders of the court are unnecessary, but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which the party desires the court to take or the party's objection to the action of the court and the grounds therefor, and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice the party	A formal exception to a ruling or order is unnecessary When the ruling or order is requested or made, a party need only state ~~—and give the grounds for —~~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[1] 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

1 **Kimble note:** As an aside, I am starting to lean toward using "that" with "party" throughout the rules See Garner under "Who (D) " Possible exception When another "that" appears in the sentence

Cooper: This is Style But my inclination begins with Garner's report under "Who (D) " He tells us that we can use "that" when referring to persons, but "Editors tend * * * to prefer" "who " Joe's position reflects the fact that a party may be either a person or an entity "That" is permissible for a real person and preferred for an entity My inclination is to prefer to dignify persons as "who," paying a slight price in promoting entities also to "who" status But whatever the choice, this is a global question to be given a uniform answer

[The Style Subcommittee suggests adding this to the list of global drafting issues]

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 ~~examine prospective jurors or may allow the parties or their attorneys to do so~~ If the court examines the jurors, it must permit~~allow~~ the parties or their **attorneys** to ask **[any~~such~~]** additional questions **[~~as~~ it]** considers proper,[1] or must itself ask those questions
(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.

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1 [Kieve/Kimble and Cooper agree on these two changes The Style Subcommittee agrees]

Cooper: I am not disposed to do anything about it now, but note that present Rule 47(a) provides somewhat more guidance than Style (a) on one question Style (a) says the court must allow the parties to ask any additional questions it considers proper, or must itself ask those questions How is the court to decide whether the questions are proper? Under the Style version, the only apparent way is to have the parties tell the court the very questions they wish to have put to the jury Under the present rule, the court shall permit the parties to supplement the examination by "further inquiry," not "further questions " That suggests that the court may authorize a general line of inquiry, without first reviewing each proposed question The Style draft avoids repeating "it considers proper," but we may pay a price

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

COMMITTEE NOTE

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

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

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1 **Cooper:** I would keep "several " This makes it clear that all available alternatives must be covered when the jury is given prepared form findings, not questions to answer [I wonder how often this practice is actually used?]

[The Style Subcommittee agrees with the Kieve suggestion to delete "several "]

2 **Kimble:** "so it can" is what I had I still like it better

Cooper: I am among those who resisted "so it can " But I am not enamored of "as needed for it to " Do we have a rule that forbids this "To enable the jury to make its findings, the court must instruct it on each submitted issue"? [Cf the edit that Joe accepts in 53(b)(1) "Before appointing a master, the court must give * * * "] If not that, "must instruct the jury ~~as needed for~~ to enable it to make its findings * * *"? "Enable" is the word of the present rule, and it is not archaic Let's keep it

{The Style Subcommittee agrees with "so it can "]

3 [Kieve/Kimble and Cooper agree on this change The Style Subcommittee agrees]

(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 w~~W~~ith Answers to Interrogatories.** **(1)** ***In General*** The court may submit to the jury [~~**appropriate**~~][1] forms for a general verdict, together with written interrogatories on one or more issues of fact that must be decided The court must instruct the jury as needed for it to render a general verdict and answer the interrogatories in writing, and must direct the jury to do both **(2)** ***Verdict and Answers Consistent.*** When the general verdict and the answers are consistent, the court must approve, for entry under Rule 58~~(a)(2)~~, 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~~(b)(2)~~, 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.

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1 **Cooper:** I am inclined to agree with deleting "appropriate " Who would think we authorize submission of inappropriate verdict forms?
[Kieve/Kimble and Cooper agree on this change The Style Subcommittee agrees]

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

1 [Kimble and Cooper agree on this change The Style Subcommittee agrees]

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

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

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

COMMITTEE NOTE

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

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

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

Rule 51. Instructions to Jury; Objections; Preserving a Claim of Error	Rule 51. Instructions to the Jury; Objections; Preserving a Claim of Error
(a) Requests (1) A party may, at the close of the evidence or at an earlier reasonable time that the court directs, file and furnish to every other party written requests that the court instruct the jury on the law as set forth in the requests **(2)** After the close of the evidence, a party may **(A)** file requests for instructions on issues that could not reasonably have been anticipated at an earlier time for requests set under Rule 51(a)(1), and **(B)** with the court's permission file untimely requests for instructions on any issue	**(a) Requests.** **(1)** ***Before or at the Close of the Evidence*** At the close of the evidence or at any earlier reasonable time that the court directs, a party may file and furnish to every other party written requests for the jury instructions it wants the court to give **(2)** ***After the Close of the Evidence.*** After the close of the evidence, a party may **(A)** file requests for instructions on issues that could not reasonably have been anticipated by an earlier time that the court set for requests, and~~or~~ **(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 **[after the trial begins and]**[1] before the jury is discharged

1 [Kieve suggested deleting "after the trial begins and "]

Kimble: If we can, delete "after the trial begins and "

Cooper: Literally, we may change meaning if we delete "after the trial begins and " Without those words, the court could instruct the jury after the jury is sworn but before trial begins in any other way It might be argued that the instructions begin the trial, but the argument would have to be made and defended Apart from that, the rule was written this way to emphasize that courts have this authority It was hoped to teach a lesson — to encourage consideration of something that otherwise might disappear without thought Let's not make the change

The Style Subcommittee does not recommend this deletion]

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

COMMITTEE NOTE

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

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

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

COMMITTEE NOTE

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

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

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

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

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

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

1 [Kieve/Kimble and Cooper agree on this change The Style Subcommittee agrees]

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

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

1 **Kimble:** "give" – see Rule 53(b)(1) [Cooper agrees with this change] [The Style Subcommittee agrees]

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

COMMITTEE NOTE

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

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

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

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

COMMITTEE NOTE

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

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

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1 [Kieve suggested deleting "relating to "]

Cooper: The choice between "relating to" and "concerning" does not seem guided by anything in Garner's Dictionary or American Usage To my eye, "relating to" is a bit more openended I would stick with the Style draft as it is

Kimble: I don't see any appreciable difference And there's a style gain it eliminates the first "to" so that the second "to" connects better with "refer "

[The Style Subcommittee agrees with Kieve's suggestion to delete "relating to" and substitute "concerning "]

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

1 [Kieve suggested deleting "as these rules provide "]

[**Cooper:** I would not delete "as these rules provide " Suppose the defendant does something not authorized by the rules, and argues that it amounts to otherwise defending? One example might be filing a parallel action in another court]

[The Style Subcommittee recommends deleting "as these rules provide " **Dean Kane notes** I disagree with Cooper The courts in interpreting "otherwise defend" have not limited actions taken "under the rules" despite that language in the current rule Sometimes they have utilized the provision (which is designed to limit the clerk's authority to enter a default) to note that (b) must be invoked because of things that occur during settlement talks, for example For numerous examples, see the discussion in sec 2686 of F, P & P treatise Thus, the deletion would be consistent with what courts actually are doing]

(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)	~~(d) Parties Entitled to a Default Judgment. This rule applies whether the party entitled to a default judgment is a plaintiff, a third-party plaintiff, a crossclaimant, or a counterclaimant~~
(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)~~(e)~~ **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.

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~~made~~ at any time after 20 days from commencement of the action or after the adverse party serves a motion for summary judgment

(b) For Defending Party. A party against whom a claim, counterclaim, or **cross-claim** is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof	**(b) By a Defending Party.** A party against whom relief is sought may move **[at any time]**, with or without supporting affidavits, for summary judgment on all or part of the claim **[~~The motion may be made at any time.~~]**[1]

1 [Kieve/Kimble and Cooper agree on this change The Style Subcommittee agrees]

(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 hearing day An adverse party may serve opposing affidavits before the hearing day The judgment sought should~~must~~ be rendered ~~promptly~~ 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~~Partial Summary Judgment~~.*** If summary judgment is not rendered on the whole action, the court should, to the extent practicable, determine what material facts are not genuinely at issue The court should so determine by examining the pleadings and evidence before it and by interrogating the **attorneys** It should then enter an order specifying what facts are not genuinely at issue~~the facts that appear without substantial controversy~~, including ~~the extent to which~~ the amount of damages or other relief ~~is not at issue~~ The facts so specified must be treated as established in the action **(2)** ***Establishing Liability~~Interlocutory Summary Judgment~~*** An interlocutory summary judgment may be rendered on **[~~the~~] liability [~~issue~~]**[1] alone, even if there is a genuine issue on the amount of damages

1 [Kieve/Kimble and Cooper agree on this change The Style Subcommittee agrees]

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party	**(e) Affidavits; Further Testimony.** **(1)** ***In General.*** Supporting and opposing affidavits must be made on personal knowledge, set forth facts that would be admissible in evidence, and **[affirmatively]**[1] show that the affiant is competent to testify on the matters stated If a paper or part of a paper is referred to in an affidavit, a sworn or certified copy must be attached or served with the affidavit The court may permit an affidavit to be supplemented or opposed by depositions, answers to interrogatories, or **[additional ~~further~~]**[2] affidavits **(2)** ***Adverse Party's Obligation to Respond*** ~~***Response by an Adverse Party***~~ When a motion for summary judgment is properly made and supported, an adverse party may not rely merely on allegations or denials in its own pleading, rather, the adverse party's response must — by affidavits or as otherwise provided in this rule — set forth specific facts showing a genuine issue for trial If the adverse party does not so respond, summary judgment should~~may~~, if appropriate, be entered against that party

1 **Cooper:** I would retain "affirmatively " The affidavit must in some way address directly with witness's competence Without this word, lawyers will argue that competence is implicitly shown by the substantive content of the affidavit

Kimble: I had a question mark next to the change I'd just note that we use a bare "show" in other places Is there a difference here?

[The Style Subcommittee recommends retaining "affirmatively "]

2 [Kieve/Kimble and Cooper agree on this change The Style Subcommittee agrees]

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

COMMITTEE NOTE

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

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

Former Rule 56(c), (d), and (e) stated circumstances in which summary judgment "shall be rendered," the court "shall if practicable" ascertain facts existing without substantial controversy, and "if appropriate, shall" enter summary judgment In each place "shall" is changed to "should." It is established that although there is no discretion to enter summary judgment when there is a genuine issue as to any material fact, there is discretion to deny summary judgment when it appears that there is no genuine issue as to any material fact. *Kennedy v. Silas Mason Co* , 334 U S. 249, 256-257 (1948). [Many lower court decisions are gathered in 10A Wright, Miller & Kane, Federal Practice & Procedure: Civil 3d, § 2728] "Should" in amended Rule 56(c) recognizes that courts will seldom exercise the discretion to deny summary judgment when there is no genuine issue as to any material fact Similarly sparing exercise of this discretion is

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1 Kieve asked whether we really need "promptly" here Kimble was not sure

Cooper: I am sympathetic to Joe's question whether we can delete "promptly " Remember we took it out of Rule 56(c), dealing with a far more important matter — entry of summary judgment "Promptly," moreover, is akin to a docket priority The Judicial Conference is opposed to docket priorities Deletion will cause some protest

[The Style Subcommittee recommends deleting "promptly "]

appropriate under Rule 56(e)(2). Rule 56(d)(1), on the other hand, reflects the more open-ended discretion to decide whether it is practicable to determine what material facts are not genuinely at issue.

