ADVISORY COMMITTEE
ON
CIVIL RULES

Washington, D.C.
May 1-2, 2003
Volume I

AGENDA
ADVISORY COMMITTEE ON CIVIL RULES
MAY 1-2, 2003

1. Report on Judicial Conference action on class actions minimal-diversity jurisdiction legislation

   - Report on local rules project, reviewed by Professors Cooper and Capra

2. **ACTION** — Approving minutes of October 3-4, 2002, committee meeting

3. Legislative Report

4. **ACTION** — Approving for publication proposed restyled Rules 1-15

5. Report of Forfeiture and Sealing Documents Subcommittee

   A. Draft language prescribing new Admiralty Rule G
   B. Federal Judicial Center study of sealed-settlement agreements and review of local sealing-order rules

6. Report of Discovery Subcommittee on electronic discovery issues

7. **ACTION** — Approving for publication proposed amendments to Rule 45(a) requiring notice to a deponent of the means of recording the deposition

8. **ACTION** — Approving for publication proposed new Rule 5.1 to provide notice to attorney general of constitutional challenge to state statute

9. **ACTION** — Approving for publication proposed amendments to Rule 6(e) clarifying time-counting provision

10. **ACTION** — Approving for publication proposed technical amendments to Rule 27 to address outdated cross-references

11. Report of Class Action Subcommittee

    - Federal Judicial Center survey of attorneys' reasons for filing class actions in federal or state court

12. Consideration of proposed new Rule 62.1 authorizing indicative court rulings

13. Consideration of proposed amendments to Rule 50(b) modifying procedures governing consideration of post-trial motions

14. Consideration of Rule 12(f) procedures governing material struck as scandalous, redundant, or impertinent in an electronic world

15. Consideration of proposed amendments to Rule 15

16. Bankruptcy Rules Committee's proposed amendments to Rule 7004 authorizing issuance of summons by electronic means

17. Next Meeting

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April 11, 2003
Projects

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April 11, 2003
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CIVIL RULES SUGGESTIONS DOCKET

ADVISORY COMMITTEE ON CIVIL RULES

The docket sets forth suggested changes to the Federal Rules of Civil Procedure considered by the Advisory Committee since 1992. The suggestions are set forth in order by (1) civil rule number, (2) form number, and where there is no rule or form number (or several rules or forms are affected), (3) alphabetically by subject matter.

[illegible]	[illegible]	[illegible]
Rule 4(c)(1) Accelerating 120-day service provision	Joseph W. Skupniewitz	4/94 - Committee deferred as premature **DEFERRED INDEFINITELY**
Rule 4(d) To clarify waiver-of-service provision	97-CV-R John J. McCarthy 11/21/97	12/97 - Referred to reporter, chair, and Agenda Subcommittee 3/99 - Agenda Subcommittee to accumulate for periodic revision **PENDING FURTHER ACTION**
Rule 4(m) Extends time to serve pleading after initial 120 days expires	Judge Edward Becker	4/95 - Committee considered **DEFERRED INDEFINITELY**
Rule 4 To provide for sanctions against the willful evasion of service	97-CV-K Judge Joan Humphrey Lefkow 8/12/97	10/97 - Referred to chair, reporter, and Agenda Subcommittee 3/99 - Agenda Subcommittee recommended accumulation for periodic revision **PENDING FURTHER ACTION**
Rule 5 Clarifies that a document is deemed filed upon delivery to an established courier	00-CV-C Lawrence A. Salibra, Senior Counsel 6/5/00	6/00 - Referred to chair, reporter, and agenda subcommittee **PENDING FURTHER ACTION**
Rule 5(d) Does non-filing of discovery material affect privilege	Standing Committee 6/99	10/99 - Committee considered **PENDING FURTHER ACTION**
Rule 6 Clarifies when three calendar days are added to deadline when service is by mail	00-CV-H Roy H. Wepner, Esq. (via Appellate Rules Committee) 11/27/00	12/00 - Referred to reporter and chair 5/02 - Committee considered 10/02 - Committee considered **PENDING FURTHER ACTION**

Rule 6(e) Clarify the method for extending time to respond after service	Appellate Rules Committee 4/02	4/02 - Referred to Committee 10/02 - Committee considered **PENDING FURTHER ACTION**
Rule 8(a)(2) Require "short and plain statement of the claim" that allege facts sufficient to establish a *prima* facie case in employment discrimination	02-CV-E Nancy J. Smith, Esq. 6/17/02	6/02 - Referred to reporter and chair **PENDING FURTHER ACTION**
Rule 12 To conform to *Prison Litigation Act of 1996* that allows a defendant sued by a prisoner to waive right to reply	97-CV-R John J. McCarthy 11/21/97	12/97 - Referred to chair, reporter, and Agenda Subcommittee 3/99 - Agenda Subcommittee considered 4/99 - Committee considered and deferred action **DEFERRED INDEFINITELY**
Rule 12(f) Provide guidance for the clerk when the court strikes a pleading	02-CV-J Judge D. Brock Hornby 10/02	10/02 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 15(a) Amendment may not add new parties or raise events occurring after responsive pleading	Judge John Martin 10/20/94 & Judge Judith Guthrie 10/27/94	4/95 - Committee considered 11/95 - Committee considered and deferred **DEFERRED INDEFINITELY**
Rule 15(c)(3)(B) Clarifying extent of knowledge required in identifying a party	98-CV-E Charles E. Frayer, Law student 9/27/98	9/98 - Referred to chair, reporter, and Agenda Subcommittee 3/99 - Agenda Subcommittee rec. accumulate for periodic revision (1) 4/99 - Committee considered and retained for future study 5/02 - Committee considered along with J. Becker suggestion in 266 F.3d 186 (3rd Cir. 2001). 10/02 - Committee referred to subcommittee for further consideration **PENDING FURTHER ACTION**
Rule 15(c)(3)(B) Amendment to allow relation back	Judge Edward Becker, 266 F.3d 186 (3rd Cir. 2001)	10/01 - Referred to chair and reporter 1/02 - Committee considered 5/02 - Committee considered 10/02 - Committee referred to subcommittee for further consideration **PENDING FURTHER ACTION**

Rule 19 Clarify language regarding dismissal of actions	02-CV-F Prof. Bradley Scott Shannon 5/30/02	7/02 - Referred to chair and reporter 10/02 - Referred to Style Consultant **PENDING FURTHER ACTION**
Rule 23 Amend class action rule to accommodate demands of mass tort litigation and other problems	Jud Conf on Ad Hoc Communication for Asbestos Litigation 3/91; William Leighton ltr 7/29/94; H.R. 660 introduced by Canady on CV 23 (f)	5/93 - Considered by Committee 6/93 - Submitted for approval for publication; withdrawn 10/93, 4/94, 10/94, 2/95, 4/95, 11/95; studied at meetings. 4/96 - Forwarded to Standing Committee for submission to Judicial Conference 6/96 - Approved for publication by Standing Committee 8/96 - Published for comment 10/96 - Discussed by Committee 5/97 - Approved and forwarded changes to (c)(1), and (f); rejected (b)(3)(A) and (B); and deferred other proposals until next meeting 4/97 - Stotler letter to Congressman Canady 6/97 - Changes to 23(f) were approved by Standing Committee; changes to 23(c)(1) were recommitted to Advisory Committee 10/97 - Considered by Committee 3/98 - Considered by Committee, deferred pending mass torts working group deliberations 3/99 - Agenda Subcommittee recommended referral to other Committee 4/00 - Committee considered 10/00 - Committee considered 4/01 - Request for publication 6/01 - Standing Committee approved for publication 8/01 - Published for public comment 10/01 - Committee considered 1/02 - Committee considered 5/02 - Committee approved 6/02 - Standing Committee approved 9/02 - Judicial Conference approved 3/03 - Supreme Court approved **PENDING FURTHER ACTION**

Rule 23 Standards and guidelines for litigating and settling consumer class actions	97-CV-T Patricia Sturdevant, for National Association for Consumer Advocates 12/10/97	12/97 - Referred to reporter, chair, and Agenda Subcommittee 3/99 - Agenda Subcommittee recommended referral to other Committee 4/00 - Committee considered 10/00 - Committee considered 4/01 - Request for publication 6/01 - Standing Committee approved for publication 8/01 - Published for public comment 10/01 - Committee considered 1/02 - Committee considered 5/02 - Committee approved 6/02 - Standing Committee approved 9/02 - Judicial Conference approved 3/03 - Supreme Court approved **PENDING FURTHER ACTION**
Rule 23(e) Amend to include specific factors court should consider when approving settlement for monetary damages under 23(b)(3)	97-CV-S Beverly C. Moore, Jr., for Class Action Reports, Inc. 11/25/97	12/ 97 - Referred to reporter, chair, and Agenda Subcommittee 3/99 - Agenda Subcommittee recommended referral to other Committee 4/00 - Committee considered 10/00 - Committee considered 4/01 - Request for publication 6/01 - Standing Committee approved for publication 8/01 - Published for public comment 10/01 - Committee considered 1/02 - Committee considered 5/02 - Committee approved 6/02 - Standing Committee approved 9/02 - Judicial Conference approved 3/03 - Supreme Court approved **PENDING FURTHER ACTION**

Rule 23(e) Require all "side-settlements," including attorney's fee components, to be disclosed and approved by the district court	99-CV-H Brian Wolfman, for Public Citizen Litigation Group 11/23/99	12/99 - Referred to reporter, chair, and Agenda Subcommittee 4/00 - Referred to Class Action Subcommittee 10/00 - Committee considered 4/01 - Request for publication 6/01 - Standing Committee approved for publication 8/01 - Published for public comment 10/01 - Committee considered 1/02 - Committee considered 5/02 - Committee approved 6/02 - Standing Committee approved 9/02 - Judicial Conference approved 3/03 - Supreme Court approved **PENDING FURTHER ACTION**
Rule 23 Class action attorney fee		10/00 - Committee considered 4/01 - Request for publication 6/01 - Standing Committee approved for publication 8/01 - Published for public comment 10/01 - Committee considered 1/02 - Committee considered 5/02 - Committee approved 6/02 - Standing Committee approved 9/02 - Judicial Conference approved 3/03 - Supreme Court approved **PENDING FURTHER ACTION**
Rule 26 Interviewing former employees of a party	John Goetz	4/94 - Declined to act **DEFERRED INDEFINITELY**
Rule 26 Does inadvertent disclosure during discovery waive privilege	Discovery Subcommittee	10/99 - Discussed **PENDING FURTHER ACTION**

Suggestion	Docket Number, Submitter, and Date	Status
Rule 26 Electronic discovery		10/99 - Referred to Discovery Subcommittee 3/00 - Discovery Subcommittee considered 4/00 - Committee considered 10/00 - Committee considered 4/01 - Committee considered 5/02 - Committee considered 10/02 - Committee and Discovery Subcommittee considered **PENDING FURTHER ACTION**
Rule 26 Interplay between work-product doctrine under Rule 26(b)(3) and the disclosures required of experts under Rules 26(a)(2) and 26 (b)(4)	00-CV-E Gregory K. Arenson, Chair, NY State Bar Association Committee on Federal Procedure 8/7/00	8/00 - Referred to reporter, chair, and Agenda Subcommittee **PENDING FURTHER ACTION**
Rule 26(a) To clarify and expand the scope of disclosure regarding expert witnesses	00-CV-I Prof. Stephen D. Easton 11/29/00	12/00 - Referred to reporter and chair **PENDING FURTHER ACTION**
Rule 30(b) Give notice to deponent that deposition will be videotaped	99-CV-J Judge Janice M. Stewart 12/8/99	12/99 - Referred to reporter, chair, Agenda Subcommittee, and Discovery Subcommittee 4/00 - Referred to Discovery Subcommittee **PENDING FURTHER ACTION**

Rule 32 Use of expert witness testimony at subsequent trials without cross examination in mass torts	Honorable Jack Weinstein 7/31/96	7/31/96 Referred to chair and reporter 10/96 - Committee considered. Federal Judicial Center to conduct study 5/97 - Reporter recommended that it be considered part of discovery project 3/99 - Agenda Subcommittee recommended referral to other committee **PENDING FURTHER ACTION**
Rules 33 & 34 Require submission of a floppy disc version of document	99-CV-E Jeffrey K. Yencho 7/22/99	7/99 - Referred to Agenda Subcommittee 8/99 - Agenda Subcommittee recommended referral to other Subcommittee **PENDING FURTHER ACTION**
Rule 40 Precedence given elderly in trial setting	00-CV-A Michael Schaefer 1/19/00	2/00 - Referred to chair, reporter, and Agenda Subcommittee **PENDING FURTHER ACTION**
Rule 41(a) Makes it explicit that actions *and* claims may be dismissed	02-CV-F Bradley Scott Shannon 5/30/02	7/02 - Referred to chair and reporter 10/02 - Referred to Style Consultant **PENDING FURTHER ACTION**
Rule 50 Eliminate the requirement that a motion for judgment be made "at the close of all the evidence" as a prerequisite for making a post-verdict motion, if a motion for judgment had been made earlier	03-CV-A New York State Bar Association Committee on Federal Procedure of the Commercial and Federal Litigation Section 2/25/03	3/03 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 50(b) When a motion is timely after a mistrial has been declared	97-CV-M Judge Alicemarie Stotler 8/26/97	8 /97 - Referred to reporter and chair 10/97 - Referred to Agenda Subcommittee 3/99 - Agenda Subcommittee to accumulate for periodic revision **PENDING FURTHER ACTION**

Rule 51 Jury instructions filed before trial	96-CV-E Judge Stotler 97-CV-V Gregory B. Walters, Circuit Executive, Office of the Circuit Executive, U.S. Courts for Ninth Circuit 12/4/97	11/8/96 Referred to chair 5/97 - Reporter recommended consideration of comprehensive revision 1/98 - Referred to reporter, chair, and Agenda Subcommittee 3/98 - Committee considered 11/98 - Committee considered 3/99 - Agenda Subcommittee recommended full Committee consideration 4/99 - Committee considered 10/99 - Committee considered 4/00 - Committee considered 10/00 - Committee considered 4/01 - Committee considered 1/02 - Committee held public hearing 5/02 - Committee approved amendments 6/02 - Standing Committee approved 9/02 - Judicial Conference approved 3/03 - Supreme Court approved **PENDING FURTHER ACTION**
Rule 53 Provisions regarding pretrial and post-trial masters	Judge Wayne Brazil	5/93 - Committee considered 10/93 - Committee considered 4/94 - Committee considered draft amendments to Civil Rule 16.1 regarding "pretrial masters" 10/94 - Committee considered draft amendments 11/98 - Subcommittee appointed 3/99 - Agenda Subcommittee recommended referral to other Committee 10/99 - Committee considered and requested Federal Judicial Center to conduct survey 4/00 - Committee considered FJC preliminary report 1/02 - Committee held public hearing 5/02 - Committee approved amendments 6/02 - Standing Committee approved 9/02 - Judicial Conference approved 3/03 - Supreme Court approved **PENDING FURTHER ACTION**
Rule 55(a) Amend rule to provide that a default may also be entered against a defending party "for failure to comply with these rules or any order of court."	Prof. Bradley Scott Shannon 1/14/03 (02-CV-F Addendum)	1/03 - Referred to reporter and chair **PENDING FURTHER ACTION**

Rule 56 To clarify cross-motion for summary judgment	John J. McCarthy 11/21/97	12/97 - Referred to reporter, chair, and Agenda Subcommittee **PENDING FURTHER ACTION**
Rule 56(a) Clarification of timing	97-CV-B Scott Cagan 2/27/97	3/97 - Referred to reporter, chair, and Agenda Subcommittee 5/97 - Reporter recommended no action 3/99 - Agenda Subcommittee to accumulate for periodic revision **PENDING FURTHER ACTION**
Rule 56(c) Time for service and grounds for summary adjudication	Judge Judith N. Keep 11/21/94	4/95 - Committee considered 11/95 - Committee considered 3/99 - Agenda Subcommittee to accumulate for periodic revision 1/02 - Committee considered and set for further discussion **PENDING FURTHER ACTION**
Rule 62.1 Proposed new rule governing "Indicative Rulings"	Advisory Comm on Appellate Rules 4/01	1/02 - Committee considered **PENDING FURTHER ACTION**
Rule 68 Party may make a settlement offer that raises the stakes of the offeree who would continue the litigation	96-CV-C Agenda book for 11/92 meeting; Judge Swearingen 10/30/96 S. 79 Civil Justice Fairness Act of 1997 and § 3 of H.R. 903 02-CV-D Gregory K. Arenson 4/19/02	1/93 - Unofficial solicitation of public comment 5/93 - Committee considered 10/93 - Committee considered 4/94 - Committee considered. Federal Judicial Center to study rule 10/94 - Committee deferred for further study 1995 - Federal Judicial Center completes its study **DEFERRED INDEFINITELY** 10/96 - Referred to reporter, chair, and Agenda Subcommittee (Advised of past comprehensive study of proposal) 1/97 - S. 79 introduced. § 303 would amend the rule 4/97 - Stotler letter to Hatch 5/97 - Reporter recommended continued monitoring 3/99 - Agenda Subcommittee recommended removal from agenda 10/99 - Consent calendar removed from agenda **COMPLETED** 5/02 - Referred to reporter and chair 10/02 - Committee considered and agreed to carry forward suggestion **PENDING FURTHER ACTION**

Rule 81 To add injunctions to the rule	John J. McCarthy 11/21/97	12/97 - Referred to reporter, chair, and Agenda Subcommittee **PENDING FURTHER ACTION**
Rule 81(c) Removal of an action from state courts — technical conforming change deleting "petition"	Joseph D. Cohen 8/31/94	4/95 - Accumulate other technical changes and submit eventually to Congress 11/95 - Reiterated April 1995 decision 5/97 - Reporter recommended that it be included in next technical amendment package 3/99 - Agenda Subcommittee to accumulate for periodic revision 4/99 - Committee considered **PENDING FURTHER ACTION**
Rule 83(a)(1) Uniform effective date for local rules and transmission to AO		3/98 - Committee considered 11/98 - Committee considered 3/99 - Agenda Subcommittee recommends referral to other Committee (3) 4/00 - Committee considered **DEFERRED INDEFINITELY**
Rule 83 Have a uniform rule making Federal Rules of Civil Procedure consistent with Federal Rules of Appellate Procedure with respect to attorney admission	02-CV-H Frank Amador, Esq. 9/19/02	9/02 - Referred to reporter and chair **PENDING FURTHER ACTION**
CV Form 1 Standard form AO 440 should be consistent with summons Form 1	98-CV-F Joseph W. Skupniewitz, Clerk 10/2/98	10/98 - Referred to chair, reporter, and Agenda Subcommittee 3/99 - Agenda Subcommittee recommended full Committee consideration **PENDING FURTHER ACTION**
CV Form 17 Complaint form for copyright infringement	Professor Edward Cooper 10/27/97	10/97 - Referred to Committee 3/99 - Agenda Subcommittee recommends full Committee consideration 4/99 - Committee deferred for further study **PENDING FURTHER ACTION**
CV Forms 31 and 32 Delete the phrase, "that the action be dismissed on the merits" as erroneous and confusing	02-CV-F Prof. Bradley Scott Shannon 5/30/02	7/02 - Referred to chair and reporter 10/02 - Referred to Style Consultant **PENDING FURTHER ACTION**

AO Forms 241 and 242 Amend to conform to changes under the Antiterrorism and Effective Death Penalty Act of 1997	98-CV-D Judge Harvey E. Schlesinger 8/10/98	8/98 - Referred to reporter, chair, and Agenda Subcommittee 3/99 - Agenda Subcommittee recommends referral to other Committee **PENDING FURTHER ACTION**
Admiralty Rule B Clarify Rule B by establishing the time for determining when the defendant is found in the district	01-CV-B William R. Dorsey, III, Esq., President, The Maritime Law Association	6/00 - Referred to reporter, chair, and Mark Kasanin 11/01 - Committee considered 10/02 - Committee approved for publication 1/03 - Standing Committee approved for publication **PENDING FURTHER ACTION**
New Admiralty Rule Authorize immediate posting of preemptive bond to prevent vessel seizure	96-CV-D Magistrate Judge Roberts 9/30/96 #1450	12/96 - Referred to Admiralty and Agenda Subcommittee 3/99 - Agenda Subcommittee deferred action until more information available 5/02 - Committee discussed new rule governing civil forfeiture practice **PENDING FURTHER ACTION**
Admiralty Rule C(4) Amend to satisfy constitutional concerns regarding default in actions *in rem*	97-CV-V Gregory B. Walters, Cir. Exec., for Jud. Council of Ninth Cir. 12/4/97	1/98 - Referred to reporter, chair, and Agenda Subcommittee 3/99 - Agenda Subcommittee recommended deferral until more information available **PENDING FURTHER ACTION**
Court filing fee AO regulations on court filing fees should not be effective until adoption in the FRCP or Local Rules of Court	02-CV-C James A. Andrews 4/1/02, 5/13/02	4/02 - Referred to reporter and chair 6/02 - Referred second letter to reporter and chair **PENDING FURTHER ACTION**
***De Bene Esse* Depositions** Provide specifically for *de bene esse* depositions	02-CV-G Judge Joseph E. Irenas 6/7/02	7/02 - Referred to reporter and chair **PENDING FURTHER ACTION**
Electronic Filing To require clerk's office to date stamp and return papers filed with the court.	99-CV-I John Edward Schomaker, prisoner 11/25/99	12/99 - Referred to reporter, chair, Agenda Subcommittee, and Technology Subcommittee **PENDING FURTHER ACTION**

Interrogatories on Disk	98-CV-C Michelle Ritz 5/13/98 See also 99-CV-E: Jeffrey Yencho suggestion re: Rules 3 and 34	5/98 - Referred to reporter, chair, and Agenda Subcommittee 3/99 - Agenda Subcommittee received and referred to other Committee **PENDING FURTHER ACTION**
Notice to U.S. Attorney. Requires litigant to notify U.S. Attorney when the constitutionality of a federal statute is challenged and when United States is not a party to the action	00-CV-G Judge Barbara B. Crabb 10/5/00	10/00 - Referred to reporter and chair 1/02 - Committee considered 10/02 - Committee considered **PENDING FURTHER ACTION**
Plain English Make the language understandable to all	02-CV-I Conan L. Hom, law student 10/2/02	10/02 - Referred to reporter and chair **PENDING FURTHER ACTION**
Postal Bar Codes Prevent manipulation of bar codes in mailings, as in zip plus 4 bar codes	00-CV-D Tom Scherer 3/2/00	7/00 - Referred to reporter, chair, and incoming chair **PENDING FURTHER ACTION**
Pro Se Litigants To create a committee to consider the promulgation of a specific set of rules governing cases filed by pro se litigants	97-CV-I Judge Anthony J. Battaglia, on behalf of the Federal Magistrate Judge Assn. Rules Committee, to support proposal by Judge David Piester 7/17/97	7/97 - Referred to reporter and chair 10/97 - Referred to Agenda Subcommittee 3/99 - Agenda Subcommittee received schedule for further study **PENDING FURTHER ACTION**
Simplified Procedures Establish federal small claims procedures	Judge Niemeyer 10/00	10/99 - Committee considered, Subcommittee appointed 4/00 - Committee considered 10/00 - Committee considered **PENDING FURTHER ACTION**
Word Substitution Substitute term "action" for "case" and other similar words; substitute term "averment" for "allegation" and other similar words	02-CV-F Prof. Bradley Scott Shannon 5/30/02	7/02 - Referred to reporter and chair 10/02 - Referred to Style Consultant **PENDING FURTHER ACTION**

LOCAL RULES: CIVIL: IDENTIFYING THE PROBLEMS

These notes reflect on the local district rules identified as problems that may warrant attention. Identification of the rules was made by The December 12, 2002 Report of the Local Rules Project, as supplemented by further study of additional rules.

First comes a brief introduction identifying the general considerations that have guided the canvass of specific rules that may present problems. Because the general considerations are subject to debate, the discussion of particular rules often suggests competing considerations that bear on the desirable course of action. Throughout, it is recognized that the Report has deliberately chosen to cast a wide net. It identifies many more possible problems than will, in the end, deserve action.

GENERAL CONSIDERATIONS

Action

The overall project is enormously useful. Compiling and comparing local rules is an arduous undertaking. No one else is likely to do it. Describing the cumulative phenomena is essential to understanding what we confront. The Standing Committee should be pleased with itself for carrying forward the study of local rules, and proud of the results.

The transition from knowledge to action may be complicated. We know a lot. Whether we want to do a lot is less clear. Even an aggressive approach to eliminating inconsistent and duplicative local rules would do little to reduce the bulk or number. And any immediate reduction might be followed by adoption of replacement rules. The occasion for acting, moreover, arises from our perception that the circuit councils have not done all that they should. There is much to be said for intruding only when two tests are met: (1) The inconsistency is clear or the duplication extensive; and (2) The subject seems at least modestly important.

Inconsistency

Local rules inconsistent with national rules seem an easy target for correction. But three cautions seem appropriate.

The easy caution is that inconsistency should be challenged gently when the question is arguable.

Inconsistency with the "spirit" of a national rule relates in part to the clarity of the inconsistency. Beyond that, there is a nearly generic category of inconsistency that arises when the national rule seems to confer discretion and the local rule seeks to confine discretion. This is a point at which it is good to heed Judge Fitzwater's sage advice: the local rule promotes consistency. If the district has encountered the spectacle of different judges routinely exercising "discretion" in inconsistent ways, a local rule response may be better for that district than more open-ended adherence to the spirit of the national rule.

At times it may be better to overlook even flat-out, clear inconsistency. A recent illustration is the pending revision of Rule 51. The Ninth Circuit Council, surveying local rules, found many that required submission of jury instruction requests before the start of trial. The Council recognized that these local rules are inconsistent with present Rule 51. Rather than rescind the rules, it asked the Rules Committees to amend Rule 51. The amendments grew well beyond this modest beginning, but throughout the process it was agreed that the national rule should authorize what the local rules had done. The local rules were better than the national rule. It would be a shame to stifle desirable practice during the years required to study, evaluate, and perhaps emulate in the national rules.

The value of overlooking even clear inconsistency ties to another frequent theme in the local rules discussion. Time and again, we have noted the value of local "experiments." The experiments are not likely to be framed with a rigor that satisfies social science standards, but they can be valuable nonetheless. Local rules that limit the number of Rule 36 requests to admit are a good example. As it happens, they are not inconsistent with the national rules; Rule 26(b)(2) expressly authorizes these local rules. Rule 26(b)(2) was deliberately written this way in the 2000 discovery amendments in the hope that experience with local rules might pave the way for a national rule. The national rule limits on numbers of interrogatories and numbers of depositions grew out of experience with local rules that imposed such limits, often for many years before the national limits were adopted. In the waning days of the CJRA, the Advisory Committee seriously considered a Rule 83 amendment that would permit 5-year experiments with inconsistent local rules by leave of the Judicial Conference. The idea was put aside, in large part from doubt whether § 2072 could be used to circumvent the consistency requirement of § 2071. A policy of genial tolerance for useful experiments may nonetheless be appropriate.

There is fair ground to debate whether there is any room to display benign tolerance for a local rule that seems to improve on a national rule. The commands of § 2071(a) and Civil Rule 83(a)(1) are not to be lightly disregarded. Inconsistencies are taken seriously in these notes. Outright rebellion is seldom tolerated. But local rules that cabin discretion, or add requirements, or seem to depart from the "spirit" or "intent" of a national rule, may serve good purposes. Acceptance, expungement, and modification may be acceptable by turns.

Duplication

The worst form of duplication is the extensive but incomplete recital or paraphrasing of a national rule. Local rules of that sort should be exterminated. Complete verbatim incorporation of a national rule also is easily identified and removed.

Less extensive duplication may be desirable, particularly when a local rule carries a reminder of a statute that might be overlooked. Two examples. "Twenty-four jurisdictions provide that the local rules shall be construed consistently with the Federal Rules of Civil

Procedure and applicable federal statutes. These rules repeat Rule 83 * * *." Yes. But they are useful reminders to lawyers — many of whom are blissfully unaware of Rule 83 — of important limits and of an essential direction to look for support in attacking or confining a local rule. We should not argue for repeal of these rules. And five local rules dealing with arbitration repeat the statutory provision that arbitration is voluntary. Particularly in light of the tendency of some judges to "encourage" anything that reduces the docket, this reminder is essential. If there were a model local rule on arbitration, I would want it to include this duplication.

I think we have agreed that we will overlook duplication of case law. Rule 83 does not prohibit that. And the reminder can be useful — many lawyers will find the local rule, and not so many will even look for the case law.

Model Rules

The Model Rules question is not directly involved in a sweep through present local rules for inconsistency and duplication, but the review inevitably suggests possible subjects for model rules. Two observations may be appropriate.

Model Rules must come from somewhere. Real difficulties arise if they come from an advisory committee or the Standing Committee. Equally real difficulties arise if they come from another source.

The Enabling Act rules committees act outside their defined role if they undertake to suggest model rules for optional adoption district-by-district. They do not have the benefit of the full Enabling Act process. Congress may become as suspicious of this activity as it has been of local rules, and might justifiably be even more concerned with a concerted national effort to achieve some semblance of national uniformity that bypasses the Supreme Court and Congress. From this perspective, it would be better to have model rules emerge from some other source — other Judicial Conference committees, the Federal Judicial Center, Administrative Office Staff, or some other agency.

Beyond that concern, action by the advisory committees would distract attention from the main business of tending to the national rules. It is not apparent that any of the advisory committees can spare much time for generating model local rules.

The idea of a model local rule, moreover, may be internally inconsistent. The purpose of local rules is to adapt to local needs and concerns. A national advisory committee may be the last place to look for the relevant knowledge.

If there is a sound foundation for adopting a uniform national rule, in short, the full Enabling Act process is appropriate. If not, Enabling Act actors should stand aloof.

Development of model local rules by other agencies, however, creates grave risks of its own. Model "local" rules could easily become a competing source of quasi-national rules, drawn with insufficient concern for inconsistency and duplication.

Model local rules still may have some place. The most likely role is to fill in gaps that are not, and will not soon be, addressed by national rules. The model rule approach to attorney conduct is a fine example. Rules on electronic filing may be another. But great care should be taken to identify the range of suitable subjects. Great care also is required to establish ad hoc committees for each suitable subject — ideally, the committees should cut across the jurisdictions of standing Judicial Conference committees to insulate the Enabling Act committees even as they are involved (and may take the lead).

RULE-BY-RULE REVIEW

Rule 1 — Scope and Purpose

notes 16-21: All of the rules identified here are questioned as superfluous. With one possible exception, all seem appropriate. Many lawyers, and particularly those who do not regularly appear in federal court, are not aware of the framework that authorizes and limits local rules. An explicit reminder that the local rules are interstitial, that national rules control, is helpful. Even a statement that pro se litigants are bound by the rules may be helpful. But we may want to look further at N.D.Ind. LR1.1. Depending on the actual expression, some litigants may be confused by a reminder that a local rule is not binding if not "passed in accordance with Rule 83 and * * * §§ 2071 and 2077." It may seem strange to offer distinctions at this level: a rule stating that a local rule is controlled by an inconsistent federal rule or statute seems useful, while a rule expressing the same thought indirectly may be confusing. The Indiana rule, however, deserves further attention.

notes 25-27: It is not clear whether these observations are intended to suggest action. Despite the overlap with Rule 83 and § 2071, it seems helpful to have a local-rule reminder that the local rules should be construed consistently with the federal rules and statutes.

notes 28-30: Again, some lawyers will be helped by a reminder that the local rules are numbered to correspond with the federal rules.

note 31: The local rules explaining defiance of the mandatory numbering system are bad. Presumably they are the subject of ongoing attention.

Rule 3. Commencement of Action

Filing Fee

notes 9-10: Duplication of the $150 statutory filing fee presents a puzzle. This is helpful advice so long as the statute is unchanged. There is an obvious risk that the process of amending the local rule will lag behind the inevitable statutory escalations. There would be little to object to if the rule says "The filing fee is governed by 28 U.S.C. § 1914. Section 1914 set the fee at $150 in 19xy, but the amount is subject to change."

notes 11-22: This question seems tricky. Section 1914(c) authorizes local rules that require advance payment of fees. A local rule may be consistent with the correct interpretation of the statute but inconsistent with the wrong interpretation adopted by the local circuit. The Local Rules project is stuck in a hard place — the prospect of second-guessing the local court of appeals is not welcome; the statute may not really address the question at all; but the adoption of inconsistent positions around the country seems unacceptable. Putting aside the question of consistency between local rule and local circuit law as a matter the circuit judicial council can address, this question deserves separate attention.

Civil Cover Sheet

notes 9-13: Are rules that add requirements to the Administrative Office civil cover sheet inconsistent with some statute or rule? Although variations "may cause difficulties," that does not establish invalidity. The requirement that information be provided about related actions seems a good idea for several reasons, beginning with local assignment practices. If a rule does not specifically state that a complaint will not be accepted for filing without a proper cover sheet, it seems difficult to challenge the local rule because it may be applied improperly. The failure probably is a matter of "proper form as required by * * * any local rules or practices" within Rule 5(e), but can we anticipate violation of Rule 5(e)? (See notes 20-24 below.)

notes 20-24: D.Mont LR200-1 does seem invalid for the reasons given.

In Forma Pauperis

notes 7-12: Do these local rules provide that a forma pauperis action will be dismissed if the supporting affidavit provides the information required by § 1915(a)(1) in a form that is not the local form? (Only E.D.Mo. LR2.05 is listed in the note 18 description of rules that "permit" the clerk to return any action that is not accompanied by "an" affidavit.) There is a great advantage in using a common form, particularly in proceedings that are likely to be pro se. We would not object if the form were strongly suggested as an aid to the litigant. If the court provides an opportunity to translate a noncomplying affidavit into the court's form, but requires the translation, we are on an uncomfortable middle ground. And even if the court simply denies

leave for failure to use the local form, we may face an argument that the local rule is not inconsistent with the statute. It requires nothing but what the statute requires, albeit in a particular form. Argument from the spirit of rules that do not apply to the district courts may not fully persuade the local courts. In short, we need to know more and to think more about these rules.

notes 18-19: Again, the inconsistency is not beyond debate. Section 1914 requires the clerk to require a filing fee. Section 1915(a)(1) permits the court to authorize filing without prepayment if an affidavit is submitted. The local rule says that if there is no fee and no affidavit that would support a court order excusing prepayment, the action cannot be filed. The rule could easily be defended on the ground that it does not involve a matter of "form." Perhaps these two rules should be approached diplomatically: they risk loss of rights, they frequently apply to untutored litigants, and they are inconsistent with the general spirit reflected in Civil Rules 5 and 83.

notes 21-32: The asserted inconsistency is a matter of statutory interpretation. The statute could be interpreted either way. The § 1915(b) provision begins with a mandate that a prisoner must pay the full amount of the filing fee, and then — recognizing that many prisoners do not have $150 ready to hand — provides for a down payment and gradual amortization by installments. It is easy to argue that there is no implication that limits the court's discretion under § 1915(a) as to nonprisoners. Congress was concerned that recreational litigation by prisoners should be constrained by a market test, hence the requirement that the full fee be paid. But Congress also recognized that this requirement could prove too drastic for many prisoners, and softened it. Nothing is offered to indicate that Congress considered and rejected the use of installment payments for others. Installment payments provide an attractive compromise for other litigants who cannot amass a filing fee in one sum, but who may be able to nibble away at it. We should expect this argument if we demand repeal in the name of statutory inconsistency.

notes 33-34: It is difficult to be excited about a local rule that warns of the Rule 4(c)(1) duty to provide sufficient copies of the complaint for service.

notes 35-36: Section 1915(f) does not say in so many words that a successful forma pauperis plaintiff must repay costs and fees from any recovery. It says more generally that judgment may be rendered for costs. A reminder that the judgment will order [re]payment may not be amiss.

note 38: How extensive are these two rules? If they do no more than advise litigants that § 1915 governs forma pauperis actions they may do some good and do little harm.

Rule 5: Proof of Service

note 7: Do we have anything to say about local rules that require proof of service by acknowledgment of the person served? What happens if the person served refuses to acknowledge? It may be difficult to argue that these rules are inconsistent with Rule 5 — no

such argument is made in the Report — so we may ignore the question whether they are a bad idea.

note 16: The inconsistency with Rule 5(d) is difficult to avoid — it is too much to argue that the court has defined the form and content of a proof of service by providing that filing is a proof of service. Apparently nothing requires a statement of the time or manner of service. On balance, this local rule does not offer an attractive occasion for reconsidering Rule 5(d). But I would be surprised if the rule causes any problems in fact.

notes 17-18: This seems to flag an inconsistency with "some case law." If a party in fact receives service and responds there is little reason to treat the service as invalid. The local rules seem fine to that extent. There is a more awkward problem if service is "made" but not received — proof of service does not really do much to make up for the failure of receipt. It may be better to ignore this set of problems.

notes 19-22: The rules that seem to extend the time to file proof of service are less troubling than the rule at note 16 above. Filing proof of service "anytime unless material prejudice would result" or "before the court takes action on the filed document" may seem to extend the Rule 5 requirement of filing "within a reasonable time." These requirements also could be seen as giving specific content to what is a "reasonable time," elaborating it in a way that provides guidance. The argument that they are inconsistent seems slightly stronger, but not compelling. The three rules that require prompt filing may shorten the time to file if it is reasonable not to file promptly. Again, the potential inconsistency is not a matter of great importance.

Rule 5: Filing of Discovery

notes 1-19: Old rules inconsistent with amended Rule 5(d) indeed should be revised or repealed. The rules described at notes 7 and 8 seem clearly inconsistent with Rule 5(d). The rules at note 9 also seem inconsistent — they do not seem to provide the alternative of filing when ordered by the court, and use "in connection with motions" may not capture the entire universe of "used in the proceeding." (Impeachment use at trial is one example.) The rules at note 10 are possibly different. Rule 5(d) does not directly state that all of a deposition must be filed if part is used to support a motion, that a complete set of interrogatories and answers must be filed if one interrogatory and answer are used, and so on. There is no obvious inconsistency, and the elaboration of Rule 5(d) may be useful. The rules tied to appeals, described at note 11, may supplement rather than contradict Rule 5(d). This is a bit of a puzzle: if the materials have already been filed, the requirement seems redundant. If not previously filed, there may be an overlap with — or even contradiction of — Appellate Rule 10. These rules may deserve more specific examination. The remaining rules described from notes 12-19 seem superannuated. This sort of inconsistency with a recently adopted national rule can be pointed out by a gentle reminder.

notes 20-24: The note 21 rules that the original deposition be retained by the party seeking it appear inconsistent with Rule 30(f)(1), which provides that a deposition transcript or recording must be stored by the attorney who arranged for the transcript or recording (who need not be the attorney who noticed the deposition). The note 22 rules requiring that the custodian of discovery must provide reasonable access to all parties may present complex issues. One arises as to the official who retains a recording of a deposition — Rule 30(f)(2) requires that a copy be provided to the deponent or any party on payment of reasonable charges: do the local rules purport to require delivery without charges? Or only access to the retained recording? The note 23 rules on obtaining copies of "the material" might present some oddball issues, as when property is "sampled" under Rule 34. All of these noted rules seem to fall into an uncertain area: it is possible to imagine inconsistencies, but difficult to guess whether they are intended or whether they are important.

Rule 9 - Three-Judge Courts

note 24: If these local rules do anything beyond excusing the clerk from the obligation to determine whether a 3-judge court is required, they indeed should be repealed. But if all they do is allow the clerk to treat the case as an ordinary filing until someone points out the need for a 3-judge court, they may not be invalid.

notes 25-26: Plainly the local rules should not imply that three district judges can constitute a statutory 3-judge court.

Rule 9 — RICO, Patent, and Other Cases

notes 2-8: It is difficult to get much feel for what these rules are like. They appear not to specify things that must be pleaded, so are not directly in conflict with Rule 8(a) or Rule 9(b). But they do seem inconsistent with the scheme of Rules 8, 9, 12(e), and 56. Rule 12(e) no longer provides for a bill of particulars; the test is whether the opposing party can frame a responsive pleading. Paving the way for summary judgment is accomplished by various means. A direction to provide a case statement in a Rule 16 conference would not be amiss. But a routinized local rule probably is invalid. The pressing need for these rules may have abated a bit as the worst excesses of civil RICO allegations seem to have receded. Some courts probably are well served by these rules, but probably we have to challenge them.

notes 9-10: If these rules directly address the pleadings, they probably are vulnerable to charges either of inconsistency or duplication.

notes 11-12: The descriptions are a bit confusing — does the rule merely require that a pleading include elements the statute requires be pleaded? Hence, unnecessary? Or do the "additional pleading requirements" add to statutory requirements, so as to be inconsistent with the general and special pleading rules in Rules 8 and 9? Either way, they probably are bad. Special pleading

rules for categories of cases seem to emerge from decisional law, but should not be imposed by local rules.

Rule 9 — Social Security and Other Administrative Appeal Cases

notes 15-17: The rules requiring that a social security number be included in the complaint are not only inconsistent with the Social Security Act but a bad idea. As electronic filing becomes ever more common, the problem will grow ever worse. Stamp them out. (If the Social Security Administration has a problem of identifying the case from the claimant's name, they should institute a different case identification system of their own, so that we could dispense with the rigmarole of providing the social security number on a separate slip of paper and so on.)

notes 20-21: A form that serves as model can be useful. A form that displaces the general pleading rules cannot stand.

notes 22-24: These rules, although apparently inconsistent with Rule 12(a)(3), may be on to something. Filing an answer 30 days after the record is filed would make sense if there is some way to ensure that the record is promptly filed (I doubt there is). An ideal resolution would be to amend the Social Security Act to provide a system-specific rule; Rule 12(a) incorporates "a different time prescribed by statute." Short of that, however, these rules contradict Rule 12(a)(3) and fail.

note 25: An automatic extension of time to answer does seem inconsistent with Rule 12(a)(3). But a local rule might properly state that the court ordinarily grants a Rule 6(b) motion for an extension if the motion explains the cause for inability to answer on time. Here — and perhaps elsewhere — the approach might be to ask whether the sensible purpose of the local rule could be achieved in a more legitimate way.

notes 26, 27: These redundant rules are not likely to cause problems (although I thought it was Rule 12, not Rule 4, that states the time to answer?). They are not likely to do much good either.

Rule 15. Amended and Supplemental Pleadings

notes to 18: The welter of local rules might be a sign that we should consider some of these questions when we come to study Rule 15 in general. Filing duplicate exhibits with an amended pleading, for example, seems wasteful; but there is some sense in requiring court permission to detach exhibits from the original pleading.

notes 19-20: This redundancy seems harmless, and potentially helpful. Some people will find the filing and service requirements in the local rule before the national rule.

notes 21-22: This redundancy is even more useful. Many pleaders seem not to understand that a Rule 15(d) supplemental pleading should be used only for events occurring after the prior pleading.

notes 23-24: Without being confident of the intended meaning, the local rule seems clearly inconsistent with Rule 15(a), and not likely to be an improvement.

Rule 16 — Alternative Dispute Resolution

Early Neutral Evaluation

General: 28 U.S.C. § 652(d) directs that each district provide for confidentiality in alternative dispute resolution processes *"[u]ntil such time as rules are adopted under chapter 131 of this title [28 U.S.C.A. § 2071 et seq.] providing for the confidentiality of alternative dispute resolution processes under this chapter [28 U.S.C.A. § 651 et seq.] * * *."* This is not a mandate, only a place-holder. Have we ever thought about this? Do the local rules collectively suggest we need think about this? Section 653(d) has a similar provision referring to national rules "relating to the disqualification of neutrals" (including, where appropriate, disqualification under section 455 of this title, other applicable law, and professional responsibility standards. Shades of FRAC!.) Section 654(b) likewise refers to national rules to ensure that consent to arbitration is freely and knowingly obtained, and that no party or attorney is prejudiced for refusal to participate in arbitration.

(note 4): Something is missing from this sentence.)

notes 17-19: There is something alarming about a system that compels parties to participate in neutral evaluation and to pay for the privilege. But these rules seem consistent with § 658(a), which authorizes the district court to establish the compensation of "each arbitrator or neutral," subject to regulations approved by the Judicial Conference (are there any regulations to use to test these local rules?). (The authority to require party participation is reflected in § 652(2).)

Summary Jury Trial

notes 4-8: Is there some way we can argue that it is inconsistent with something in Rule 38, the Act (which refers to "minitrial"), or the Seventh Amendment to compel parties to participate unwillingly in a summary jury trial? It seems a truly bad idea. But there likely is little to be done about it.

Mediation

notes 19-23: As with the general topic, notes 17-19 above, there is something unnerving about compelling a party to pay for undesired mediation. But again we seem to be stuck.

Arbitration

note 18: It is so important to protect against even the perception that a court may be anxious to encourage arbitration that we should not object to local rules that state that arbitration is voluntary. This protection cannot be stated too clearly or too often.

notes 19-22: Yes. Anything that arranges for arbitration before consent of all parties is anathema, and contrary to the statute as well.

note 29: As with note 18, the nonbinding nature of arbitration is so important that we should welcome this bit of statutory duplication.

notes 30-32: The rules that permit the parties to agree to binding arbitration present a tricky question under the statute. Section 651(b) says that "the use of arbitration may be authorized only as provided in section 654." Section 654 requires party consent, and allows referral to arbitration of any civil action. Section 657(a) provides for filing an award "under this chapter," seeming to include both § 651 and § 654. Section 657(c)(1) permits any party to demand trial de novo, and § 657(a) provides for entry of judgment on the award only after expiration of the time for demanding trial de novo. All of these provisions do seem to say that the arbitration cannot be binding. But the face of the statute does not of itself suggest any reason to supersede the general principle that parties may agree to submit a dispute to binding arbitration. Court procedures that facilitate consensual submission for a binding determination seem useful — they exist outside the 1998 Act, but are not inconsistent with it. Unless the legislative history shows compelling reasons to reject these local rules, they might well be allowed to stand so long as there is no evident coercion.

note 33: Again, it may be useful to remind the parties that the award will be entered as a judgment if trial de novo is not demanded. The fact that fourteen districts have thought so may offer some support for allowing these rules to remain.

note 34: A rule that provides for immediate entry of judgment if the arbitration is binding can be valid only if it is valid to provide for binding arbitration by local rule. See notes 30-32 above.

note 35: The text is puzzling. Entry-of-judgment provisions do not seem to bear on the statutory provision for filing the award.

notes 36- 37: Again, it may be useful to reassure the parties that this court takes seriously the confidentiality of the award.

note 38: How does the rule assume that the award "may be non-binding"?

notes 39-44: All of these rules seem not only neglectful continuations of rules adopted under former § 655(e), but also inconsistent with the present § 657(c) promise of trial de novo. In particular, § 657(c)(2) provides that on demand for trial de novo the action "shall be * * * treated for all purposes as if it had not been referred to arbitration."

notes 53-55: Section 657(a) only says that the award shall be filed promptly. A local rule that specifies that the duty to file falls on the arbitrator answers a question left open by the statute. Even if the statute is generally read this way, it is useful to have a local rule that provides a clear statement. A rule directing the arbitrator to "report[] to the court" may or may not be inconsistent with the rule that requires that the award be filed, but it is inconsistent with the confidentiality of the award unless "at the end" means after judgment.

Court Settlement Conferences

note 23: Rule 16(c) provides that at least one attorney for each party have authority to enter into stipulations. It also provides that the court may require that a party or its representative be reasonably available by telephone to consider possible settlement. It does not, and cannot, require that a party settle. A rule that requires that an attorney come to a settlement conference with authority to settle seems inconsistent with Rule 16(c). Indeed, if Rule 16(c) attempted to embody this requirement it would be inconsistent with § 2072. These rules should go.

Rule 17: Parties Plaintiff and Defendant; Capacity

note 11: Rule 17 simply says that the court may appoint a guardian ad litem. Appointment of an attorney as guardian may mean that there is no real client; appointment of an adult or competent person who then selects an attorney gives a real client. Although limiting appointment to attorneys may not be inconsistent with Rule 17(c), it may be inconsistent with the "spirit." Someone who knows more about guardian ad litem practice should consider whether these rules are sufficiently bad to deserve question as inconsistent with the (better) "spirit" of Rule 17.

notes 13-16: These rules are a puzzle because Rule 17(c) is a puzzle. Looking only to 6A Federal Practice & Procedure § 1572, we are told that former Equity Rule 70 referred to the representative of a child plaintiff as a next friend, while the representative of a child defendant was a guardian ad litem. The 10th Circuit drew a different distinction (that seems intuitively more common): a next friend is a representative who has not been "regularly appointed," while a guardian is a representative who has been appointed. The authors go on to say that the difference "was only formal, and the functions of the two representatives were much the same." Rule 17(c) is said to eliminate the distinction, permitting either. And "there are no special requirements for the person suing as next friend." What these local rules seem to do is insist that there be some formal review of the purported representative — appointment under state law or confirmation by the federal court. That seems a pretty good idea. Here too, we may wish to learn more about the realities of practice. See the further discussion with notes 17-19. And

compare the statement at note 7 that the court has inherent power to appoint a guardian ad litem when the present representative has interests that may conflict; the text at note 31 seems similarly encouraging.

notes 17-19: These tie to note 14. As described, the rules that require proof of appointment under state law are not pleading rules. They address a specific problem — making the court aware that suit is brought on behalf of an infant or incompetent person, and providing assurance that it is properly brought. If the rules escape the problem of inconsistency with the "next friend" aspect of Rule 17(c), the incongruity with Rule 9 may not tip the balance. As above, it would be nice to know whether there is a real problem that these rules address — perhaps a problem that is peculiar to local conditions. (One rule is from E.D.Cal.; we may have ready access to information about its function. This rule is one of those cited in note 29 as also requiring state-court approval of a settlement. If state procedure permits approval only if there is a court-appointed representative, we have good reason for the local rule.)

notes 21-23: Do these local rules either repeat Rule 17(c) in extenso or paraphrase poorly? If they do no more than provide a reminder, perhaps the duplication is sufficiently useful to tolerate.

Rule 24 — Claim of Unconstitutionality

General: We are considering a proposal to replace this portion of Rule 24(c) with a new Rule 5.1. The basis for measuring local rules may change.

notes 16-18: It is not clear what "particular requirements for the content of the notice" are imposed. If the local rules do not demand that the requirements be met in a pleading, it is difficult to find an inconsistency with Rule 8(a). Remembering that Rule 24(c) is pretty open-ended — "A party challenging the constitutionality of legislation should call the court's attention to its consequential duty" — there is no clear inconsistency in demanding information that helps the court provide meaningful notice. We also may be stuck in a position similar to our recent experience with Rule 51. Successive drafts of a possible Rule 5.1 require the party to file a notice that states the constitutional question. If these local rules anticipate something similar, it seems awkward to campaign for repeal of rules that may soon become valid after all.

note 19: The Department of Justice is anxious that a new rule specifically require that both the party and the court notify the Attorney General. A local rule that displaces the court's responsibility probably is inconsistent with § 2403, and is inconsistent with present Rule 24(c). But again we may be changing the Rule.

note 20: is the "separate pleading" in N.D.Okla. LR24.1 a complete pleading? If so, this seems inconsistent with both Rule 8 and Rule 24(c).

note 21: What is inconsistent about requiring duplicate copies? One for the court to keep, one for the court to send. Doesn't seem worth worrying about.

Rule 34 — Production of Documents

notes 37-38: The description of the rule is ambiguous: is the requirement that a certificate of service "accompany" the request mean that it be filed? Or that it be delivered to the party asked to produce? Either way, it seems duplicative, but not a matter of great concern.

notes 39-40: A reminder not to ask for matter outside the permissible scope of discovery is redundant. But when the reminder may address a problem — use of form requests recycled without thought from one case to another — the specific focus may be useful.

notes 41-42: If the rule simply parrots Rule 26(a)(1)(D), it is objectionable for that reason. If it extends disclosure requirements beyond 26(a)(1)(D), it is inconsistent: the limits on the kinds of information that must be disclosed were deliberate.

notes 43-44: As described, this rule is a substantial but incomplete rendition of Rule 26(a)(1)(D) — it does not refer to materials bearing on the nature and extent of injuries suffered. That is particularly dangerous. If it is in fact a full and complete rendition, it suffers from the sin of wasteful duplication. And it may be inconsistent with the national rule if it actually requires that a party "provide" the documents rather than "mak[e] available for inspection and copying."

note 45: These rules may illustrate a peculiar phenomenon. When there is a brand new federal rule, it may be useful to point to it in a local rule. That is particularly true with something like disclosure in a district that had opted out of the 1993 rule. But the value of this continuing education function quickly diminishes. So it may be appropriate to challenge them as superfluous — they will have served their purpose by the time of repeal.

notes 46-48: If indeed these local rules purport to displace the Rule 26(d) discovery moratorium, they are inconsistent and invalid.

notes 49-50: The local rule seems inconsistent with Civil Rule 30(a)(2)(C); the mismatch with the disclosure rule cited in the footnote is less apparent. But the local rule still is bad.

note 51: How long are these rules? A reminder of the Rule 34(b) incorporation of Rule 26(d) rather does us one up in our own game. Rule 26(d) does the job. We have a redundant reminder in Rule 34(b) — one of the Style Project dilemmas — for a reason. A similar reason underlies the local rule: people forget or never got it in the first place. If the rules are brief, perhaps we should not get excited about them.

notes 52-58: Again, the descriptions do seem to involve simple duplication. And again, we need to decide how far to pursue brief, not misleading, and potentially helpful duplication.

notes 59-64: This paragraph illustrates one of the oddities that would be encountered if we were to take on rules that are either inconsistent with local circuit law or that, because consistent, seem redundant. We could easily reach a position in which the same local rule is valid in one district but not valid in another. We may want to avoid that result.

notes 65-71: The text discussion basically says it all. We have a long and proud history of tolerating local rules that limited the number of discovery events, particularly with respect to the number of interrogatories. Some were then incorporated in the national rules, establishing uniform limits in place of disparate limits around the country. It is possible that experience with Rule 34 limits will show the way to achieve a workable limiting principle, something the Advisory Committee could not imagine in the more recent rounds of discovery amendments. So tradition and possible utility are on the side of the local rules. But they are clearly inconsistent with the text and intent of the national rules.

notes 72-74; The details of the local rule time periods are not provided, but anything that shortens the time to reply is inconsistent, undesirable, and invalid. Something that lengthens the time to reply is inconsistent and invalid. Whether undesirable may be less clear.

Rule 35 — Physical & Mental Examinations

notes 9-11: Note 11 might add that Rule 37 is permeated with requirements to confer or attempt to confer before going to the court for help.

notes 12-13: To the extent that the court actually seeks an impartial expert, this rule seems eccentric but not inconsistent with Rule 35. It is not clear whether the local rule actually refers to Evidence Rule 706, nor how far it seeks to make the court-appointed expert examiner also a court-appointed expert witness. There might be some potential difficulty with the Rule 35(b) provisions for waiving privilege by requesting a copy of the examiner's report, and so on.

notes 14-15: Rule 26(d) allows a court to order discovery before the Rule 26(f) conference. Rule 35 requires an order. The local rule does not seem inconsistent with these rules. Neither does there seem to be an actionable conflict with Rule 16(b): the scheduling order is to limit the time to complete discovery, but the court can modify the order.

note 16: Surely we have the right to be offended if the local rule sets out Rule 35 completely, or if it sets out substantial parts but not all.

Rule 36 — Requests for Admission

notes 12-15: These local rules may predate the 2000 discovery amendments. They are inconsistent and must go.

notes 16-17: We need a better description of the local rule. Although it likely is inconsistent with some part of the intricate relationships between Rule 26(a), 26(d), and 26(f), the precise points of conflict need to be identified.

notes 18-20: There is an inconsistency — Rule 26(d) allows discovery to begin after the Rule 26(f) conference; the scheduling order comes later. But there may be good reason to defer all discovery, let alone Rule 36 requests to admit, until entry of a scheduling order. A lot depends on how regularly and vigorously the court takes hold at the scheduling-order phase. We may not want to push very hard on this one.

notes 21-26: These inconsistent rules likely are hangovers from earlier days. Of course they should go.

notes 27-31: There may be some risk in most of these duplications. The note 31 local rules that simply "highlight" the importance of tending to the Rule 36 limits may have some value: some litigants may expect laxity and forgiveness. An official message of stern admonition may be useful.

note 38-39: The proof-of-service and relevancy requirements seem redundant. We might as well assail them if in the mood for minor tasks.

note 40: If "combined" means that a party may not simultaneously make requests to admit and carry on other forms of discovery, the local rule is indeed inconsistent. Out with it.

notes 43-46: These duplications of the national rules may as well be included on the hit list.

notes 47-48: The inconsistency seems plain. These rules should be expunged.

notes 49-67: We should consider further whether the Local Rules Project wants to recommend revision of the Rule 26(b)(2) amendment that was deliberately made in 2000. The question whether to authorize local rules limiting the number of requests to admit was considered earnestly and at length. The decision to permit local rule limits rested on the desire to develop experience with such limits. Just as long experience with a variety of local rules limiting the number of interrogatories supported eventual adoption of a national rule limit, so it may be here. We did not in 2000 know how to establish a workable national limit, but that did not reflect lack of interest in learning how to develop one. There may be another concern as well. The FJC study done as part of the process leading to the 2000 amendments showed far greater use of

requests to admit than many of us would have expected. As more and more cases come to be actively managed, the utility of Rule 36 may be subject to increasing questions. The conceptual confusions reflected in parts of the 1970 amendments also are troubling.

Rule 38 — Jury Trial of Right

notes 12-32: The conclusion that the right to demand jury trial cannot be forfeited for failure to comply with a local rule designating the method of indorsing the demand on a pleading seems right. Inconsistency can be found by interpreting Rule 38(b) to say that indorsement anywhere suffices. This interpretation makes sense in light of the great importance of constitutional and statutory rights to jury trial. It also makes sense to approve local rules that state the place of indorsement, so long as noncompliance does not lead to forfeiture. But it is difficult to assert that failure to include a non-forfeiture provision invalidates the local rule. If forfeiture is inconsistent with Rule 38, the non-forfeiture provision might even seem a duplication, but the lack of any express statement in Rule 38(b) surely justifies the duplication.

note 33: This sort of minor duplication should rank low on our indignation scale.

notes 34-35: Duplication of case law is off our table. And it can be a good idea — it is very useful to have a jury check box on the cover sheet, and wise to remind counsel that it does not satisfy the requirement to serve a demand.

Rule 39 — Trial by Jury or Court

note 5: I cannot guess whether there is some value in reminding lawyers of the bankruptcy jury-trial provision. This duplication may not be truly troubling.

note 6: A "local rule that simply repeats almost the entire Federal Rule" does seem nefarious. We should protest.

Rule 41 — Dismissal of Actions

notes 2-6: This text should be revised to guard against misreading. Rule 41(a)(1) allows a plaintiff to do more than "seek" dismissal; in the appropriate circumstances the plaintiff can dismiss. The (a)(1) provision that makes the dismissal operate as an adjudication on the merits applies when the earlier dismissed action was "based on or includ[ed] the same claim." That is not quite the same as dismissing "the action." And it would help to clearly mark out the sentence with note 6 as describing Rule 41(a)(2).

note 10: This sentence too might be revised. Rue 41(d) extends to a federal-court action that follows dismissal by the plaintiff of an earlier state-court action, reaching beyond an action

"previously dismissed under this rule." The remedy is "such order" for paying the costs of the action previously dismissed as the court deems proper.

note 12: If the rules that allow the clerk to grant an order of voluntary dismissal extend beyond Rule 41(a)(1) they are inconsistent with (a)(2), which bars dismissal "at the plaintiff's instance save upon order of the court * * *."

notes 13-14: These rules directly contradict the purpose of Rule 41(a). It is a mystery that they should survive.

notes 15-17: These rules too directly contradict the purpose of Rule 41 in allowing dismissal without prejudice.

note 18: A brief reminder of the option to seek voluntary dismissal is not necessary, but might be useful. Particularly if state procedure is different.

notes 28-38: Some of these rules, apart from seeming foolish, may raise consistency problems. The note 29 rules on dismissal for failure to make service should be checked against Rule 4(m). The note 37 rule on dismissal for failure to appeal is baffling without more description. The note 38 rule on dismissal for "failure to engage in discovery" should be checked against Rule 37.

notes 41-42: These rules seem a close call. Rule 41(b) says that a Rule 41(b) dismissal operates as an adjudication upon the merits, with three stated exceptions, "[u]nless the court in its order for dismissal otherwise specifies." The local rules seem to reverse the order: all Rule 41(b) dismissals are not on the merits unless the court otherwise specifies. That is inconsistent with Rule 41(b), but it may not be a bad idea. The onus of obtaining a dismissal on the merits is placed on the party seeking dismissal, or on the court when it acts on its own displeasure. (We are stuck, at least in the Style process, with the unfortunate phrase — "operates as an adjudication on the merits" — but it has caused so much misunderstanding as to enhance the attraction of these local rules.)

Rule 42 — Consolidation; Separate Trials

notes 15-16: "these papers" is vague. Rule 5(a) itself is vague at the margins. To the extent that the local rules cover written motions that cannot be heard ex parte, the service requirement clearly duplicates Rule 5(a), though with little apparent harm. The "similar paper" category in Rule 5(a) will never become a closed set; if the local rules bring some clarity by reaching something in addition to written motions, they should be welcomed.

note 17: The duplication may be harmless, but if it is more than a reminder we should challenge it.

Rule 47 — Selection of Jurors

notes 10-12: The suggested inconsistencies are so flagrant as to raise doubt whether these local rules are intended either to forbid peremptory challenges or to forbid a request that the court exercise its Rule 47(c) authority to "excuse" a juror during trial or deliberations. An alternative meaning may be that an attorney may not seek to get a potential juror off the hook of jury duty in more general terms, acting outside the voir dire and challenge process. Before challenging these rules, we should be confident of their meaning.

notes 13-15: The sheer number of local rules on communication with jurors suggests that this topic might deserve a place on the Advisory Committee agenda. There probably is nothing to be done about jurors who call press conferences, but a rule requiring court permission to initiate communication with a juror outside the courtroom might be useful.

Rule 48 — Number of Jurors

notes 16, 18, 21, text after note 21: Note 16 cites eight rules providing that the parties may stipulate to a jury of fewer than 6 members. Notes 18 and 21 cite different local rules, all of which seem to state that a jury must have at least 6 members. The text that attaches to notes 16 and 18 suggests that rules permitting stipulation to a jury of fewer than 6 members, or setting the minimum at 6, simply duplicate Rule 48 and should be repealed. The text after note 21 suggests that a rule that bars stipulation to a jury of fewer than 6 members is inconsistent with Rule 48. Rule 48 permits the parties to stipulate that a verdict may be taken from a jury of fewer than 6 members. The text of Rule 48 does not clearly indicate whether the stipulation can take the form of a stipulation to begin with a jury of fewer than 6 members. The second paragraph of the 1991 Committee Note says: "If the parties agree to trial before a smaller jury, a verdict can be taken, but the parties should not other than in exceptional circumstances be encouraged to waive the right to a jury of six * * *." These two paragraphs should be reworked. If any local rule actually says that the parties may not stipulate to a jury of fewer than 6 members from the beginning, it is inconsistent with the apparent meaning of Rule 48 as interpreted by the Committee Note. It must go. But the local rules described at note 16 may be useful, even if they contemplate stipulation for an initial jury of fewer than 6, because the meaning of Rule 48 is not clear on its face. And the rules that simply say that a jury is at least 6 members do two things: they tell lawyers where the local court has placed its bets, and they indicate that a greater number can be requested. Probably we should not disturb them.

note 22: The rules assuming the existence of alternate jurors are more than a decade behind the revision schedule. We should advise these courts to get with it.

Rule 51 — Instructions to Jury

General: The proposed new Rule 51 has been transmitted by the Judicial Conference to the Supreme Court. We should measure local rules against new Rule 51.

notes 16-19: A local rule that limits the length or number of proposed jury instructions is inconsistent with Rule 51, which in both present and new forms allows a party to submit requests without any hint of a limit. Nor are these rules a good idea. They are a clear target for rescission.

note 21: Do the rules that require case citations to support instruction objections recognize that there may not be any case citations available? More generally, both present and new Rule 51 require that the objection state "distinctly the matter objected to and the grounds of the objection." Although it is increasingly common to encounter statements that this obligation includes citation to supporting authority, a local rule may be so confining as to be inconsistent with Rule 51. Suppose the objection clearly and distinctly states the precise reasoning of authority the objector has not found — do we really want to excuse a wrong instruction? These rules may be troubling, depending on wording and application, but there may not be much we can do about them.

note 24: New Rule 51(d)(1)(B) requires an objection "unless the court made a definitive ruling on the record rejecting the request." These local rules are inconsistent with the new rule to the extent that the court fails to make a definitive ruling on the record. We can point out the new rule, when it takes effect, and suggest the potential inconsistency. (I am not enthusiastic about this, because I favored a more flexible version of the circumstances that would excuse the need to use an objection to renew a request the court had rejected. These local rules probably satisfy the functional needs expressed through Rule 51. And there is an argument that the inconsistency does no real harm. But inconsistency in this sensitive area should be challenged.)

notes 26-27: Duplication of the provision requiring an opportunity to object out of the jury's hearing is not troubling.

notes 28-34: All of these local rules prompted the process that led to new Rule 51. The new rule allows the court to require submission of requests "[a]t the close of the evidence or at an earlier reasonable time." That includes a reasonable time before trial. The only remaining risk of inconsistency is that something like "three days before the pretrial conference" is unreasonable — if it is really a trial pretrial conference, no problem. (Presumably that is what they have in mind?)

notes 35-36: A rule providing that the judge decides when the instructions are due duplicates Rule 51, but seems harmless.

notes 37-38: A rule that the judge instructs the jury seems about as unnecessary as a rule can be.

Whether we should object on duplication grounds is not so clear. So of the rules that "repeat various portions of Rule 51": they likely will be superseded by new Rule 51, and should be pointed out only to ensure that they do not carry forward the duplication of a no longer existing rule.

Rule 54 — Jury Cost Assessment

notes 19-20: In all, there are 50 local rules that allow (48) or require (2) that jury costs be assessed against counsel who settle a case shortly before trial. This seems to be a consensus on either inherent power or a strained reading of § 1927, so perhaps we should not open the question whether settlement a day too late falls into § 1927's personal liability for "excess costs" as one "who so multiplies the proceedings in any case unreasonably and vexatiously." But personal liability of counsel seems a surprise — there is no duty to settle, and it seems difficult to imagine a duty to settle (if at all) at a particular time.