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

Rule 57. Declaratory Judgments	Rule 57. Declaratory Judgment
The procedure for **obtaining** a declaratory judgment pursuant to Title 28, U S C , § 2201, shall be in accordance with these rules, and the right to **trial by jury** may be demanded under the circumstances and in the manner provided in Rules 38 and 39 The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar	These rules govern the procedure for **obtaining** a declaratory judgment under 28 U S C § 2201 A **[party may demand a] jury trial** **[~~may be demanded~~]**[1] under Rules 38 and 39 The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate The court may order a speedy hearing of a declaratory-judgment action and may advance it on the calendar

COMMITTEE NOTE

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

1 [Kieve/Kimble and Cooper agree on this change The Style Subcommittee agrees]

Rule 58. Entry of Judgment	Rule 58. Entering Judgment
(a) Separate Document. **(1)** Every judgment and amended judgment must be set forth on a separate document, but a separate document is not required for an order disposing of a motion **(A)** for judgment under Rule 50(b), **(B)** to amend or make additional findings of fact under Rule 52(b), **(C)** for **attorney fees** under Rule 54, **(D)** for a new trial, or to alter or amend the judgment, under Rule 59, or **(E)** for relief under Rule 60	**(a) Separate Document.** Every judgment and amended judgment must be set forth in a separate document, but a separate document is not required for an order disposing of a motion **(1)** for judgment under Rule 50(b), **(2)** to amend or make additional findings of fact under Rule 52(b), **(3)** for **attorney's fees** under Rule 54, **(4)** for a new trial, or to alter or amend the judgment, under Rule 59, or **(5)** for relief under Rule 60

(2) Subject to Rule 54(b) **(A)** unless the court orders otherwise, the clerk must, without awaiting the court's direction, promptly prepare, sign, and enter the judgment when **(i)** the jury returns a general verdict, **(ii)** the court awards only costs or a sum certain, or **(iii)** the court denies all relief, **(B)** the court must promptly approve the form of the judgment, which the clerk must promptly enter, when **(i)** the jury returns a special verdict or a general verdict accompanied by interrogatories, or **(ii)** the court grants other relief not described in Rule 58(a)(2)	**(b) Entering Judgment.** **(1)** ***Without the Court's Direction*** Subject to Rule 54(b) and unless the court orders otherwise, the clerk must, without awaiting the court's direction, promptly prepare, sign, and enter the judgment when **(A)** the jury returns a general verdict,; **(B)** the court awards only costs or a sum certain, or **(C)** the court denies all relief.; **(2)** ***Court's Approval Required*** ~~***After the Court Approves the Form.***~~ Subject to Rule 54(b), the court must promptly approve the form of the judgment, which the clerk must promptly enter, when **(A)** the jury returns a special verdict or a general verdict with answers to interrogatories, or **(B)** the court grants other relief not described in this subdivision (b)

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

1 **Cooper:** Let me break my rule to comment on a change I accept Joe and Loren are right this should be "or "

[The Style Subcommittee agrees]

(d) Request for Entry. A party may request that judgment be set forth on a separate document as required by Rule 58(a)(1)	**(e) Request for Entry.** A party may request that judgment be set forth ~~mon~~ a separate document as required by (a)

COMMITTEE NOTE

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

Rule 59. New Trials; Amendment of Judgments	Rule 59. New Trial; Amending a Judgment
(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a **trial by jury**, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States, and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States **On a motion** for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment	**(a) In General** **(1)** ***New Trial.*** The court may, **on motion**, grant a new trial on all or some of the issues **(A)** after a **jury trial**, for any reason for which a new trial has heretofore been granted in an action at law in federal court, and **(B)** after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court **(2)** ***Further Action After a Nonjury Trial.*** After a nonjury trial, the court may, **on motion** for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct entry of a new judgment

(b) **Time for Motion.** Any motion for a new trial shall be filed no later than 10 days after entry of the judgment	(b) **Time to File a Motion for a New Trial.** A motion for a new trial must be filed no later than 10 days after the entry of the judgment
(c) **Time for Serving Affidavits.** When a motion for new trial is based on affidavits, they shall be filed with the motion The opposing party has 10 days after service to file opposing affidavits, but that period may be extended for up to 20 days, either by the court **for good cause** or by the parties' written stipulation The court may permit reply affidavits	(c) **Time to Serve Affidavits.** When a motion for new trial is based on affidavits, they must be filed with the motion The opposing party has 10 days after service to file opposing affidavits, but that period may be extended for up to 20 days, either by the court **for good cause** or by the parties' written stipulation The court may allow reply affidavits

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

COMMITTEE NOTE

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

Rule 60. Relief From Judgment or Order	Rule 60. Relief from a Judgment or Order
(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time **of its own initiative** or **on the motion** of any party and after such notice, if any, as the court orders During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court	**(a) Corrections Based on Clerical Mistakes; Oversights and Omissions.** The court may correct a clerical mistake or a mistake arising from oversight or omission, whenever found in a judgment, order, or other part of the record The court may do so **on motion** or **on its own**, with or without notice But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons (1) mistake, inadvertence, surprise, or excusable neglect, (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b), (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party, (4) the judgment is void, (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application, or (6) any other reason justifying relief from the operation of the judgment	**(b) Grounds for Relief From Judgment.** On motion and just terms, the court may relieve a party or [its ~~party's~~][1] legal representative from a final judgment, order, or proceeding for the following reasons **(1)** mistake, inadvertence, surprise, or excusable neglect, **(2)** newly discovered evidence that, with due diligence, could not have been discovered in time to move for a new trial under Rule 59(b), **(3)** fraud (whether intrinsic or extrinsic), misrepresentation, or misconduct by an adverse party, **(4)** the judgment is void, **(5)** the judgment has been satisfied, released or discharged, it is based on an earlier judgment that has been reversed or vacated, or applying it prospectively is no longer equitable, or **(6)** any other reason that justifies relief

1 **Cooper:** Yes, substitute "its" for "party's " But if we do not make the substitution, we should supply something omitted from the Style draft — "a party or a party's legal representative * * * "

[The Style Subcommittee agrees with substituting "its" for "party's" here **Dean Kane notes:** This goes back to the "who" vs "that" when referring to parties I probably would stick with "a party's legal representative " In any event flag this as a global issue]

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 ~~subdivision~~ (b) must be made within a reasonable time — and, for reasons (1), (2), and (3), within a year after the entry of the judgment or order or the date of the proceeding **(2)** ***Effect on Finality.*** The motion does not affect the finality of a judgment or suspend its operation
This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U S C , § 1655, or to set aside a judgment for fraud upon the court 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	**(d) Independent Action.** This rule does not limit a court's power to entertain an independent action to relieve a party from a judgment, order, or proceeding, to grant relief under 28 U S C § 1655 to a defendant who is not personally notified of the action, or to set aside a judgment for fraud on the court

COMMITTEE NOTE

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

The final sentence of former Rule 60(b) formally "abolished" writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review That provision is deleted; it is no longer necessary to continue to abolish writs so long abolished. Deletion of the abolition does not expand whatever residual uses may have survived the formal abolition. See *Ejelonu v. INS*, 355 F.3d 539, 544-548 (6th Cir.2004). Neither does deletion of the abolition mean that federal courts should adopt state-court uses of these abandoned writs

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 ~~substantial~~ justice requires otherwise, no error in admitting or excluding evidence — or any other error by the court or defect in a party's acts or omissions — is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order At every stage of the proceeding, the court must disregard all errors or defects that do not affect any party's substantial right

COMMITTEE NOTE

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

Rule 62. Stay of Proceedings To Enforce a Judgment	Rule 62. Stay of Proceedings to Enforce a Judgment
(a) Automatic Stay; Exceptions—Injunctions, Receiverships, and Patent Accountings. Except as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action, or a judgment or order directing an accounting in an action for infringement of letters patent, shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal The provisions of subdivision (c) of this rule govern the suspending, modifying, restoring, or granting of an injunction during the pendency of an appeal	**(a) Automatic Stay; Exceptions for Injunctions, Receiverships, and Patent Accountings.** Except as stated in this rule, no execution may issue on a judgment, nor may proceedings be taken for its enforcement, until 10 days have passed after its entry But unless the court orders otherwise, the following are not automatically stayed after being entered, even if an appeal is taken **(1)** an interlocutory or final judgment in an action for an injunction or ~~for~~ a receivership, or **(2)** a judgment or order that directs an accounting in an action for patent infringement

(b) Stay on Motion for New Trial or for Judgment. **In its discretion** and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60, or of a motion for judgment in accordance with a motion for a directed verdict made pursuant to Rule 50, or of a motion for amendment to the findings or for additional findings made pursuant to Rule 52(b)	**(b) Stay Pending the Disposition of a Motion.** On appropriate conditions for the adverse party's security, the court may stay the execution of a judgment — or any proceedings to enforce it — pending disposition of any of the following motions **(1)** under Rule 50, for judgment as a matter of law, **(2)** under Rule 52(b), to amend the findings or for additional findings, **(3)** under Rule 59, for a new trial or to alter or amend a judgment, or **(4)** under Rule 60, for relief from a judgment or order
(c) Injunction Pending Appeal. When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court **in its discretion** may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the **security of the rights** of the adverse party If the judgment appealed from is rendered by a district court of three judges specially constituted pursuant to a **statute of the United States,** no such order shall be made except (1) by such court sitting in open court or (2) by the assent of all the judges of such court evidenced by their signatures to the order	**(c) Injunction Pending an Appeal.** After an appeal is taken from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that **[~~the court considers proper to~~]**[1] **secure** the adverse party's rights If the judgment appealed from is rendered by a statutory three-judge district court, the order must be made either **(1)** by that court sitting in open session, or **(2)** by the assent of all its~~three~~ judges, as evidenced by their signatures~~each of whom must sign the order~~
(d) Stay Upon Appeal. When an appeal is taken the appellant by giving a supersedeas bond may **obtain** a stay subject to the exceptions contained in subdivision (a) of this rule The bond may be given at or after the time of filing the notice of appeal or of **procuring** the order allowing the appeal, as the case may be The stay is effective when the supersedeas bond is approved by the court	**(d) Stay on Appeal.** If an appeal is taken, the appellant may, by supersedeas bond, **obtain** a stay, subject to the exceptions in (a) The bond may be given upon or after filing the notice of appeal or upon **obtaining** the order allowing the appeal The stay takes effect when the court approves the bond

1 [Kieve suggested this deletion]

Kimble: I agree with "terms that secure," if the rest is "unnecessary," as Kieve suggests

Cooper: Do not make the change To say "terms that secure" implies that the terms must secure "That the court considers proper to secure" leaves discretion to find proper something that is less than full security **Kimble response:** Then I'd say "that adequately secure" Isn't the court's discretion explicit in "the court may" and implicit in any event Look at 62(b), for instance We don't say "On conditions that the court considers appropriate " Or look at 62(h) We don't say "conditions that the court considers necessary " This comes up time and again

[The Style Subcommittee recommends deleting "the court considers proper to "]

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

COMMITTEE NOTE

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

Rule 63. Inability of a Judge To Proceed	Rule 63. Judge's Inability to Proceed[1]
If a trial or hearing has been commenced and the judge is unable to proceed, any other judge may proceed with it upon certifying familiarity with the record and determining that the proceedings in the case may be completed without prejudice to the parties In a hearing or trial without a jury, the successor judge shall at the request of a party recall any witness whose testimony is material and disputed and who is available to testify again without undue burden The successor judge may also recall any other witness	If the judge who commenced a hearing or trial cannot proceed, any other judge may proceed with it upon certifying familiarity with the record and determining that the proceedings in the case may be completed without prejudice to the parties In a hearing or trial without a jury, the successor judge must, at a party's request, recall any witness whose testimony is material and disputed, and who is available to testify again without undue burden The successor judge may also recall any other witness

COMMITTEE NOTE

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

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1 Staff notes from the Subcommittee B meeting reflect that there was a style suggestion to change the Rule 63 caption to "When a Judge Cannot Proceed "

Cooper's notes leave no doubt that the change was to be made He notes further "And I think the change is important We discussed whether it was proper to change "unable" in the present rule to "cannot" in the Style rule We agreed to retain "cannot" in the text of the rule It might be argued that carrying forward "inability" in the caption signals that "cannot" means the same thing as "unable " But then why change the rule? If we change the rule, we should change the caption "

Kimble responds: I think the words mean the same thing The form of "When a Judge Cannot Proceed" is not consistent with our other rule titles we don't use clauses I'd almost rather go back to "is unable to " But I really don't think it's a problem

[The Style Subcommittee does not recommend changing the caption]

Rule 50(b): Trial Motion Prerequisite; Hung Jury

Two Rule 50(b) changes are identified in the Rule and Committee Note that follow. The Rules 15-50 Subcommittee recommends the first change and presents the second for consideration without recommendation. The full text of Rule 50(a) is set out without change as a reminder of the rule that a motion for judgment as a matter of law may be made "at any time before submission of the case to the jury." (The Style version is used; it seems sufficiently advanced to use it as the basis for publication in August, ahead of the Style package.)