Rule 81 — Naturalization

notes 1-6: Rule 81 is our most frequently amended rule. It is a superb illustration of the dangers of specific statutory references. District of Columbia mental health proceedings were removed from Rule 81 about a decade after the event. So here we will be even more remiss. We should amend Rule 81(a)(2) to delete the statement that the rules apply to proceedings for admission to citizenship. The local rules can be abolished before that — they are inconsistent with the 1990 statutory system.

Rule 81 — Jury Demand in Removed Cases

general: While we're at it, we should amend Rule 81(c) to refer to the "notice" of removal; the petition procedure was changed by statute some years back.

notes 5-6: This duplication may be helpful. It seems a safe guess that many lawyers overlook the jury-trial demand part of Rule 81(c).

notes 8-11: The complex web of Rule 81(c) probably should be improved. The local rules that violate Rule 81(c) presumably reflect administrative ease — the court wants to know which cases are jury cases, and a separate jury-trial demand makes that easier. But the rules described at notes 8 through 11 should be set aside. And the final sentence of this paragraph may be too gentle. Rule 81(c) says there is no need to make a jury demand in federal court after removal from a state court that does not require an express demand "unless the court directs that [the parties] do so * * *." A local rule converts this case-specific order into a general practice, depriving the parties of case-specific notice. That is inconsistency enough to defeat the local rules even in that application.

notes 12-14: Inconsistent time limits are clearly undesirable. These local rules should go.

notes 16-17: These rules raise a recurring theme: what do we do when a local rule may be applied in a way that is inconsistent with national rule or statute, but also is susceptible of a validating interpretation? Do we really want to tell a court that its rule is proper only if properly interpreted and applied?

Rule 83 — Availability of Local Rules

note 6: There is little reason to be bothered by a local rule that says that copies of the local rules are available. All they need do is make it a bit longer and no one could object on "mere duplication" grounds — copies are available in the clerk's office, on the web site, or wherever. There is or is not a charge. Proposed amendments are published in _____. We should be happy with what we've got.

Rule 83 — Sanctions

notes 5-6: Fines seem a bit extreme, but there is no apparent conflict with Rule 83.

notes 7-10: As with Rule 81, notes 16-17, how do we rescind an invalid application of a local rule that is not invalid in its own terms?

Comments on Local Rules Draft

By Dan Capra

Date: March 7, 2003

First, thanks for the opportunity to comment on the project. Mary has done a remarkable job with very difficult material. I am limiting my comments to what I feel was discussed and decided as the scope of the project at the Standing Committee meeting in Tucson in 2002.

General Comment:

In general, I believe the Report cites more rules as problematic than there actually are. Specifically, I think the Report should be cut back in three respects:

1) Its assumption that any rule tracking a Federal Rule is automatically "duplicative" and therefore in violation of Rule 83 is too literal – a more flexible inquiry should be undertaken as to whether a local rule is in fact exactly duplicative of a national rule and therefore problematic. (Examples to follow).

2) Its conclusion that many local rules should be abrogated because they are inconsistent with the "spirit" of a national rule should be changed. In my view, and I believe in the view of most members of the Standing Committee, local rules are problematic only when they specifically violate Rule 83 or the relevant statute. That principle is implicated only when the local rule is consistent with text of the National Rule itself, not its "spirit", whatever that may mean.

3) The references to local rules consistent or inconsistent with case law should be deleted. There is no authority in Rule 83 or any other source that invalidates a local rule that is consistent or inconsistent with case law.

Specific Comments:

1. Page 3-4, runover paragraph. In my view, all of the rules referred to in the runover paragraph on page 4 should be retained as they are not in fact duplicative of any Federal Rule.

Stating the obvious (e.g., the National Rule controls where there is a conflict) is not the same as restating the text of a national rule. Nor is it "unnecessary" to, for example, explain that the Rules are promulgated pursuant to Rule 83 and the statute. Citing a source of authority gives the local rules a provenance that warrants respect–they don't come out of whole cloth. Moreover, *citing* the source of authority is not the same as *duplicating* the text of that source.

2. Page 5, first paragraph. The local provisions stating that the local rules shall be construed consistently with National Rules are not duplicative of Rule 83. These local rules refer to how other rules are to be *construed.* There is no National Rule that states how a local rule should be construed. Moreover, a rule stating how local rules should be construed is undoubtedly helpful to practitioners. So there is no reason to think that these rules should be abrogated.

3. Page 5, second paragraph. The local rules that *explain* how the local rules are numbered are not duplicative of any National Rule. The National Rule *requires* a uniform numbering system for local rules, but it does not provide any *explanation* that is duplicated by the local rules discussed in this paragraph. Likewise, the four courts with rules explaining that the rules are numbered according to the National Rules have not thereby duplicated any National Rule. There is no national rule giving such an *explanation.* Moreover, it seems to me, on a policy level, that there is nothing at all harmful and indeed something beneficial in having a rule explaining how the rules are numbered. What could possibly be wrong with that?

4. Pages 8-10 – The entire discussion of the relationship of the local rules and case law should be deleted. There is no source of authority to abrogate a rule that is inconsistent with case law.

5. Pages 12-13: The discussion of variations in civil cover sheets should be deleted. These variations do not duplicate a national rule, nor are they inconsistent with a national rule. Particularly problematic is the sentence on page 13 stating that a rule is problematic if the variations "may cause difficulties for people who are new to the jurisdiction or who file only infrequently in that court." The fact that local rules have variances should hardly be surprising. If the Committee plans to suggest abrogation of every local rule that varies from another local rule, then the scope of this project has just expanded dramatically–and dramatically beyond that contemplated by the Standing Committee. The Standing Committee last year agreed to limit the report to questions of "inconsistency" with and "duplication" of the national rules.

6. Page 14. The local rule discussed is an excellent example of a rule that is inconsistent with federal law. It permits an activity that is expressly prohibited by a federal rule. I would delete the references to case law, however, as they are unnecessary and beyond the scope of the Report.

7. Page 16. The paragraph running over to page 17 should be deleted. It states that the local rules are in conflict with the "spirit" of federal law, but in fact there is nothing in the local rule discussed that is fundamentally inconsistent with the text of any national rule that is cited there. Moreover, the discussion is unnecessary because it is established in the previous paragraph that those local rules are inconsistent with the text of a statute.

8. Page 18. Delete the reference to case law in the first full paragraph.

9. Page 20. I am not sure that the local rules providing for installment payments by non-prisoners is inconsistent with the statute. It appears, on the basis of the discussion, that the statute doesn't say anything at all about non-prisoners when it comes to installment payments. It doesn't say that non-prisoners cannot pay by installment, it simply says that prisoners can do so. The old *expressio unis* rule of statutory construction might be used to find an inconsistency, but I would not go that far. I would say that the local rule is problematic only if there is a direct conflict with the text. That is the only clear case. Everything else is a matter of supposition, subjectivity, and dispute among reasonable minds.

10. Page 23. Middle paragraph: I am sorry, I might be missing something, but I don't see anything inconsistent with a rule dispensing with further proof of service and the provisions of Rule 5(d). That rule does not appear to say anything about further proof of service once filed with the court.

Bottom paragraph: Delete, because it is a reference to case law conflict.

11. Page 24: I can't see how a rule requiring "prompt" filing of proof of service is inconsistent with the national rule that requires filing within a reasonable time. Nor is it clear that the other rules referred to (filing anytime unless there is prejudice, or before the court takes action) are inconsistent with a broad reasonableness standard. It seems to me that these two latter sets of rules provide extra, helpful guidelines that are not inconsistent. So I would cut the paragraph on page 24.

12. General observation about service: Perhaps some reference should be made to the electronic case filing rules. While most of these are found in standing orders, some are found in local rules, and I believe they are grouped under Rule 5 to the extent uniform numbering is used.

13. Page 36-37. The discussion of inconsistency and duplication in RICO actions is too general for me to comment on whether the specific local rules are in fact inconsistent or duplicative. I think it is awfully broad to say that a whole host of local rules should be abrogated without a specific analysis of how they are in fact problematic. The same goes for the rules discussed on page 37.

14. Page 39. The statutory reference should be, I believe, to some statutory act rather than to "the Social Security Administration". *Moreover, and more importantly, the report should refer to the Judicial Conference report on internet access and privacy issues. That report states that social security numbers should not be placed in filings subject to internet access.*

15. Page 81-82: The runover paragraph refers to rules imposing requirements for the content of the notice as inconsistent with the relevant statute and Federal Rule. I do not see a direct inconsistency. As far as I can tell, the statute are Federal Rule do not prohibit these specific requirements.

16. Page 86-87: In the runover paragraph, I fail to see how a caution against using form requests is at all inconsistent with Rule 26. A reminder that a form may ask for irrelevant information is not at all consistent with the substantive standard of relevance. I would therefore delete this paragraph.

17. Page 89. Cut the first full paragraph, referring to case law.

18. Page 90. The discussion on local rules limiting the number of requests for production is basically saying that such limitations are inconsistent with the "spirit" of the national rules–but there is nothing in the text of any national rule that prohibits such a limit. Therefore I would delete the discussion.

19. Page 99. First full paragraph: A local rule reminding a party to pay attention to the time limits in Rule 36 is not duplicative of the terms of Rule 36. Rather, it provides a helpful reminder. There is no authority, and no reason, for it to be abrogated.

20. Page 103: Runover paragraph: I agree with the suggestion that an amendment to Rule 36 should be considered. But as it currently is, there is no conflict between a numbers limitation and the text of that Rule.

21. Page 113: The report states that the local rules holding a demand insufficient should be abrogated because they "repeat existing law." But it is apparent from the discussion that the law they "repeat" is case law. Rule 83 does not prohibit a local rule that repeats existing case law. Moreover, earlier in the report there seemed to be several instances in which rules repeating existing case law were approved. So I would cut the paragraph.

22. Page 117: Runover paragraph: the rules that require permission to refile are not in conflict with Rule 41(a). Rule 41(a) doesn't say that court permission for refiling is not required. It doesn't say anything one way or the other about court permission, as far as I can tell. Therefore, it is not inconsistent to impose a requirement of obtaining permission.

First full paragraph: Local Rules acknowledging the option of seeking voluntary dismissal are not duplicative of a National Rule permitting such a dismissal. Rather, the Local Rules are helpful notifications to practicing attorneys. So I do not agree that they should be rescinded.

23. Discussion of Rule 47: References to "preemptory" challenges should be changed to "peremptory".

24. Page 132: Rules stating that objections are made out of the hearing of the jury are not duplicative of a national rule providing that the court shall give the parties an *opportunity* to make objections outside the jury's hearing.

25: Page 135: I would cut the sentence: "Specific local directive is unnecessary since the courts have inherent authority to impose this type of sanction." It sounds like the report is suggesting abrogation of these local directives, but that does not appear to be the case. If the report *is* suggesting abrogation, it should not do so, because these rules are not inconsistent with the text of any national rule or statute.

26. Page 144: There is no conflict between Rule 83, which says that local rules "shall be made available" to the public, and a local rule providing that copies are, indeed, available. Again, these local rules serve important notification functions, are not duplicative, and should not be abrogated.

Final Observation:

I agree with every single word of Ed Cooper's far more thorough and far more thoughtful memo. I did not read it until I had finished all my comments above, but I think you can see that our

comments are largely in accord. I waited to read it so as not to be accused of being a "free-rider." There should be a qualified work product privilege for Reporters.

REPORT OF THE

LOCAL RULES PROJECT

PROFESSOR MARY P. SQUIERS

Table of Contents

I. Scope of Rules—One Form of Action

Rule 1. Scope and Purpose of Rules

Seventy-three jurisdictions have local rules that explain the applicability of the local rules in the respective jurisdictions.[1] These rules generally cover seven broad areas: 1) The title and citation form for the local rules; 2) The effective date of the local rules; 3) The scope of the local rules; 4) The relationship of the local rules to prior rules; 5) The modifications or suspension of the local rules; 6) The rules of construction and definition; and, 7) The numbering of the local rules. Most of these rules should remain subject to local variation. Rules in some jurisdictions, however, repeat existing law, and rules in a few courts are inconsistent with existing law. These problematic rules should be rescinded.

DISCUSSION

Rules addressing each of these seven topics are appropriate as local rules. For example, forty jurisdictions have local rules setting forth the title of the rules.[2] Forty-two

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[1] M.D.Ala. LR1.1; S.D.Ala. LR1.1; C.D.Cal. LR1; E.D.Cal. GR1-100; N.D.Cal. LR01-Jan; S.D.Cal. LR1.1; D.Colo. LR1.1; D.Conn. LR1; D.Del. LR1.1; D.D.C. LR101; M.D.Fla. LR1.01; N.D.Fla. LR1.1; S.D.Fla. LR1.1; N.D.Ga. LR1.1; S.D.Ga. LR1.1; D.Haw. LR1.1; D.Idaho LR1.1; C.D.Ill. LR1.1; S.D.Ill. LR1.1; N.D.Ind. LR1.1; S.D.Ind. LR1.1; N.D.Iowa LR1.1; S.D.Iowa LR1.1; D.Kan. LR1.1; E.D.Ky. LR1.1; W.D.Ky. LR1.1; D.Me. LR1; D.Mass. LR1.1; E.D.Mich. LR1.1; W.D.Mich. LR1.1, 1.2; D.Minn. LR1.1; N.D.Miss. LR1.1; S.D.Miss. LR1.1; E.D.Mo. LR1-1.01; D.Mont. LR100-1; D.Neb. LR1.1; D.Nev. LR1A. 1-1; D.N.H. LR1.1; D.N.J. LR1.1; D.N.Mex. LR1.1, 1.2; E.D.N.Y. LR1.1; N.D.N.Y. LR1.1; S.D.N.Y. LR1.1; W.D.N.Y. LR1.1; E.D.N.Car. LR1; M.D.N.Car. LR1.1; D.N.Mar.I LR1.1; N.D.Ohio LR1.1; S.D.Ohio LR1.1; E.D.Okla. LR1.1; N.D.Okla. LR1.1; W.D.Okla. LR1.1; D.Or. LR1.1; E.D.Pa. LR1.1; M.D.Pa. LR1.1; W.D.Pa. LR1.1; D.P.R. LR101; D.R.I. LR1; D.S.Car. LR1.01; E.D.Tenn. LR1.1; M.D.Tenn. Preface; E.D.Tex. LRCV-1; N.D.Tex. LR1.1; W.D.Tex. LRCV-1; D.Utah LR101; D.Vt. LR1.1; D.V.I. LR1.1; E.D.Va. LR1; E.D.Wash. LR1.1; N.D.W.Va. Civ 1.01; S.D.W.Va. Civ 1.01; E.D.Wis. LR1.01; D.Wyo. LR1.1.

[2] M.D.Ala. LR1.1; S.D.Ala. LR1.1; C.D.Cal. LR1; E.D.Cal. GR1-100; N.D.Cal. LR01-Jan; S.D.Cal. LR1.1; D.Colo. LR1.1; D.Conn. LR1; D.Del. LR1.1; S.D.Fla. LR1.1; N.D.Ga. LR1.1; D.Haw. LR1.1; D.Idaho LR1.1; C.D.Ill. LR1.1; S.D.Ill. LR1.1; N.D.Ind. LR1.1; S.D.Ind. LR1.1; N.D.Iowa LR1.1; S.D.Iowa LR1.1; D.Mass. LR1.1; E.D.Mich. LR1.1; W.D.Mich. LR1.1, 1.2; D.Minn. LR1.1; E.D.Mo. LR1-1.01; D.Nev. LR1A. 1-1; D.N.H. LR1.1; D.N.Mex. LR1.1, 1.2;

courts have local rules explaining the citation form for the local rules.[3] Forty-two courts have local rules setting forth the effective date of the rules themselves and, in some courts, the effective date of amendments as well.[4]

Forty-five courts have local rules that explain which rules apply to which types of cases.[5] Another nine courts have local rules that list which actions the local rules apply to or govern.[6] Rules in nineteen courts provide that a local rule may be waived for the convenience of the parties or in the interest of justice.[7] Another two courts allow the

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N.D.N.Y. LR1.1; W.D.N.Y. LR1.1; D.N.Mar.I LR1.1; E.D.Okla. LR1.1; N.D.Okla. LR1.1; W.D.Pa. LR1.1; D.P.R. LR101; D.R.I. LR1; E.D.Tenn. LR1.1; D.Utah LR101; D.Vt. LR1.1; D.V.I. LR1.1; D.Wyo. LR1.1.

[3] M.D.Ala. LR1.1; S.D.Ala. LR1.1; N.D.Cal. LR01-Jan; S.D.Cal. LR1.1; D.Colo. LR1.1; D.Conn. LR1; D.Del. LR1.1; N.D.Fla. LR1.1; S.D.Fla. LR1.1; N.D.Ga. LR1.1; D.Haw. LR1.1; D.Idaho LR1.1; C.D.Ill. LR1.1; N.D.Ind. LR1.1; S.D.Ind. LR1.1; N.D.Iowa LR1.1; S.D.Iowa LR1.1; D.Mass. LR1.1; E.D.Mich. LR1.1; D.Minn. LR1.1; E.D.Mo. LR1-1.01; D.Nev. LR1A. 1-1; D.N.H. LR1.1; D.N.Mex. LR1.1, 1.2; N.D.N.Y. LR1.1; E.D.N.Car. LR1; D.N.Mar.I LR1.1; N.D.Ohio LR1.1; S.D.Ohio LR1.1; E.D.Okla. LR1.1; N.D.Okla. LR1.1; D.Or. LR1.3; W.D.Pa. LR1.1; D.P.R. LR101; D.S.Car. LR1.01; E.D.Tenn. LR1.1; E.D.Tex. CV-1; W.D.Tex. CV-1; D.Utah LR101; D.Vt. LR1.1; D.V.I. LR1.1; D.Wyo. LR1.1.

[4] M.D.Ala. LR1.1; S.D.Ala. LR1.1; E.D.Cal. GR1-100; N.D.Cal. LR1-3; S.D.Cal. LR1.1; D.Colo. LR1.1; D.Conn. LR1; D.Del. LR1.1; S.D.Fla. LR1.1; D.Haw. LR1.2; D.Idaho LR1.1; C.D.Ill. LR1.1; S.D.Ill. LR1.1; N.D.Ind. LR1.1; S.D.Ind. LR1.1; N.D.Iowa LR1.1; S.D.Iowa LR1.1; D.Mass. LR1.2; E.D.Mich. LR1.1; W.D.Mich. LR1.3; D.Minn. LR1.1; E.D.Mo. LR86-1.03; D.Mont. LR100-1; D.Nev. LR1A.5-1; D.N.H. LR1.1; D.N.Mex. LR1.1, 1.2; N.D.N.Y. LR1.1; D.N.Mar.I LR1.1; N.D.Ohio LR1.1; S.D.Ohio LR1.1; E.D.Okla. LR1.1; N.D.Okla. LR1.1; W.D.Okla. LR1.2; D.Or. LR1.2; E.D.Pa. LR1.1; W.D.Pa. LR1.1; E.D.Tenn. LR1.1; W.D.Tex. LRCV-1; D.Utah LR101; D.Vt. LR1.1; D.V.I. LR1.1; E.D.Va. LR1.

[5] E.D.Cal. GR1-100; D.Colo. LR1.1; M.D.Fla. LR1.01; N.D.Fla. LR1.1; D.Haw. LR1.3; D.Idaho LR1.1; C.D.Ill. LR1.1; S.D.Ill. LR1.1; N.D.Ind. LR1.1; S.D.Ind. LR1.1; N.D.Iowa LR1.1; S.D.Iowa LR1.1; D.Kan. LR1.1; D.Me. LR1; D.Mass. LR1.2; E.D.Mich. LR1.1; W.D.Mich. LR1.4; D.Minn. LR1.1; E.D.Mo. LR81-1.02; D.Neb. LR1.1; D.Nev. LR1A.2-1, 5-1; D.N.H. LR1.1; D.N.Mex. LR1.3, 1.5, 1.6; E.D.N.Y. LR1.1; S.D.N.Y. LR1.1; M.D.N.Car. LR1.1; D.N.Mar.I LR1.1; N.D.Ohio LR1.1; S.D.Ohio LR1.1; E.D.Okla. LR1.1; N.D.Okla. LR1.1; D.Or. LR1.1; M.D.Pa. LR1.1; W.D.Pa. LR1.1; D.P.R. LR102; D.R.I. LR2; D.S.Car. LR1.01; E.D.Tex. LRCV-1; D.Utah LR101; D.V.I. LR1.1; E.D.Va. LR1; E.D.Wis. LR1.01; D.Wyo. LR1.1.

[6] M.D.Ala. LR1.1; S.D.Ala. LR1.1; C.D.Cal. LR1.1; E.D.Cal. GR1-102; N.D.Cal. LR1-2; D.Del. LR1.1; D.D.C. LR101; S.D.Fla. LR1.1; N.D.Ga. LR1.1.

[7] S.D.Cal. LR1.1; M.D.Fla. LR1.01; N.D.Ind. LR1.1; S.D.Ind. LR1.1; D.Kan. LR1.1; D.Me. LR1; E.D.Mich. LR1.2; D.Nev. LR1A. 3-1; D.N.Mex. LR1.7; E.D.N.Car. LR1; S.D.Ohio LR1.1; E.D.Okla. LR1.1; N.D.Okla. LR1.1; W.D.Okla. LR1.2; D.Or. LR1.4; M.D.Pa. LR1.3; D.P.R. LR105; D.R.I. LR2; D.S.Car. LR1.02.

rules to be suspended unless unjust or impracticable.[8] Another court has a rule allowing a judge to "waive any requirement of these rules regarding the administration of that judge's specific docket."[9] These rules reflect that the court has discretion in interpreting its local rules[10] and that even a court's failure to comply with its own rules is not necessarily grounds for dismissal.[11]

Seventeen courts have local rules that explain that the new local rules supercede the prior rules.[12] Twenty-five courts have local rules explaining that the new rules apply to actions filed after the effective date and to those pending at the effective date, if practicable.[13] In one court, cases pending on the effective date of the rules are governed by prior practice[14] while in another court pending cases are governed by new amendments but not if there are fewer than ten days before a party must act in accordance with the new amendments.[15] These rules are appropriate as local directives.

There are other rules covering this topic that are problematic. One local rule repeats existing law by explaining that the local rules govern "except when the conduct of

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[8] D.Colo. LR1.1; D.Me. LR1.

[9] W.D.Tex. CV-1.

[10] *See, e.g., Henry v. Gill Industries, Inc.,* 983 F.2d 943, 950 (9th Cir. 1993); *Somilyo v. J. Lo-Rob Enterprises, Inc.,* 932 F.2d 1043, 1048 (2d Cir. 1991); *Hernandez v. George,* 793 F.2d. 264, 266067 (10th Cir. 1986); *Zaklama v. Mount Sinai Medical Center,* 906 F.2d 645, 647 (11th Cir. 1990).

[11] *See Mardack v. Southwestern Electric Power Co.,* 915 F.2d 172, 175 (5th Cir. 1990).

[12] M.D.Ala. LR1.1; S.D.Fla. LR1.1; E.D.Mich. LR1.1; W.D.Mich. LR1.4; D.Minn. LR1.1; E.D.Mo. LR86-1.04; D.N.H. LR1.1; D.N.Mex. LR1.3; D.N.Mar.I LR1.1; S.D.Ohio LR1.1; E.D.Okla. LR1.1; N.D.Okla. LR1.1; W.D.Pa. LR1.1; E.D.Tenn. LR1.1; D.Utah LR101; D.Vt. LR1.1; D.V.I. LR1.1.

[13] M.D.Ala. LR1.1; D.Del. LR1.1; N.D.Ga. LR1.1; D.Haw. LR1.2; D.Idaho LR1.1; N.D.Ind. LR1.1; S.D.Ind. LR1.1; N.D.Iowa LR1.1; S.D.Iowa LR1.1; D.Mass. LR1.1; E.D.Mich. LR1.1; D.Minn. LR1.1; D.Neb. LR1.1; D.N.J. LR1.1; D.N.Mex. LR1.3; D.N.Mar.I LR1.1; S.D.Ohio LR1.1; E.D.Okla. LR1.1; N.D.Okla. LR1.1; W.D.Pa. LR1.1; E.D.Tenn. LR1.1; W.D.Tex. LRCV-1; D.Utah LR101; D.Vt. LR1.1; D.V.I. LR1.1.

[14] D.Nev. LR1A.5-1.

[15] M.D.Fla. LR1.01.

this court is governed by federal statutes and rules."[16] Two other courts have local rules stating that the local rules apply unless they are inconsistent with the federal statute or rule.[17] Two other courts explain that, in the event of a conflict between rules, the Federal Rules control.[18] Another rule explains that no litigant is bound by a rule that is not passed in accordance with Rule 83 and 28 U.S.C. §§2071 and 2077.[19] One court has a local rule reminding people that *pro se* litigants are bound by the local rules.[20] Lastly, one court has a local rule explaining that the rules are promulgated pursuant to Rule 83 and 28 U.S.C. §2071.[21] All of these rules repeat portions of either Rule 83, section 2071 of Title 28, or both and are, therefore, unnecessary.

The construction of the rules are set forth in the local rules in seven courts.[22] Fourteen courts state that federal law, specifically, Title I, sections one through five, governs the construction of the local rules.[23] Because these sections also govern the construction of other federal statutes, it is appropriate to use them to construe local court rules as well. Forty courts have local rules that also set forth some actual definitions used in their respective rules.[24] All of these local rules should remain.

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[16] E.D.N.Car. LR1.00.

[17] N.D.Iowa LR1.1; S.D.Iowa LR1.1.

[18] S.D.Ga. LR1.1; D.Haw. LR1.3.

[19] N.D.Ind. LR1.1. *See* Fed.R.Civ.P. 83, 28 U.S.C. §2071.

[20] C.D.Cal. LR1.2.

[21] W.D.Mich. LR1.1, 1.2.

[22] M.D.Ala. LR1.1; E.D.Cal. LRGR1-100; W.D.Mich. LR1.6; N.D.Miss. LR1.1; S.D.Miss. LR1.1; N.D.Ohio LR1.1.

[23] M.D.Ala. LR1.1; D.Del. LR1.1; S.D.Fla. LR1.1; D.Idaho LR1.1; D.Minn. LR1.1; D.Neb. LR1.1; D.N.H. LR1.1; D.N.Mar.I LR1.1; S.D.Ohio LR1.1; W.D.Pa. LR1.1; D.P.R. LR103; E.D.Tenn. LR1.1; D.V.I. LR1.1; E.D.Va. LR1. *See* 1 U.S.C. §§1-5.

[24] S.D.Ala. LR1.1; C.D.Cal. LR1.3; E.D.Cal. GR1-101; N.D.Cal. LR05-Jan; S.D.Cal. LR1.1; D.Colo. LR1.1; D.Conn. LR4; N.D.Ga. LR1.1; D.Haw. LR1.4; D.Idaho LR1.1; N.D.Iowa LR1.1; S.D.Iowa LR1.1; D.Kan. LR1.1; E.D.Ky. LR1.2; W.D.Ky. LR1.2; D.Me. LR1; W.D.Mich. LR1.6;

Twenty-four jurisdictions provide that the local rules shall be construed consistently with the Federal Rules of Civil Procedure and applicable federal statutes.[25] These rules repeat Rule 83 of the Federal Rules of Civil Procedure that provides that individual districts can pass local rules that are "consistent with Acts of Congress and the Federal Rules."[26] These local rules also repeat section 2071 of Title 28, which indicates that the court may prescribe rules that "shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court.[27]

There are local rules that address the seventh topic, the uniform numbering system, which either repeat or are inconsistent with the Federal Rules and should, therefore, be rescinded. Five rules, for example, explain how the local rules are numbered.[28] Rule 83 of the Federal Rules of Civil Procedure already requires that the local rules "conform to any uniform numbering system prescribed by the Judicial Conference of the United States."[29] Four other courts have local rules that explain that the rules are numbered according to the Federal Rules of Civil Procedure again repeating the existing framework.[30] Lastly, there are local rules in two jurisdictions explaining that the original structure of the local rules follow a local framework rather than the federal

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N.D.Miss. LR1.2; S.D.Miss. LR1.2; E.D.Mo. LR1-1.06; D.Neb. LR1.1; D.N.H. LR1.1; D.N.J. LR1.2; D.N.Mex. LR1.5, 1.6; N.D.N.Y. LR1.1; W.D.N.Y. LR1.2; M.D.N.Car. LR1.1; D.N.Mar.I LR1.1; N.D.Ohio LR1.2; D.Or. LR1.5; M.D.Pa. LR1.4; D.R.I. LR3; E.D.Tenn. LR1.1; M.D.Tenn. Preface; N.D.Tex. LR1.1; D.Vt. LR1.2D.V.I. LR1.1; N.D.W.Va. Civ 1.01; S.D.W.Va. Civ 1.01; D.Wyo. LR1.1.

[25] S.D.Ala. LR1.1; N.D.Cal. LR02-Jan; S.D.Cal. LR1.1; D.D.C. LR101; M.D.Fla. LR1.01; N.D.Ga. LR1.1; S.D.Ga. LR1.1; D.Haw. LR1.3; E.D.Ky. LR1.1; W.D.Ky. LR1.1; D.Mont. LR100-1; D.Nev. LR1A. 2-1; D.N.J. LR1.1; D.N.Mex. LR1.4; N.D.N.Y. LR1.1; W.D.N.Y. LR1.1; M.D.N.Car. LR1.2; N.D.Ohio LR1.1; S.D.Ohio LR1.1; W.D.Okla. LR1.1, 1.2; D.R.I. LR3; E.D.Tenn. LR1.1; E.D.Tex. LRCV-1.

[26] Fed.R.Civ.P. 83(a)(1).

[27] 28 U.S.C. §2071.

[28] M.D.Ala. LR1.1; E.D.Cal. LRGR1-100; N.D.Miss. LR1.1; S.D.Miss. LR1.1; N.D.Ohio LR1.1.

[29] Fed.R.Civ.P. 83(a)(1).

outline.[31] Such a framework is clearly inconsistent with the stated mandate of Rule 83.

II. Commencement of Action: Service of Process, Pleadings, Motions, and Orders

Rule 3. Commencement of Action

Rule 3.—Filing Fee

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[30] D.Me. LR1; E.D.Mo. LR81-1.02; D.N.H. LR1.1; D.N.Mex. LR1.4.

[31] N.D.Ind. LR1.3; E.D.Mo. LR81-1.02.

Thirty-nine courts have local rules addressing the payment of fees.[1] Many of these rules exist in response to a statutory provision allowing such local rulemaking. Some of them also seek to supplement the statute and are also appropriate. Rules in two courts simply repeat the applicability of the statute and, as such, are unnecessary. Several of the courts have rules that are inconsistent with case law from their respective Courts of Appeals. These rules should be rescinded.

DISCUSSION

Section 1914 of Title 28 provides guidelines on filing fees.[2] This provision sets the filing fee in the district court at $150.00 and permits "[e]ach district court by rule or standing order [to] require advance payment of fees."[3] Thirty-five of the thirty-nine courts actually do require advance payment of the filing fees.[4] Seven of the courts allow the marshal to ask for prepayment of his fee.[5] Other courts refer to a list of the services

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[1] D.Alaska LR27; D.Ariz. LR2.2; S.D.Cal. LR4.5; D.Colo. LR4.4; N.D.Ga. LR3.2; N.D.Ill. LRLR5; S.D.Ill. LR3.1; N.D.Iowa LR3.1(d); S.D.Iowa LR3.1(d); E.D.La. LR5.2; M.D.La. LR5.2; W.D.La. LR5.2; D.Me. LR3(a); D.Mass. LR4.5; W.D.Mich. LR3.1; D.Minn. LR4.2; N.D.Miss. LR3.1(C); S.D.Miss. LR3.1(C); D.Neb. LR3.2; D.N.H. LR4.4; D.N.Mex. LR5.3; N.D.N.Y. LR5.2; W.D.N.Y. LR5.6; W.D.N.Car. LR3.1(A); D.N.Dak. LR4.1; N.D.Ohio LR3.12; S.D.Ohio LR3.3; E.D.Okla. LR5.1C; N.D.Okla. LR5.1F; W.D.Okla. LR3.2; D.Or. LR3.6(a); M.D.Pa. LR4.3; D.P.R. LR303; D.R.I. LR26(a); E.D.Tenn. LR4.5; N.D.Tex. LR4.2; S.D.Tex. LR4; D.Utah LR108; D.Wyo. LR5.1(f).

[2] 28 U.S.C. §1914.

[3] *Id.* at (c).

[4] D.Alaska LR27; D.Ariz. LR2.2; D.Colo. LR4.4; N.D.Ga. LR3.2; N.D.Ill. LRLR5; S.D.Ill. LR3.1; E.D.La. LR5.2; M.D.La. LR5.2; W.D.La. LR5.2; D.Me. LR3(a); D.Mass. LR4.5; D.Minn. LR4.2; N.D.Miss. LR3.1(C); S.D.Miss. LR3.1(C); D.Neb. LR3.2; D.N.H. LR4.4; D.N.Mex. LR5.3; N.D.N.Y. LR5.2; W.D.N.Y. LR5.6; W.D.N.Car. LR3.1(A); D.N.Dak. LR4.1; N.D.Ohio LR3.12; S.D.Ohio LR3.3; E.D.Okla. LR5.1C; N.D.Okla. LR5.1F; W.D.Okla. LR3.2; D.Or. LR3.6(a); M.D.Pa. LR4.3; D.P.R. LR303; D.R.I. LR26(a); E.D.Tenn. LR4.5; N.D.Tex. LR4.2; S.D.Tex LR4; D.Utah LR108; D.Wyo. LR5.1(f).

[5] N.D.Ohio LR3.12; S.D.Ohio LR3.3; N.D.Okla. LR5.1F; M.D.Pa. LR4.3; D.R.I. LR26(a); N.D.Tex. LR4.2; S.D.Tex. LR4.

and their respective fees.[6] These rules are all appropriate.

In addition, a number of courts have local rules concerning the method of payment. One court has a rule allowing payment by credit card.[7] Another court allows the clerk to require payment by cash or certified check.[8] These rules are also appropriate exercises of local rulemaking authority.

Two courts have local rules indicating that the filing fee is $150.[9] These rules repeat subsection (a) of section 1914 and should, therefore, be rescinded. [10]

Rules in eleven courts discuss the consequences of a failure to accompany the complaint with a filing fee. There is also case law addressing this issue. There is a split among the federal courts on whether the filing fee requirement is jurisdictional. The greater weight of authority indicates that the filing fee is not jurisdictional so that a complaint filed with the court and otherwise proper is appropriately before the court even if the fee has not yet been paid.[11] The rules in these eleven courts may be problematic,

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[6] D.Ariz. LR2.2; S.D.Cal. LR4.5; W.D.N.Y. LR5.6; D.N.Dak. LR4.1; E.D.Okla. LR5.1C; N.D.Okla. LR5.1F; D.Utah LR117.

[7] D.Colo. LR4.4.

[8] W.D.Mich. LR3.1.

[9] N.D.Iowa LR3.1(d); S.D.Iowa LR3.1(d).

[10] *See* 28 U.S.C. §1914(a).

[11] *Burnett et al. v. Perry Manufacturing, Inc.* 151 F.R.D. 398, 401 n.3 (D.Kan. 1993). *citing Cintron v. Union Pacific R. Co.,* 813 F.2d 917, 921 (9th Cir. 1987); *Rodgers on Behalf of Jones v. Bowen,* 790 F.2d 1550, 1551 (11th Cir. 1986); *Wrenn v. American Cast Iron Pipe Co.,* 575 F.2d 544, 545 (5th Cir. 1978); *Johnson v. Bowen,* 803 F. Supp. 1414, 1418-1419 (N.D. Ind. 1992); *Bolduc v. United States,* 189 F. Supp. 640, 64-642 (D. Maine 1960). *See also Parissi v. Telechron, Inc.,* 349 U.S. 46, 47, 99 L. Ed. 867, 75 S. Ct. 577 (1955) *(per* curiam)(clerk received timely notice of appeal: "untimely payment of §1917 fee did not vitiate the validity of petitioner's notice of appeal. Anything to the contrary, ... we disapprove."); *Gilardi v. Schroeder,* 833 F.2d 1226, 1233 (7th Cir. 1987) (stating that "the district court should regard as 'filed' a complaint which arrives in the custody of the clerk within the statutory period but fails to conform with formal requirements in local rules"); *Lyons v. Goodson,* 787 F.2d 411, 412 (8th cir. 1986) (same); *Loya v. Desert Sands Unified School District,* 721 F.2d 279, 281 (9th Cir. 1983) (same). *Contra Wanamaker v. Columbian Rope Co.,* 713 F. Supp. 533, 537 (N.D.N.Y. 1989); *Keith v. Heckler,* 603 F. Supp. 150, 156-157 (E.D. Va. 1985); *Anno v. United States,* 125 Ct. Cl. 535, 113 F. Supp. 673, 675 (Ct. Cl. 1953); *Turkett v. United States,* 76 F. Supp. 769, 770 (N.D.N.Y. 1948).

depending upon which Circuit Court cases control in the district courts.

Six courts have local rules stating that the complaint is not deemed filed until the fee is paid.[12] Five of these courts are in the Tenth Circuit where there is no specific and controlling case law.[13] These rules, then, can stand. The remaining rule is from the Northern District of Georgia which is in the Eleventh Circuit and which reads: "Advance payment of fees is required before the clerk will file any civil action, suit, or proceeding."[14] This rule is inconsistent with the case law in the Eleventh Circuit and should, therefore, be rescinded.[15]

There is a rule in a district court in the First Circuit that forbids the clerk from filing a complaint submitted without the filing fee.[16] A 7-day grace period is provided during which the fee can be paid; if it is not paid within that time, the complaint is dismissed without prejudice.[17] This local rule may also be appropriate since there is no controlling First Circuit opinion on this issue.

Rules in two courts, the District of Minnesota and the Northern District of Illinois, give the clerk the option to accept a complaint without prepayment of the fee or to reject such a complaint until the fees are paid.[18] Each of these rules seems inconsistent

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[12] D.Colo. LR4.4; N.D.Ga. LR3.2; E.D.Okla. LR5.1C; N.D.Okla. LR5.1F; D.Utah LR108; D.Wyo. LR5.1(f).

[13] D.Colo. LR4.4; E.D.Okla. LR5.1C; N.D.Okla. LR5.1F; D.Utah LR108; D.Wyo. LR5.1(f).

[14] .N.D.Ga. LR3.2.

[15] *See Rodgers v. Bowen*, 790 F.2d 1550, 1551 (11th cir. 1986).

[16] D.N.H. LR4.4.

[17] *Id.*

[18] N.D.Ill. GR11; D.Minn. LR4.2.

with existing case law in their respective circuits, the Eighth and Seventh Circuits.[19] As such, they should be rescinded.

There are two courts with local rules requiring that the clerk mark a complaint as received but file it only when the fee is paid.[20] The significance of these rules is unclear. Assuming they intend to indicate that the complaint is filed after the fee is paid *nunc pro tunc*, they are appropriate. It appears, however, that the rule in the District of North Dakota means something different. This local rule seems to say that the complaint is not constructively filed at the earlier time but is only filed when the fee is actually provided.[21] If this interpretation is accurate, the rule seems to run afoul of controlling case law in the Eighth Circuit and should, therefore, be rescinded.[22]

Rule 3—Civil Cover Sheet

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[19] *See Lyons v. Goodson*, 787 F.2d 411, 412 (8th Cir. 1986) (complaint should be deemed filed even if it fails to conform with formal requirements of local rules); *Gilardi v. Schroeder*, 833 F.2d 1226, 1233 (7th Cir. 1987) (same).

[20] D.N.Dak. LR4.1; E.D.Tenn. LR4.5.

[21] D.N.Dak. LR4.1.

[22] *See Lyons v. Goodson*, 787 F.2d 411, 412 (8th Cir. 1986) (complaint should be deemed filed even if it fails to conform with formal requirements of local rules).

Forty-four courts have local rules concerning the use of a civil cover sheet when filing an action in the federal district courts.[1] Most of these rules are appropriate as local rules if it is assumed that a failure to comply with one of these local rules does not result in a rejection of the complaint. A rule in one district court is inconsistent with existing law by allowing the clerk to reject the complaint for failing to file a civil cover sheet.

The content of these local rules has changed somewhat since the first Local Rules Project Report. In 1989, there were forty-five courts with local rules on this subject, almost the same number as now.[2] The earlier Report, however, identified eleven jurisdictions with local rules that conflicted with existing law by allowing the clerk to refuse to accept the filing of a complaint if a civil cover sheet is not also submitted.[3] The number of courts with such a local rule has now been reduced to only one.

DISCUSSION

Forty-two of the forty-four courts have rules requiring that the civil cover

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[1] M.D.Ala. LR3.1; N.D.Ala. LR3.1; S.D.Ala. LR3.2; D.Alaska LR6M; C.D.Cal. LR3.3; E.D.Cal. LR3-200; N.D.Cal. LR3-2(a);S.D.Cal. LR3.1;D.Colo. LR3.1;D.Del. LR3.1;S.D.Fla. LR3.3; S.D.Ga. LR4.1; N.D.Ill. LR2.20; N.D.Iowa LR3.1(c);; S.D.Iowa LR3.1(c); D.Kan. LR3.1; D.Me. LR3(a); D.Md. LR103.1; D.Mass. LR3.1; E.D.Mich. LR3.1; D.Minn. LR3.1; N.D.Miss. LR3.1(B); S.D.Miss. LR3.1(B); E.D.Mo. LR3-2.02(A); D.Mont. LR200-1; D.Neb. LR3.1; D.N.H. LR3.1; D.N.Mex. LR3.1; N.D.N.Y. LR3.1; M.D.N.Car. LR3.1(a); D.N.Mar.I LR3.1; N.D.Ohio LR3.13; S.D.Ohio LR3.1; E.D.Okla. LR3.1; N.D.Okla. LR3.1; W.D.Okla. LR3.1; W.D.Pa. LR3.1; E.D.Tenn. LR3.1; N.D.Tex. LR3.1; S.D.Tex. LR3.A; W.D.Tex. CV-3(a); D.Utah LR201; D.V.I. LR3.1; D.Wyo. LR3.1

[2] Report of the Local Rules Project: Local Rules on Civil Practice [hereinafter "Report"] at "Suggested Local Rules," p.15; and "Questionable Local Rules" p.13. The first Report of the Local Rules Project was distributed to the Chief Judges of the District Courts by the Honorable Joseph F. Weis, Jr., Chairman of the Committee on Rules of Practice and Procedure, in April 1989. It consisted of several documents, two of which are cited throughout this document. The first document is entitled: "Suggested Local Rules, Including Model Local Rules and Rules that Should Remain Subject to Local Variation" [hereinafter "Suggested Local Rules"]. This document discusses those local rules that should remain as local directives. It includes Model Local Rules that may appropriately be the subject of rulemaking for all jurisdictions. The second document is entitled: Questionable Local Rules [hereinafter "Questionable Local Rules"]. This second document identifies those local rules that are inconsistent with existing law and those local rules that repeat existing law.

sheet be filed with the initial complaint or notice of removal.[4] Eighteen of those courts have rules clearly stating that the civil cover sheet is used only for administrative purposes and that it has no legal effect.[5]

The Judicial Conference at its September 1974 meeting recommended the use of a civil cover sheet for all district courts.[6] The civil cover sheet was part of a civil docket package from the Administrative Office of the United States Courts that had been used experimentally in eleven jurisdictions:

> [It was] decided to reduce the clerical effort required to initiate the docket sheet and ... statistical reports for each case and, in addition, [to remove] the burden of serving the complaint for the issue involved from the filing clerk to the attorney.[7]

The civil cover sheet was recommended for use by all districts as of January 1, 1975 "in accordance with Rule 79(a) of the F.R.Civ.P."[8]

Some courts expand on what the civil cover sheet requires in certain ways. For example, four courts require that the document be filed in duplicate[9] and another

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[3] *Id.*

[4] M.D.Ala. LR3.1; N.D.Ala. LR3.1; S.D.Ala. LR3.2; D.Alaska LR6M; C.D.Cal. LR3.3; E.D.Cal. LR3-200; N.D.Cal. LR3-2(a); S.D.Cal. LR3.1; D.Colo. LR3.1; D.Del. LR3.1; S.D.Fla. LR3.3; S.D.Ga. LR4.1; N.D.Iowa LR3.1(c); S.D.Iowa LR3.1(c); D.Kan. LR3.1; D.Me. LR3(a); D.Md. LR103.1; D.Mass. LR3.1; E.D.Mich. LR3.1; D.Minn. LR3.1; N.D.Miss. LR3.1(B); S.D.Miss. LR3.1(B); E.D.Mo. LR3-2.02(A); D.Mont. LR200-1; D.Neb. LR3.1; D.N.H. LR3.1; D.N.Mex. LR3.1; N.D.N.Y. LR3.1; M.D.N.Car. LR3.1(a); D.N.Mar.I LR3.1;; N.D.Ohio LR3.13; S.D.Ohio LR3.1; E.D.Okla. LR3.1; N.D.Okla. LR3.1; W.D.Okla. LR3.1; E.D.Tenn. LR3.1; N.D.Tex. LR3.1; S.D.Tex. LR3.A; W.D.Tex. CV-3(a); D.Utah LR201; D.V.I. LR3.1; D.Wyo. LR3.1

[5] M.D.Ala. LR3.1; E.D.Cal. LR3-200; S.D.Cal. LR3.1; D.Del. LR3.1; S.D.Fla. LR3.3; S.D.Ga. LR4.1; D.Minn. LR3.1; D.Neb. LR3.1; D.N.H. LR3.1; D.N.Mex. LR3.1; N.D.N.Y. LR3.1; D.N.Mar.I LR3.1; S.D.Ohio LR3.1; N.D.Okla. LR3.1; E.D.Tenn. LR3.1; D.Utah LR201; D.V.I. LR3.1; D.Wyo. LR3.1

[6] Report of the United States Judicial Conference (September 1974) 18.

[7] *Id.*

[8] *Id.*

[9] C.D.Cal. LR3.3; N.D.Iowa LR3.1(c); S.D.Iowa LR3.1(c); N.D.Tex. LR3.1.

court requires it be filed in triplicate.[10] Several courts also require that additional information be provided on the document such as whether there is a related action.[11] Two of the courts require the submission of a civil cover sheet and another document that seems to supplement the information requested on the official form.[12] Another court requires the use of a completely different form.[13] While these variations may seem small, they may cause difficulties for people who are new to the jurisdiction or who file only infrequently in that court. These local rules may also be problematic to the extent that a failure to comply with them results in a rejection of the complaint.

In nine of the courts, pro se litigants are specifically exempt from filing the civil cover sheet.[14] Two of these courts also exempt prisoners.[15] In another court a court clerk will file the civil cover sheet on behalf of a prisoner.[16]

Some of the rules discuss the significance of a failure to file the civil cover sheet. For example, six courts indicate that a complaint without a civil cover sheet is dated and filed later *nunc pro tunc*.[17] In other courts, the clerk will either help to complete the document[18] or notify the litigant of the failure to file the document.[19] These rules are consistent with existing law.

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[10] M.D.N.Car. LR3.1(a).

[11] D.Del. LR3.1.

[12] D.Mass. LR3.1 (civil cover sheet and local category sheet); N.D.Ohio LR3.13 (civil cover sheet and Case Information Sheet).

[13] N.D.Ill. GR2.20 (must file a designation sheet).

[14] D.Del. LR3.1; D.Mont. LR200-1; D.N.H. LR3.1; D.N.Mex. LR3.1; N.D.Okla. LR3.1; S.D.Tex. LR3.A; W.D.Tex. CV-3(a); D.V.I. LR3.1; D.Wyo. LR3.1

[15] D.Mont. LR200-1; W.D.Tex. CV3(a).

[16] N.D.Ill. LR2.20.

[17] M.D.Ala. LR3.1; D.Del. LR3.1; S.D.Ga. LR4.1; D.Minn. LR3.1; D.N.Mar.I LR3.1; D.V.I. LR3.1.

[18] E.D.Mich. LR3.1.

In one court, however, the clerk can refuse a pleading that does not have a civil cover sheet: "The Clerk is authorized to reject for filing any civil case which is not accompanied by a completed and executed civil cover sheet."[20] This local rule is inconsistent with Rule 5(e) of the Federal Rules of Civil Procedure which forbids the clerk from rejecting such a complaint: "The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in the proper form as required by these rules or any local rules or practices."[21] In 1991 this Rule was amended to forbid such action: "[refusing to accept a document for filing] is not a suitable role for the office of the clerk, and the practice exposes litigants to the hazards of time bars; for these reasons, such rules are proscribed by this revision."[22] There is also case law indicating that a complaint filed without a civil cover sheet is still deemed a filed complaint.[23] Because this local rule is inconsistent with the federal rules and case law, it should be rescinded.[24]

Rule 3—In Forma Pauperis

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[19] D.N.H. LR3.1; D.N.Mex. LR3.1; S.D.Ohio LR3.1; D.Wyo. LR3.1.

[20] D.Mont. LR200-1.

[21] Fed.R.Civ.P. 5(e).

[22] Fed.R.Civ.P. 5(e) Note to 1991 Amendments; *see also* Fed.R.Civ.P. 5(e).

23 *See, e.g., Cintron v. Union Pacific Railroad Co*, 813 F.2d 917, 920 (9th Cir. 1987) (complaint presented without civil cover sheet in violation of local rule still deemed filed: "The consensus is that 'papers and pleadings including the original complaint are considered filed when they arse placed in the possession of the clerk of the court.'" (*citations omitted*)); *see also In Re Toler*, 999 F.2d 140 (6th Cir. 1993) (complaint presented without summons in violation of local rule still deemed filed); *McDowell v. Delaware State Police*, 88 F2d 188 (3rd Cir. 1996) (complaint presented without filing fee in violation of local rule deemed filed); *McClellon v. Lone Star Gas. Co.*, 66 F.3d 98 (5th Cir. 1995) (defective complaint presented in violation of local rule deemed filed.)

[24] D.Mont. LR200-1(b).

Thirty-three jurisdictions have local rules concerning the procedure to obtain permission to proceed *in forma pauperis*.[1] There are rules that explain the content necessary for affidavits seeking to proceed *in forma pauperis* and those that explain the procedure for seeking court approval. These rules are appropriate. There are also rules that require the use of form affidavits and those that allow the clerk to reject a request to proceed *in forma pauperis* without judicial action. These rules are problematic and should be rescinded. There are also rules that permit the assessment of partial payment of fees against non-prisoners. Existing law does not permit these types of assessments, so these local rules are also problematic. Lastly, several courts have local rules that repeat existing law and should, therefore, be rescinded.

DISCUSSION

Most of the procedure for securing *in forma pauperis* status is found in the first instance in Section 1915 of Title 28, which was amended in 1996 by the Prisoner Litigation Reform Act.[2] This provision, generally, allows any person to bring a lawsuit "without prepayment of fees or security therefor" if the person files an affidavit of poverty.[3] Prisoners must also file a trust fund account statement indicating the amount of money in the prisoner's account.[4]

There are eight courts with local rules that discuss the required content of any

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[1] D.Alaska LR27; D.Ariz. LR1.19; C.D.Cal. LR26.3; N.D.Cal. LR3-10; S.D.Cal. LR3.2; M.D.Fla. LR4.07; N.D.Ga. LR3.2; N.D.Ill. LRGR11; S.D.Ill. LR3.1; N.D.Ind. LR4.3; E.D.Ky. LR5.5; W.D.Ky. LR5.5; D.Me. LR3(a); D.Mass. LR4.5; W.D.Mich. LR3.4; D.Minn. LR4.2; E.D.Mo. LR2.05; D.Neb. LR3.5; D.N.H. LR4.2; D.N.Mex. LR5.3; N.D.N.Y. LR5.4; W.D.N.Y. LR5.3; E.D.N.Car. LR22.00; N.D.Ohio LR3.15; W.D.Okla. LR3.3; D.Or. LR3.6(b); M.D.Pa. LR4.6; D.P.R. LR303; E.D.Tenn. LR4.2; D.Utah LR108; W.D.Wash. LRCR3; N.D.W.Va. LRGR6.02; S.D.W.Va. LRGR6.02.

[2] *See* 28 U.S.C. §1915.

[3] *Id.* at (a)(1).

affidavit seeking *in forma pauperis* status.[5] Such directives are appropriate supplements to the existing statutory scheme.[6]

There are, however, rules requiring the use of a form affidavit that may be problematic. Seven courts have local rules requiring that a form application be used in seeking *in forma pauperis* status.[7] These rules do not allow for the use of an equivalent affidavit but rely solely on the form affidavit. Such a requirement is inconsistent with the statute which only requires submission of an affidavit "that includes a statement of all assets such prisoner possesses [and a statement] that the person is unable to pay such fees or give security therefor."[8]

This requirement is also inconsistent with the spirit of the Federal Rules. The Supreme Court Rules and the Federal Rules of Appellate Procedure each have a specific requirement that a party interested in proceeding *in forma pauperis* file an affidavit or declaration "in the form prescribed by the Fed. Rules of App. Pro. Form 4."[9] Even this requirement is not unyielding. For example, the Supreme Court Rules provide for "due allowance" when a document is filed by a pro se litigant if the document, while not precisely following the form, still complies "with the substance of these Rules."[10] The relevant Appellate Rule also does not require absolute compliance with Form 4 by stating

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[4] *Id.* at (a)(2).

[5] D.Ariz. LR1.19; C.D.Cal. LR26.3; N.D.Cal. LR3-10; S.D.Cal. LR3.2; D.Neb. LR3.5; D.N.H. LR4.2; N.D.N.Y. LR5.4.

[6] *See* 28 U.S.C. §1915(a)(1); *see also Zaun v. Dobbin*, 628 F.2d 1990, 992 (7th Cir. 1980); *Adkins v. E.I. DuPont DeNemours & Co.*, 335 U.S. 331, 339-340, 69 S.Ct. 85, 89, 93 L.Ed 43, 47 (1948).

[7] N.D.Cal. LR3-10; S.D.Ill. LR3.1; E.D.Ky. LR5.5; W.D.Ky. LR5.5; D.Mass. LR4.5; E.D.Mo. LR2.05; W.D.Okla. LR3.3; D.Utah LR108; W.D.Wash. LRCR3.

[8] 28 U.S.C. §1915(a).

[9] Sup.Ct.R. 39.1; *see also* Fed.R.App.P. Form 4.

[10] Sup.Ct.R. 39.3.

that the necessary affidavit must show "in the detail prescribed by Form 4 of the Appendix of Forms, the party's inability to pay."[11] Lastly, existing case law recognizes that the precise form of the affidavit is not what is important but, rather, the general content.[12] Because these local rules are inconsistent with existing law, they should be rescinded.

There are a variety of local rules that discuss the procedure used to approve a request to proceed *in forma pauperis*. For example, there are local rules explaining that, after filing, the affidavit is provided to the assigned judge,[13] to the chief judge,[14] or to the magistrate judge for approval.[15] Five courts have local rules that explain that, after approval, the clerk files the materials.[16] One court has a local rule indicating that a request to proceed *in forma pauperis* is deemed granted if there is no court action within sixty days.[17] All of these rules are appropriate supplements to the statutory arrangement.

There are, however, rules in two jurisdictions that may be problematic. These rules permit the clerk to return any action that is not accompanied by an affidavit.[18] Such a requirement is inconsistent with both Rule 5 and Rule 83 of the Federal Rules of Civil Procedure, which seek to protect a litigant from being penalized by an action of the clerk

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[11] Fed.R.App.P. 24(a)(1)(A).

[12] *See McGore v. Wrigglesworth*, 114 F.3d 601, 605 (6th Cir. 1997) (must file a completed Form 4 or its equivalent); *Adkins v. E.I. DuPont DeNemours & Co.*, 335 U.S. 331, 339, 69 S.Ct. 85, 89, 93 L.Ed 43, 47 (1948) (court can seek particularized information about a party's financial status).

[13] N.D.Cal. LR3-10; M.D.Fla. LR4.07; N.D.Ill. LRGR11.

[14] D.Alaska LR27; M.D.Pa. LR4.6.

[15] D.Minn. LR4.2; W.D.Mich. LR3.4; N.D.N.Y. LR5.4; N.D.Ohio LR3.15; M.D.Pa. LR4.6; D.P.R. LR303.

[16] D.Alaska LR27; N.D.Ill. LRGR11; D.Mass. LR4.5; D.N.Mex. LR5.3; D.Or. LR3.6(b).

[17] N.D.Ill. GR11.

[18] D.Ariz. LR1.19; E.D.Mo. LR2.05.

without benefit of judicial action.[19] These rules should be rescinded.

Another potentially problematic issue concerns the circumstances under which the court is permitted to order partial payment of a fee. Local rules in seven courts allow for a partial fee assessment for non-prisoners.[20] These rules are contrary to existing law reflected in both statutory amendments to the *in forma pauperis* statute and case law. These rules should, therefore, be rescinded.

Prior to the Prisoner Litigation Reform Act of 1996, the *in forma pauperis* statute was silent on whether a partial fee could be assessed. The statute allowed a suit to be commenced "without prepayment of fees and costs or security therefor, by a person who made affidavit that he was unable to pay such costs or give security therefor."[21] District courts ordered partial payment of fees for prisoners seeking to proceed *in forma pauperis* after examining the inmate's trust account.[22] The Ninth Circuit Court of Appeals extended this procedure to non-prisoners:

> Appellants' chief contention is that while 28 U.S.C. §1915 permits district courts to require full fees or to wave all fees, it does not grant district courts the authority to require a partial filing fee. We take this opportunity to make the apparent explicit: Courts have discretion to impose partial filing fees under the in forma pauperis statute.[23]

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[19] Fed.R.Civ.P. 5(e) ("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."); Fed.R.Civ.P. 83(a)(2) ("A local rule imposing a requirement of form shall not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement.").

[20] S.D.Cal. LR3.2; M.D.Fla. LR4.07; N.D.Ind. LR4.3; D.Neb. LR3.5; D.N.H. LR4.2; W.D.Okla. LR3.3; E.D.Tenn. LR4.2.

[21] 28 U.S.C. §1915(a) (1995).

[22] *See e.g., In Re Williamson*, 786 F.2d 1336 (8th Cir. 1986); *Lambert v. Illinois Department of Corrections*, 827 F.2d 257 (7th Cir. 1987); *Prous v. Kastner*, 842 F.2d 138 (5th Cir. 1988), *rehearing den'd, en banc*, 847 F.2d 840 (5th Cir. 1988), *cert. den'd*, 488 U.S. 941, 109 S.Ct. 364, 102 L.Ed.2d 354 (1988).

[23] Olivares v. Marshall, 59 F.3d 109, 111 (9th Cir. 1995).

That court then cited cases in nine other circuit courts as support for the idea that partial filing fees could be assessed against non-prisoners.[24] All of the cited cases, however, refer only to prisoners proceeding *in forma pauperis*.

The distinction between prisoners and non-prisoners was articulated in the statute in 1996. The Prisoner Litigation Reform Act of 1996 amended section 1915.[25] There is now specific reference to prisoners in the statute, and they are treated differently than non-prisoners. Subsection (a) of the statute allows anyone to proceed "without prepayment of fees or security" if the person can establish an inability to pay.[26] The statute then specifically requires a prisoner to pay the filing fee albeit in installments:

> Notwithstanding subsection (a), if a prisoner brings a civil action ... the prisoner shall be required to pay the full amount of the filing fee. The court shall assess and, when funds exist, collect, as a partial payment [a certain amount based on a formula].... After payment of the initial partial filing fee ... [payments shall be forwarded] until the filing fees are paid.[27]

The prisoner is also required to make payments for costs in a similar manner.[28] The change in this statute means that, now, the issue for an inmate is not whether that inmate will pay the fees and costs but when—will the inmate pay the filing fee at the beginning of the lawsuit or throughout some period of the lawsuit on an installment plan?[29]

The partial fee assessment discussed in the *in forma pauperis* statute in

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[24] *Id.*, *see also Zaun v. Dobbin*, 628 F.2d 1990, 993 (7th Cir. 1980) (with respect to a non-prisoner, "it should be within the court's authority to order payment of a portion of the expense while waiving the remainder.")

[25] 28 U.S.C. §1915 last amended by Pub.L. 104-134, April 26, 1996.

[26] 28 U.S.C. §1915(a).

[27] *Id.* at (b).

[28] *Id.* at (f)(2).

[29] *McGore v. Wrigglesworth*, 114 F.3d 601, 605 (6thCir. 1997).

section (b) refers only to prisoner.[30] The requirement of paying for costs under an installment system is also applicable only to prisoners.[31] At least one court has acknowledged the significance of differentiating between prisoners and non-prisoners in this regard.[32] The statute treats the two categories of people differently and requires prisoners to be assessed the full fee through an installment payment arrangement. This method of payment is not sanctioned in the statute for use with non-prisoners. Accordingly, the local rules seeking to do so in the seven district courts should be rescinded.

Several courts have local rules that repeat existing law and should, therefore, be rescinded. For example, one court has a local rule requiring a person to provide sufficient copies of the complaint for service.[33] This rule simply repeats Rule 4(c)(1) of the Federal Rules of Civil Procedure.[34] Several courts have local rules stating that persons proceeding *in forma pauperis* have agreed to pay the costs and fees from any recovery.[35] These provisions repeat a portion of the *in forma pauperis* statute itself.[36] Two courts have local rules that simply repeat the applicability of this statute.[37]

Rule 5. Service and Filing of Pleadings and Other Papers

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[30] 28 U.S.C. §1915(b).

[31] *Id.* at (f)(2).

[32] *Walker v. People Express Airlines, Inc.*, 886 F.2d 598, 601 (3rd Cir. 1989) (Non-prisoner treated the same as a prisoner with respect to partial fee assessment before Prisoner Litigation Reform Act: "[I]nasmuch as neither §1915(a) nor §753(f) differentiates between prisoner and non-prisoner cases, we find it of no consequence that Walker litigated his suit from outside prison walls.")

[33] S.D.Ill. LR3.1..

[34] Fed.R.Civ.P. 4(c)(1).

[35] M.D.Fla. LR4.07; Mass. LR4.5; E.D.Mo. LR2.05D.Neb. LR3.5; W.D.Wash. LRCR3; N.D.W.Va. LRGR6.02; S.D.W.Va. GR6.02.

[36] *See* 28 U.S.C. §1915(f).

[37] N.D.W.Va. GR6.02; S.D.W.Va. GR6.02.

Rule 5—Proof of Service

Thirty-two courts have rules discussing the use of a proof of service.[1] Many of these local rules address either the form or content of any certificate of service and, as such, are appropriate supplements. There is one local rule that questions whether a certificate of service is actually required; given the existence of Rule 5, this rule is problematic and should be rescinded. There are other rules that discuss when the certificate must be filed that are also problematic because they appear inconsistent with Rule 5.

DISCUSSION

Rule 5 of the Federal Rules of Civil Procedure was amended in 1991 to include a requirement that papers be accompanied by a certificate of service when filed: "All papers after the complaint required to be served upon a party, together with a certificate of service, shall be filed with the court within a reasonable time after service...."[2] The Committee Note to this Rule recognized that this requirement had previously been provided by local rule.[3] Prior to this amendment, in fact, forty-six courts had local rules requiring that some type of proof of service accompany documents filed pursuant to Rule 5.[4]

Most of the current local rules in the thirty-three courts explain the form of the

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[1] C.D.Cal. LR5.8; E.D.Cal. LR5-135(a); N.D.Cal. LR5-4; S.D.Cal. LR5.2;; D.Conn. LR7(e); D.Del. LR5.2(a); D.D.C. GR110; N.D.Fla. LR5.1(C);; S.D.Fla. LR5.2(A); S.D.Ga. LR5.1; D.Idaho LR5.2; N.D.Iowa LR5.1(b); S.D.Iowa LR5.1(b); E.D.La. LR5.3; M.D.La. LR5.3; W.D.La. LR5.3; D.Md. LR102.1; W.D.Mich. LR5.2; N.D.Miss. LR5.2(B); S.D.Miss. LR5.2(B); D.Mont. LR210-3; D.Neb. LR5.2; D.Nev. LR5-1; E.D.Okla. LR5.1(D); N.D.Okla. LR5.1(C); W.D.Okla. LR5.1; W.D.Pa. LR5.2; D.R.I. LR10(b); D.S.Dak. ; W.D.Tex. CV-5(c); W.D.Wash. LR5(f); D.Wyo. LR5.1(g).

[2] Fed.R.Civ.P. 5(d).

[3] *See* Fed.R.Civ.P. 5(e) Note to 1991 Amendments.

proof of service. For example, twenty-three courts have local rules requiring that the proof of service be by certification from counsel pursuant to 28 U.S.C. §1746.[5] Another ten courts require that the certification be from the person making service.[6] Approximately eleven courts have rules requiring, instead, that the proof be by written acknowledgement from the person served.[7] Lastly, three courts simply state that other proof may be permitted if satisfactory to the court.[8] These rules are all appropriate.

Many of the rules also discuss the content of the proof of service. Twenty-one of the courts have rules requiring that the date of service be set forth.[9] Sixteen courts have rules requiring an explanation of the method or manner of service, such as personal service or mail service.[10] Nine courts have directives indicating that the proof of service must contain the name[11] or name and address[12] of the person being served. These rules

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[4] *See* Report at Suggested Local Rules, p.19.

[5] N.D.Cal. LR5-4; S.D.Cal. LR5.2; D.Conn. LR7(e); D.Del. LR5.2(a); D.D.C. GR110; N.D.Fla. LR5.1(C); S.D.Fla. LR5.2(A); S.D.Ga. LR5.1; D.Idaho LR5.2; N.D.Iowa LR5.1(b); S.D.Iowa LR5.1(b); E.D.La. LR5.3; M.D.La. LR5.3; W.D.La. LR5.3; D.Md. LR102.1; W.D.Mich. LR5.2; N.D.Miss. LR5.2(B); S.D.Miss. LR5.2(B); D.Neb. LR5.2; E.D.Okla. LR5.1(D); N.D.Okla. LR5.1(C); D.R.I. LR10(b); D.Wyo. LR5.1(g).