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

(a) Judgment as a Matter of Law.

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

(A) determine the issue against the party; and

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

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

(b) Renewing 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 subdivision (a), the court is deemed to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after the entry of judgment, or if a complete verdict was not returned by filing a motion no later than 10 days after the jury was discharged ~~and~~ The movant may alternatively request a new trial or join a motion for a new trial under Rule 59. * * *

Committee Note

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

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

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

Evidence introduced at trial after the pre-verdict motion may bear on the post-verdict motion. Evidence favorable to the party opposing the motion must be considered. The court also may consider evidence unfavorable to the party opposing the motion if it is evidence that the jury must believe unless there is reason to believe the opposing party had no fair opportunity to meet that evidence.

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

Discussion

The Subcommittee recommends publication for comment of the change that would permit a post-trial motion for judgment as a matter of law to renew any motion for judgment as a matter of law made during trial. As before, the post-trial motion could be supported only by arguments made to support the trial motion. But the requirement that the post-trial motion be made at the close of all the evidence would be eliminated. The attached memorandum discusses in detail the long history of this requirement. Support for the change may be found in several considerations. In brief statement: (1) The concern that a party seeking judgment as a matter of law should give explicit notice to the adversary so as to ensure one final chance to correct the asserted inadequacy is satisfied. (2) The well-established requirement that there be a motion at the close of all the evidence is, despite its familiarity, all too often ignored in the press of events at trial's close. (3) Responding to the failure to renew at the close the evidence a motion made earlier during the trial, a number of courts of appeals have started to nibble away at the edges of the requirement. The results seem laudable, but the effect is to create uncertainty and to proliferate arguments for expanding the flexibility. A clear answer will reduce litigation over this subject. (4) Despite the Seventh Amendment origins of the present requirement, the requirement represents the process of law reform by fiction. A sound procedure is fully consistent with the Seventh Amendment.

The Subcommittee has not devoted sufficient attention to support a recommendation with respect to the change that would set a deadline for renewing a trial motion for judgment as a matter of law after the jury has failed to agree. Read literally, Rule 50(b) permits renewal of a trial motion at any time up to 10 days after entry of final judgment. But it would be absurd to allow "renewal" of a motion made at the first trial after a second trial has been held. The worst absurdity would occur if the court were to grant the motion based on the insufficiency of the evidence at the first trial, even though sufficient evidence was presented at the second trial. It would be less absurd, but still foolish, to consider and deny the motion only on the basis of the evidence presented at the first trial. There is authority addressing this issue by saying that the motion made at the first trial must be renewed within 10 days after the jury is discharged. 9A Federal Practice & Procedure: § 2357, p. 353. This view may rest on earlier versions of Rule 50(b), which set the general limit at 10 days after the jury is discharged. A series of amendments, culminating in 1995, established uniform time limits based on entry of judgment for Rules 50, 52, and 59. It is easy enough to restore a special pre-judgment time limit for a Rule 50(b) motion "if a complete verdict was not returned." This question seems sufficiently clear to warrant deliberation and disposition without further consideration by the Subcommittee.

If Rule 50(b) is amended to set an explicit time to move after failure to return a complete verdict, the Committee Note might be expanded to offer some advice. Committee Notes are not often used to offer advice, but there might be some value in noting that failure to renew the trial motion in time does not doom the court and parties to a second trial A motion for summary judgment can be made before the second trial. The motion can be supported by pointing to the trial record as the best evidence of what the opposing party can present at trial. The critical difference between this motion, which is both post-trial and pretrial, is that as a motion for summary judgment

the opposing party must be allowed to respond. If the trial record is insufficient but the opposing party can point to evidence that would make the record sufficient, summary judgment would be denied. But if the opposing party cannot supplement an inadequate trial showing after this one final "last chance," summary judgment can dispose of the action.

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

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

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

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

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

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

This proposal renews a question that was considered by the Advisory Committee when it developed the 1991 Rule 50 amendments. Failure to move in this direction appears to have been affected by lingering Seventh Amendment concerns. The concerns may have been affected by considering a proposal that would eliminate any requirement for a pre-verdict motion. There was little doubt then that a more functional approach would provide real benefits. It is difficult to believe that lingering Seventh Amendment concerns dictate the precise point at which a pre-verdict motion must be made during trial. There is at least good reason to believe that the Seventh Amendment permits a more aggressive approach that would ask only whether the issue raised by a post-verdict motion was clearly disclosed to the opposing party before the close of all the evidence. This proposal does not go that far, for the reasons suggested in Part IV.

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

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

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

I Seventh Amendment History

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

> When the verdict was set aside the issues of fact were left undetermined, and until they should be determined anew no judgment on the merits could be given. The new determination, according to the rules of the common law, could be had only through a new trial, with the same right to a jury as before.
>
> * * * [T]his procedure was regarded as of real value, because, in addition to fully recognizing [the right of trial by jury], it afforded an opportunity for adducing further evidence rightly conducing to a solution of the issues. In the posture of the case at bar the plaintiff is entitled to that opportunity, and for anything that appears in the record it may enable her to supply omissions in her own evidence, or to show inaccuracies in that of the defendant * * *. 228 U.S. at 380-381.

The Court also observed that it is the province of the jury to settle the issues of fact, and that while it is the province of the court to aid the jury in the right discharge of their duty, even to the extent of directing their verdict where the insufficiency or conclusive character of the evidence

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

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

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

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

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

> In the Redman case, on the other hand, the trial court expressly reserved its ruling. And
>
> Whether the evidence was sufficient or otherwise was a question of law to be resolved by the court. The verdict for the plaintiff was taken pending the court's rulings on the motions and subject to those rulings. No objection was made to the reservation or this mode of

proceeding, and they must be regarded as having the tacit consent of the parties. 295 U S. at 659

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

As to the Slocum decision,

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

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

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

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

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

II Functional Values

Sixty-five years of fiction is enough. The question today is not whether the Seventh Amendment commands that a post-verdict motion for judgment be supported by a motion at the

close of all the evidence in order to rely on the ancient practice of reserving a ruling.[58] The question is whether there are functional advantages in a close-of-the evidence motion that might be read into the Seventh Amendment and that in any event justify carrying forward the requirement as a matter of good procedure.

The central functional purpose in requiring a close-of-the-evidence motion is to afford the opposing party one final notice of the evidentiary insufficiency. Courts repeatedly state this purpose. The benefits flow to the court and the moving party as well as to the opposing party. The opposing party, given this final notice, may in fact supply sufficient evidence that otherwise would not be provided. But if the opposing party does not fill in the gap, the final clear notice makes it easier for the court after verdict to deny any second opportunity by way of a new trial or dismissal without prejudice. Another advantage may be reflected in statements that the close-of-the-evidence motion enables the trial court to reexamine the sufficiency of the evidence (e.g., Polanco v. City of Austin, 5th Cir.1996, 78 F.3d 968, 973-975). Although courts commonly prefer to take a verdict in order to avoid the retrial that would be required by reversal of a pre-verdict judgment, there are advantages in directing a verdict. These advantages are more likely to be realized if a ruling is prompted by a close-of-the-evidence motion.

The need to point out a perceived deficiency in the evidence is real. But this need ordinarily is satisfied repeatedly as the case progresses toward the close of all evidence. The deficiencies are likely to be pointed out in pretrial conference, by motion for summary judgment, in arguments, and in jury instruction requests. And a motion for judgment as a matter of law at the close of the

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

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

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

plaintiff's case frequently points out deficiencies that are not cured by the examination and cross-examination of the defendant's witnesses. The need to alert the adversary to the claimed deficiencies can be served by many means.

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

III Relaxations of Rule 50(b)

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

Since the 1991 amendments, courts have continued to recognize the close-of-the-evidence motion requirement. The most straight-forward cases are those in which the issue raised by post-verdict motion or by the court was not raised by any pre-verdict motion. See American & Foreign Ins. Co. v. Bolt, 6th Cir.1997, 106 F.3d 155, 159-160. In others, a motion made at the close of the plaintiff's case but not renewed at the close of the evidence is held not sufficient to support a post-verdict motion. E.g., Mathieu v. Gopher News Co., 8th Cir.2001, 273 F.3d 769, 774-778, stating that Rule 50(b) cannot be ignored simply because its purposes have been fulfilled; Frederick v. District of Columbia, D.C.Cir.2001, 254 F.3d 156, ruling that a motion at the close of the plaintiff's case cannot stand duty as a close-of-the-evidence motion merely because the district court took the motion under advisement.

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

Forfeiture and plain error principles have been applied to the close-of-the evidence motion requirement Issues not raised in a close-of-the-evidence motion have been considered on a post-verdict motion when the opposing party did not object to the post-verdict motion on the ground that

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

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

A somewhat similar principle is involved in cases that treat a Rule 51 request for jury instructions as satisfying the functions of a close-of-the-evidence motion. See Bartley v. Euclid, Inc., 5th Cir.1998, 158 F.3d 261, 275 (objection to any instruction on an issue not supported by evidence); Bay Colony, Ltd. v. Trendmaker, Inc., 5th Cir.1997, 121 F.3d 998 (objection to instruction on same grounds as advanced in motion for judgment at close of the plaintiff's case); Scottish Heritable Trust, PLC v. Peat Marwick Main & Co., 5th Cir.1996, 81 F.3d 606, 610-611 & n. 14. When the instruction request explicitly presents a "no sufficient evidence" argument, it seems easy enough to treat it as equivalent to a motion for judgment as a matter of law on that issue.

An example of a somewhat more expansive principle is provided by Judge Posner's opinion in Szmaj v. American Tel. & Tel. Co., 7th Cir.2002, 291 F.3d 955, 957-958. The court took under advisement a motion made at the close of the plaintiff's case. The defendant did not renew the motion at the close of the evidence. The court affirmed judgment as a matter of law for the defendant. It observed that if the motion at the close of the plaintiff's case is denied, the plaintiff may assume that the denial "is the end of the matter." But if the motion is taken under advisement,

the plaintiff knows that the defendant's demand for judgment as a matter of law remains alive "There is no mousetrapping of the plaintiff in such a case." Neither Rule 50(b) nor the Committee Note state that renewal of the motion is required, and it would be wasteful to require renewal.

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

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

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

IV How Much Flexibility?

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

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

sufficient opportunity to introduce the evidence or to request procedural accommodation for later presentation. Satisfying this functional concern should satisfy the Seventh Amendment as well; the formal ritual of a separate motion at the close of all the evidence adds too little to count.

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

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

Committee Note

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

This change responds to many decisions that have begun to drift away from the requirement that there be a motion for judgment as a matter of law at the close of all the evidence. Although the requirement has been clearly established for several decades, lawyers continue to overlook it The most common occasion for omitting a motion at the close of all the evidence is that a motion is made at the close of the plaintiff's case, advancing all the arguments that the defendant wants to renew after

a verdict for the plaintiff or a new trial. In many of the cases the trial court either takes the motion under advisement or gives some more positive indication that the question will be decided after submission to the jury. The niceties of the close-of-the-evidence requirement are overlooked by both court and parties The present rule continues to trap litigants who, properly understanding that there is no functional value served by repeating an earlier motion at the close of the evidence, overlook the formal requirement. The courts are slowly working away from the formal requirement, but amendment carries the process further and faster.

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

Evidence introduced at trial after the pre-verdict motion may bear on the post-verdict motion. Evidence favorable to the party opposing the motion must be considered. The court also may consider evidence unfavorable to the party opposing the motion if it is evidence that the jury must believe unless there is reason to believe the opposing party had no fair opportunity to meet that evidence.