[6] S.D.Cal. LR5.2; D.Conn. LR7(e); D.Del. LR5.2(a); N.D.Iowa LR5.1(b);; S.D.Iowa LR5.1(b); W.D.Mich. LR5.2; D.Mont. LR210-3; D.Neb. LR5.2; D.Nev. LR5-1; W.D.Okla. LR5.1.

[7] S.D.Cal. LR5.2; D.Conn. LR7(e); D.Idaho LR5.2; N.D.Iowa LR5.1(b); S.D.Iowa LR5.1(b); W.D.Mich. LR5.2; D.Mont. LR210-3; D.Neb. LR5.2; D.Nev. LR5-1; W.D.Okla. LR5.1; D.R.I. LR10(b).

[8] S.D.Cal. LR5.2; D.D.C. GR110; D.Mont. LR210-3.

[9] C.D.Cal. LR5.8; E.D.Cal. LR5-135(a); N.D.Cal. LR5-4; S.D.Cal. LR5.2; D.D.C. GR110; N.D.Fla. LR5.1(C); S.D.Fla. LR5.2(A); S.D.Ga. LR5.1; D.Idaho LR5.2; N.D.Iowa LR5.1(b); S.D.Iowa LR5.1(b); W.D.Mich. LR5.2; N.D.Miss. LR5.2(B); S.D.Miss. LR5.2(B); D.Mont. LR210-3; D.Nev. LR5-1; E.D.Okla. LR5.1(D); N.D.Okla. LR5.1(C); D.R.I. LR10(b); W.D.Tex. CV-5(c); D.Wyo. LR5.1(g).

[10] C.D.Cal. LR5.8; E.D.Cal. LR5-135(a); N.D.Cal. LR5-4; S.D.Cal. LR5.2; D.D.C. GR110; D.Idaho LR5.2; N.D.Iowa LR5.1(b); S.D.Iowa LR5.1(b); W.D.Mich. LR5.2; N.D.Miss. LR5.2(B); S.D.Miss. LR5.2(B); D.Mont. LR210-3; D.Nev. LR5-1; D.R.I. LR10(b); W.D.Tex. CV-5(c); D.Wyo. LR5.1(g).

[11] C.D.Cal. LR5.8; S.D.Fla. LR5.2(A); S.D.Ga. LR5.1; D.Idaho LR5.2; N.D.Miss. LR5.2(B); S.D.Miss. LR5.2(B); D.Neb. LR5.2; D.Nev. LR5-1; W.D.Tex. CV-5(c).

are also appropriate.

Some of the courts discuss where the proof of service should be physically located within the pleadings. For example, eight courts have local rules requiring that the proof be a separate attachment or on the document itself.[13] Another four courts require that the proof of service be a separate attachment.[14] Four courts state that, if the proof of service is attached as a document, it must be the last page.[15] These rules may stand.

The courts vary on whether they actually require a certificate of service and, if so, what the effect of a failure to file is. For example, one court has a rule stating that, when a document is filed with the court, it is a representation that it has also been served and that "[n]o further proof of service is required unless an adverse party raises a question of notice."[16] This rule, by its language is inconsistent with Rule 5 (d) of the Federal Rules of Civil Procedure and should, therefore, be rescinded.

Seven courts have local rules stating that the failure to make proof of service does not affect the validity of service.[17] There is, however, some case law to the contrary.[18]

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[12] D.Conn. LR7(e); S.D.Fla. LR5.2(A); S.D.Ga. LR5.1; N.D.Miss. LR5.2(B);; S.D.Miss. LR5.2(B); D.Neb. LR5.2.

[13] E.D.Cal. LR5-135(a); D.Idaho LR5.2; E.D.La. LR5.3; M.D.La. LR5.3; W.D.La. LR5.3; D.Nev. LR5-1; W.D.Tex. CV-5(c); D.Wyo. LR5.1(g).

[14] D.Del. LR5.2(a); D.D.C. GR110; S.D.Fla. LR5.2(A); S.D.Ga. LR5.1.

[15] C.D.Cal. LR5.8; S.D.Cal. LR5.2; D.Mont. LR210-3; D.Nev. LR5-1.

[16] W.D.Pa. LR5.2.

[17] S.D.Cal. LR5.2; D.D.C. GR110; D.Mont. LR210-3; D.Neb. LR5.2; D.Nev. LR5-1; D.R.I. LR10(b); W.D.Wash. LR5(f).

[18] *E.g., Patel v. Contemporary Classics of Beverly Hills &Herbert Schachter*, __F.3d __, 2001 W.L. 872901 (2d Cir. 2001); *Eilander v. Federated Mutual Insurance Co.*, 2001 W.L. 770986 (N.D.Tex. 2001) (although court determined that motion was not timely filed since it was not accompanied by a certificate of service and, therefore, was appropriately dismissed, the court noted that there were no substantive grounds to uphold the motion either); *Board of Trustees of the Laborers' District Council*

Lastly, some of these local rules indicate when the proof of service must be filed. The Federal Rule on the timeliness of filing the certificate of service reads as follows: "All papers after the complaint required to be served upon a party, together with a certificate of service, shall be filed with the court within a reasonable time after service...."[19] Six of the courts have local rules that allow the proof of service to be filed anytime unless material prejudice would result.[20] Five courts have local rules requiring that the proof of service be filed before the court takes action on the filed document.[21] Three other courts mandate that the proof of service be filed "promptly."[22] Because the Federal Rules require that the filing occur "within a reasonable time after service", these local rules are inconsistent and should, therefore, be rescinded.

Rule 5—Filing of Discovery

Health & Welfare Fund v. Pennsbury Excavating and Landscaping, Inc., 2001 W.L. 1201380 (E.D.Pa. 2000) (because there was no certificate of service, the motion was denied but without prejudice).

[19] Fed.R.Civ.P. 5(d).

[20] S.D.Cal. LR5.2; D.D.C. GR110; D.Mont. LR210-3; D.Neb. LR5.2; D.Nev. LR5-1;; W.D.Wash. LR5(f).

[21] S.D.Cal. LR5.2; N.D.Iowa LR5.1(b); S.D.Iowa LR5.1(b); D.Mont. LR210-3; D.Nev. LR5-1.

[22] S.D.Cal. LR5.2; D.Mont. LR210-3; W.D.Tex. CV-5(c).

Eighty-three courts have local rules addressing whether discovery documents are permitted or required to be filed. These rules were promulgated before December 1, 2000, the effective date of the amendments to Rule 5.[1] Most of these rules were rendered ineffective by the new amendments. They should be rescinded. In addition, some rules, specifically those discussing how to obtain access to filed discovery and who maintains non-filed discovery, can remain subject to local variation.

DISCUSSION

Prior to the recent amendments, Rule 5(d) of the Federal Rules of Civil Procedure allowed the court on motion of a party or on its own initiative to order that certain discovery material not be filed.[2] That Rule made the filing requirement subject to a court order that discovery not be filed if so requested by the court or the party.[3] The language in the Committee Note indicates that the Advisory Committee intended in Rule 5(d) that filing be the norm and that non-filing only be permitted in particular cases. The Committee Note to the 1980 amendments states that the requirement of filing is:

> subject to an order of the court that discovery materials not be filed unless filing is requested by the court or is effected by the parties who wish to use the material in the proceeding. [4]

Eighty-three courts have local rules based on this version of Rule 5(d).[5]

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[1] *See* Fed.R.Civ.P. 5(d).

[2] Fed.R.Civ.P. 5(d) prior to the 2000 amendments read, in relevant part: "but the court may on motion of a party or on its own initiative order that depositions upon oral examination and interrogatories, requests for documents, requests for admission, and answers and responses thereto not be filed unless on order of the court or for use in the proceeding."

[3] Fed.R.Civ.P. 5 Note to 1980 Amendments.

[4] *Id.*.

[5] M.D.Ala. LR5.1; N.D.Ala. LR5.1; S.D.Ala. LR5.5; D.Alaska LR8(A); E.D.Ark. LR5.5; W.D.Ark. LR5.5; C.D.Cal. LR26-8.3; E.D.Cal. LR5-134(e); N.D.Cal. LR26-2;; S.D.Cal. LR30.1; D.Colo. LR31; D.Conn. LR7(g); D.Del. LR5.4; D.D.C. LR107;; M.D.Fla. LR3.03; N.D.Fla. LR26.2; S.D.Fla. LR26.1; M.D.Ga. LR5.1; N.D.Ga. LR5.4; S.D.Ga. LR26.6; D.Haw. LR5.1; D.Idaho LR5.5;

Basically, these rules require non-filing of discovery in the ordinary course. Seventy-six of them require that general discovery such as interrogatories, requests for production, requests for admission, and answers and responses, not be filed.[6] There are several exceptions written into these rules. For example, forty-six courts have local rules providing that no discovery be filed except on order of the court.[7] Thirty-two courts provide for non-filing except for use at trial.[8] Thirty-six courts provide for non-filing

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C.D.Ill. LR26.3; N.D.Ill. LR18; N.D.Ind. LR26.2; S.D.Ind. LR26.2; N.D.Iowa LR5.2; S.D.Iowa LR5.2; D.Kan. LR26.3; E.D.Ky. LR5.2; W.D.Ky. LR5.2; E.D.La. LR26.5; M.D.La. LR26.5; W.D.La. LR26.5; D.Me. LR5(b); D.Md. LR104.5; D.Mass. LR26.6; E.D.Mich. LR26.2; W.D.Mich. LR5.3;; D.Minn. LR26.4; E.D.Mo. LR26-3.02; W.D.Mo. LR26.4; D.Mont. LR200-3; D.Neb. LR5.1; D.Nev. LR26-8; D.N.H. LR26.1; D.N.J. LR26.1(c); ; D.N.Mex. LR26.2; E.D.N.Y. LR5.1; N.D.N.Y. LR26.2; S.D.N.Y. LR5.1; W.D.N.Y. LR26(c);; M.D.N.Car. LR5.2; W.D.N.Car. LR26.1; D.N.Mar.I LR26.13; N.D.Ohio LR5.3;; S.D.Ohio LR26.2; E.D.Okla. LR26.1; N.D.Okla. LR26.1B; W.D.Okla. LR26.3; D.Or. LR5.1(c); E.D.Pa. LR26.1(a); M.D.Pa. LR5.4; W.D.Pa. LR5.3; D.P.R. LR315; D.R.I. LR14(b); D.S.Car. LR5.01; D.S.Dak. LR; E.D.Tenn. LR26.2; M.D.Tenn. LR9(c); W.D.Tenn. LR26.1(b); E.D.Tex. LR26(e); N.D.Tex. LR5.2; S.D.Tex. LR5B; W.D.Tex. LR30(b); D.Utah LR204-3(c); D.Vt. LR26.1(f); D.V.I. LR26.1; E.D.Wash. LR26.1; W.D.Wash. LR5(d); N.D.W.Va. LR3.03; S.D.W.Va. LR3.03; E.D.Wis. LR5.04; D.Wyo. LR26.1(d).

[6] M.D.Ala. LR5.1; N.D.Ala. LR5.1; S.D.Ala. LR5.5; D.Alaska LR8(A); E.D.Ark. LR5.5; W.D.Ark. LR5.5; C.D.Cal. LR26-8.3; E.D.Cal. LR32-250; N.D.Cal. LR26-2;S.D.Cal. LR33.1, 36.1; D.Colo. LR31; D.Conn. LR7(g); D.Del. LR5.4; D.D.C. LR107; M.D.Fla. LR3.03; N.D.Fla. LR26.2; S.D.Fla. LR26.1; N.D.Ga. LR5.4; S.D.Ga. LR26.6; D.Haw. LR5.1; D.Idaho LR5.5; C.D.Ill. LR26.3; N.D.Ill. LR18; N.D.Ind. LR26.2; S.D.Ind. LR26.2; N.D.Iowa LR5.2; S.D.Iowa LR5.2; D.Kan. LR26.3; E.D.Ky. LR5.2; W.D.Ky. LR5.2; E.D.La. LR26.5; M.D.La. LR26.5; W.D.La. LR26.5; D.Me. LR5(b); D.Md. LR104.5; D.Mass. LR26.6; E.D.Mich. LR26.2; W.D.Mich. LR5.3; D.Minn. LR26.4; E.D.Mo. LR26-3.02; D.Mont. LR200-3; D.Neb. LR5.1; D.Nev. LR26-8; D.N.H. LR26.1; D.N.J. LR26.1(c); D.N.Mex. LR26.2; E.D.N.Y. LR5.1; N.D.N.Y. LR26.2;; S.D.N.Y. LR5.1; M.D.N.Car. LR5.2; W.D.N.Car. LR26.1; S.D.Ohio LR26.2; E.D.Okla. LR26.1A; N.D.Okla. LR26.1B; W.D.Okla. LR26.3; D.Or. LR5.1(c); E.D.Pa. LR26.1(a); M.D.Pa. LR5.4; W.D.Pa. LR5.3; D.P.R. LR315; D.S.Car. LR5.01; D.S.Dak. LR; E.D.Tenn. LR26.2; M.D.Tenn. LR9(c); W.D.Tenn. LR26.1(b); N.D.Tex. LR5.2; S.D.Tex. LR5A; W.D.Tex. LR5(b); D.Utah LR204-3(c); D.Vt. LR26.1(f); E.D.Wash. LR26.1; W.D.Wash. LR5(d); N.D.W.Va. LR3.03; S.D.W.Va. LR3.03; E.D.Wis. LR55.0; D.Wyo. LR26.1(d).

[7] M.D.Ala. LR5.1, LR26.1; N.D.Ala. LR5.1, LR26.1; N.D.Cal. LR26-2, LR26-4; S.D.Cal. LR30.1, LR33.1, LR36.1; D.Colo. LR31; D.Conn. LR7(g); D.Del. LR5.4; D.D.C. LR107; M.D.Fla. LR3.03; S.D.Fla. LR26.1; S.D.Ga. LR26.6; D.Haw. LR5.1; D.Idaho LR5.5; N.D.Ill. LR18; E.D.La. LR26.5; M.D.La. LR26.5; W.D.La. LR26.5; D.Me. LR5(b); D.Md. LR104.5; D.Mass. LR26.6; E.D.Mich. LR26.2; D.Minn. LR26.4, LR26.1(a)(2); W.D.Mo. LR26.4; D.Nev. LR26-8; D.N.H. LR26.1; D.N.J. LR26.1(c); E.D.N.Y. LR5.1; S.D.N.Y. LR5.1; M.D.N.Car. LR5.2; W.D.N.Car. LR26.1; W.D.Okla. LR26.3; D.Or. LR5.1(c); M.D.Pa. LR5.4; W.D.Pa. LR5.3; D.R.I. LR14(b); E.D.Tenn. LR26.2; M.D.Tenn. LR9(c); D.Utah LR204-3(c); N.D.W.Va. LR3.03; S.D.W.Va. LR3.03; E.D.Wis. LR5.04.

[8] M.D.Ala. LR5.1; N.D.Ala. LR5.1; D.Alaska LR8(A); E.D.Ark. LR5.5; W.D.Ark. LR5.5; N.D.Cal. LR26-4; S.D.Cal. LR30.1; D.Colo. LR31; D.Del. LR5.4; N.D.Fla. LR26.2; S.D.Fla. LR26.1; N.D.Ga. LR5.4; S.D.Ga. LR26.6; D.Haw. LR5.1; D.Idaho LR5.5; E.D.Ky. LR5.2; W.D.Ky. LR5.2; E.D.Mich. LR26.2; W.D.Mich. LR5.3; D.Neb. LR5.1; N.D.N.Y. LR26.2; W.D.N.Car. LR26.1;

except when needed in connection with motions.[9] Thirty-eight courts require that, when discovery is needed with a motion, only the relevant parts of the discovery be filed.[10] Eighteen courts require that any discovery material needed for an appeal be filed at that time.[11]

There are also local rules specifically discussing depositions. Twenty-three courts have local rules mandating that notices of depositions not be filed.[12] Sixty-three courts have local rules requiring that depositions themselves not be filed.[13] Eight courts

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N.D.Okla. LR26.1B; W.D.Okla. LR26.3; M.D.Pa. LR5.4; D.P.R. LR315; D.S.Car. LR5.01; D.S.Dak. LR; W.D.Tenn. LR26.1(b); S.D.Tex. LR5B; D.Vt. LR26.1(f); W.D.Wash. LR5(d).

[9] M.D.Ala. LR5.1; N.D.Ala. LR5.1; D.Alaska LR8(A); E.D.Ark. LR5.5; W.D.Ark. LR5.5; S.D.Cal. LR30.1, LR33.1, LR36.1; D.Colo. LR31; D.Del. LR5.4; M.D.Fla. LR3.03; N.D.Fla. LR26.2; S.D.Fla. LR26.1; N.D.Ga. LR5.4; S.D.Ga. LR26.6; D.Haw. LR5.1; N.D.Ill. LR18; E.D.Ky. LR5.2; W.D.Ky. LR5.2; D.Md. LR104.5; E.D.Mich. LR26.2; D.Minn. LR26.4, LR26.1(a)(2); E.D.Mo. LR26-3.02; D.Mont. LR200-3; D.N.J. LR26.1(c); N.D.N.Y. LR26.2; M.D.N.Car. LR5.2; W.D.N.Car. LR26.1; S.D.Ohio LR26.2; N.D.Okla. LR26.1B; W.D.Okla. LR26.3; D.S.Dak. LR; W.D.Tex. LR5(b); D.Vt. LR26.1(f); W.D.Wash. LR5(d); E.D.Wis. LR5.04.

[10] M.D.Ala. LR5.1; N.D.Ala. LR5.1; S.D.Ala. LR5.5; E.D.Ark. LR5.5; W.D.Ark. LR5.5; C.D.Cal. LR26-8.3; E.D.Cal. LR32-250; N.D.Cal. LR26-4; D.Conn. LR7(g); D.Del. LR5.4; D.D.C. LR107; N.D.Fla. LR26.2; N.D.Ga. LR5.4; S.D.Ga. LR26.6; D.Idaho LR5.5; C.D.Ill. LR26.3; N.D.Ind. LR26.2; S.D.Ind. LR26.2; D.Mass. LR26.6; W.D.Mich. LR5.3; W.D.Mo. LR26.4; E.D.N.Y. LR5.1; S.D.N.Y. LR5.1; M.D.N.Car. LR5.2; W.D.N.Car. LR26.1; W.D.Pa. LR5.3; D.P.R. LR315; D.S.Car. LR5.01; E.D.Tenn. LR26.2; M.D.Tenn. LR9(c); W.D.Tenn. LR26.1(b); N.D.Tex. LR5.2; S.D.Tex. LR5B; W.D.Tex. LR26(a); E.D.Wash. LR26.1; N.D.W.Va. LR3.03; S.D.W.Va. LR3.03; D.Wyo. LR26.1(d).

[11] M.D.Ala. LR5.1; D.Conn. LR7(g); D.Del. LR5.4; D.D.C. LR107; N.D.Fla. LR26.2; S.D.Fla. LR26.1; N.D.Ga. LR5.4; D.Idaho LR5.5; S.D.Ind. LR26.2; E.D.Ky. LR5.2; W.D.Ky. LR5.2; E.D.Mich. LR26.2; E.D.N.Y. LR5.1; S.D.N.Y. LR5.1; M.D.Pa. LR5.4; W.D.Pa. LR5.3; D.P.R. LR315; D.S.Car. LR5.01.

[12] M.D.Ala. LR5.1; N.D.Ala. LR5.1; S.D.Ala. LR5.5; C.D.Cal. LR26-8.3; E.D.Cal. LR30-250(a); N.D.Cal. LR26-2; D.Conn. LR7(g); M.D.Fla. LR3.03; D.Haw. LR5.1; N.D.Ill. LR18; N.D.Ind. LR26.2; N.D.Iowa LR5.2; S.D.Iowa LR5.2; E.D.N.Y. LR5.1; N.D.N.Y. LR26.2; S.D.N.Y. LR5.1; D.Or. LR5.1(c); E.D.Pa. LR26.1(a); N.D.Tex. LR5.2; W.D.Tex. LR5(b); N.D.W.Va. LR3.03; S.D.W.Va. LR3.03; E.D.Wis. LR5.04.

[13] M.D.Ala. LR5.1; N.D.Ala. LR5.1; S.D.Ala. LR5.5; D.Alaska LR8(A); E.D.Ark. LR5.5; W.D.Ark. LR5.5; C.D.Cal. LR26-8.3; E.D.Cal. LR5-134(e), LR30-250(a); S.D.Cal. LR30.1; D.Colo. LR31; D.Conn. LR7(g); D.D.C. LR107; M.D.Fla. LR3.03; N.D.Fla. LR26.2; S.D.Ga. LR26.6; D.Haw. LR5.1; C.D.Ill. LR26.3; N.D.Ill. LR18; N.D.Ind. LR26.2; S.D.Ind. LR26.2; N.D.Iowa LR5.2; S.D.Iowa LR5.2; E.D.La. LR26.5; M.D.La. LR26.5; W.D.La. LR26.5; D.Me. LR5(b); D.Mass. LR26.6; E.D.Mich. LR26.2; W.D.Mich. LR5.3; D.Minn. LR26.4; E.D.Mo. LR26-3.02; W.D.Mo. LR26.4; D.Mont. LR200-3; D.Nev. LR26-8; D.N.H. LR26.1; D.N.Mex. LR30.3; E.D.N.Y. LR5.1; N.D.N.Y. LR26.2; S.D.N.Y. LR5.1; M.D.N.Car. LR5.2; W.D.N.Car. LR26.1; E.D.Okla. LR26.1A; N.D.Okla. LR26.1B; W.D.Okla. LR26.3; D.Or. LR5.1(c); E.D.Pa. LR26.1(a); W.D.Pa. LR5.3; D.P.R. LR315; D.R.I. LR14(b); D.S.Car. LR5.01; E.D.Tenn. LR26.2; W.D.Tenn. LR26.1(b);

have local rules mandating that depositions upon written questions not be filed.[14]

Some courts have local rules that specifically forbid filing of disclosures made pursuant to several portions of Rule 26: Rule 26(a)(1) concerning initial disclosures,[15] Rule 26(a)(2) concerning expert testimony,[16] and Rule 26(a)(3) concerning pre-trial discovery.[17]

Rule 5(d) was amended effective December 1, 2000 to forbid filing of discovery in many cases:

> All papers ... must be filed with the court ... 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.[18]

The existing local rules are rendered ineffective by this new amendment:

> The rule supersedes and invalidates local rules that forbid, permit, or require filing of these materials before they are used in the action.[19]

Most of these local rules, then, should be rescinded.

There are some local rules, however, that may continue to be valid even with the newly amended Rule 5(d). These rules relate to maintenance of the original

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N.D.Tex. LR5.2; S.D.Tex. LR5A; D.Utah LR204-3(c); D.Vt. LR26.1(f); E.D.Wash. LR26.1; W.D.Wash. LR5(d); N.D.W.Va. LR3.03; S.D.W.Va. LR3.03; E.D.Wis. LR5.04.

[14] S.D.Fla. LR26.1; C.D.Ill. LR26.3; N.D.Ill. LR18; E.D.Mo. LR26-3.02; D.Nev. LR26-8; D.N.H. LR26.1; W.D.Tenn. LR26.1(b); S.D.W.Va. LR3.03.

[15] M.D.Ala. LR26.1; N.D.Ala. LR26.1; N.D.Ind. LR26.2; S.D.Ind. LR26.2; D.Kan. LR26.3; W.D.Mo. LR26.4; D.N.Mex. LR26.2; W.D.N.Y. LR26(c); E.D.Wash. LR26.1; D.Wyo. LR26.1(d).

[16] N.D.Ala. LR26.1; D.Conn. LR7(g); D.Idaho LR5.5; S.D.Ind. LR26.2; D.Kan. LR26.3; D.Me. LR5(b); D.N.H. LR26.1; D.N.Mex. LR26.2; D.Minn. LR26.1(a)(2); W.D.N.Y. LR26(c); D.Or. LR5.1(c).

[17] D.Me. LR5(b); S.D.N.Y. LR5.1.

[18] Fed.R.Civ.P. 5(d).

[19] Fed.R.Civ.P. 5(d) Note to 2000 Amendments.

discovery and access to the unfilled discovery. Forty-two courts, for example, have local rules stating that the party responsible for service of the discovery retains the original.[20] In addition, four courts specifically indicate by local rule that the original deposition be maintained by the party seeking it.[21] Five courts have local rules that specifically indicate that the custodian of the discovery must provide reasonable access of the discovery to all parties.[22] Seven courts indicate that others can obtain the material by paying reasonable copying expenses with leave of the court.[23] Another five courts suggest that the public can ask the court that the discovery be filed.[24]

III. Pleadings and Motions

Rule 9. Pleading Special Matters

Rule 9—Three-Judge Courts

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[20] M.D.Ala. LR5.1; N.D.Ala. LR5.1; S.D.Ala. LR5.5; C.D.Cal. LR26-8.3; D.Colo. LR31; D.Del. LR5.4; D.D.C. LR107; N.D.Fla. LR26.2; N.D.Ga. LR5.4; S.D.Ga. LR26.6; D.Idaho LR5.5; C.D.Ill. LR26.3; N.D.Ill. LR18; N.D.Ind. LR26.2; S.D.Ind. LR26.2; E.D.Ky. LR5.2; W.D.Ky. LR5.2; E.D.La. LR26.5; M.D.La. LR26.5; W.D.La. LR26.5; D.Me. LR5(b); D.Md. LR104.5; D.Mass. LR26.6; E.D.Mich. LR26.2; W.D.Mich. LR5.3; D.Nev. LR26-8; D.N.J. LR26.1(c); M.D.N.Car. LR5.2; W.D.N.Car. LR26.1; E.D.Okla. LR26.1A; E.D.Pa. LR26.1(a); M.D.Pa. LR5.4; W.D.Pa. LR5.3; D.P.R. LR315; D.R.I. LR14(b); D.S.Car. LR5.01; W.D.Tenn. LR26.1(b); W.D.Tex. LR30(b); D.Utah LR204-3(c); E.D.Wash. LR26.1; N.D.W.Va. LR3.03; S.D.W.Va. LR3.03.

[21] S.D.Fla. LR26.1; N.D.Ga. LR5.4; D.Idaho LR5.5; M.D.Pa. LR5.4.

[22] M.D.Ala. LR5.1; N.D.Ala. LR5.1; C.D.Cal. LR26-8.3; D.D.C. LR107; D.Md. LR104.5.

[23] M.D.Ala. LR5.1; N.D.Ala. LR5.1; S.D.Ala. LR5.5; C.D.Cal. LR26-8.3; D.Haw. LR5.1; N.D.Ill. LR18; D.Neb. LR5.1.

[24] D.Mass. LR26.6; D.Mont. LR200-3; W.D.Pa. LR5.3; N.D.W.Va. LR3.03; S.D.W.Va. LR3.03.

Twenty-four jurisdictions have local rules concerning the procedures by which a party seeking a three-judge court files a pleading.[1] The original Local Rules Project suggested that the courts adopt a Model Local Rule. Most of the existing local rules consist of language that is either taken from that model Local Rule or varies from it in only small respects. In addition, there are four courts with local rules that are inconsistent with existing law and those rules should, therefore, be rescinded.

DISCUSSION

The circumstances under which a three-judge court is convened and the procedure for convening such a tribunal are governed by 28 U.S.C. §2284. It provides for a three-judge court in cases challenging the constitutionality of state or federal legislative apportionment and in cases in which the convening of a three-judge court is allowed by other federal law.[2] The jurisdiction of three-judge courts has been largely eliminated since the repeal in 1976 of 28 U.S.C. §§2281 and 2282, which required determination by a three-judge court of injunctions restraining the enforcement, on constitutional grounds, of state and federal statutes. At present, there are relatively few situations where a three-judge court is either required or available, if requested:

1) Actions challenging the constitutionality of the apportionment of congressional districts or of any statewide legislative body (three-judge court required);[3]

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[1] M.D.Ala. LR9.2; D.Ariz. LR2.3; S.D.Cal. LR9.2; D.Conn. LR7(c); D.Del. LR9.2; D.D.C. LR202; S.D.Fla. LR9.1; N.D.Ga. LR9.1; N.D.Ill. LR31; N.D.Ind. LR9.2; S.D.Ind. LR9.2; E.D.La. LR9.1; M.D.La. LR9.1; W.D.La. LR9.1; D.Me. LR9(a); E.D.Mich. LR9.1(c); D.Neb. LR9.2; D.N.H. LR9.2; N.D.N.Y. LR9.1; D.N.Mar.I LR9.2; N.D.Okla. LR9.2; W.D.Okla. LR9.1; D.R.I. LR28; W.D.Wash. LR9(i).

[2] 28 U.S.C. §2284.

[3] 28 U.S.C. §2284.

2) Actions brought under the Civil Rights Act of 1964 relating to voting rights protection (Attorney General or defendants may request three-judge court);[4]

3) Actions alleging deprivation of rights in public accommodations (Attorney General may request three-judge court and must file certificate stating case is of "general public importance");[5]

4) Actions seeking to protect equal employment opportunities (Attorney General may request three-judge court and must file certificate stating case is of "general public importance");[6]

5) Actions brought under the Voting Rights Act of 1965 challenging tests which may abridge the right to vote (three-judge court in the District Court of the District of Columbia required if action brought by state or political subdivision seeking declaratory relief);[7]

6) Other actions under the Voting Rights Act (three-judge court required)[8]

7) Actions brought under the Presidential Election Campaign Fund Act of 1971 for declaratory or injunctive relief "concerning any civil matter" (Federal Election Commission may request three-judge

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[4] 42 U.S.C. §1971(g).

[5] 42 U.S.C. §2000a-5.

[6] 42 U.S.C. §2000e.

[7] 42 U.S.C. §1973(b), (c)

[8] 42 U.S.C. §1973aa-2, 1973H, 1973bb.

court);[9] and,

8) Actions brought under the Presidential Election Campaign Fund Act by an entity or individual "appropriate to implement or construe" the Act (three-judge court required).[10]

The first Local Rules Project suggested that a Model Local Rule be provided that encompassed, generally, the issues addressed by the then-existing local rules.[11] For example, there were provisions requiring that particular notice be given to the clerk or that a special designation be made on the pleading requesting a three-judge court. The required designation following the title of the pleading was straightforward and simple and intended to alert the clerk. The requirement of setting forth the basis of the request was equally straightforward. If the basis were clearly provided, the judge would not be forced to determine what the ground might have been. The Model Local Rule also permitted the designation to be a sufficient request pursuant to 28 U.S.C. §2284, although the party requesting the three-judge court was not precluded from making any other request. Those provisions were intended to assist the court in complying with the procedures of 28 U.S.C. §2284 so that, after the clerk was made aware of the designation, the clerk could notify the appropriate judge.

There were also local rules establishing the number of copies of pleadings to be filed. The clerk could file the original and then have copies to distribute to the three judges. The Model Local Rule required that three copies of each document be filed along with the original, unless it was determined that a three-judge court would not be

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[9] 26 U.S.C. §9010(c).

[10] 26 U.S.C. §9011(b).

convened or until the three-judge court was convened and dissolved and the case remanded to a single judge. This procedure put the burden on the litigants, rather than on the court, to provide the copies. In the event, however, that a litigant could not comply with this requirement, the rule provided that the litigant could have the requirement waived by court order. This provision was a convenient mechanism for timely receipt of the pleadings by the judges.

There was also a statement in the Model Local Rule indicating that a failure to comply with the local rule was not a ground for failing to convene or for dissolving a three-judge court. This provision recognized that Section 2284(a) is jurisdictional so that a failure to make an appropriate demand does not preclude the judge from convening a three-judge court or empower the judge to hear the case as a single judge.

It should be noted that many of the twenty-four courts with local rules on this subject have adopted, in large measure, the substance of this Model Local Rule. For example, fifteen courts have local rules that require a designation of "Three-Judge Court Requested" or the equivalent in the caption of the first pleading.[12] Nine of these rules indicate that these words are sufficient pursuant to 28 U.S.C. §2284.[13] Twelve of the courts mandate that the basis for the request be apparent from the pleadings,[14] be set forth

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[11] *See* Report at Suggested Local Rules, p.47.

[12] M.D.Ala. LR9.2; S.D.Cal. LR9.2; D.Del. LR9.2; S.D.Fla. LR9.1; N.D.Ind. LR9.2; S.D.Ind. LR9.2; D.Me. LR9(a); E.D.Mich. LR9.1(c); D.Neb. LR9.2; D.N.H. LR9.2; N.D.N.Y. LR9.1; D.N.Mar.I LR9.2; N.D.Okla. LR9.2; D.R.I. LR28; W.D.Wash. LR9(i).

[13] M.D.Ala. LR9.2; S.D.Cal. LR9.2; D.Del. LR9.2; S.D.Fla. LR9.1; N.D.Ind. LR9.2; S.D.Ind. LR9.2; E.D.Mich. LR9.1(c); D.N.Mar.I LR9.2; N.D.Okla. LR9.2.