B. Require Sufficiency Issue To Be Raised

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

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

V Other Rule 50(b) Issues

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

A. Renewed Motion Requirement

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

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

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

B. Time For Motion After Mistrial

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

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

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

C. Other Possible Rule 50 Questions

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

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

Rule 50(b): Alternative Draft

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

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

(2) ***Time To Move or Act.*** The time to move or act on the legal questions reserved by a Rule

50(a) motion is as follows:

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

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

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

(A) enter judgment on the verdict;

(B) order a new trial; or

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

Committee Note

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

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

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

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
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To: **Advisory Committee on Civil Rules**

From: **Judge Richard H. Kyle**

Date: **March 29, 2004**

Re: **Report of the Civil Subcommittee on Rule 15 and Rule 50**

The Subcommittee did not reach a consensus with respect to Rule 15.

By way of background, Rule 15 questions have come from different sources at different times. Much of the Rule 15 discussion was provoked by Judge Becker's pointed suggestion that the Advisory Committee should take up a Rule 15(c)(3) issue that has been long on the docket. The specific problem arises when a plaintiff is unable to identify a defendant before bringing suit Often the case involves claims against public officials, particularly police officers. The plaintiff believes that police officers violated the plaintiff's rights, but the police department will not or cannot identify them for the plaintiff. The plaintiff sues one or more named officers and adds one or more "unknown named" officers. With discovery, the plaintiff identifies proper defendants and seeks to join them. Most of the courts of appeals have ruled that Rule 15(c)(3) is not available because it allows relation back only when there was "a mistake concerning the identity of the proper party " A plaintiff who knows that a defendant cannot be identified has not made a mistake. This interpretation could be changed by adding a few words: "but for a mistake or lack of information concerning the identity ****." But that simple change is not so simple: should

Rule 15 protect a plaintiff who has not diligently sought to identify the proper defendants before brining suit? And the questions proliferate. A close look at Rule 15(c)(3) suggests many problems beyond the one that stirred the issue, and these questions do not yield easy answers.

Other Rule 15 questions have been before the Committee and were set forth in Professor Cooper's detailed memorandum appearing with the agenda materials for last year's October meeting.

These questions, like Rule 15(c)(3), do not yield easy answers. The Subcommittee has not determined whether any of the proposed solutions to Rule 15 issues have sufficient real-world experience as to justify the time and effort of drafting a better rule and running the risk that the result might be a worse rule. With so many other matters before the full Committee -- style, e-discovery, Rule G, etc. -- requiring substantial time and effort by all members of the Committee, our Subcommittee did not get our job done; and it is doubtful if we can do so in the near term. We recommend that Rule 15 be put on the "back burner" until these other matters are behind us.

Attorney Reports on the Impact of *Amchem* and *Ortiz* on Choice of a Federal or State Forum in Class Action Litigation

A Report to the Advisory Committee on Civil Rules Regarding a Case-based Survey of Attorneys

Executive Summary

Thomas E. Willging
Shannon R. Wheatman

April 2004

Federal Judicial Center

This study was undertaken at the request of the Judicial Conference's Advisory Committee on Civil Rules and is in furtherance of the Center's statutory mission to conduct and stimulate research and development for the improvement of judicial administration The views expressed are those of the authors and not necessarily those of the Advisory Committee on Civil Rules or of the Federal Judicial Center

The full report, including a Methods Appendix and copies of the questionnaires, is available at http //www fjc gov under "Publications "

The Project Team included George Cort, Vashty Gobinpersad, Tyeika Hartsfield, Andrea Henson-Armstrong, Maria Estelita Huidobro, Dean Miletich, Robert Niemic, and Robert Timothy Reagan

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Background

In 2001, the Advisory Committee on Civil Rules ("the Committee") asked the Federal Judicial Center to conduct empirical research in an attempt to gain information that might assist the Committee's examination of whether Federal Rule of Civil Procedure 23 should be amended to provide a different certification standard for classes certified for settlement rather than for trial and litigation After researching class action filing rates,[1] the Center designed and conducted a survey of attorneys who had represented clients in recently terminated class action litigation

In both state and federal courts, many class actions have been resolved by certification for settlement In class action litigation that is characterized by multiple filings in state and federal forums, such as mass tort cases, the ability to certify cases for multistate or nationwide settlement is viewed as important to achieving a broad resolution of the litigation In 1996, the Committee published for public comment a proposed amendment to Rule 23 that would have permitted certification of a settlement class action "even though the requirements of subdivision (b)(3) might not be met for purposes of trial "[2] The Committee deferred consideration of the proposed amendment after the Supreme Court granted certiorari in *Amchem Products, Inc v Windsor*[3] and later in *Ortiz v Fibreboard Corp*[4] In those cases, the Court held that under Rule 23 a court could not certify a class for settlement unless the class met all of the Rule 23(a) criteria and one of the Rule 23(b) criteria, with the exception of trial manageability for

1 In September 2002, the Center presented to the Committee the results of a related study, also requested by the Committee, of the effect of the *Amchem* and *Ortiz* decisions on the filing of class actions in federal courts *See* Bob Niemic & Tom Willging, Effects of *Amchem/Ortiz* on the Filing of Federal Class Actions Report to the Advisory Committee on Civil Rules (2002) (available at http //www fjc gov) That study reported that the rate of filing of class actions in federal court had increased after *Amchem* and *Ortiz* That study does not—and could not—directly answer the question whether those two decisions have had an impact on the settlement of class actions in federal court or whether there is any relationship between the Court decisions and attorney–client decisions on where to file cases For example, those two cases may have influenced attorneys' decisions in a limited number of specific types of cases, also, the number of federal class action filings might have increased at a slower rate than state class action filings

2 Proposed Amendments to the Federal Rules of Civil Procedure, 167 F R D 559 (1996), *see also id* at 563–64 (Proposed Committee Note)

3 521 U S 591 (1997) In *Amchem*, the Supreme Court affirmed a Third Circuit decision that vacated the order of the district court certifying a class of individuals with asbestos injury claims against a number of defendants and approving a Rule 23(b)(3) opt-out settlement The district court had combined in one class action claimants with present asbestos injuries and future claimants (absent and unknown) who had been exposed to an asbestos product but who had not to date discovered an asbestos-related injury The Court held that the district court's ruling had allowed settlement of a "sprawling" class action that failed to provide future claimants the adequate representation required by Rule 23(a)(4)

4 527 U S 815 (1999) In *Ortiz*, the Court reversed a Fifth Circuit decision that had affirmed an asbestos settlement with similar features to those the Court criticized in *Amchem* The settlement in *Ortiz*, however, focused on a single manufacturer of products containing asbestos and used a mandatory "limited fund" settlement class certified under Rule 23(b)(1)(B)

a (b)(3) class The rulings restricted the ability of federal courts to certify settlement class actions

In *Amchem,* the Court noted the Committee's pending "settlement class" proposal and stated that, although parts of the Court's ruling were rooted in due process concerns about notice, the holding on certification standards was limited to Rule 23 "as it is currently framed "[5] Since the Supreme Court decisions, the Committee has continued to receive proposals to amend Rule 23 to relax the certification standard for settlement classes—proposals that emphasize the importance of such class actions to achieving the broad resolution of repetitive litigation [6] The Committee has also continued to receive advice that the problems of such a rule amendment would outweigh any benefits that facilitating settlements might provide [7]

As part of its examination of proposals to amend Rule 23 to provide a separate settlement class certification standard, the Committee asked the Center to assist by providing empirical information, if possible, as to the effect of *Amchem* and *Ortiz* on class action litigation in federal courts The Center, in consultation with the Committee, designed a survey of attorneys in class actions recently terminated in federal courts Questionnaires were designed to provide data on whether the Supreme Court decisions restricting certification of settlement classes in federal courts under existing Rule 23 influenced attorneys to file and litigate such actions in state courts The survey also sought information on the extent to which limits on certification of settlement classes affected the number of overlapping or duplicative class actions pending simultaneously in state and federal courts

This report is based on analyses of responses to questionnaires (copies of which can be found in the Questionnaire Appendix accompanying the full report) returned by 728 attorneys, 312 (43%) representing plaintiffs and 416 (57%) representing defendants in 621 class actions (see the Methods Appendix accompanying the full report) These class actions were either filed in federal court or removed to federal court between 1994 and 2001 and terminated between July 1, 1999, and December 31, 2002 In 107 of the 621 cases, we received responses from attorneys for both sides [8] The response rate was 39% of 1,851 attorneys Attorneys were asked to report infor-

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5 *Amchem,* 521 U S at 619

6 *See, e g ,* Francis McGovern, *Settlement of Mass Torts in a Federal System,* 36 Wake Forest L Rev 871, 878 (2001) (stating that "*Amchem* and *Ortiz* have changed the practical landscape for the global resolution of personal injury mass tort litigation by making class action settlements more expensive and, in certain circumstances, improbable") According to Professor McGovern, a change in Rule 23 to facilitate settlement class actions for all types of cases is one way to address the problem *Id* at 882 (asserting that "[t]here will be efforts to facilitate class action settlements by relaxing the 23(a) prerequisites and, at the same time, strengthening 23(e) scrutiny")

7 For discussion of some of the arguments against global class action settlements and settlement class rules in the pre-*Amchem* legal environment, see generally, *Symposium, Mass Tortes Serving Up Just Desserts,* 80 Cornell L Rev 811 (1995)

8 All responses were used for analyses based on attorney reports (Parts 1 and 3) For analyses done at the case level (Parts 2, 4, and 5), if two responses referred to the same case, each response was given a weight of 0 5

mation about a specific case in which they had represented a party (the "named case") We selected the named cases from the database used for the Center's earlier report to the Committee on class action filing activity

The report identifies factors that attorneys reported—with the benefit of hindsight—as related to their decisions about where to file or whether to remove a class action, and it presents data concerning attorney perceptions of the relative importance of those factors Questions called for numerous attorney judgments about whether individual factors might have influenced that attorney's total assessment of differences between state and federal courts in handling class action litigation

Unless specified as not statistically significant, all differences discussed in this report were statistically significant By statistically significant we mean significant at the 05 level or better (i e , the probability that the differences occurred by chance is at most 5%)

Executive Summary

Overall conclusions regarding *Amchem* and *Ortiz* factors

The Committee's primary question was whether existing Rule 23, as interpreted and applied in the *Amchem* and *Ortiz* line of cases to restrict class certification for settlement class actions, induced attorneys to file and litigate class actions in state rather than federal court This study supports the following empirical conclusions based on attorney reports regarding specified cases

- neither *Amchem* and *Ortiz* nor federal class certification rules were reported to have directly affected the vast majority of plaintiff attorneys' choice of forum,
- defendant attorneys reported their perceptions that federal courts' strict application of class certification rules was one factor that affected their decision to *remove* cases *to* federal courts, which would not be likely to avoid any effects of *Amchem* and *Ortiz*,
- in less than 10% of the cases, *Amchem* and *Ortiz* factors may have been related to attorneys' choice of forum and to how courts managed class actions,
- despite attorneys' perceptions that federal judges were less receptive than state judges to motions to certify class actions, federal and state judges were almost equally likely to certify class actions and to certify those cases for litigation and trial or for settlement;
- federal and state judges were equally likely to approve class settlements,
- federal judges were more likely than state judges to deny class certification, while state judges were more likely than federal judges to not rule on certification,
- the reported size of certified classes tended to be larger in state courts, but no direct link to *Amchem* and *Ortiz* was found and we could not directly test speculation that *Amchem* and *Ortiz* may have driven the larger classes into state court where they could be settled more easily,
- the rate at which proposed class actions were reported to have been certified appears to have declined when compared to a Federal Judicial Center pre-*Amchem* and *Ortiz* study of class actions in four federal districts,
- based on the same study, the percentage of certified class actions that were reported to have been certified for settlement appears to have increased after *Amchem* and *Ortiz*, and
- the percentage of class recoveries reported to have been allocated to attorney fees appears to have been about the same as in the previous Center study

Summary of findings

1. Attorney reports of the effects of *Amchem* and *Ortiz* on choice of forum

(a) Plaintiff attorney reports of reasons for filing the named case in federal or state court

We presented plaintiff attorneys a range of questions and statements to find out why they filed the named case in state or federal court. Three factors were strongly related to their decisions about where to file: widely shared attorney perceptions that state or federal judges were predisposed to rule on certain claims in line with the interests of the attorney's client, attorney reports of the source of law (state or federal) for the claims, and attorney reports of "state facts," a composite measure we created, using the average of the percent of class members who resided in the state and the percent of claims-related transactions or events that attorneys reported having occurred within the state.[9]

Attorneys' decisions regarding where to file were associated with other factors, but not as strongly as with those above. The strongest group of additional factors encompassed the substantive law and the discovery rules governing the case. Those factors were also related to attorney perceptions of judicial predisposition. Plaintiff attorneys did not report that either class certification rules in general or the *Amchem* and *Ortiz* holdings in particular had any direct impact on their choice of a state or federal forum.