[14] M.D.Ala. LR9.2; S.D.Cal. LR9.2; D.Del. LR9.2; S.D.Fla. LR9.1; N.D.Ind. LR9.2; S.D.Ind. LR9.2; D.Neb. LR9.2; D.N.H. LR9.2; N.D.N.Y. LR9.1; D.N.Mar.I LR9.2; N.D.Okla. LR9.2; D.R.I. LR28.

in the pleading,[15] or be in a brief, attached statement.[16] Eighteen courts have local rules requiring the submission of the original and three copies of all documents.[17] The court has discretion to order fewer than three copies in ten jurisdictions.[18] Seven jurisdictions indicate that failure to comply with the local rule is not grounds for either denying or dissolving the three-judge court.[19]

There are also some local rules that vary from the original Model Local Rule. For example, two courts have local rules that require a memorandum when seeking a three-judge court that contains cited authority to support the application.[20] One court requires only three copies of documents[21] while another requires an original and four copies.[22] Six courts have local rules requiring simply that the party notify the clerk that a three-judge court is requested and state the relevant statutory provision.[23] These rules are also appropriate exercises of local rulemaking.

Three jurisdictions have local rules that simply state that, in the absence of the required notice, the clerk may treat the case as one not requiring a three-judge court.[24]

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[15] M.D.Ala. LR9.2; S.D.Cal. LR9.2; D.Del. LR9.2; S.D.Fla. LR9.1; N.D.Ind. LR9.2; S.D.Ind. LR9.2; D.Neb. LR9.2; D.N.H. LR9.2; N.D.N.Y. LR9.1; D.N.Mar.I LR9.2; N.D.Okla. LR9.2; D.R.I. LR28.

[16] M.D.Ala. LR9.2; S.D.Cal. LR9.2; D.Del. LR9.2; S.D.Fla. LR9.1; N.D.Ind. LR9.2; S.D.Ind. LR9.2; D.Neb. LR9.2; D.N.H. LR9.2; N.D.N.Y. LR9.1; D.N.Mar.I LR9.2; N.D.Okla. LR9.2; D.R.I. LR28.

[17] M.D.Ala. LR9.2;; D.Ariz. LR2.3; S.D.Cal. LR9.2; D.Conn. LR7(c); D.Del. LR9.2; D.D.C. LR202; S.D.Fla. LR9.1; N.D.Ill. LR31; N.D.Ind. LR9.2; S.D.Ind. LR9.2; E.D.La. LR9.1; M.D.La. LR9.1; W.D.La. LR9.1; D.Neb. LR9.2; D.N.H. LR9.2; N.D.N.Y. LR9.1; N.D.Okla. LR9.2; W.D.Wash. LR9(i).

[18] M.D.Ala. LR9.2; S.D.Cal. LR9.2; D.Del. LR9.2; S.D.Fla. LR9.1; N.D.Ind. LR9.2; S.D.Ind. LR9.2; D.Neb. LR9.2; D.N.H. LR9.2; D.N.Mar.I LR9.2; N.D.Okla. LR9.2.

[19] M.D.Ala. LR9.2; S.D.Cal. LR9.2; D.Del. LR9.2; S.D.Fla. LR9.1; D.Neb. LR9.2; D.N.H. LR9.2; D.N.Mar.I LR9.2.

[20] D.D.C. LR202; E.D.Mich. LR9.1(c).

[21] D.Me. LR9(a). .

[22] D.N.Mar.I. LR9.2.

[23] N.D.Ga. LR9.1; N.D.Ill. LR31; E.D.La. LR9.1; M.D.La. LR9.1; W.D.La. LR9.1; W.D.Okla. LR9.1.

[24] E.D.La. LR9.1; M.D.La. LR9.1; W.D.La. LR9.1.

The requirement of Section 2284 is jurisdictional so that a failure to comply with any notice requirement will not affect the applicability of that provision. These rules should, therefore, be rescinded.

One court has a local rule that seems to refer to a three-judge court but the precise language used in describing this court is "A District Court Composed of Three District Judges."[25] This definition is inconsistent with the clear language of Section 2284 that requires three judges "at least one of whom shall be a circuit judge."[26] This rule should also be rescinded.

Rule 9—RICO, Patent, and Other Cases

[25] D.Ariz. LR2.3.

[26] 28 U.S.C. §2284(b)(1).

Seven courts have local rules concerning pleading requirements in certain types of cases.[1] All of these local rules should be rescinded since they either repeat portions of relevant federal statutes and rules or they are inconsistent with such law.

DISCUSSION

Five of the seven courts have local rules relating to the Racketeering Influence and Corrupt Organization Act (RICO).[2] For example, three of these courts have local rules explaining that a RICO case statement is needed within thirty days of filing the complaint.[3] Another court requires that the statement be filed with the complaint.[4] Five courts explain that the statement must include facts relied upon to initiate the claim.[5] One court actually provides a large list of the fact that should be set forth.[6] Two courts recognize that a failure to submit a statement may mean dismissal.[7] The statutory scheme for RICO actions, both criminal and civil, is quite extensive.[8] To the extent the local rules intend to restate the controlling federal statute relating to civil actions, the rules are unnecessary. To the extent, on the other hand, that these rules intend to supplement the pleading requirements of not only the Federal Rules but also the relevant federal statute, they are inconsistent with the extensive and detailed statutory scheme that already exists.

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[1] S.D.Cal. LR11.1; S.D.Fla. LR12.1; S.D.Ga. LR9.1; D.Haw. LR 9.1, 9.2, 9.3; N.D.Ill. LR13; N.D.N.Y. LR9.2; D.Or. LR10.6.

[2] S.D.Cal. LR11.1; S.D.Fla. LR12.1; S.D.Ga. LR9.1; D.Haw. LR 9.1, 9.2, 9.3; N.D.N.Y. LR9.2.

[3] S.D.Cal. LR11.1; S.D.Fla. LR12.1; N.D.N.Y. LR9.2.

[4] D.Haw. LR9.1.

[5] S.D.Cal. LR11.1; S.D.Fla. LR12.1; S.D.Ga. LR9.1; D.Haw. LR 9.1; N.D.N.Y. LR9.2.

[6] S.D.Fla. LR12.1.

[7] S.D.Cal. LR11.1; D.Haw. LR9.2.

[8] *See* 18 U.S.C. §§1961 *et seq.*

Two courts have local rules relating to a remedy for patent infringement.[9] Similar to the local rules imposing greater pleading requirements in RICO cases, these local rules either repeat or are inconsistent with federal law. For example, these rules require, in essence, what is already required by the statute so they are unnecessary.[10]

One court has a local rule intending to mandate additional pleading requirements in Truth in Lending Act cases.[11] This rule repeats the requirement in the provision explaining how civil actions can be brought.[12] This rule is unnecessary.

Rule 9— Social Security and Other Administrative Appeal Cases

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[9] N.D.Ill. LR13; D.Or. LR10.6; *see* 35 U.S.C. §§281-297.

[10] *See* 35 U.S.C. §290.

[11] S.D.Ga. LR9.1; *see* 15 U.S.C. §§1601 *et seq.*

[12] *See* 15 U.S.C. §1640.

Twenty-five courts have local rules that relate to the use of a social security number in appeals from either social security cases or black lung cases.[1] Rules in fourteen courts require the use of the social security number in the complaint and are, therefore, inconsistent with existing law. The original Local Rules Project proposed a Model Local Rule to avoid the problem with using the social security number.[2] There are rules in about seven courts that already rely on this Model Local Rule, in basic substance. These rules are appropriate.

There are also rules that address various other aspects of administrative appeals. For example, there are local rules covering the procedure used to obtain attorneys fees and the briefing schedules for these types of cases that are appropriately the subject of local rulemaking. There are rules concerning the use of form complaints in administrative cases that may be problematic. Another two courts have rules that are inconsistent with the Federal Rules of Civil Procedure in applying different time limits from those set forth in the Federal Rules. Lastly, there are rules in two courts that simply repeat existing law.

DISCUSSION

Most of the twenty-five courts have local rules concerning the use of a social security number when seeking judicial review.[3] It is understandable that providing a

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[1] *See generally* 42 U.S.C. §405(g). *See generally* 33 U.S.C. §921(d). *See also* E.D.Ark. LR9.1; W.D.Ark. LR9.1; E.D.Cal. LR8-206; M.D.Ga. LR9.1; D.Idaho LR9.1;; S.D.Ill. LR9.1; E.D.Ky. LR9.1; W.D.Ky. LR9.1; E.D.La. LR9.2; M.D.La. LR9.2; W.D.La. LR9.2; E.D.Mich. LR9.1(f); D.Minn. LR9.1; W.D.Mo. LR9.1; D.Neb. LR9.1(a); D.N.H. LR9.1; D.N.J. LR9.1; N.D.N.Y. LR9.3; D.N.Mar.I LR9.1; N.D.Ohio LR9.1; E.D.Okla. LR9.1; N.D.Okla. LR9.1; E.D.Tenn. LR9.1; N.D.Tex. LR9.1' D.V.I. LR9.1.

[2] Report at Suggested Local Rules, p.43.

[3] E.D.Cal. LR8-206; D.Idaho LR9.1; S.D.Ill. LR9.1; E.D.Ky. LR9.1; W.D.Ky. LR9.1;; M.D.La. LR9.2; W.D.La. LR9.2; D.Minn. LR9.1; W.D.Mo. LR9.1; D.Neb. LR9.1(a); N.D.N.Y. LR9.3;

social security number would be helpful in cases appealing social security and black lung awards since these cases are initially adjudicated at the agency level and are filed according to social security number.[4] The relevant statute, however, does not mandate the provision of the social security number when seeking judicial review.[5] To the contrary, the Social Security Administration specifically discusses the confidential nature of the social security number:

> Social security account numbers and related records that are obtained or maintained by authorized persons pursuant to any provision of law, enacted on or after October 1, 1990, shall be confidential, and no authorized person shall disclose any such social security account number or related record.[6]

This Act goes on to allow the federal, state, and local governments, and, rarely, private organizations, to use social security numbers as a means of identifying people in specifically enumerated circumstances such as for tax collection,[7] child support,[8] blood donation,[9] and jury selection.[10] It should be noted that the Privacy Act[11] regulates the use of social security numbers generally although it appears to be inapplicable to the courts since the definition of "agency" as used in the Act does not include the courts of the United States.[12]

D.N.Mar.I LR9.1; N.D.Ohio LR9.1; E.D.Okla. LR9.1; N.D.Okla. LR9.1; N.D.Tex. LR9.1; E.D.Tenn. LR9.1; D.V.I. LR9.1.

[4] *See e.g.*, 42 U.S.C. §405(g); 33 U.S.C. §921, 932, 945.

[5] *Id.*

[6] 42 U.S.C. §405(c)(2)(C)(viii).

[7] *Id.* at §405(c)(2)(C)(i).

[8] *Id.* at §405(c)(2)(C)(ii).

[9] *Id.* at §405(c)(2)(D)(i).

[10] Id. at §405(c)(2)(D)(ii).

[11] 5 U.S.C. §552a note.

[12] 5 U.S.C. §551(1) (applicable to the Privacy Act through 5 U.S.C. §552a(a)(1), 552(e), and 551(1)).

The Local Rules Project originally suggested that the courts adopt a Model Local Rule that is based on the provisions of the policy under the Social Security Act and the Privacy Act. It recognized the problem of the Commissioner of Social Security or other agency head in identifying and locating a particular record without the benefit of the social security number. The requirement was not a burden to the claimant since these claimants have already used social security numbers to apply for benefits in the first instance. Therefore, no one would be obliged to have a number assigned solely for the purpose of judicial review. The Model Local Rule also considered the policy behind the Social Security Act and the Privacy Act by requiring that only the Commissioner of Social Security or other agency head receive the social security number. The number was not required to be filed with the court. It further stated that, in the event a claimant did not provide the number, the claimant did not waive any rights to judicial review.

At present, seven courts have adopted, in almost identical form, the original Model Local Rule on this topic, which requires that the social security number be provided on a separate piece of paper and that the person state in the complaint that a separate paper is attached.[13] Eight courts have adopted the provision in the Model Local Rule that the failure to provide this information is not grounds for dismissal of the complaint.[14]

Fourteen courts have local rules requiring that the social security number be

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[13] D.Idaho LR9.1; S.D.Ill. LR9.1; D.Minn. LR9.1; D.Neb. LR9.1(a); D.N.Mar.I LR9.1; E.D.Tenn. LR9.1; D.V.I. LR9.1.

[14] D.Idaho LR9.1; S.D.Ill. LR9.1; E.D.Mich. LR9.1(f); D.Minn. LR9.1; D.Neb. LR9.1(a); D.N.Mar.I LR9.1; E.D.Tenn. LR9.1; D.V.I. LR9.1.

set forth in the complaint.[15] These rules are problematic since they provide for the public display of the social security number. Actually, in two of the courts the local rules require the placement of the social security number in the caption of the complaint or directly below the caption.[16] It is not necessary that these numbers be available for anyone to see in the public court documents. It is necessary only that the person or agency charged with responsibility for certifying the record on appeal be able to accurately and quickly find the relevant record. This duty can be accomplished by providing the social security number on a separate sheet of paper that is not made part of the public court papers. In addition, these local rules are inconsistent with the wording and spirit of two relevant federal statutes, the Social Security Act and the Privacy Act.[17] Accordingly, the Local Rules Project suggests that these courts rescind their existing local rules.

Two jurisdictions have local rules outlining the procedures to be used by attorneys seeking an award of fees.[18] These procedures should remain subject to local variation since they do not impact on any rights of the litigants, they assist the court in processing the material expeditiously, and they appear to impose only a negligible burden on the attorneys, a burden that the court could impose on the attorneys regardless of the existence of any rule.

Eight district courts have local rules setting forth the briefing schedule for

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[15] E.D.Ark. LR9.1; W.D.Ark. LR9.1; E.D.Cal. LR8-206; E.D.Ky. LR9.1; W.D.Ky. LR9.1; M.D.La. LR9.2; W.D.La. LR9.2; E.D.Mich. LR9.1(e); W.D.Mo. LR9.1; N.D.N.Y. LR9.3; N.D.Ohio LR9.1; E.D.Okla. LR9.1; N.D.Okla. LR9.1; N.D.Tex. LR9.1.

[16] E.D.Ark. LR9.1; W.D.Ark. LR9.1..

[17] 42 U.S.C. §405; 5 U.S.C. §552a note.

[18] E.D.Ky. LR9.1; W.D.Ky. LR9.1; *see also* 42 U.S.C. §406; 28 U.S.C. §2412.

social security claims and review of other administrative claims.[19] These rules are also appropriate as local directives.

Three courts have local rules that require that the complaint be on a form supplied by the court or be in substantial conformity with the form.[20] To the extent these rules simply provide guidance to a litigant, they are appropriate. To the extent, however, that a failure to be in substantial compliance with the form may result in negative repercussions such as dismissal, the rules are problematic and should be rescinded. The Federal Rules allow for a "short and plain statement of the claim" and require that "all pleadings ... be so construed as to do substantial justice."[21] To punish a litigant solely because the person did not use a form complaint is contrary to Rule 8 of the Federal Rules of Civil Procedure.

Local rules in two jurisdictions extend the time within which the Secretary of Health and Human Services may answer the complaint from sixty days to within thirty days after the record is filed[22] or within ninety days after service.[23] Both of these rules are inconsistent with Rule 4 of the Federal Rules of Civil Procedure, which requires the agency head to file an answer within sixty days after service.[24]

Four other courts have local rules allowing a one-time automatic extension of time within which the Commissioner of Social Security or the Secretary of Health and

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[19] M.D.Ga. LR9.2; S.D.Ill. LR9.1; E.D.Ky. LR9.1; W.D.Ky. LR9.1; W.D.Mo. LR9.1; D.N.H. LR9.1; D.N.J. LR9.1; E.D.Okla. LR9.1.

[20] E.D.La. LR9.2; W.D.Mo. LR9.1; N.D.Ohio LR9.1.

[21] Fed.R.Civ.P. 8(a), and (f).

[22] W.D.Mo. LR9.1 (defendant files answer within thirty days after filing record).

[23] D.N.H. LR9.1 (defendant files answer and record within ninety days after service of complaint).

[24] Fed.R.Civ.P. 4(a).

Human Services must answer.25 These rules are problematic in allowing extensions of time on a routine basis. They are similar to the local rules just discussed that allow a specific amount of extra time within which to answer. In all of these jurisdictions, the plaintiff is disadvantaged by a delay in answering which Rule 4 of the Federal Rules of Civil Procedure does not permit. These rules should be rescinded.

Two courts have local rules that repeat existing law and should, therefore, be rescinded. One rule repeats the applicability of the Social Security Act to court review of social security awards.[26] The other rule simply repeats the portion of Federal Rule 4, that an answer must be filed within sixty days of service.[27]

Rule 15. Amended and Supplemental Pleadings

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[25] M.D.Ga. LR9.3; E.D.Ky. LR9.1; W.D.Ky. LR9.1; E.D.Tenn. LR9.1.

[26] M.D.Ga. LR9.1; *see also* 42 U.S.C. §405(g).

[27] E.D.Tenn. LR9.1; *see also* Fed.R.Civ.P. 4(a).

Thirty-seven jurisdictions have local rules outlining the procedure and the form of the motion to be used in amending or supplementing a pleading pursuant to Rule 15 of the Federal Rules of Civil Procedure.[1] All of these courts have local rules that are appropriate supplements to this Federal Rule. In addition, one of these jurisdictions has a local rule that is inconsistent with Rule 15 and should be rescinded. Four courts have local rules that repeat portions of the Federal Rule that should also be rescinded.

DISCUSSION

Rule 15 allows a party to amend a pleading under certain circumstances: (1) either "before a response is served" or within twenty days after service of a pleading to which no response is allowed; (2)"by leave of court or by written consent of the adverse parties"; or (3) upon motion to conform to the evidence.[2] The Rule sets forth the circumstances under which a pleading may relate back to the date of the original pleading.[3] Lastly, the Rule allows a party to move to file a supplemental pleading "setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented."[4]

The original Local Rules Project recommended a Model Local Rule for the

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[1] Fed.R.Civ.P. LR15; *see* M.D.Ala. LR15.1; D.Alaska LR6J; D.Ariz. LR1.9(e); C.D.Cal. LR3.8; E.D.Cal. LR15-220; S.D.Cal. LR15.1; D.Del. LR15.1; D.D.C. LR108(Ii); M.D.Fla. LR4.01; N.D.Fla. LR15.1; S.D.Fla. LR15.1; N.D.Ga. LR15.1; D.Idaho LR15.1; S.D.Ill. LR15.1; N.D.Ind. LR15.1; S.D.Ind. LR15.1; N.D.Iowa LR15.1; S.D.Iowa LR15.1; ; .Kan. LR15.1; D.Md. LR103.6; D.Mass. LR15.1; E.D.Mich. LR15.1; D.Minn. LR15.1; D.Mont. LR200-2; D.Neb. LR15.1; D.Nev. LR15-1; D.N.H. LR15.1; D.N.Mex. LR15.1; ; .D.N.Y. LR7.1; D.N.Mar.I LR15.1; E.D.Okla. LR15.1; D.Or. LR15.1; D.S.Dak. LR15.1; E.D.Tenn. LR15.1; N.D.Tex. LR15.1; D.Vt. LR15.1; D.V.I. LR15.1; D.Wyo. LR15.1.

[2] Fed.R.Civ.P. 15(a) and (b).

[3] *Id* at (c).

[4] *Id* at (d).

jurisdictions to consider adopting.[5] The Model Local Rule required submission of the original amended pleading along with the motion to amend. It is already common practice to include the amendment with the Rule 15(a) motion; at present, twenty-nine courts have this requirement[6]

The Model Local Rule also required submission of a copy of the amended pleading. In the event the motion to amend is allowed, the copy could remain attached to the motion as a supporting document, and the original could be filed as the pleading. Eight courts have this requirement at present.[7]

The Model Local Rule required that the pleading be complete and not incorporate earlier pleadings by reference. This can ease the process of review for the court and opposing parties. By requiring a party filing a Rule 15(a) motion to include a copy of the proposed amendment without any references to other pleadings, the rule can further aid the disposition of cases on the merits, by allowing a judge to read the amendment in full before ruling on it. Twenty-six courts have local rules that contain this provision.[8]

The last sentence of the Model Local Rule provided that the motion will not

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[5] Report at Suggested Local Rules, p.51.

[6] M.D.Ala. LR15.1; D.Alaska LR6J; C.D.Cal. LR3.8; D.Del. LR15.1; D.D.C. LR108(Ii); N.D.Fla. LR15.1; S.D.Fla. LR15.1; S.D.Ill. LR15.1; N.D.Ind. LR15.1; S.D.Ind. LR15.1; N.D.Iowa LR15.1; S.D.Iowa LR15.1; D.Kan. LR15.1; D.Md. LR103.6; E.D.Mich. LR15.1; D.Minn. LR15.1; ; D.Mont. LR200-2; D.Neb. LR115.; D.Nev. LR15-1; D.N.H. LR15.1; ; D.N.Mex. LR15.1; N.D.N.Y. LR7.1; D.N.Mar.I LR15.1; E.D.Okla. LR15.1; D.Or. LR15.1; D.S.Dak. LR15.1; E.D.Tenn. LR15.1; N.D.Tex. LR15.1; D.V.I. LR15.1.

[7] M.D.Ala. LR15.1; C.D.Cal. LR3.8; D.Del. LR15.1; S.D.Ind. LR15.1; D.Mont. LR200-2; E.D.Okla. LR15.1; E.D.Tenn. LR15.1; D.V.I. LR15.1.

[8] M.D.Ala. LR15.1; D.Alaska LR6J; D.Ariz. LR1.9(e); C.D.Cal. LR3.8; E.D.Cal. LR15-220; S.D.Cal. LR15.1; D.Del. LR15.1; M.D.Fla. LR4.01; N.D.Fla. LR15.1; S.D.Fla. LR15.1; N.D.Ind. LR15.1; S.D.Ind. LR15.1; N.D.Iowa LR15.1; S.D.Iowa LR15.1; E.D.Mich. LR15.1; D.Minn. LR15.1; D.Neb. LR15.1; D.Nev. LR15-1; D.N.H. LR15.1; N.D.N.Y. LR7.1; D.N.Mar.I LR15.1; E.D.Okla. LR15.1; D.Or. LR15.1; E.D.Tenn. LR15.1; D.Vt. LR15.1; D.V.I. LR15.1.

be denied for failure to comply with the local rule, thus avoiding any denial of the motion to amend for technical matters only. This provision is important in promoting the language of the rule, that leave to amend shall be "freely given when justice so requires."[9] Nine courts have such a local rule now.[10]

Many of the remaining local rules are appropriate exercises of local rulemaking. For example, many of the courts have local rules explaining the form of the pleadings that must accompany the motion to amend. Six courts require that amended pleadings contain all exhibits[11] while one court requires that only newly added exhibits be attached.[12] Another four courts require court permission to remove exhibits from prior pleadings and attach them to the amended pleading.[13] Three courts define the title of such pleadings such as "First Amended Complaint", and "Second Amended Complaint."[14] Some courts require that the motion to amend contain the amended pleading with an explanation of what is different by bracketing and underlining what is newly added in the complaint,[15] or by including a concise statement of the amendment sought.[16] Two courts require that the motion have a copy of the original complaint

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[9] Fed.R.Civ.P. 15(a); *see also Foman v. Davis*, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962); *Ordonez v. Johnson*, 254 F3d 814 (9th Cir. 2001) (disallowing motion to amend because of violation of local rule is abuse of discretion).

[10] M.D.Ala. LR15.1; D.Del. LR15.1; S.D.Fla. LR15.1; D.Idaho LR15.1; N.D.Ind. LR15.1; E.D.Mich. LR15.1; D.N.Mar.I LR15.1; E.D.Tenn. LR15.1; D.V.I. LR15.1.

[11] D.Alaska LR6J; D.Ariz. LR1.9(e); C.D.Cal. LR3.8; E.D.Cal. LR15-220; S.D.Cal. LR15.1; D.Nev. LR15-1.

[12] D.Md. LR103.6.

[13] D.Alaska LR6J; E.D.Cal. LR15-220; S.D.Cal. LR15.1; D.Nev. LR15-1.

[14] S.D.Cal. LR15.1; D.Or. LR15.1; D.V.I. LR15.1.

[15] D.Del. LR15.1; S.D.Ill. LR15.1; N.D.Iowa LR15.1; S.D.Iowa LR15.1; D.Md. LR103.6; D.Vt. LR15.1.

[16] D.Kan. LR15.1; D.Neb. LR15.1; D.N.H. LR15.1; N.D.N.Y. LR7.1; D.Or. LR15.1; D.V.I. LR15.1.

attached to it.[17] Two courts require that the original amended complaint and two extra copies be provided.[18]

Four courts have local rules that repeat portions of the Federal Rules of Civil Procedure and should, therefore, be rescinded. These four jurisdictions provide that, if the motion to amend a complaint is granted, the party must then file and serve the amended complaint.[19] This requirement simply repeats the service and filing provision of Rule 15(a) and Rule 5.[20] One of these courts also states in its local rule that a motion to supplement a pleading is limited to acts occurring after the filing of the original complaint.[21] This rule repeats the requirements in Rule 15(d) that a supplemental pleading must relate to "transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented."[22]

One court has a local rule that is inconsistent with Rule 15 and should, therefore, be rescinded. This local rule provides that the date for a party to answer shall run from the date of filing the order allowing the pleading or, where there was no order, from the date of service of the amended pleading.[23] This rule is inconsistent with Rule 15(a) that states that the party must plead "within the time remaining for response to the original pleading or within 10 days after service of the amended pleadings, whichever

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[17] N.D.Iowa LR15.1; S.D.Iowa LR15.1.

[18] D.Minn. LR15.1; D.N.Mar.I LR15.1.

[19] D.Minn. LR15.1; D.Neb. LR15.1; N.D.N.Y. LR7.1; D.Or. LR15.1.

[20] Fed.R.Civ.P. 15(a), 5(a), 5(b).

[21] N.D.N.Y. LR7.1.

[22] Fed.R.Civ.P. 15(d).

[23] D.Nev. LR15-1.

period may be longer...."[24]

Rule 16. Pretrial Conferences; Scheduling; Management

Rule 16—Alternative Dispute Resolution

[24] Fed.R.Civ.P. 15(a).

The Alternative Dispute Resolution Act of 1998 (hereinafter Act) was passed after some experimentation with other alternative dispute mechanisms in the previous ten years.[1] The Civil Justice Reform Act of 1990[2] and the Judicial Improvements and Access to Justice Act of 1988[3] had both provided an opportunity for experimenting with alternative dispute resolution in the federal courts. Both of these acts were intended to expire after a set time period.[4]

This Act requires each district court by local rule to authorize alternative dispute resolution processes in civil actions.[5] An alternative dispute resolution process, under the Act, includes

> any process or procedure, other than an adjudication by a presiding judge, in which a neutral third party participates to assist in the resolution of issues in controversy, through processes such as early neutral evaluation, mediation, mini-trials, and arbitration as provided in sections 654 and 658.[6]

Under this Act, courts are permitted to use existing alternative dispute resolution programs and to devise other processes not enumerated above.[7]

The act gives broad authority to the district courts to set forth, by local rule, the type of available alternative dispute resolution process and the categories of actions

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[1] Pub.L. No. 105-315, 112 Stat. 2298 (codified at 28 U.S.C. §§651-658).

[2] Pub.L. No. 101-650, 104 Stat. 5089 (1990) (codified as amended at 28 U.S.C. §§471-482).

[3] Pub.L. No. 100-702, 102 Stat. 4642 (1988).

[4] The Civil Justice Reform Act expired December 1, 1997. 28 U.S.C. §471 note (1994). The Judicial Improvements and Access to Justice Act was originally intended to expire in 1994 but that provision was repealed in 1994 so that the arbitration programs in the twenty experimental district courts could continue. Judicial Improvements Act of 1994, Pub.L. No. 103-420, 3(b), 108 Stat. 4343, 4345.

[5] 28 U.S.C. §651(b).

[6] *Id.* at (a).

[7] *Id.* at (a)-(c), *see* 28 U.S.C. §652(a).

exempted from the particular alternative dispute resolution mechanism.[8] The Act also requires that the district court adopt procedures to make appropriate neutrals available for each of the processes offered by the court.[9] With respect to all alternative dispute resolution processes, except arbitration, the statute provides no other requirements. The Act's arbitration provisions, on the other hand, do provide some concrete guidance.[10] These specifics are discussed in the section on arbitration, *infra*.

Thirty courts discuss the use of alternative dispute resolution techniques generally.[11] Because different courts may have different alternative dispute resolution options available to litigants and because some courts have specific local rules discussing certain forms of alternative dispute resolution, the rules on this topic are quite diverse. Generally, they seek to alert litigants to the court's interest in using one or more forms of alternative dispute resolution. These rules should all remain subject to local variation.

DISCUSSION

The first issue addressed by these rules is how the litigants get to the actual alternative in the first instance. Twenty-six of the courts have local rules permitting the court to order litigants to participate in alternative dispute resolution.[12] In five courts, the

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[8] *Id* at 652(a).

[9] 28 U.S.C. §653.

[10] *See* 28 U.S.C. §§654-658.

[11] M.D.Ala. LR16.1(c); N.D.Ala. App. C; S.D.Ala. LR16.6; D.Ariz. LR2.11; C.D.Cal. LR23; N.D.Cal. LRADR 2; D.Conn. LR36; N.D.Ga. LR16.7; S.D.Ill. LR16.4; E.D.Ky. LR16.2; W.D.Ky. LR16.2; D.Mass. LR16.4; W.D.Mich. LR16.2; D.Minn. LR16.5; D.Nev. LR16-5; W.D.N.Car. LR16.3; N.D.Ohio LR16.1; N.D.Okla. LRCJRA Sec. VI; W.D.Okla. LRL.Civ.R.16.3 Supp.; D.Or. LRCJRA Sec.6; M.D.Pa. LR16.7; E.D.Tenn. LR16.3; M.D.Tenn. LR21; W.D.Tenn. LR16.1; E.D.Tex. LRCV-16(c); S.D.Tex. LR20; W.D.Tex. CV-88; D.Utah LR212; N.D.W.Va. LR5.02; D.Wyo. LR16.3.

[12] M.D.Ala. LR16.1(c); N.D.Ala. LR16.1; S.D.Ala. LR16.6; N.D.Cal. ADR 2, ADR 3, LR16-12; N.D.Ga. LR16.7; S.D.Ill. LR16.4; E.D.Ky. LR16.2; W.D.Ky. LR16.2; D.Mass. LR16.4; W.D.Mich. LR16.2; D.Minn. LR16.5; D.Nev. LR16-5; W.D.N.Car. LR16.3; N.D.Okla. LR16.3;

counsel must meet to discuss alternative dispute resolution options within a prescribed time.[13] In seven courts, the parties must decide on the actual alternative procedure used.[14] Three courts allow relief from an alternative method on motion for good cause shown.[15] The actual methods available for use are set out in the Civil Justice Reform Act plans of three courts[16] and in the Alternative Dispute Resolution Plans of three other courts.[17]

Some courts address whether the result of a particular form of alternative dispute resolution is binding or not on the parties. In two courts, the parties, themselves, must decide whether the method used will be binding or not.[18] Two other courts specifically say that they are non-binding.[19]

Other rules address the issue of neutrals. There are panels of neutrals available to conduct various alternative dispute resolution processes in five courts.[20] Two other courts have administrative bodies that run district-wide alternative dispute resolution programs.[21]

Another issue concerns the cost of the procedure. Three courts explain that

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W.D.Okla. LR16.3; D.Or. CJRA Sec.6; M.D.Pa. LR16.7; E.D.Tenn. LR16.3; M.D.Tenn. LR20; W.D.Tenn. LR16.1; E.D.Tex. LRCV-16(c); S.D.Tex. LR20; W.D.Tex. LRCV-88; D.Wyo. LR16.3.

[13] N.D.Cal. LR16-12W.D.Mich. LR16.2; W.D.Okla. LR16.3; S.D.Tex. LR20; W.D.Tex. LRCV-88.

[14] N.D.Ala. App. C; D.Ariz. LR2.11; N.D.Cal. ADR 3; D.Conn. LR36; N.D.Ohio LR16.1, 16.4; W.D.Tex. CV-88; D.Wyo. LR16.3.

[15] W.D.Okla. LR16.3; S.D.Tex. LR20; W.D.Tex. LRCV-88.

[16] M.D.Ala. LR16.1(c); N.D.Okla. CJRA Sec. VI; D.Utah LR212.

[17] N.D.Ala. LR16.1; M.D.Tenn. LR20; D.Utah, LR212.

[18] D.Conn. LR36; S.D.Tex. LR20.

[19] D.Minn. LR16.5; W.D.Tex. CV-88.

[20] N.D.Cal. LRADR 2; W.D.Okla. LR 16.3 Supp.; M.D.Tenn. LR21; S.D.Tex. LR20; W.D.Tex. LRCV-88.

[21] N.D.Cal. ADR2; N.D.Ohio LR16.4.

any alternate method is conducted at the expense of the parties.[22] One court admonishes that any fee be "reasonable"[23]; another court allows the parties and the alternative dispute resolution neutral to agree on a fee or else it will be determined by the judge.[24]

Some courts address confidentiality of the procedure. Seven courts specifically state that any of the available choices are confidential.[25] Three courts explain that the information is privileged and cannot be used in court.[26]

There are other topics addressed as well that vary significantly among the courts. Five courts provide sanctions for violation of any of the alternative dispute resolution rules.[27] In three courts, the rules provide that a representative, with authority to settle, be present unless that person is excused by motion for good cause shown.[28] The remaining rules on this subject cover narrow topics particular to just one court.[29]

Rule 16—Early Neutral Evaluation

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[22] N.D.Ala. App. C; D.Minn. LR16.5; W.D.Tex. LRCV-88.