We also found that the filing of a class action in state or federal court was strongly associated with the location of a competing or overlapping class action.

(b) Comparison of plaintiff and defendant attorney reports of reasons for choosing to file the named case in, or remove it to, federal court

We presented a similar set of statements to defendant attorneys so they could indicate why they removed the named case, and we compared their responses to those of plaintiff attorneys who also chose a federal forum. Defendant attorneys more often than plaintiff attorneys cited their expectations that federal courts would apply class certification rules strictly and that substantive law, discovery rules, and expert evidence rules would favor their side. Aside from the importance defendant attorneys attributed to stringent class certification rules in general, *Amchem* and *Ortiz* factors limiting federal courts' ability to certify a class for settlement did not appear to have played a role in either side's decision to select a federal forum. In general, a defendant attorney was far more likely than a plaintiff attorney to refer to the attorney's personal preferences or to client preferences as a basis for a decision to select a federal forum.

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9 The portion of the "state facts" variable that deals with the location of claims-related transactions or events depends on the ability of a responding attorney to distinguish between events (such as the purchase of a product) that may have occurred both within the state of filing and in a number of other states. For further discussion of the "state facts" variable see the full text of this report at *infra* notes 19–20.

(c) *Attorney reports of the effects of Amchem and Ortiz on the named case and in general*

We also posed direct questions to attorneys about any effects *Amchem* and *Ortiz* may have had on their decisions about where to file or litigate the named cases and on class action litigation in general, including case management Attorneys' responses suggest that, at most, the two decisions may have had a relationship to the attorneys' choice of forum and to case management in a small percentage of the named cases Overall, as discussed in Parts 1(a) and (b), attorneys' statements as to why they filed cases in state or federal courts did not independently generate a conclusion that the *Amchem* and *Ortiz* decisions played an important role Viewed in the aggregate—that is, in the context of the many factors that might have been associated with choice of forum—attorneys reported perceptions that *Amchem* and *Ortiz* factors had an impact on a small proportion of cases

Nonetheless, attorney responses to the direct *Amchem* and *Ortiz* questions provide some support for the conclusion that the cases have had some relationship with class action certification and settlement Our findings in that regard appear to be limited to a small proportion of the cases covered in the survey, less than 10% of which generated reports of some link with the two decisions

Attorneys' opinions about the impact of *Amchem* and *Ortiz* indicate that they expected the two cases to have had more of an impact than their collective reports show they had in the named cases Forty-three percent (43%) said that *Amchem* and *Ortiz* had made it more difficult in general to certify, settle, and/or maintain class actions in federal and state courts, another 5% thought the two cases had such an impact, but only in mass tort cases

(d) *Plaintiff and defendant attorney reports about any relationship between client characteristics and filing and removal decisions*

We also asked plaintiff and defendant attorneys about characteristics that might have described their clients (such as place of residence, type of business, gender, race, and ethnicity) and whether, at the time of filing or removing an action, they perceived any litigation advantage or disadvantage arising out of any of those characteristics None of the differences appeared to be related to choice of a federal or state forum We found few important differences in reports of advantages or disadvantages based on party characteristics The majority of attorneys reported that they perceived no advantage or disadvantage in most of their clients' characteristics

Comparing perceptions of plaintiff attorneys who filed in state courts with those who filed in federal courts, the only salient client characteristics were connected to the defendant's type of business and the proposed class representative's local residence and reputation The class representative's local residence appeared to be the factor with the strongest association with a plaintiff's decision to file a class action in a state court

Comparing perceptions of plaintiff attorneys with those of defendant attorneys (regardless of the choice of forum), the only client characteristic that elicited a major-

ity response was that plaintiff attorneys tended to see the proposed class representative's local residence as an advantage Other client characteristics (e g , defendant's corporate status or type of business) produced different responses from plaintiff and defendant attorneys

2. Competing or overlapping class actions filed in other courts

A clear majority of attorneys reported the existence of other lawsuits dealing with the same subject matter as the named case in other state or federal courts Those attorneys also indicated that about three-fourths of the other lawsuits were resolved in the same manner as the named case Among the remaining cases, we found that when the named case was dismissed on the merits, voluntarily dismissed, or terminated by summary judgment (and not resolved as a class action), the related cases were more likely to have had a different outcome Those data suggest that rulings on the merits of individual claims did not prevent further litigation in other courts in related cases

3. Plaintiff and defendant attorney perceptions of state and federal judges' predispositions toward plaintiff and defendant interests

(a) Attorney perceptions of judicial predispositions

Attorneys on both sides of the litigation reported their expectations about judicial predispositions at the time they filed or removed the named case Those impressions were often related to lawyers' judgments about the favorability of that court's rules and the substantive law applicable to their clients' claims and defenses, and to attorneys' impressions of judicial receptivity to claims like those of the clients

About half of the plaintiff attorneys who filed cases in state courts expressed an impression that state judges were more likely than federal judges to rule in favor of interests like those of their clients About one in four plaintiff attorneys who filed in federal court, though, expressed an expectation that federal judges were more likely than state judges to rule in favor of their clients' interests, and about 40% of plaintiff attorneys filing in federal court reported that they perceived no difference between state and federal judges in that regard

Three out of four defendant attorneys who removed cases to federal courts reported the impression that federal judges were more likely than state judges to rule in favor of interests like those of their clients About 20% of attorneys perceived no difference between the two sets of judges

(b) Substantive law, procedural rules, and judicial receptivity as sources of perceived judicial predispositions

Plaintiff attorneys were more likely to perceive judicial predispositions in favor of their clients' interests when they also reported that state substantive law and state discovery, evidence, and class action certification rules favored their clients' interests Those plaintiff attorneys were also more likely than other plaintiff attorneys to report

that state court judges were more receptive than federal judges to motions to certify a class and more receptive to their clients' claims on the merits

In reporting their impressions of judicial predispositions, defendant attorneys presented almost, but not exactly, a mirror image of plaintiff attorneys Defendant attorneys who removed cases to federal courts were more likely to perceive federal predispositions in favor of their clients' interests when they also reported that federal discovery, expert evidence, and general evidentiary rules favored their clients' interests Those defendant attorneys were also more likely than other defendant attorneys to report that federal judges were less receptive than state judges to motions to certify a class and more receptive to their clients' positions on the merits Defendant attorneys who perceived federal judicial predispositions, however, were no more likely than other defendant attorneys to report that federal substantive law was favorable to their clients' interests

In the next two sections we explore how those perceptions in individual named cases matched up with the aggregate of judicial rulings, procedural outcomes, and monetary recoveries and settlements in two groups of named cases first, those removed from federal courts and, in the final section, all of the named cases

4. Comparison of rulings by state and federal courts in removed cases

In Part 1(a) we reported that attorney perceptions of judicial predispositions toward interests like those of the attorneys' clients represented one of the strongest factors affecting choice of forum Do these attorney perceptions about judicial predispositions have any basis in the reality of judicial rulings in the named cases viewed as a whole?

We found little relationship between the attorneys' perceptions and federal and state judicial rulings in the named cases Federal district judges remanded to state court almost half of the cases that defendants removed to federal court, providing an opportunity to compare rulings in the two sets of courts [10] We found federal and state judges about equally likely to certify cases as class actions (which happened in 22% of the remanded cases and 20% of the cases retained in federal courts) Moreover, federal and state judges were about equally likely to certify classes for trial and litigation or for settlement Half of the certifications in each set of courts were for trial and litigation and half were for settlement

In the attorney reports about the named cases, federal judges were more likely than state judges to issue rulings denying class certification, while state judges were more likely than federal judges to take no action regarding class certification Neither the action or inaction of courts regarding class certification was associated with whether a case produced a monetary recovery or settlement A ruling denying class

10 Note that our comparison of the two sets of cases proceeds on the assumption (untestable in the context of this survey) that district judges' decisions to remand were based on the presence or absence of federal subject-matter jurisdiction and were not affected one way or the other by the certifiability of the case as a class action or by the underlying merits of the claims presented

certification usually was accompanied by explicit resolution of the individual claims of the proposed class representatives, whether the resolution was by settlement, summary judgment, or trial The absence of a ruling on class certification was more often accompanied by voluntary dismissal of the claims

In the named cases, we found no statistically significant differences in rulings on dispositive procedural motions in cases remanded to state courts and in cases retained in the federal courts In certified class actions, state and federal courts were equally likely to approve a classwide settlement In one or two instances in federal or state court the settlement had been revised before court approval, no class settlement was rejected in total

We also found, in removed cases, a relationship (again, not necessarily a causal relationship) between attorneys' perceptions of judicial predispositions and whether the parties' class settlements included a money recovery—and, if so, how much Attorney fees also varied in the same direction as the predisposition perceived by attorneys, that is, fees were higher when plaintiffs perceived a predisposition in their favor than when they did not perceive such a predisposition

Despite the similarities in rulings, monetary recoveries—almost always in the form of settlements fashioned by the parties—differed in the two court systems In removed cases that were remanded to state courts, the amount of classwide monetary recoveries and settlements was substantially larger than monetary recoveries and settlements in cases retained in federal court The median recovery in state court was $850,000 and in federal court was $300,000 Those differences, however, appeared to be a product of the larger size of classes resolved in state courts (typically, 5,000 class members compared to 1,000 in federal courts) The typical recovery per class member turned out to be higher in federal court $517 in federal court compared to $350 in cases remanded to state courts

We also found a relationship between class size and attorney perception of predispositions Attorneys were somewhat more likely to perceive federal court predispositions to favor client interests in cases with a smaller class size and to perceive favorable state court predispositions toward such interests in cases with a larger class size These differences seem marginal, however, and applicable to a small number of cases

5. Procedural outcomes and monetary recoveries and settlements in named cases (removed and not removed)

Looking at the total sample of all closed cases (including cases filed as original federal class actions, not just the removed cases discussed in Part 4), we found that in the majority of cases (57%) the court took no action on class certification Courts certified 24% of the cases as class actions and denied certification in 19% of them Of the certified cases, 58% were certified for settlement and 42% were certified for trial or litigation

The Center's 1996 research for the Committee, focusing on class actions terminated in 1992–1994 in four federal district courts, and based on examination of court files, not attorney recollections, reported a class certification rate of 37% The percent-

age of those cases certified for settlement was 39% While the study methods were different, comparing data from the current study and the 1992–1994 study indicates that the rate of class certification as a whole most likely has not increased and appears to have declined (from 37% to 24%) in the period after *Amchem* and *Ortiz* These two studies also indicate that the percentage of class actions certified for settlement appears to have increased (from 39% to 58%)

In the study at hand, in both state and federal courts, certified class actions generally terminated with settlements and monetary recoveries Almost all certified class actions settled In contrast, most cases that were never certified terminated by dismissal, summary judgment, voluntary dismissal, or settlement of class representatives' claims

In state and federal courts combined, about one in four of the named cases included a monetary recovery or settlement for the class The typical (i e , median) recovery was $800,000 Twenty-five percent of the recoveries and settlements exceeded $5 2 million, and 25% were $50,000 or less

Various commentators and judges have criticized the use of coupons—especially nontransferable coupons without any market value—to settle class actions In the study, 29 of 315 cases (9%) with a recovery included some type of coupon in the recovery, 3 of those cases (1%) involved nontransferable coupons

Attorney fees typically were about 29% of the class recovery, which was about the same percentage as in the prior FJC study of class actions Twenty-five percent of the cases involved fees of 36% or more, which was also similar to what we found previously

Sealed Settlement Agreements in Federal District Court

Tim Reagan, Shannon Wheatman, Marie Leary, Natacha Blain, Steve Gensler, George Cort, Dean Miletich[1]
Federal Judicial Center

The Judicial Conference's Advisory Committee on Civil Rules asked the Federal Judicial Center to conduct research on sealed settlement agreements filed in federal district court. Although the practice of *confidential* settlement agreements is common, the question is how often and under what circumstances are such agreements *filed* under seal?

Many civil cases settle before trial and defendants commonly seek confidentiality agreements concerning the terms of settlement. Usually such agreements are not filed. A high proportion of civil cases settle,[2] but a sealed settlement agreement is filed in less than one half of one percent of civil cases. In 97% of these cases, the complaint is not sealed.

The Law of Sealing

"It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." *Nixon v. Warner Communications Inc.*, 435 U.S. 589 (1978) (footnote omitted). "It is uncontested, however, that the right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes." *Id.* at 598.

Accountability is a principal reason for public access. *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982) ("An adjudication is a formal act of government, the basis of which should, absent exceptional circumstances, be sub-

[1] We are grateful to our colleagues Pat Lombard, Angelia Levy, David Guth, Donna Pitts-Taylor, Vashty Gobinpersad, and Estelita Huidobro for their assistance with this project We are grateful to Russell Wheeler, Jim Eaglin, Syl Sobel, Tom Willging, Molly Treadway Johnson, and Ken Withers for advice on this report. We are especially grateful to the clerks of court, other court staff, and archive personnel who provided us with information and helped us acquire access to court files.

[2] An analysis of disposition codes for civil terminations from 1997 through 2001 showed 22% were dismissed as settled and 2% were terminated on consent judgment Another 10% were voluntary dismissals, and some of these probably were settled An additional 20% are coded as "other" dismissals.

ject to public scrutiny."); *Jessup v. Luther*, 277 F.3d 926, 928 (7th Cir. 2002) ("the public cannot monitor judicial performance adequately if the records of judicial proceedings are secret"); *id.* at 929 ("The public has an interest in knowing what terms of settlement a federal judge would approve and perhaps therefore nudge the parties to agree to."); *Union Oil Co. of California v. Leavell*, 220 F.3d 562 (7th Cir. 2000) ("The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat, which requires compelling justification.").

Courts of appeals have determined that the common law presumption of access applies to documents filed with the court, although it does not apply to documents exchanged in discovery, *Federal Trade Commission v. Standard Financial Management Corp.*, 830 F.2d 404, 408 (1st Cir. 1987); *United States v. Amodeo*, 71 F.3d 1044, 1050 (2d Cir. 1995), or to settlement agreements not filed, *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 781-83 (3d Cir. 1994). Also, the presumption of public access is stronger for documents filed in conjunction with substantive action by the court than for documents filed as part of discovery disputes. *Anderson v. Cyrovac Inc.*, 805 F.2d 1, 11 (1st Cir. 1986); *Leucadia Inc. v. Applied Extrusion Technologies Inc.*, 998 F.2d 157, 165 (3d Cir. 1993); *Foltz v. State Farm Mutual Automobile Insurance Co.*, 331 F.3d 1122, 1135-36 (9th Cir. 2003); *Chicago Tribute Co. v. Bridgestone/firestone Inc.*, 263 F.3d 1304, 1312 (11th Cir. 2001).

Some cases have stated explicitly that if a settlement agreement is filed with the court for the court's approval or interpretation, then denying the public access to the agreement requires special circumstances. *Bank of America National Trust & Savings Association*, 800 F.2d 339, 345 (3d Cir. 1986) ("Once a settlement is filed in the district court, it becomes a judicial record, and subject to the access accorded such records."); *Herrnreiter v. Chicago Housing Authority*, 281 F.3d 634 (7th Cir. 2002) ("[Defendant's] desire to keep the amount of its payment quiet (perhaps to avoid looking like an easy mark, and thus drawing more suits) is not nearly on a par with national security and trade secret information. Now that the agreement itself has become a subject of litigation, it must be opened to the public just like other information (such as wages paid to an employee, or the price for an architect's services) that becomes the subject of litigation."); *Brown v. Advantage Engineering Inc.*, 960 F.2d 1013, 1016 (11th Cir. 1992) ("It is immaterial whether the sealing of the record is an integral part of a negotiated settlement between the parties, even if the settlement comes with the court's active encouragement. Once a matter is brought

before a court for resolution, it is no longer solely the parties' case, but also the public's case. Absent a showing of extraordinary circumstances . . . , the court file must remain accessible to the public.").

Many appellate opinions have stressed the importance of the court's stating specific reasons for sealing a filed document. *In re Cendant Corp.*, 260 F.3d 183, 194 (3d Cir. 2001) ("Broad allegations of harm, bereft of specific examples or articulated reasoning, are insufficient."); *Stone v. University of Maryland Medical System Corp.*, 855 F.2d 178, 182 (4th Cir. 1988) ("the district court must provide a clear statement, supported by specific findings, of its reasons for sealing any records or documents, as well as its reasons for rejecting measures less drastic than sealing them"); *Hagestad v. Tragesser*, 49 F.3d 1430, 1435 (9th Cir. 1995) ("because the district court failed to articulate any reason in support of its sealing order, meaningful appellate review is impossible").

Only two federal district courts have local rules pertaining specifically to sealed settlement agreements. The District of South Carolina proscribes them, D.S.C. L.R. 5.03(C), and the Eastern District of Michigan limits how long they may remain sealed, E.D. Mich. L.R. 5.4. Forty-nine districts (52%) have local rules pertaining to sealed documents generally. Fourteen districts (15%) have rules covering only administrative mechanics (e.g., how sealed documents are marked),[3] 32 districts (34%) have rules covering how long a document may remain sealed (after which it is returned to the parties, destroyed, or unsealed),[4] and 12 districts (13%) have good cause rules.[5] These rules are compiled in Appendix B.

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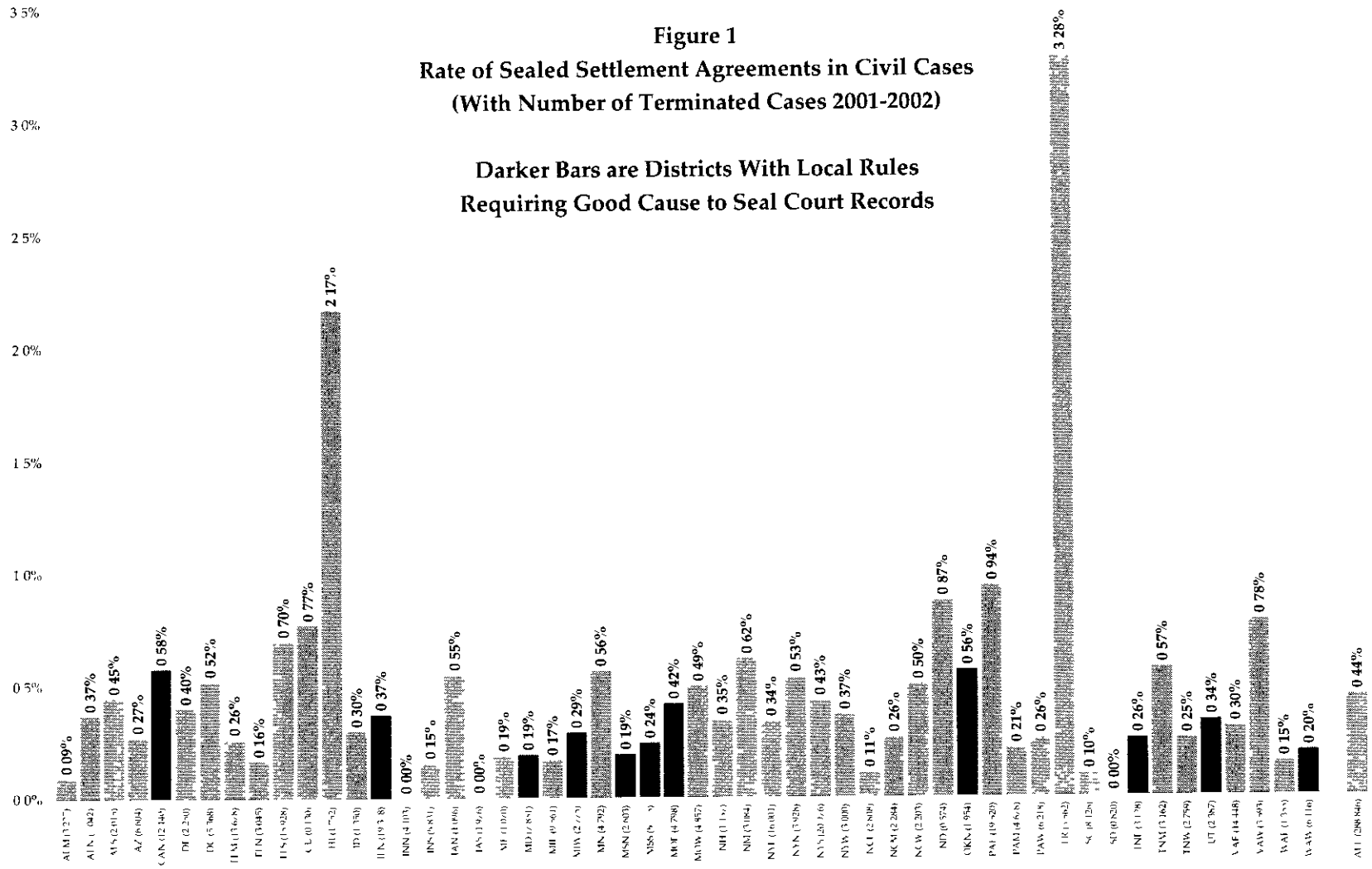
[3] California Central, California Eastern, Colorado, Delaware, District of Columbia, Georgia Southern, Indiana Southern, Montana, New Hampshire, New York Northern, Oklahoma Western, Rhode Island, Vermont, Wisconsin Eastern

[4] Arizona, California Northern, California Southern, Connecticut, Florida Southern, Idaho, Illinois Northern, Iowa Northern and Southern, Kansas, Maryland, Michigan Eastern, Michigan Western, Minnesota, Mississippi Northern and Southern, Missouri Eastern, New York Eastern, North Carolina Eastern, North Carolina Middle, North Carolina Western, North Dakota, Ohio Northern, Ohio Southern, Oregon, Pennsylvania Middle, Tennessee Eastern, Texas Eastern, Texas Northern, Utah, Virginia Western, Washington Western.

[5] California Northern, Illinois Northern, Maryland, Michigan Western, Mississippi Northern and Southern, Missouri Eastern, New York Western, Oklahoma Northern, Tennessee Eastern, Utah, Washington Western Note that the good cause rule for the Western District of New York is new (May 1, 2003).

Figure 1
Rate of Sealed Settlement Agreements in Civil Cases
(With Number of Terminated Cases 2001-2002)

Darker Bars are Districts With Local Rules Requiring Good Cause to Seal Court Records



Findings

We examined 288,846 civil cases that were filed in a sample of 52 districts. We found 1,272 cases with sealed settlement agreements (0.44%). That is one in approximately 227 cases.