[23] W.D.Okla. LR16.3 Supp.

[24] M.D.Tenn. LR21.

[25] C.D.Cal. LR23; D.Conn. LR36; W.D.Mich. LR16.2; W.D.Okla. LR16.3 Supp.; M.D.Tenn. LR21; S.D.Tex. LR20; W.D.Tex. LRCV-88.

[26] M.D.Tenn. LR27; S.D.Tex. LR20; W.D.Tex. CV-88.

[27] N.D.Cal. LRADR 2; N.D.Okla. LR16.3; M.D.Tenn. LR20; S.D.Tex. LR20; W.D.Tex. LRCV-88.

[28] M.D.Tenn. LR20; S.D.Tex. LR20; W.D.Tex. LRCV-88.

[29] *E.g.*, #31 (discovery stayed during alternative dispute resolution); #30 (all parties must attend alternative dispute resolution orientation session); #8 (settlement must be reported immediately).

Thirteen courts have local rules that discuss early neutral evaluation.[1] These rules should remain subject to local variation.

DISCUSSION

Early neutral evaluation is a "hybrid process" designed, at an early point in the pretrial process, to bring in some of the benefits of arbitration, mediation, and the use of a special master.[2] As originally designed, the significant feature of early neutral evaluation was an evaluator who had experience with the subject matter of the case, who had experience as a civil litigator, and who had special training for early neutral evaluation.[3] The idea behind early neutral evaluation is to force the parties to delve into a large in a comprehensive way earlier than would normally occur.[4] This examination may help the parties develop an efficient plan for the case disposition either through a follow up settlement negotiation, motion, or trial.[5]

Most of the courts have local rules explaining how a case may become part of the early neutral evaluation process. For example, nine courts allow the judge to refer a case for early neutral evaluation.[6] One court allows all cases, except certain enumerated types of cases, to be referred for early neutral evaluation.[7] In addition, in two courts the

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[1] . M.D.Ala. LRCJRA; E.D.Cal. LR16-271; N.D.Cal. LRADR 5; N.D.Ga. LR16.7; W.D.Mich. LR16.4; E.D.Mo. LR6.01 *et seq.*; N.D.Ohio LR16.5; N.D.Okla. CJRA VI; W.D.Okla. LRL.Civ.R.61.3 Supp.; W.D.Pa. LR16.3; M.D.Tenn. LRApp.3; D.Vt. LR16.3; S.D.W.Va. LR5.01(g).

[2] 3 *Moore's Federal Practice 3d.* §1653[5][a] pp16-126-27.

[3] *Id.* at 127.

[4] *Id.*

[5] *Id.*

[6] M.D.Ala. CJRA; E.D.Cal. LR16-271; N.D.Cal. LRADR 5; N.D.Ga. LR16.7; E.D.Mo. LR6.01 *et seq.*; N.D.Ohio LR16.5; W.D.Okla. LRL.Civ.R.61.3 Supp.; W.D.Pa. LR16.3; S.D.W.Va. LR5.01(g).

[7] E.D.Cal. LR16-271.

parties themselves may elect this procedure.[8] Two courts explain the mechanics of a referral to early neutral evaluation.[9] In two courts, the clerk may automatically make the referral.[10] In one court, the judge cannot refer a case over the objection of a party[11]; in two other courts the parties may seek relieve from referral for good cause shown.[12]

There are also rules that deal with who evaluators can be. In seven courts, there is a list of potential evaluators.[13] In four courts the parties pick the evaluator and, if they are unable to do so, the judge selects the person.[14] In two courts the judge selects the evaluator.[15] In one court a senior district judge or a magistrate judge conducts the evaluation.[16]

There are some rules concerning the fee for the evaluation. The fee is agreed upon or set by the judge in one court.[17] In another court the evaluator sets the fee.[18] One court explains that each side pays one-half of the fee.[19]

Two courts specifically state that the result of an early neutral evaluation is non-binding.[20]

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[8] E.D.Cal. LR16-271; W.D.Okla. LR16.3 Supp.

[9] E.D.Mo. LR6.01 *et seq.*; N.D.Ohio LR16.10.

[10] N.D.Cal. ADR 5: D.Vt. LR16.3.

[11] E.D.Cal. LR16-271.

[12] N.D.Cal. ADR 5; D.Vt. LR16.3.

[13] E.D.Cal. LR16-271; N.D.Cal. ADR 5; E.D.Mo. LR6.01 *et seq.*; N.D.Ohio LR16.5; W.D.Okla. LR61.3 Supp.; W.D.Pa. LR16.3; D.Vt. LR16.3.

[14] W.D.Mich. LR16.4; E.D.Mo. LR6.01 *et seq.*; N.D.Ohio LR16.5; D.Vt. LR16.3.

[15] N.D.Ga. LR16.7; W.D.Pa. LR16.3.

[16] M.D.Ala. CJRA.

[17] N.D.Ga. LR16.7.

[18] W.D.Mich. LR16.4.

[19] E.D.Mo. LR6.01 *et seq.*

[20] N.D.Ga. LR16.7; W.D.Okla. LR16.3 Supp.

There are procedures set forth in some courts that explain the actual mechanics of the process. For example, six courts specifically require the submission of certain paperwork before the actual session with the evaluator.[21] All statements made are kept confidential by local rule in eight jurisdictions.[22] Local rules in eight courts require the parties themselves to attend.[23] In five courts the attorneys who will try the case must attend as well.[24] Four courts explain that, after the process, the evaluator reports the results to the judge within a specified time period.[25]

Rule 16—Summary Jury Trial

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[21] N.D.Ohio LR16.5; W.D.Okla. LR16.3 Supp.; W.D.Pa. LR16.3; M.D.Tenn. LR24, App.3; D.Vt. LR16.3.

[22] E.D.Cal. LR16-271; N.D.Cal. ADR 5; N.D.Ga. LR16.7; E.D.Mo. LR6.01 *et seq.*; N.D.Ohio LR16.5; W.D.Okla. LRL.Civ.R.16.3 Supp.; W.D.Pa. LR16.3; D.Vt. LR16.3.

[23] N.D.Cal. LRADR 5; N.D.Ga. LR16.7; W.D.Mich. LR16.4; N.D.Ohio LR16.5; W.D.Okla. LR16.3 Supp.; W.D.Pa. LR16.3; M.D.Tenn. LR24; D.Vt. LR16.3.

[24] N.D.Ohio LR16.5; W.D.Okla. LR16.3 Supp.; W.D.Pa. LR16.3; M.D.Tenn. LR24; D.Vt. LR16.3.

[25] N.D.Ga. LR16.7; W.D.Mich. LR16.4; E.D.Mo. LR6.01 *et seq.*; D.Vt. LR16.3.

Twelve courts have local rules explaining the summary jury trial procedure.[1] All of the rules in these courts are appropriate supplements to Rule 16 and should remain subject to local variation.

DISCUSSION

A summary jury trial results in an advisory jury verdict that can be used as a tool in settlement negotiations.[2] A jury is usually drawn from the court's jury pool. The parties then make their presentations, consisting of opening and closing remarks and a narrative summary of the evidence from the attorneys. Witnesses are not usually called. At the conclusion of each side's presentation, the judge instructs the jury. The jury then deliberates. The jury announces its verdict and the jury may be asked questions by the parties about particular aspects of the case. The verdict and the jurors' evaluation of the case can then be used to facilitate settlement.[3]

The first issue the district courts address in the local rules concerns what category of a case is eligible for summary jury trial. In four jurisdictions, the court may order this procedure even if a party objects[4] while in three other jurisdictions the court is authorized to order summary jury trial only if everyone agrees.[5] In four jurisdictions, the court is authorized to order summary jury trial for any case.[6] It should be noted that the *Manual for Complex Litigation* does not favor requiring parties to participate in this

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[1] N.D.Cal. LRADR 8; S.D.Cal. LR16.3; E.D.Ky. LR16.2; W.D.Ky. LR16.2; D.Mass. LR16.4; W.D.Mich. LR16.7; E.D.N.Car. LR31; D.N.Mar.I LR16.11; N.D.Ohio LR16.9; E.D.Okla. LRCJRA IV; W.D.Okla. LR16.3 Supp.; W.D.Tex. LRCV-88(h).

[2] *Manual for Complex Litigation, Third*, ¶23.152 (2000).

[3] *Id.* For a general discussion on this method of alternative dispute resolution, *see also* 3 *Moore's Federal Practice 3rd* §16.53[6][b].

[4] S.D.Cal. LR16.3; E.D.Okla. LRCJRA IV; W.D.Okla. LR16.3 Supp.; W.D.Tex. LRCV-88(h).

[5] S.D.Cal. LR16.3; D.Mass. LR16.4; E.D.N.Car. LR31.

procedure:

> Because of the time and expense involved and because the process is less likely to be productive with unwilling parties, it is not advisable to hold a summary jury trial without the parties' consent.[7]

Because of the expense and judicial resources used in this procedure, one court requires that it be used only in those cases with trials scheduled to last longer than seven days.[8]

There are also rules that explain the effect of a summary jury trial and how it fits with other aspects of trial management. For example, six courts explain that a summary jury trial is non-binding[9] while three other courts offer the parties the opportunity to agree to a binding summary jury trial.[10] Two courts specifically explain that, after summary jury trial, settlement negotiations are held, and the verdict and jury reactions may be used for settlement purposes.[11]

Three courts stipulate that the jury shall consist of six members and, in certain situations, more members.[12] These came courts also contemplate the use of non-jury summary trials.[13]

The remaining rules set forth some procedural aspects to the process. For example, three courts state that summary jury trial is confidential.[14] Four courts set forth

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[6] E.D.Ky. LR16.2; W.D.Ky. LR16.2; D.N.Mar.I LR16.11; N.D.Ohio LR16.8, 16.9.

[7] *Manual for Complex Litigation, Third* ¶ 23.152.

[8] E.D.N.Car. LR31.00.

[9] N.D.Cal. LRADR 8; S.D.Cal. LR16.3; D.Mass. LR16.4; W.D.Mich. LR16.7; E.D.N.Car. LR31; W.D.Okla. LR16.3 Supp.

[10] E.D.N.Car. LR31.00; W.D.Okla. LR16.3 Supp.

[11] N.D.Cal. ADR 8; W.D.Okla. LR16.3 Supp.

[12] E.D.N.Car. LR31.00; N.D.Ohio LR 16.8; W.D.Okla. LR16.3 Supp.

[13] *Id.*

[14] D.Mass. LR16.4; E.D.Okla. CJRA IV; W.D.Okla. LR16.3 Supp.

some specific procedural considerations that must be examined.[15] One court clearly requires the lead attorneys to attend and requires that the parties attend with full authority to settle. [16] This court provides that attendance may be waived on motion for good cause shown in one court.[17] This court also explains that the attorneys make the case presentation and that certain paper work is required before the summary jury.[18] One court specifically says that judge and the parties will decide the particular procedure for the actual summary jury trial.[19]

Rule 16—Mediation

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[15] E.D.N.Car. LR31; D.N.Mar.I LR16.11; N.D.Ohio LR16.8, 16.9.

[16] W.D.Okla. LR16.3 Supp.

[17] *Id.*

[18] *Id.*

[19] W.D.Tex. CV-88(h).

Thirty-three courts have local rules concerning how cases get to mediation and, once there, what the procedure is for actually conducting the mediation.[1] All of these rules should remain subject to local variation.

DISCUSSION

Mediation is an informal non-binding settlement opportunity using a facilitator or neutral to assist the parties. It can be particularly useful in helping the parties articulate fully not only their legal positions but also their underlying concerns and interests. It can also be useful in helping the parties develop a non-traditional settlement arrangement. Some judges favor referral to mediation in simpler cases while others feel that more complex cases can benefit from the process as well. There is also variation among judges about when in the trial process mediation should be initiated with some judges referring a case only after substantially all discovery is completed and others referring much earlier in the process. Generally, mediation has been shown to be fairly inexpensive and successful.[2]

In nine courts, local rules exist that encourage mediation and discuss its purpose.[3]

Many courts have local rules explaining the circumstances under which cases are referred to mediation. For example, seventeen courts have local rules allowing the

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[1] M.D.Ala. LR16.1(c); N.D.Ala. App. C; S.D.Ala. LRS.O.; N.D.Cal. LRADR 6; M.D.Fla. LR9.01 *et seq.*; N.D.Fla. LR16.3; S.D.Fla. LR16.2; N.D.Ga. LR16.7; N.D.Ill. LRCR5.10; D.Mass. LR16.4; E.D.Mich. LR16.3; W.D.Mich. LR16.3; E.D.Mo. LR6.01 *et seq.*; D.N.J. LR301.1; N.D.N.Y. LR83.11; E.D.N.Car. LR32; M.D.N.Car. LR16.4; W.D.N.Car. LR16.3; N.D.Ohio LR16.6; W.D.Okla. LRL.Civ.R.16.3 Supp.; D.Or. LR16.4; E.D.Pa. LRCJRA 6; M.D.Pa. LR16.8; D.S.Car. LR16.3 *et seq.*; E.D.Tenn. LR16.4; M.D.Tenn. App. 2; W.D.Tenn. Med. Plan; E.D.Tex. App. H; D.Utah LR212; E.D.Wash. LR16.2; N.D.W.Va. LR5.01; S.D.W.Va. LR5.01; W.D.Wis. Add. I, Sec.IV.

[2] *See Manual for Complex Litigation, Third*, §23.151 (2000).

judge to refer eligible cases.[4] In another six courts, the judge may refer any case to mediation.[5] One court provides that the clerk will refer all "odd-numbered civil cases" for mediation.[6] In two courts, certain cases are automatically selected for mediation.[7] In seven courts, there is a procedure in place for the parties to object to the referral.[8] In ten courts, the mechanics of actually referring a case are set out.[9]

The effect of mediation is discussed in some courts. For example, seven courts explain that mediation is non-binding.[10] Two courts, however, explain that, if settlement is reached based on a mediation report, judgment is entered on that report.[11] Three courts specifically state that mediation will not delay other activities in the case.[12] One court has a local rule explaining that, if the mediation is unsuccessful, the court will decide whether a special master mediation or arbitration is a good next step.[13]

The question of who can be a mediator is addressed by the local rules in many courts. For example, in twenty-one courts, there is a list of interested and qualified

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[3] M.D.Ala. LR16.1(c), 16.2; M.D.Fla. LR9.01 *et seq.*; E.D.N.Car. LR32; M.D.N.Car. LR83.10; N.D.Ohio LR16.6; E.D.Tex. App. H; E.D.Wash. LR16.2; N.D.W.Va. LR5.01.

[4] M.D.Ala. LR16.1(c); N.D.Cal. LRADR 6; M.D.Fla. LR9.01 *et seq.*; N.D.Fla. LR16.3; E.D.Mich. LR16.3; E.D.Mo. LR6.01 *et seq.*; E.D.N.Car. LR32; W.D.N.Car. LR16.2; N.D.Ohio LR16.6; E.D.Pa. LRCJRA 6; W.D.Tenn. LR16.1; E.D.Tex. App. H; E.D.Wash. LR16.2; N.D.W.Va. LR5.01.

[5] N.D.Ga. LR16.7; N.D.N.Y. LR83.11; M.D.N.Car. LR83.10; N.D.Ohio LR16.6; M.D.Pa. LR16.8; E.D.Tex. App. H.

[6] E.D.Pa. LR53.2.1.

[7] M.D.N.Car. LR16.4, 83.10.

[8] N.D.Ala. App. C ; E.D.N.Car. LR32; M.D.N.Car. LR16.4, 83.10; N.D.Ohio LR16.6; D.S.Car. LR16.3 *et seq.*; E.D.Tex. App. H; S.D.W.Va. LR5.01.

[9] M.D.Fla. LR9.01 *et seq.*; S.D.Fla. LR16.2; W.D.Mich. LR16.3; E.D.Mo. LR6.01 *et seq.*; E.D.Pa. LRLR53.2.1E.D.Tex. App. H; D.Utah LR212; N.D.W.Va. LR5.01; S.D.W.Va. LR5.01.

[10] N.D.Cal. LRADR 6; N.D.Ga. LR16.7; W.D.Okla. LRL.Civ.R.16.3 Supp.; D.S.Car. LR16.3 *et seq.*; E.D.Tenn. LR16.4; E.D.Tex. App. H; E.D.Wash. LR16.2.

[11] M.D.Fla. LR9.01 *et seq.*; W.D.Mich. LR16.5.

[12] N.D.N.Y. LR83.11; D.Or. LR16.4; D.S.Car. LR16.3 *et seq.*

[13] E.D.Wash. LR16.2.

neutrals from which the mediator is selected.[14] One court suggests that its magistrate judges be mediators.[15] In four other courts, anyone can be a mediator if agreed upon by the parties.[16] In thirteen courts, the parties select the mediator[17] and in six other jurisdictions, the judge picks the person.[18]

Another important issue addressed by the local rules in some courts has to do with whether there is a fee for mediation and, if so, who pays it and when. In five courts, mediation is provided to the parties at no cost.[19] In other courts, there is a fee at a rate either set by the court[20], or set by the mediator.[21] In two courts, the money for mediation is deposited with the court before the mediation begins[22]; in two other courts, the fees can be recovered as costs to the prevailing party at trial.[23]

Most of the courts have local rules explaining in detail how the actual mediation will operate. For example, fourteen courts have local rules indicating that the

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[14] N.D.Ala. App. C;; S.D.Ala. LRS.O.; N.D.Cal. ADR 6; M.D.Fla. LR9.01 *et seq.*; N.D.Fla. LR16.3; S.D.Fla. LR16.2; E.D.Mich. LR16.3; W.D.Mich. LR16.3; E.D.Mo. LR6.01 *et seq.*; D.N.J. LR301.1; N.D.N.Y. LR83.11; E.D.N.Car. LR32; M.D.N.Car. LR83.10; E.D.Pa. LR52.2.1; M.D.Pa. LR16.8; D.S.Car. LR16.3 *et seq.*; E.D.Tenn. LR16.4; W.D.Tenn. Med. Plan; D.Utah LR212; E.D.Wash. LR16.2; S.D.W.Va. LR5.01.

[15] W.D.Wis. Add.I Sec.IV.

[16] N.D.Fla. LR16.3; E.D.Mich. LR16.3; D.S.Car. LR16.3 *et seq.*; W.D.Tenn. Med. Plan.

[17] N.D.Ala. App. C; W.D.Mich. LR16.5; E.D.Mo. LR6.01 *et seq.*; N.D.N.Y. LR83.11; E.D.N.Car. LR32; M.D.N.Car. LR83.10; N.D.Ohio LR16.6; D.Or. LR16.4; D.S.Car. LR16.3 *et seq.*; W.D.Tenn. Med. Plan; D.Utah LR212; E.D.Wash. LR16.2; S.D.W.Va. LR5.01.

[18] N.D.Ga. LR16.7; E.D.N.Car. LR32; E.D.Pa. LR53.2.1; M.D.Pa. LR16.8; E.D.Tex. App. H; N.D.W.Va. LR5.01.

[19] E.D.Pa. LR53.2.1; M.D.Pa. LR16.8; E.D.Wash. LR16.2; N.D.W.Va. LR5.01; S.D.W.Va. LR5.01.

[20] M.D.Fla. LR9.01 *et seq.*; N.D.Fla. LR16.3; S.D.Fla. LR16.2; N.D.Ga. LR16.7; W.D.Mich. LR16.5; D.N.J. LR301.1; E.D.N.Car. LR32; M.D.N.Car. LR83.10.

[21] W.D.Mich. LR16.3; E.D.Mo. LR6.01 *et seq.*; E.D.N.Car. LR32; D.S.Car. LR16.3 *et seq.*; E.D.Tenn. LR16.4; E.D.Tex. App. H.

[22] N.D.Ala. App. C; N.D.Cal. ADR 6.

[23] W.D.Okla. LR16.3 Supp.; W.D.Tenn. MedPlan.

process is confidential.[24] Nine courts allow the mediator discretion in determining how the mediation will be conducted.[25] In approximately seven courts, the local rules explain, in a general sense, that mediation involves a joint meeting of all parties and counsel, followed up by individual meetings with the mediator.[26] Certain paperwork is required to be submitted in fifteen courts.[27] After the actual mediation, nineteen courts require that the report be filed.[28] The parties themselves are required to attend in twenty-two courts unless excused by the judge.[29] The court's power to sanction anyone who fails to participate in good faith is articulated in the local rules in nine jurisdictions.[30]

Rule 16—Arbitration

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[24] M.D.Fla. LR9.01 *et seq.*; S.D.Fla. LR16.2; D.Mass. LR16.4; N.D.N.Y. LR83.11; E.D.N.Car. LR32; D.Or. LR16.4; E.D.Pa. LR53.2.1; M.D.Pa. LR16.8; E.D.Tenn. LR16.4; E.D.Tex. App. H; D.Utah LR212; E.D.Wash. LR16.2; N.D.W.Va. LR5.01.

[25] M.D.Fla. LR9.01 *et seq.*; S.D.Fla. LR16.2; D.Mass. LR16.4; N.D.N.Y. LR83.11; E.D.N.Car. LR32; M.D.N.Car. LR83.10; D.Or. LR16.4; M.D.Pa. LR16.8; E.D.Tenn. LR16.4; E.D.Tex. App. H; D.Utah LR212; E.D.Wash. LR16.2; N.D.W.Va. LR5.01.

[26] M.D.Ala.LR16.2; N.D.Ala. App. C; N.D.N.Y. LR83.11; W.D.Okla. LRL.Civ.R.16.3 Supp.; E.D.Tenn. LR16.4; D.Utah LR212; N.D.W.Va. LR5.01.

[27] N.D.Ala. App. C; N.D.Ga. LR16.7; W.D.Mich. LR16.3, 16.5; D.N.J. LR301.1; N.D.N.Y. LR83.11; M.D.N.Car. LR83.10; W.D.Okla. LRL.Civ.R.16.3 Supp.; D.Or. LR16.4; D.S.Car. LR16.3 *et seq.*; M.D.Tenn. LRLR23, App. 2; D.Utah LR212; E.D.Wash. LR16.2; S.D.W.Va. LR5.01.

[28] M.D.Fla. LR9.01 *et seq.*; S.D.Fla. LR16.2; N.D.Ga. LR16.7; W.D.Mich. LR16.3; E.D.Mo. LR6.01 *et seq.*; N.D.N.Y. LR83.11; E.D.N.Car. LR32; M.D.N.Car. LR83.10; W.D.N.Car. LR16.3; N.D.Ohio LR16.6; W.D.Okla. LRL.Civ.R.16.3 Supp.; M.D.Pa. LR16.8; E.D.Tenn. LR16.4; M.D.Tenn. LR23; W.D.Tenn. Med. Plan; E.D.Tex. App. H; E.D.Wash. LR16.2; N.D.W.Va. LR5.01; S.D.W.Va. LR5.01.

[29] N.D.Cal. ADR 6; M.D.Fla. LR9.01 *et seq.*; S.D.Fla. LR16.2; N.D.Ga. LR16.7; W.D.Mich. LR16.3; D.N.J. LR301.1; N.D.N.Y. LR83.11; E.D.N.Car. LR32; M.D.N.Car. LR83.10; N.D.Ohio LR16.6; W.D.Okla. LRL.Civ.R.16.3 Supp.; D.Or. LR16.4; E.D.Pa. LR53.2.1; D.S.Car. LR16.3 *et seq.*; E.D.Tenn. LR16.4; M.D.Tenn. LR23; E.D.Tex. App. H; D.Utah LR212; E.D.Wash. LR16.2; N.D.W.Va. LR5.01; S.D.W.Va. LR5.01; W.D.Wis. Add. I, Sec.IV.

[30] E.D.N.Car. LR32; E.D.Pa. LR53.2.1; D.S.Car. LR16.3 *et seq.*; E.D.Tenn. LR16.4; M.D.Tenn. LR23; D.Utah LR212; E.D.Wash. LR16.2; N.D.W.Va. LR5.01; S.D.W.Va. LR5.01.

The Alternative Dispute Resolution Act of 1998 (hereinafter Act) requires each court to authorize the use of alternative dispute resolution processes by local rule.[1] The Act provides some specific guidance for those courts interested in providing arbitration as one of its alternative dispute resolution processes.[2] It should be noted that this Act indicated that arbitration procedures already established pursuant to the Judicial Improvements and Access to Justice Act of 1988 could continue to remain in effect.[3]

Seventeen courts have local rules relating to arbitration.[4] Most of these local rules are appropriate supplements to the Act and should continue to exist. Some of these rules are inconsistent with the Act and some of them repeat portions of the Act. These problematic rules should be rescinded.

DISCUSSION

The Act allows a district court to refer cases for arbitration when the parties consent.[5] Local rules in some courts supplement this referral process and explain the general procedure for initiating the arbitration. These rules should remain subject to local variation. For example, three courts have local rules explaining that the court will refer certain cases[6], and two of those courts acknowledge that a party may opt out.[7] Another

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[1] 28 U.S.C. §651. For a brief discussion of this Act, *see* local rule discussion at "Rule 16.—Alternative Dispute Resolution", *supra*..

[2] *See* 28 U.S.C. §§654-658.

[3] *See* 28 U.S.C. §654(d).

[4] N.D.Ala. App. C; D.Ariz. LR2.11; N.D.Cal. LRADR 4; M.D.Fla. LR8.01 *et seq.*; M.D.Ga. LR16.2; N.D.Ga. LR16.7; W.D.Mich. LR16.6; D.N.J. LR201.1; W.D.N.Y. LR16.2; N.D.Ohio LR16.7; N.D.Okla. LRCJRA VI; W.D.Okla. LRL.Civ.R16.3 Supp.; E.D.Pa. LR53.2; W.D.Pa. LR16.2; M.D.Tenn. LRApp.4; D.Utah LR212; E.D.Wash. LR16.2.

[5] 28 U.S.C. §654(a).

[6] M.D.Ga. LR16.2; N.D.Ohio LR16.7; E.D.Pa. CJRA.

[7] M.D.Ga. LR16.2; W.D.Pa. LR16.2.

three courts explain the actual procedure used to opt out of arbitration.[8] One court indicates that the clerk notifies the parties of the opportunity for arbitration.[9] That same court has a local rule explaining that, in the event there is no consent to arbitrate, the judge and magistrate judge are not notified as to which party refused the process.[10] Three courts explain either that mediation may be substituted for arbitration[11], or that arbitration can begin after the mediation phase.[12] Three courts explain how arbitration is scheduled[13] and another eight courts require the submission of certain paperwork before the actual process begins.[14] Three courts have local rules that specifically state that the normal operation of the case will continue in spite of on-going arbitration efforts "unless good cause [is] shown."[15] Seven courts explain that the Act is applicable to the arbitration program.[16] Another two courts have local rules that acknowledge that the parties may agree to arbitration as set forth in the Act.[17]

There are some local rules relating to the referral process that are problematic because they either repeat this Act or are inconsistent with it. Five courts repeat a portion

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[8] M.D.Ga. LR16.2; N.D.Ohio LR16.7; W.D.Pa. LR16.2.

[9] W.D.N.Y. LR16.2.

[10] *Id.*

[11] M.D.Fla. LR8.01 *et seq.*

[12] N.D.Ala. App. C; E.D.Wash. LR16.2.

[13] W.D.N.Y. LR16.2; W.D.Okla. LR16.3 Supp.; W.D.Pa. LR16.2.

[14] N.D.Ala. App. C; M.D.Fla. LR8.01 *et seq.*; M.D.Ga. LR16.2; W.D.Okla. LRL.Civ.R16.3 Supp.; W.D.Pa. LR16.2; M.D.Tenn. LR25; D.Utah LR212; E.D.Wash. LR16.2.

[15] M.D.Ga. 16.2; W.D.N.Y. LR16.2; W.D.Pa. LR16.2.

[16] D.Ariz. LR2.11; W.D.Mich. LR16.6; W.D.N.Y. LR16.2; N.D.Ohio LR16.7; W.D.Okla. LR16.3 Supp.; W.D.Pa. LR16.2; M.D.Tenn. LR25.

[17] W.D.Mich. LR16.6; D.N.J. LR201.1.

of section 654 indicating that the arbitration program is voluntary.[18] Four courts allow the clerk to automatically refer some cases[19] while two of the jurisdictions provide relief from the automatic referral for good cause.[20] To the extent these rules dispense with the consent requirement altogether or require a party to prove in some way why the failure to consent is justified, these rules are inconsistent with the act which simply explains that the parties must consent to arbitration and that there is no arbitration without consent.[21] Presumably, these rules were based on the old statutory provisions.[22]

Section 653 of the Act explains that the district courts must develop a procedure for making neutrals available to assist with all methods of alternative dispute resolution, including arbitration.[23] Twelve courts have local rules explaining that the jurisdictions each maintain s panel of arbitrators for use by the parties.[24] In seven courts, the parties pick the neutral and, if unable to do so, the court will make the selection.[25] In two other courts, the clerk picks the arbitrator[26] and, in a third court, if the parties cannot agree, the clerk makes the choice.[27] All of these rules are appropriate supplements to the statutory scheme.

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[18] D.Ariz. LR2.11; M.D.Ga. LR16.2; W.D.N.Y. LR16.2; W.D.Pa. LR16.2; E.D.Wash. LR16.2. *See* 28 U.S.C. §654(a).

[19] N.D.Cal. ADR 4; M.D.Fla. LR8.01 *et seq.*; W.D.Mich. LR16.6; D.N.J. LR201.1.

[20] N.D.Cal. ADR 4;W.D.Okla. LR16.3 Supp.

[21] *See* 28 U.S.C. §652(a); 654.

[22] *See* 28 U.S.C. §652(a) (1988) ("A district court ... may ... require ... arbitration [under a specific set of circumstances]".)

[23] *See* 28 U.S.C. §653.

[24] D.Ariz. LR2.11; N.D.Cal. LRADR 4; M.D.Fla. LR8.01 *et seq.*; M.D.Ga. LR16.2; W.D.Mich. LR16.6; D.N.J. LR201.1; W.D.N.Y. LR16.2; N.D.Ohio LR16.7; E.D.Pa. LR53.2; W.D.Pa. LR16.2; D.Utah LR212; E.D.Wash. LR16.2.

[25] N.D.Ala. App. C; D.Ariz. LR2.11; M.D.Fla. LR8.01 *et seq.*; N.D.Ohio LR16.7; W.D.Okla. LRL.Civ.R16.3 Supp.; D.Utah LR212; E.D.Wash. LR16.2.

[26] D.N.J. LR201.1; W.D.Pa. LR16.2.

The Act sets forth the effect of the arbitration award and allows any party to seek a trial de novo within thirty days after the arbitration award is filed.[28] The existing local rules in this area are either inconsistent with this Act or repeat it; they should be rescinded. For example, nine courts have local rules explaining that the arbitration decision is non-binding[29]; another eight courts permit the parties to agree to binding arbitration.[30] These rules are inconsistent with the language of Section 657 that the award "shall be entered as the judgment of the court after the time has expired for requesting trial de novo."[31] Of course, the Act, itself, provides the parties with the practical equivalent of a non-binding process since either party may seek a trial de novo and, during such a trial, the existence of the award remains sealed.[32]

Fourteen courts have local rules repeating that the award is entered as the judgment if a trial de novo is not requested.[33] Two courts have local rules repeating that the judgment is entered right away when the arbitration is binding.[34] These rules repeat the language in Section t657 that the arbitration award be filed "promptly after the arbitration hearing is concluded."[35] One court has a local rule explaining that the award

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[27] W.D.N.Y. LR16.2.

[28] 28 U.S.C. §657.

[29] N.D.Ala. App. C; D.Ariz. LR2.11; N.D.Cal. LRADR 4; W.D.N.Y. LR16.2; W.D.Okla. LR16.3 Supp.; W.D.Pa. LR16.2; M.D.Tenn. LR25; D.Utah LR212; E.D.Wash. LR16.2.

[30] N.D.Ala. App. C; D.Ariz. LR2.11; N.D.Cal. LRADR 4; N.D.Ga. LR16.7; W.D.Mich. LR16.6; W.D.N.Y. LR16.2; W.D.Okla. LR16.3 Supp.; E.D.Wash. LR16.2.

[31] 28 U.S.C. §657(a).

[32] *See* 28 U.S.C. §657(a), (b).

[33] D.Ariz. LR2.11; N.D.Cal. LRADR 4; M.D.Fla. LR8.01 *et seq.*; M.D.Ga. LR16.2; W.D.Mich. LR16.6; D.N.J. LR201.1; W.D.N.Y. LR16.2; N.D.Ohio LR16.7; W.D.Okla. LRL.Civ.R16.3 Supp.; E.D.Pa. LR53.2; W.D.Pa. LR16.2; D.Utah LR212; E.D.Wash. LR16.2.

[34] M.D.Fla. LR8.01; M.D.Ga. LR16.2.