The sealed settlement rate for individual districts ranges from considerably less than the national rate to considerably more than that rate. Figure 1 shows sealed settlement rates for individual districts. Three of the districts we studied (6%) had no sealed settlement agreements among cases terminated in 2001 and 2002 – Indiana Northern, Iowa Southern, and South Dakota. Three districts (6%) had sealed settlement rates more than twice the national rate – Pennsylvania Eastern (0.94%), Hawaii (2.2%), and Puerto Rico (3.3%).[6]

We studied all 11 districts whose local rules require good cause to seal a document. The rate of sealed settlement agreements in those districts was 0.37%. The rate of sealed settlement agreements in the other districts was somewhat higher – 0.45% – but the difference was not statistically significant.[7]

Sealed settlement agreements appear in cases of many different types. Table 1 shows nature of suit frequencies. More than half of the cases with sealed settlement agreements are either personal injury cases (30%) or employment cases (26%). Another fifth are either civil rights cases (10%) or contract cases (11%). Intellectual property cases account for 11% of civil cases with sealed settlement agreements, but the rate of sealed settlement agreements in such cases is relatively high (1.54%). Cases identified as Fair Labor Standards Act cases have an even higher rate of sealed settlement agreements (2.58%), almost six times the overall average. Because the court must approve settlement agreements in such cases, they are frequently filed. They often are filed under seal to preserve confidentiality.

Sealed settlement agreements appear to be filed typically to facilitate their enforcement. If they are filed with the court, the same judge who

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[6] The high rate for Pennsylvania Eastern is due largely to a single multidistrict litigation case in that district, 79% of the cases with sealed settlement agreements that we found in that district were in this multidistrict litigation. The sealed settlement agreement rate in Hawaii is relatively frequent in part because the sealing of the record of successful settlement conferences is relatively high there; approximately two-thirds of the cases we identified as containing sealed settlement agreements in that district were so identified for this reason The high rate of sealed settlement agreements in Puerto Rico appears to reflect a relatively more common practice of filing and sealing such agreements in that district

[7] $p = 0\ 63$

heard the case can enforce the agreement without a new action being filed, and the court can enforce the agreement with contempt powers. Often the agreement is filed so that the court can approve it. Among cases with sealed settlement agreements, approximately one-quarter (22%) were actions typically requiring court approval of settlement agreements – 13% were cases involving minors or other persons requiring special protection, 7% were actions under the Fair Labor Standards Act, and 6% were class actions.[8]

Table 1. Types of Cases With Sealed Settlement Agreements

Nature of Suit	Number of Cases	Proportion Among Cases With Sealed Settlement Agreements	Sealed Settlement Rate
Personal Injury	378	30%	0.82%
Personal Property	28	2%	0.64%
Real Property	7	1%	0.07%
ERISA	26	2%	0.20%
Fair Labor Standards Act	88	7%	2.58%
Other Employment/Labor	223	18%	0.75%
Other Civil Rights	125	10%	0.55%
RICO	9	1%	1.06%
Securities	11	1%	0.76%
Antitrust	10	1%	0.59%
Trademark	48	4%	1.19%
Patent	62	5%	2.17%
Copyright	29	2%	1.25%
Contract	145	11%	0.33%
Other	83	7%	0.08%
Total	**1,272**	**100%**	**0.44%**

Sometimes the settlement agreement is not filed until one party believes it has been breached, and then it is filed as a sealed exhibit to a mo-

[8] The three individual percentages add up to more than the overall percentage, because some cases had more than one reason for court approval of settlements A few cases with Fair Labor Standards Act claims had other nature of suit codes.

tion to enforce it. In approximately 11% of the cases with sealed settlement agreements, this was how the agreement came to be filed. In a few additional cases, there was a motion to enforce after the agreement was filed.

Occasionally the settlement agreement is not a sealed document filed with the court but a part of a sealed or partially sealed proceeding or transcript. This is true for 13% of the cases we found with sealed settlement agreements.

In 97% of the cases with sealed settlement agreements the *complaint* is *not sealed*. Almost the only time we encountered a sealed complaint was in cases where the entire record was sealed. (Sometimes the docket sheet was sealed;[9] sometimes although the case file was sealed, the docket sheet was

[9] We encountered 23 cases with sealed docket sheets: *Cahaba Pressure-Treated Forest Products v OM Group* (AL-N 7:97-cv-01917 filed 07/25/1997) (fraud action dismissed as settled), *Thomasson Lumber Co. v. Cahaba Pressure-Treated Forest Products* (AL-N 7 98-cv-00043 filed 01/08/1998) (contract action dismissed as settled), *Pennsylvania National Mutual Casualty Insurance Co. v. Cahaba Pressure-Treated Forest Products* (AL-N 2·98-cv-01261 filed 05/19/1998) (insurance action dismissed as settled), *Sealed Plaintiff v Sealed Defendant* (CA-N 4.00-cv-02945 filed 08/14/2000) (Statutory action dismissed as settled), *Sealed Plaintiff v. Sealed Defendant* (CA-N 3:01-cv-01156 filed 03/21/2001) (statutory action dismissed as settled), *Sealed Plaintiff v Sealed Defendant* (CA-N 3.01-cv-02928 filed 07/27/2001) (contract action dismissed as settled), *Nick Chorak Mowing v United States* (DC 1·99-cv-00587 filed 03/08/1999) (contract action dismissed as settled), *Engel v. Equifax Inc* (DC 1:01-cv-00882 filed 04/17/2001) (statutory action dismissed as settled), *United States v Board of Regents* (FL-N 4.93-cv-40226 filed 06/25/1993) (statutory action dismissed as settled), *Sealed Plaintiff v. Sealed Defendant* (FL-S 0.01-cv-01845 filed 05/04/2001) (commerce action resolved by consent judgment), *Casimiro v Allstate* (HI 1:99-cv-00527 filed 07/22/1999) (insurance action dismissed as settled), *Kessler v. American Postal* (MD 8.98-cv-03547 filed 10/21/1998) (statutory action dismissed as settled), *United States v Frederick Memorial* (MD 1.01-cv-02923 filed 10/02/2001) (statutory action dismissed as settled), *Compaq Computer Corp. v SGII Inc* (MI-W 1:02-cv-00028 filed 01/16/2002) (trademark action dismissed as settled), *Sealed Plaintiff v Sealed Defendant* (MN 0:98-cv-02428 filed 11/10/1998) (fraud action dismissed as settled), *Sealed Plaintiff v Sealed Defendant* (MN 0:99-cv-00292 filed 02/18/1999) (fraud action dismissed as settled), *Sealed Plaintiff v Sealed Defendant* (MN 0 02-cv-00369 filed 02/12/2002) (fraud action dismissed as settled), *Sealed Plaintiff v. Sealed Defendant* (MN 0 02-cv-04270 filed 11/07/2002) (contract action dismissed as settled), *Sealed Plaintiff v. Sealed Defendant* (MS-S 1 95-cv-00161 filed 03/23/1995) (statutory action dismissed as settled), *Compass Marine v Lambert Fenchurch* (MS-S 1:99-cv-00252 filed 04/05/1999) (fraud action dismissed as settled), *Arviso v. Mission Manor Health* (NM 6 02-cv-01072 filed 08/27/2002) (statutory action dismissed as settled), *United States v Genesee Valley Card* (NY-W 6 97-cv-06502 filed 11/12/1997) (statutory action dismissed as settled), *United States v. 2986 Tallman Road* (NY-W 6 01-cv-06155 filed 03/23/2001) (drug-related seizure of property case resolved by consent judgment).

not.[10]) In one additional case, all documents in the case file were sealed, including the complaint and the settlement conference report, *except* for the agreed judgment, which specified the terms of settlement.[11]

We did not evaluate whether the sealing of documents complied with circuit law and local rules, but we did observe that the public record almost never included specific findings justifying sealing.

Some of the cases with sealed settlement agreements are likely to be of greater public interest than others. Table 2 lists some types of cases that might be of special public interest and states what proportion of sealed settlements in our study are in cases of each type. Approximately two-fifths of the cases have at least one of the features in Table 2 that might make them of special public interest.

Appendix C contains case descriptions showing what the public record reveals about each case. Because the complaints are almost never sealed, the public record almost always identifies the defendants and reveals what the defendants are alleged to have done.

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[10] We encountered 15 cases with sealed case files but unsealed docket sheets. a product liability action brought by a minor, *Farr v Newell Rubbermaid Inc* (AL-N 5.00-cv-00997 filed 04/18/2000), an employment action against the University of Michigan where private medical information was an issue, *Baker v Bollinger* (MI-E 4:00-cv-40239 filed 06/26/2000); a civil rights action by a minor against a county, *M K. v Pinnacle Programs Inc* (MN 0:98-cv-02440 filed 11/13/1998), a wrongful death action against a city and a railroad, *Schlicht v Dakota Minnesota & Eastern R R. Corp.* (MN 0 98-cv-02059 filed 12/28/1999), a job discrimination action brought on behalf of children, *Rowe v. Boys and Girls Club of America* (MN 0 01-cv-202269 filed 12/10/2001); two consolidated foreclosure actions pertaining to gambling boat mortgages, *Credit Suisse First Boston Mortgage Capital LLC v Doris* (MS-N 4.99-cv-00283 filed 11/22/1999), consolidated with *Credit Suisse First Boston Mortgage Capital Inc. v. Bayou Caddy's Jubilee Casino* (MS-N 4:99-cv-00284 filed 11/22/1999); a qui tam action under the False Claims Act against a hospital, *United States ex rel. Padda v Jefferson Memorial Hospital* (MO-E 4:00-cv-00177 filed 02/03/2000), a RICO case by one unnamed plaintiff against three unnamed defendants, *Sealed Plaintiff v Sealed Defendant* (NY-E 9:00-cv-04693 filed 08/11/2000), another product liability case with a minor plaintiff, *Keyes v Deere & Co* (PA-E 2 98-cv-00602 filed 02/06/1998), an insurance case involving a workers' compensation claim, *Slater v Liberty Mutual Insurance Co* (PA-E 2 98-cv-01711 filed 03/31/1998), a copyright case, *Valitek Inc. v. Hewlett-Packard Co.* (PA-E 2:99-cv-03024 filed 06/15/1999); an insurance case against a church, *Jesus Christ of the Apostolic Faith* (PA-E 2:00-cv-03320 filed 06/29/2000), a patent case, *Graham Packaging Co v. Mooney* (PA-M 1:00-cv-02027 filed 11/20/2000), and a third product liability case with a minor plaintiff, *Angelo v. General Motors Corp* (PA-W 2.00-cv-00871 filed 05/04/2000).

[11] This was a civil rights action for failure to prevent disclosure of plaintiff's medical condition, *Doe v City of Tulsa* (OK-N 4:00-cv-00896 filed 10/18/2000). We counted this as a case with a sealed settlement agreement, because although the agreed judgment was not sealed, other documents containing terms of settlement were sealed.

Table 2. Types of Cases That Might Be Of Special Public Interest

Type of Case	Cases	
Environmental	10	(1%)
Product Liability (includes cases with other Nature of Suit codes)[12]	258	(20%)
Professional Malpractice	40	(3%)
Public Party Defendant	153	(12%)
Very Serious Injury (death or serious permanent disability)	334	(26%)
Sexual Abuse	31	(2%)
Any Reason	**504**	**(40%)**

We had access to important terms of settlement in 18% of the cases with sealed settlement agreements. Occasionally this was because we had access to sealed documents. Sometimes sealed documents became unsealed. Sometimes documents that are not sealed disclose some or all terms of the settlement agreement. Analysis of information available in this way confirms that settlement agreements, sealed or otherwise, generally contain four essential elements: (1) a denial of liability, (2) a release of liability, (3) the amount of settlement, and (4) a requirement of confidentiality. In unfair competition cases, especially cases involving patents, the terms of settlement typically bind the parties to certain actions in addition to or instead of the payment of a settlement amount. In general, however, the only thing kept secret by the sealing of a settlement agreement is the amount of settlement.

Conclusion

Sealed settlement agreements are rare in federal court. They occur in less than one-half of one percent of civil cases. In 97% of these cases, the complaint is not sealed, so the public has access to information about the alleged wrongdoers and wrongdoings. Although the public record seldom contains specific findings justifying the sealing of settlement agreements,

[12] More than half of these cases arise from a 1998 airplane crash near Peggy's Cove, Nova Scotia (144 cases in the Eastern District of Pennsylvania), the 1996 crash of TWA flight 800 taking off from Kennedy airport also accounted for a substantial fraction of these cases (31 cases in the Southern District of New York)

generally the only thing kept secret by the sealing is the amount of settlement.

Appendix A
Method

Districts

We looked for sealed settlement agreements in the 11 districts with local rules requiring good cause to seal a document and a 50% random sample of the other districts.[13]

We originally designed our method so that we might include all districts in the study, but we have studied the districts in a modified random order, so that if we concluded the research without studying all districts, we would have studied a random sample. Because state court practices influence federal practice, we decided to study districts in the same state together, and we decided the same researcher should study them. So we listed the states (plus the District of Columbia, Guam, Puerto Rico, and the Virgin Islands) in random order and began studying the districts in that order.[14]

We modified random selection in the following ways. We began our research with districts in North Carolina, which is home to the subcommittee's chair (the Honorable Brent McKnight, formerly magistrate judge for the Western District of North Carolina and now district judge there), so that his additional knowledge about cases in his district would serve as a check on our work. We also put at the top of the list states with districts having local rules specifically concerning sealed settlement agreements. The Eastern District of Michigan has a rule calling for the unsealing of settlement agreements after two years. E.D. Mich. L.R. 6.4. The District of South Carolina has a new rule proscribing the sealing of settlement agreements. D.S.C. L.R. 5.03(C). We also put Florida at the top of the list, because of the state's groundbreaking Sunshine in Litigation law, Fla. Stat. § 69.081.

We decided the first 47 districts in the list would provide a sample of sufficient size, taking into account an estimate that it would take approximately a year and a half to study that many districts. We determined that our time frame would permit us to supplement the random sample with the five otherwise unselected districts with local rules requiring good cause to seal a document. That way our study would include all 11 dis-

[13] The Western District of New York adopted a good cause rule after the cases in this study were terminated

[14] The Northern Mariana Islands is not included, because its docket sheets are not available electronically.

tricts with good cause rules,[15] permitting a rough comparison between those districts and a sample of other districts, especially with respect to sealed settlement rates.[16]

To test whether results from our modified random sample are likely to be different from an unmodified random sample, we computed the overall rate of sealed settlement agreements using a procedure somewhat different from just comparing the number of sealed settlements we found to the number of cases we examined. There are nine districts that were selected first, before we starting selecting districts at random – districts in Florida, Michigan, North Carolina, and South Carolina. We computed an average by weighting each of these districts as 1. There are 85 other districts Not considering the five districts that were selected only because they have good cause rules (California Northern, Illinois Northern, Maryland, Oklahoma Northern, and Utah), we selected 38 at random. So we weighted these districts 85/38 = 2.24 in computing an average. Using this weighting scheme, we computed a sealed settlement rate of 0.46%, which is almost identical to the unweighted rate of 0.44%. For this reason, we decided to analyze our data as if our sample were truly random.

Termination Cohort

We decided to look at cases terminated over a two-year period – calendar years 2001 and 2002. Because we include all calendar months, there are unlikely to be any hidden seasonal biases. Looking at two years of terminations ensures that our data will not be based only on an idiosyncratic year.

Finding Sealed Settlement Agreements

Our search for sealed settlement agreements was a process of step-by-step elimination – upon closer and closer review – of cases that do not have sealed settlement agreements.

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[15] California Northern, N.D. Cal. Civ L.R. 79-5, Illinois Northern, N D Ill. L R 26 2; Maryland, D. Md L.R. 105.11, Michigan Western, W D. Mich. L. Civ. R. 10.6, Mississippi Northern and Southern, N. & S D. Miss L.R 83.6, Missouri Eastern, E.D Mo L R. 83-13.05(A), Oklahoma Northern, N.D Okla L.R. 79.1(D), Tennessee Eastern, E.D Tenn. L.R. 26 2, Utah, D. Utah L Civ. R. 5-2, and Washington Western, W D. Wash. L. Civ. R 5 The Western District of New York adopted a good cause rule after the cases in this study were terminated, *see* W.D.N.Y. L R 5 4(a) (adopted May 1, 2003).

[16] Three of these additional districts – California Northern, Illinois Northern, and Oklahoma Northern – are in multidistrict states We did not study the other districts in those states.

We rejected the idea of looking only at cases with disposition codes of "settled" or "consent judgment" in data reported to the Administrative Office – that would have eliminated 37% of the cases we ultimately found.[17] Even if we also looked at cases with disposition codes of "voluntary dismissal" and "other dismissal," we would have eliminated 20% of the cases we ultimately found.[18]

We attempted to download all 288,846 docket sheets for cases terminated in 2001 or 2002 in the study districts. We found 138 of the docket sheets (0.05%) to be sealed. We searched each unsealed docket sheet for the word "seal."[19] This search found "seal," "sealed," "unseal," etc., including "Seal," "Seale," etc. in a party name. Docket *entries* (and headers) with the word "seal" in them were extracted and assembled into a text file. If a docket *sheet* had the word "seal" in it, then we also searched for the word "settle" (which found "settle," "settled," "settlement," etc.), extracted docket *entries* with the word "settle" in them, and assembled them into the same text file as the docket entries with the word "seal" in them. Naturally, some docket entries had both the word "seal" and the word "settle" in them. In this way we examined docket entries from 15,026 cases.

We considered, but rejected, looking only at cases where a docket entry with the word "seal" had a date within two weeks, for example, of either the termination date or a docket entry with the word "settle." Had we done this, we would have missed 8% of the cases we ultimately found.[20]

If "seal" and "settle" docket entries from the same case suggested that the case might or did have a sealed settlement agreement, then we read the entire docket sheet for that case. Sometimes, for example, a docket entry merely says "sealed document," and review of other docket entries is necessary to determine what the sealed document might be.[21]

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[17] 60% of the cases we found were coded 13 = "dismissed. settled" and 4% were coded 5 = "judgment on consent."

[18] 8% of the cases we found were coded 12 = "dismissed: voluntarily" and 9% were coded 14 = "dismissed: other "

[19] Because the Northern District of Illinois has a procedure for restricting public access to documents without actually sealing them – although they may also be sealed – for that district we also searched for the word "restrict "

[20] In one case the word "seal" is 627 days from both termination and the word "settle" (*Franco v Saks & Co.*, NY-S 1:00-cv-05522 filed 07/26/2000).

[21] For this project, researchers who examine docket sheets and court documents all have law degrees – either a J.D. or an M.L.S (master of legal studies, which typically requires approximately one year of law school) Tim Reagan reviewed documents from districts in California, Guam, Iowa, Michigan, Missouri, New Hampshire, North Caro-

This review of 2,262 docket sheets eliminated cases with sealed documents filed only at the beginning of qui tam actions or attached only to discovery motions, motions for summary judgment, and motions in limine.

When we reviewed a complete docket sheet, we determined two things. First, we determined whether the case might or did include a sealed settlement agreement. If so, then we identified which documents in the case file to review to learn what the case is about and to learn as much as possible about the sealed settlement agreement. We reviewed actual documents filed in 1,415 cases.[22] Generally we reviewed complaints, cross- and counterclaims, court opinions, and documents pertaining, or possibly pertaining, to the settlement.

We were not able to determine with very good precision whether cases with sealed docket sheets contained sealed settlement agreements, so we regarded cases with sealed docket sheets that were terminated by consent judgment or settlement as containing sealed settlement agreements and cases terminated otherwise as not containing sealed settlement agreements.[23]

In this way we identified 1,272 cases among cases terminated over a two-year period in 52 districts that appear to have sealed settlement agreements.[24] Table A summarizes the number of cases reviewed in each district. Descriptions of these cases are in Appendix C.

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lina, Puerto Rico, South Carolina, and Virginia, Shannon Wheatman reviewed documents from districts in Florida, Hawaii, Indiana, Maine, Maryland, North Dakota, Pennsylvania, Puerto Rico, Virginia, and Washington; Marie Leary reviewed documents from districts in Alabama, Arizona, Delaware, Idaho, New York, and South Dakota, Natacha Blain reviewed documents from districts in Illinois, Minnesota, Mississippi, New Mexico, Oklahoma, Tennessee, and Utah, Steve Gensler reviewed documents from the District of Columbia

[22] For one case in the Northern District of Illinois, most of the case file is lost, so our decision as to the presence of a sealed settlement agreement was based on review of the docket sheet and a one-page stipulated dismissal. An additional two case files in the Southern District of New York are lost, so our decisions as to the presence of sealed settlement agreements were based on review of the docket sheets alone

[23] We were given access to 17 of these sealed docket sheets and our decision as to the presence of a sealed settlement agreement was based on a review of the docket sheets rather than the less precise rule of thumb.

[24] This includes 23 cases (2%) with sealed docket sheets terminated either by consent judgment or settlement, according to data reported to the Administrative Office

Table A Case Counts

District	Cases Terminated in 2001 or 2002	Sealed Docket Sheets	Docket Sheets with Entries Examined	Docket Sheets Read	Case Files Examined	Cases with Sealed Settlement Agreements
Alabama Middle	3,237	0	80	4	3	3
Alabama Northern	7,042	3	745	26	24	26
Alabama Southern	2,015	1	78	22	9	9
Arizona	6,604	18	347	32	21	18
California Northern**	12,140	11	635	146	82	70
Delaware	2,250	0	213	13	9	9
District of Columbia	5,368	5	469	39	35	28
Florida Middle	13,678	17	529	103	43	36
Florida Northern	3,045	2	160	11	5	5
Florida Southern	15,928	16	669	260	128	111
Guam	130	0	7	3	1	1
Hawaii	1,752	2	458	42	40	38
Idaho	1,350	6	440	10	5	4
Illinois Northern**	19,378	0	649	99	80	72
Indiana Northern	4,103	1	216	11	7	0
Indiana Southern	5,831	0	200	60	13	9
Iowa Northern	1,096	0	42	15	6	6
Iowa Southern	1,976	0	69	9	0	0
Maine	1,070	0	141	10	2	2
Maryland**	7,851	8	232	20	15	15
Michigan Eastern	9,561	0	351	52	19	16
Michigan Western*	2,775	2	181	13	7	8
Minnesota	4,792	13	300	31	27	27
Mississippi Northern*	2,603	0	54	22	5	5
Mississippi Southern*	5,775	11	211	38	18	14
Missouri Eastern*	4,798	0	342	53	22	20
Missouri Western	4,857	0	167	35	27	24
New Hampshire	1,157	2	83	10	4	4
New Mexico	3,084	3	86	23	19	19
New York Eastern	16,001	0	495	88	59	54
New York Northern	3,928	0	192	27	22	21
New York Southern	20,976	0	948	130	93	90
New York Western	3,000	12	106	20	12	11
North Carolina Eastern	2,808	0	143	12	4	3
North Carolina Middle	2,284	0	63	10	7	6
North Carolina Western	2,203	2	101	27	14	11
North Dakota	574	0	126	8	6	5

Table A Case Counts.

District	Cases Terminated in 2001 or 2002	Sealed Docket Sheets	Docket Sheets with Entries Examined	Docket Sheets Read	Case Files Examined	Cases with Sealed Settlement Agreements
Oklahoma Northern**	1,954	0	176	35	15	11
Pennsylvania Eastern	19,520	0	655	208	192	183
Pennsylvania Middle	4,678	0	520	25	12	10
Pennsylvania Western	6,218	0	306	44	20	16
Puerto Rico	3,562	0	223	159	120	117
South Carolina	8,126	0	311	25	8	8
South Dakota	820	0	40	6	0	0
Tennessee Eastern*	3,128	0	249	15	11	8
Tennessee Middle	3,162	0	581	39	24	18
Tennessee Western	2,759	0	222	37	16	7
Utah*	2,387	3	179	11	8	8
Virginia Eastern	14,448	0	330	57	47	44
Virginia Western	3,593	0	112	41	31	28
Washington Eastern	1,355	0	70	3	2	2
Washington Western*	6,116	0	741	23	16	12
Total Number of Cases	**288,846**	**138**	**15,043**	**2,262**	**1,415**	**1,272**

* District with a local rule requiring good cause for sealing and part of the 50% random sample
** District with a local rule requiring good cause for sealing and *not* part of the 50% random sample