[35] 28 U.S.C. §657(a).

is kept confidential from the judge or magistrate judge if not accepted.[36] To the extent this rule repeats that the arbitration award is sealed until the action is terminated, it repeats the Act.[37] To the extent it assumes that the arbitration award may be non-binding, it is inconsistent with the Act.[38]

Lastly, there are rules in some courts that concern the parties' ability to secure a trial de novo after the filing of the arbitration award which are inconsistent with the Act and should be rescinded. For example, five courts require a party to deposit an amount equal to the arbitrator's fee when seeking a trial de novo.[39] Another three courts provide that, if the trial de novo amount is not "substantially more favorable" than the award, the opposing party may be awarded costs and fees pursuant to 28 U.S.C. §655(e).[40] Six other courts explain that the arbitrator's fee is assessed to the party demanding a trial de novo if the trial award is not more favorable than the arbitration award.[41] One court defines "substantially more favorable" as 10 per cent above the award.[42] Another court requires a $50 deposit when seeking a trial de novo.[43] These local rules were undoubtedly passed to supplement the old statute that allowed the arbitrator's fee to be taxed as costs against

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[36] W.D.Pa. LR16.2.

[37] *See* 28 U.S.C. §657(b).

[38] *Id.*

[39] D.Ariz. LR2.11; N.D.Cal. LRADR 4; M.D.Fla. LR8.01 *et seq.*; M.D.Ga. LR16.2; W.D.Mich. LR16.6; D.N.J. LR201.1; W.D.N.Y. LR16.2; N.D.Ohio LR16.7; W.D.Okla. LRL.Civ.R16.3 Supp.; E.D.Pa. LR53.2; W.D.Pa. LR16.2; D.Utah LR212; E.D.Wash. LR16.2.

[40] D.Ariz. LR2.11; W.D.N.Y. LR16.2; N.D.Ohio LR16.7.

[41] D.Ariz. LR2.11; M.D.Fla. LR8.01 *et seq.*; W.D.N.Y. LR16.2; N.D.Ohio LR16.7; W.D.Okla. LR16.3 Supp.; E.D.Pa. LR53.2.

[42] D.Ariz. LR2.11, *see also* W.D.Mich. LR16.6 (formula for preventing assessment of costs if award is rejected and trial de novo sought.)

[43] D.N.J. LR201.1, *see also* E.D.Wash. LR16.2 (standard is "more favorable to that party").

the party demanding a trial de novo under certain enumerated circumstances.[44]

There are local rules that explain some aspects of the actual arbitration process. Most of these rules are appropriate as local directives. The power of the arbitrator is set forth in the Act.[45] Five courts have local rules that supplement the discussion on the authority of the arbitrator.[46] There are also rules explaining the procedure that will be used during the actual arbitration. For example, seven courts have local rules requiring a pre-hearing exchange of information[47] and another three courts have rules explaining the need for written statements, telephone conferences, and attendance.[48] With respect to attendance, three courts specifically require the parties to attend unless excused for good cause.[49]

The Act requires that each court, by local rule, "provide for the confidentiality of the alternative dispute resolution process and ... prohibit disclosure of confidential dispute resolution communications." [50] Three courts have local rules stating that the arbitration process is confidential[51] while six courts have local rules stating that the arbitration itself is privileged.[52] These rules are also appropriate.

Eighteen courts have local rules requiring either that the arbitrator files the

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[44] *See* 28 U.S.C. §655(d) (1988).

[45] *See* 28 U.S.C. §655 and 656.

[46] D.Ariz. LR2.11; N.D.Cal. LRADR 4; D.N.J. LR201.1; W.D.N.Y. LR16.2; E.D.Wash. LR16.2.

[47] D.Ariz. LR2.11; M.D.Fla. LR8.01 *et seq.*; W.D.N.Y. LR16.2; N.D.Ohio LR16.7; E.D.Pa. LR53.2; W.D.Pa. LR16.2; E.D.Wash. LR16.2.

[48] N.D.Cal. ADR 4; W.D.N.Y. LR16.2; M.D.Tenn. LRApp.4.

[49] M.D.Fla. LR8.01 *et seq.*; N.D.Ohio LR16.7; W.D.Okla. LR16.3 Supp.

[50] 28 U.S.C. §652(d).

[51] M.D.Ga. LR16.2; W.D.Mich. LR16.6; W.D.Pa. LR16.2.

[52] D.Ariz. LR2.11; M.D.Ga. LR16.2; W.D.Okla. LR16.3 Supp.; E.D.Pa. LR53.2; W.D.Pa. LR16.2; D.Utah LR212.

decision[53] or that the arbitrator reports to the court at the end.[54] These rules are unnecessary since they repeat the Act's requirement that the award be filed with the clerk "promptly after the arbitration hearing is concluded."[55] They should be rescinded.

Pursuant to the Act, compensation for arbitration can be established by the district court.[56] Five courts set forth the pay for arbitrators[57], and another court explains that the fee is agreed upon or, in the absence of agreement, set by the judge.[58] These local rules are appropriate supplements to the Act.

Rule 16—Court Settlement Conferences

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[53] N.D.Ala. App. C; D.Ariz. LR2.11; N.D.Cal. LRADR 4; M.D.Fla. LR8.01 *et seq.*; M.D.Ga. LR16.2; W.D.Mich. LR16.6; D.N.J. LR201.1; W.D.N.Y. LR16.2; N.D.Ohio LR16.7; W.D.Okla. LR16.3 Supp.; E.D.Pa. LR53.2; W.D.Pa. LR16.; D.Utah LR21; E.D.Wash. LR16.2.

[54] N.D.Ala. App. C; M.D.Fla. LR8.01 *et seq.*; N.D.Ga. LR16.7; W.D.Okla. LR16.3 Supp.

[55] 28 U.S.C. §657(a).

[56] 28 U.S.C. §658(a).

[57] D.Ariz. LR2.11; W.D.Mich. LR16.6; D.N.J. LR201.1; E.D.Pa. LR53.2; W.D.Pa. LR16.2.

[58] N.D.Ga. LR16.7.

Although a court settlement conference may not technically be designated an alternative dispute resolution process, it can help the parties achieve settlement and, even if the case continues, it can be helpful in fostering communication, narrowing issues for trial, and forcing the parties to examine settlement early in the judicial process.[1] Twenty-seven courts have local rules explaining the procedure for judicially hosted settlement conferences.[2] All of these rules are appropriate as local directives.

DISCUSSION

The first issue addressed by these rules is how the conference is offered in the first instance. Fourteen courts have local rules permitting the court to refer a case for such a settlement conference.[3] Another three courts require such a conference automatically after the close of discovery.[4] Either of these mechanisms is appropriate under Rule 16, which contemplates early judicial involvement in case management.[5]

There are various local rules explaining exactly who the facilitator should be in these conferences. Ten courts suggest that the trial judge serve as facilitator;[6] another eight courts suggest that a randomly selected judge or magistrate judge not already

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[1] *See, generally*, Fed.R.Civ.P. 16; Fed.R.Civ.P. 16 Advisory Committee Note to 1983 Amendments; Manual for Complex Litigation (3rd ed.) §20.13 (1995).

[2] C.D.Cal. LR23; E.D.Cal. LR16-270; N.D.Cal. LRADR 7; S.D.Cal. LR16.3; D.Conn. LR11(c); D.Haw. LR16.5; D.Idaho LR16.2; C.D.Ill. LR16.1(B); S.D.Ill. LR16.4; D.Md. LR111.2; D.Mass. LR16.4; W.D.Mich. LR16-8; E.D.N.Car. LR30; W.D.N.Car. LR16.3(D); E.D.Okla. LRCJRA Sec. IV; N.D.Okla. CJRA Sec. VI; W.D.Okla. LR16.2; D.Or. LR16.5; M.D.Pa. LR16.9; M.D.Tenn. LR22; W.D.Tenn. LR16.1; N.D.Tex. LR16.3(b); D.Utah LR204-2; N.D.W.Va. LR2.04(e); S.D.W.Va. LR2.04(e); E.D.Wis. LR13.06(p); D.Wyo. LR16.3.

[3] N.D.Cal. LRADR 7; D.Idaho LR16.2; C.D.Ill. LR16.1(B); S.D.Ill. LR16.4; D.Mass. LR16.4; E.D.N.Car. LR30; W.D.N.Car. LR16.3(D); E.D.Okla. LR16.3, CJRA Sec. IV; N.D.Okla. LR16.3; W.D.Okla. LR16.2; D.Or. LR16.5; M.D.Pa. LR16.9; M.D.Tenn. LR22; D.Utah LR204-2.

[4] D.Conn. LR11(c); D.Haw. LR16.5; D.Idaho LR16.2.

[5] *See, e.g.*, Fed.R.Civ.P. 16(a) ("The court may in its discretion ...[hold] a conference or conferences before trial for such purposes as ... facilitating the settlement of the case.")

connected with the case serve.[7] Two courts allow an attorney to facilitate.[8] Three courts require that the parties specifically request the trial judge to act as facilitator or else that person cannot participate.[9] Three courts explain that the magistrate judge usually runs these conferences.[10] Six courts explain that the judge conducting the conference is usually not the judge assigned to the case.[11] In one court, the local rule explains that the parties usually agree on the settlement officer with the court's approval[12] and that the selected person does not need to be a judicial officer.[13]

There are rules in seven jurisdictions that require that the content of the conferences be kept confidential.[14] Six courts have local rules indicating that the content of the conference is privileged and cannot be used at trial.[15] These rules are appropriate as local directives.

Six courts have specific procedures for these conferences.[16] One jurisdiction

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[6] C.D.Cal. LR23; S.D.Cal. LR16.3; D.Conn. LR11(c); D.Haw. LR16.5; D.Idaho LR16.2; C.D.Ill. LR16.1(B); W.D.Mich. LR16-8; W.D.Tenn. LR16.1; N.D.W.Va. LR2.04(e); S.D.W.Va. LR2.04(e).

[7] D.Conn. LR11(c); D.Haw. LR16.5; D.Idaho LR16.2; C.D.Ill. LR16.1(B); W.D.Mich. LR16-8; M.D.Tenn. LR22; N.D.Tex. LR16.3(b); D.Utah LR204-2.

[8] C.D.Cal. LR23; D.Utah LR204-2.

[9] E.D.Cal. LR16-270; N.D.Cal. LRADR 7; S.D.Cal. LR16.3.

[10] N.D.Cal. ADR 7; E.D.Wis. LR13.06(p); D.Wyo. LR16.3.

[11] E.D.N.Car. LR30; W.D.N.Car. LR16.3(D); E.D.Okla. LR16.3; N.D.Okla. LR16.3; W.D.Okla. LR16.2; M.D.Tenn. LR22.

[12] M.D.Pa. LR16.9.

[13] D.Wyo. LR16.3.

[14] D.Idaho LR16.2; S.D.Ill. LR16.4; W.D.Okla. LR16.2; M.D.Pa. LR16.9; M.D.Tenn. LR22; D.Utah LR204-2; D.Wyo. LR16.3.

[15] E.D.N.Car. LR30; E.D.Okla. LR16.3; W.D.Okla. LR16.2; M.D.Pa. LR16.9; M.D.Tenn. LR22; D.Utah LR204-2.

[16] C.D.Cal. LR23; E.D.Cal. LR16-270; D.Haw. LR16.5; D.Idaho LR16.2; S.D.Ill. LR16.4; W.D.Okla. LR16.2; M.D.Tenn. LR22.

has a local rule explaining that the settlement judge may require certain procedures.[17] Again, these rules are appropriate supplements to Rule 16.

There are rules that explain who may or must participate and what their roles ought to be. For example, eight courts require that the actual parties participate in the settlement efforts unless they have been exempted.[18] Twelve courts have rules that require that principals usually participate.[19] In six courts where the parties are not required to attend, they must be telephone accessible.[20] Seven courts require the attendance of the attorneys[21], and two of those courts specifically require the attendance of attorneys familiar with the case.[22] Eight courts require that attorneys come to the conference with authority to settle.[23] Three courts require that everyone in attendance be candid.[24] Again, these rules are appropriate as local directives.

IV. Parties

Rule 17. Parties Plaintiff and Defendant; Capacity

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[17] E.D.Okla. LR16.3.

[18] C.D.Cal. LR23; S.D.Cal. LR16.3; C.D.Ill. LR16.1(B); S.D.Ill. LR16.4; N.D.Okla. LRCJRA Sec. VI; N.D.W.Va. LR2.04(e); S.D.W.Va. LR2.04(e); E.D.Wis. LR7.12.

[19] E.D.Cal. LR16-270; W.D.Mich. LR16-8; E.D.N.Car. LR30; E.D.Okla. CJRA Sec. IV; N.D.Okla. LRCJRA Sec. VI ; W.D.Okla. LR16.2; M.D.Tenn. LR22; D.Utah LR204-2; N.D.W.Va. LR2.04(e); S.D.W.Va. LR2.04(e); E.D.Wis. LR13.06(p); D.Wyo. LR16.3.

[20] D.Haw. LR16.5; D.Idaho LR16.2; D.Mass. LR16.4; N.D.Okla. LR16.3; M.D.Tenn. LR22; E.D.Wis. LR7.12.

[21] D.Md. LR111.2; W.D.N.Car. LR16.3(D); E.D.Okla. LR16.3; M.D.Pa. LR16.9; N.D.W.Va. LR2.04(e); S.D.W.Va. LR2.04(e); D.Wyo. LR16.3.

[22] M.D.Pa. LR16.9; D.Utah, LR204-2.

[23] D.Conn. LR11(c); D.Haw. LR16.5; D.Idaho LR16.2; C.D.Ill. LR16.1(B); W.D.N.Car. LR16.3(D); M.D.Tenn. LR22; D.Utah LR204-2; D.Wyo. LR16.3.

[24] E.D.N.Car. LR30.00; E.D.Okla. LR16.3; N.D.Okla. LR16.3.

Seventeen courts have local rules dealing with infants and incompetent persons.[1] These rules address one or both of these topics: (1) who is permitted to represent a minor or incompetent person; and (2) how a settlement is approved and distributed.

Eight courts have local rules discussing who can represent the minor or incompetent person. Rules in three of these courts are appropriate supplements to Rule 17. Rules in seven of these courts should be rescinded because they are either inconsistent with existing law or repeat it.

Sixteen courts have local rules that discuss the settlement of cases involving minors or incompetent persons and the disbursement of any settlement funds for the benefit of such person. These rules should remain subject to local variation.

DISCUSSION

Rule 17 of the Federal Rules of Civil Procedure provides that infants and incompetent persons may sue and be sued under certain circumstance.[2] Subsection (a) requires that an action "be prosecuted in the name of the real parties in interest."[3] Subsection (b) states the capacity of a person "other than one acting in a representative capacity" to sue or be sued is determined by the law of the person's domicile.[4] Subsection (c) relates specifically to infants and incompetent persons and indicates that the representative of such minor or infant "may sue or defend on behalf of the infant or

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[1] E.D.Cal. LR17-202; S.D.Cal. LR17.1; S.D.Ga. LR17.1; D.Haw. LR17.1; D.Idaho LR17.1; D.Minn. LR17.1; D.Mont. LR226; D.N.H. LR17.1; N.D.N.Y. LR17.1; E.D.N.Car. LR20.01; M.D.N.Car. LR17.1; D.N.Mar.I LR17.1; W.D.Okla. LR17.1; W.D.Pa. LR17.1; D.S.Car. LR17.01; E.D.Wash. LR17.1; W.D.Wash. LR17(c).

[2] Fed.R.Civ.P. 17.

[3] *Id* at (a).

[4] *Id*. at (b).

incompetent person."[5]

If the infant or incompetent person is not otherwise represented, either by a nominal party or by another representative, then, under subsection (c), the infant or incompetent person may sue by a next friend or guardian *ad litem*.[6] Even if a representative exists, the court still has discretion to appoint a next friend or guardian *ad litem*:

> [T]he courts have consistently recognized that they have inherent power to appoint a guardian ad litem when it appears that the minor's general representative has interests which may conflict with those of the person he is supposed to represent.[7]

Such appointment is a matter of procedure and, therefore, not a matter of state law.[8]

Eight courts have local rules concerning who the representative of any infant or incompetent person can be.[9]

Three of these courts have local rules that should remain subject to local variation.[10] Two of these local rules simply mandate that the guardian *ad litem* be an attorney.[11] Another local rule explains that any motion for appointment of a guardian *ad*

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[5] *Id.* at (c).

[6] *Id.*

[7] *Hoffert v. General Motors Corporation*, 656 F.2d 161, 164 (5th Cir. 1981) *reh'g and reh'g en banc denied* October 13, 1981, *and cases cited therein. See also Developmental Disabilities Advocacy Center, Inc. v. Melton*, 689 F.2d 281 (1st Cir. 1982); *Wolfe v. Bias*, 601 F.Supp. 426 (S.D.W.Va. 1984); *Slade v. Louisiana power and Light Company*, 418 F.2d 125 (5th Cir. 1969) *cert. denied* 397 U.S. 1007, 90 S.Ct. 1233, 25 L.Ed.2d 419 (1970).

[8] *Bengtson v. Travelers Indemnity Company*, 132 F.Supp. 512, 516-17 (W.D.La. 1955).

[9] E.D.Cal. LR17-202; D.Mont. LR226; E.D.N.Car. LR20.01; M.D.N.Car. LR17.1; D.N.Mar.I LR17.1; D.S.Car. LR17.01; E.D.Wash. LR17.1; W.D.Wash. LR17(c).

[10] M.D.N.Car. LR17.1; E.D.Wash. LR17.1; W.D.Wash. LR17(c).

[11] E.D.Wash. LR17.1; W.D.Wash. LR17(c).

litem be made early in the proceedings.[12] Both of these requirements are appropriate supplements to Rule 17.

Three courts have local rules concerning the appointment of guardians *ad litem* that are problematic and should be rescinded.[13] The local rules in two of the courts require that, in representing a minor or incompetent person, the attorney provide either proof of the appointment of a representative under state law or a motion for an appointment of a guardian *ad litem*.[14] The local rule in the other court states that minors or incompetent persons may sue or defend only by a general or testamentary guardian or by a guardian *ad litem*.[15] To the extent these requirements may eliminate the possibility that the minor or incompetent person is represented by a next friend they are inconsistent with Rule 17(c), which, by its terms, contemplates that a minor or incompetent person may be represented by a next friend as well as by a guardian *ad litem*.[16]

Further, the requirement that an attorney, at the commencement of the action, provide proof of the appointment of a representative made pursuant to state law, conflicts with Rules 8 and 9 of the Federal Rules of Civil Procedure.[17] Rule 9(a) indicates, with respect to the capacity to be sued, that "[i]t is not necessary to aver ... the authority of a party to sue or be sued in a representative capacity";[18] rather, any party wishing to challenge the capacity must raise the issue by "specific negative averment, which shall

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[12] M.D.N.Car. LR17.1.

[13] E.D.Cal. LR17-202; M.D.N.Car. LR17.1; E.D.Wash. LR17.1.

[14] E.D.Cal. LR17-202; E.D.Wash. LR17.1.

[15] M.D.N.Car. LR17.1.

[16] Fed.R.Civ.P. 17(c).

[17] Fed.R.Civ.P. 8, 9.

[18] Fed.R.Civ.P. 9(a).

include such supporting particulars as are peculiarly within the pleader's knowledge."[19]

Another four district courts have local rules concerning, generally, the appointment of a representative that repeat existing law and should be rescinded.[20] Two jurisdictions have local rules that simply repeat the applicability of Rule 17.[21] Another two courts have rules that allow the appointment of a guardian *ad litem* anytime upon a proper showing.[22] Rule 17 clearly articulates the court's authority to make any order at any time "as it deems proper for the protection of the infant or incompetent person."[23]

Sixteen jurisdictions have local rules concerning the resolution of cases involving minors and incompetent person.[24] These local rules may assist in delineating the procedures used in approving any settlement of actions involving minors or incompetents.

Fourteen of these local rules provide that any settlement or compromise of a suit involving a minor or incompetent be approved by the court.[25] Many of these rules also set forth various procedures which the individual district courts use such as: (1) the procedure for the disbursement of any award for the benefit of the minor or incompetent

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[19] *Id.*

[20] D.Mont. LR226; E.D.N.Car. LR20.01; D.N.Mar.I LR17.1; D.S.Car. LR17.01.

[21] E.D.N.Car. LR20.01; D.S.Car. LR17.01.

[22] D.Mont. LR226; D.N.Mar.I LR17.1.

[23] Fed.R.Civ.P. 17(c).

[24] E.D.Cal. LR17-202; S.D.Cal. LR17.1; S.D.Ga. LR17.1; D.Haw. LR17.1; D.Idaho LR17.1; D.Minn. LR17.1; D.Mont. LR226; D.N.H. LR17.1; N.D.N.Y. LR17.1; E.D.N.Car. LR 20.02; M.D.N.Car. LR17.1; D.N.Mar.I LR17.1; W.D.Pa. LR17.1; D.S.Car. LR17.02; E.D.Wash. LR17.1; W.D.Wash. LR17(c).

[25] E.D.Cal. LR17-202; S.D.Cal. LR17.1; S.D.Ga. LR17.1; D.Haw. LR17.1; D.Idaho LR17.1; D.Minn. LR17.1; D.N.H. LR17.1; N.D.N.Y. LR17.1; E.D.N.Car. LR 20.02; M.D.N.Car. LR17.1; D.N.Mar.I LR17.1; W.D.Pa. LR17.1; D.S.Car. LR17.02; E.D.Wash. LR17.1.

person;[26] (2) the procedure for claiming attorneys' fees and expenses;[27] (3) the procedure for securing court approval of any settlement;[28] and, (4) the requirement of state court approval of a settlement, where necessary in addition to federal court approval.[29]

Such court involvement in cases involving minors or incompetent persons is clearly within the powers set forth in Rule 17(c) and the existing case law. Rule 17(c) specifically provides that the court has the authority to "appoint a guardian ad litem ... or ... [to] make such other order as it deems proper for the protection of the infant or incompetent person."[30] Further, it has been recognized that the courts have inherent power to protect the interests of the minor or incompetent person by appointing an appropriate representative and that, after such an appointment, the court has broad authority to inquire into issues bearing on the settlement agreement.[31] The right of the court to approve or fix the amount of the fees for counsel and the expenses for the appointed representative is also well recognized.[32]

These local rules are appropriate as supplements to the existing case law and Rule 17. Local variation is desirable since the law of the state in which the jurisdiction is

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[26] E.D.Cal. LR17-202; S.D.Cal. LR17.1; S.D.Ga. LR17.1; D.Idaho LR17.1; D.Minn. LR17.; D.Mont. LR226; D.N.H. LR17.1; N.D.N.Y. LR17.1; E.D.N.Car. LR20.03: M.D.N.Car. LR17.1; D.N.Mar.I LR17.1; W.D.Pa. LR17.1; D.S.Car. LR17.03; E.D.Wash. LR17.1; W.D.Wash. LR17(c).

[27] E.D.Cal. LR17-202; S.D.Ga. LR17.1; D.N.H. LR17.1; M.D.N.Car. LR17.1; W.D.Pa. LR17.1.

[28] E.D.Cal. LR17-202; S.D.Ga. LR17.1; D.N.H. LR17.1; E.D.N.Car. LR 20.02; M.D.N.Car. LR17.1; W.D.Pa. LR17.1; D.S.Car. LR17.02.

[29] E.D.Cal. LR17-202; D.Haw. LR17.1.

[30] Fed.R.Civ.P. 17(c).

[31] *Hoffert v. General Motors Corporation*, 656 F.2d 161, 164 (5th Cir. 1981) *reh'g and reh'g en banc denied* October 13, 1981, *citing M.S. v. Wermers*, 557 F.2d 170, 175 (8th Cir. 1977); *Dacanay v. Mendoza*, 573 F.2d 1075, 1079 (9th Cir. 1978); *Horacek v. Exxon*, 357 F.Supp. 71, 74 (D.Neb. 1973).

[32] *See Friends for All Children, Inc. v. Lockheed Aircraft Corporation*, 533 F.Supp. 895 (D.C. 1982) (reasonable cost for the guardian ad litem); *United States v. Equitable Trust Company of New York*, 283 U.S. 738, 51 S.Ct. 639, 75 L.Ed. 1379 (1931) (reasonable cost for the next friend); *Hoffert v. General*

located may influence many of the procedures. Such rules do not alter the rights of the litigants since, when a representative is suing or defending on behalf of a minor or incompetent, the court already has discretionary authority to be involved in the formulation of the result.

Rule 24. Intervention

Rule 24—Claim of Unconstitutionality

Motors Corporation, 656 F.2d 161, 164 (5th Cir. 1981) *reh'g and reh'g en banc denied* October 13, 1981 (attorneys' fees).

The United States or a state is permitted to intervene in certain cases that present a constitutional question.[1] Thirty-three jurisdictions have local rules that, generally, provide a procedure for the parties to notify the court of the presence of a constitutional question so that the court can notify the United States or a state of its opportunity to intervene. In addition, there are rules in approximately eighteen district courts that are inconsistent with existing law and should, therefore, be rescinded.

DISCUSSION

Section 2403 of Title 28 permits the United States or a state to intervene in any action where the constitutionality of an Act of Congress or the constitutionality of a state statute affecting the public interest is drawn into question.[2] The procedure which the court must follow in notifying the United States or a state is set forth in this statute.[3] Specifically, with respect to an Act of Congress, "the court shall certify such fact to the Attorney General";[4] with respect to a state statute, "the court shall certify such fact to the attorney general of the State."[5] This procedure is again set forth in the Federal Rules of Civil Procedure:

> When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to 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 an 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

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[1] 28 U.S.C. §2403; Fed.R.Civ.P. 24.

[2] 28 U.S.C. §2403(a) (Act of Congress), 2403(b) (state statute).

[3] *Id.*

[4] *Id.* at (a).

[5] *Id.* at (b).

> 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.[6]

The obligation of the court to notify the proper governmental agency is absolute and certification is not discretionary.[7] This is true even if the court thinks the claim "is obviously frivolous or may be disposed of on other grounds."[8] In fact, judicial discretion was expressly removed by amendment in 1937 when section 2403 was originally adopted.[9] It has been recognized that certification and intervention "are permissible at any stage of the proceeding."[10]

The Local Rules Project originally recommended that a Model Local Rule be provided to jurisdictions that chose to have any rule concerning notification of claims of unconstitutionality.[11]

The Model Local Rule sought to assist the court in complying with 28 U.S.C. §2403. At the same time, it removed from the party the responsibility for providing notice to the appropriate governmental entity. Since notification to the state or federal government is the court's responsibility and not the litigant's, this rule required that the initial notice be directed to the court. No litigant, then, was obliged to give any notice to any governmental entity.

The initial notification to the court was quite simple. If the claim of

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[6] Fed.R.Civ.P. 24(c).

[7] *Jones v. City of Lubbock*, 727 F.2d 364, 372 (5th Cir. 1984), *reh'g and reh'g en banc denied* April 10, 1984, 730 F.2d 233; *Merrill v. Town of Addison*, 763 F.2d 80, 82 (2d Cir. 1985).

[8] *Merrill, supra*, at 82.

[9] *See* 81 Cong. Rec. 8507 (1937).

[10] *Wallach v. Lieberman*, 366 F.2d 254, 258 n.9 (2d Cir. 1966); *see also Thatcher v. Tennessee Gas Transmission Co*, 180 F.2d 644 (5th Cir. 1950) *cert. denied* 340 U.S. 829, 71 S.Ct. 66, 95 L.Ed 609 (1950); *Tonya K. v. Board of Education*, 849 F.2d 1243, 1247 (7th Cir. 1988); *Merrill, supra*; *Jones, supra*.

unconstitutionality is made when the first pleading is filed, the accompanying civil cover sheet may serve as the notice to the court. At present, eight courts have this provision.[12] If the claim is made in a pleading, a designation may be made immediately following the title of the pleading stating: "Claim of Unconstitutionality" or the equivalent. At present, approximately twelve courts provide for this method of notification.[13] Either of these methods will provide sufficient notice to the clerk of the existence of the constitutional question.

The potential for unfair punitive measures was avoided in the original Model Local Rule by stating that a litigant will not waive any rights by failing to give notice under the rule. Twelve courts now have local rules containing this provision.[14] It is appropriate that no significant sanctions be available since this rule exists only to assist the court and not to pursue or protect any rights of the parties.

Lastly, the Model Local Rule indicated that any notice under this rule is not a substitute for any other pleading requirements that may exist in the Federal Rules or statutes. Twelve courts currently provide this directive as well.[15]

Some of the other rules are problematic in several respects. For example, twelve courts have local rules explaining the particular requirements for the content of

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[11] *See* Report at Suggested Local Rules p.40.

[12] M.D.Ala. LR24.1; S.D.Ill. LR24.1; D.Minn. LR24.1; D.N.Mar.I LR24.1; W.D.Pa. LR24.1; E.D.Tenn. LR24.1; D.V.I. LR24; D.Wyo. LR24.1.

[13] M.D.Ala. LR24.1; S.D.Fla. LR24.1; S.D.Ill. LR24.1; D.Minn. LR24.1; D.N.H. LR24.1; D.N.Mar.I LR24.1; N.D.Ohio LR24.1; E.D.Okla. LR24.1; W.D.Pa. LR24.1; E.D.Tenn. LR24.1; D.V.I. LR24; D.Wyo. LR24.1.

[14] M.D.Ala. LR24.1; S.D.Fla. LR24.1; S.D.Ill. LR24.1; N.D.Ind. LR24.1; S.D.Ind. LR24.1; D.Minn. LR24.1; D.N.H. LR24.1; D.N.Mar.I LR24.1; N.D.Ohio LR24.1; W.D.Pa. LR24.1; E.D.Tenn. LR24.1; D.V.I. LR24.

the notice.[16] The relevant statute and Federal Rule do not require such specificity.[17] It should not be permitted in local rulemaking either. To require such detail puts an unnecessary burden on the parties, which is not supported by the existing law. The responsibility for notifying the Attorney General belongs to the court, not the parties. The parties, of course, have the responsibility to provide "a short and plain statement" to demonstrate the court's jurisdiction and "a short and plain statement of the claim showing that the pleader is entitled to relief" along with a demand for judgment.[18] Local rules requiring further specificity are inconsistent with the language and spirit of Rule 8 and should be rescinded.

Three courts have local rules that require the litigant to carry out the court's responsibility in providing notice, requiring that notice be served on the judge, the parties, and the attorney general.[19] Local Rules in three courts have other requirements that may unduly burden litigants. One court mandates that a separate pleading be filed as notice.[20] Another two district courts require duplicate copies.[21] All of these rules should be rescinded.

V. Depositions and Discovery

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[15] M.D.Ala. LR24.1; S.D.Fla. LR24.1; S.D.Ill. LR24.1; N.D.Ind. LR24.1; S.D.Ind. LR24.1; D.Minn. LR24.1; D.N.H. LR24.1; D.N.Mar.I LR24.1; N.D.Ohio LR24.1; W.D.Pa. LR24.1; E.D.Tenn. LR24.1; D.V.I. LR24.

[16] D.Ariz. LR2.4; E.D.Cal. LR24-133; S.D.Cal. LR24.1; D.Colo. LR24.1; N.D.Fla. LR24.1; S.D.Fla. LR24.1; D.Kan. LR24.1; D.N.J. LR24.1; W.D.N.Y. LR24; M.D.Pa. LR4.5; D.Utah LR208; E.D.Wash. LR24.1.

[17] *See* 28 U.S.C. §2403; Fed.R.Civ.P. 24(c).

[18] Fed.R.Civ.P. 8(a).

[19] E.D.Cal. LR24-133; D.Colo. LR24.1; D.Kan. LR24.1.

[20] N.D.Okla. LR24.1.

[21] M.D.Pa. LR4.5; E.D.Wash. LR9.1.

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

Fifty-three courts have local rules that relate to requests for production of documents and things.[22] Approximately thirty-two courts have local rules defining the form of requests for production. The Local Rules Project originally recommended the jurisdictions adopt a Model Local Rule describing the form of many discovery documents, including requests for production. Most of these thirty-two courts have adopted at least some part of this Model Local Rule. Four courts have local rules that concern the form of such requests and that repeat existing law. Three courts have local rules that require certain items be included in requests for production; these rules also repeat existing law.

Seven courts have local rules concerning when requests for production can be served; these rules either repeat existing law or are inconsistent with it.

Seventeen courts have local rules that explain how objections can be made to requests for production. Rules in all of these courts repeat existing law. In addition, rules in several of these jurisdictions that address this topic are appropriate.

Two courts have limits on the number of requests for production that can be served. These rules are inconsistent with the discovery process set forth in the Federal

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[22] M.D.Ala. LR26.3; N.D.Ala. LR26.1(a); S.D.Ala. LR26.1; C.D.Cal. LR6.2; E.D.Cal. LR34-250; N.D.Cal. LR34-1; S.D.Cal. LR34.1; D.Del. LR26.1; D.D.C. LR207(d); N.D.Fla. LR26.2; S.D.Fla. LR26.1G; M.D.Ga. LR34; S.D.Ga. LR26.7; D.Haw. LR26.2; N.D.Ind. LR26.1; S.D.Ind. LR26.1; E.D.Ky. LR34.1; W.D.Ky. LR34.1; M.D.La. LR26.2; W.D.La. LR26.2; D.Md. LR104.6; D.Mass. LR34.1; E.D.Mich. LR26.1; D.Minn. LR26.2; W.D.Mo. LR26.2; D.Mont. LR200-5; D.Neb. LR34.1; D.Nev. LR34-1; D.N.H. LR26.1(h); D.N.J. LR34.1; D.N.Mex. LR26.1; E.D.N.Y. LR26.6; N.D.N.Y. LR26.1; S.D.N.Y. LR34.1; E.D.N.Car. LR23.02; N.D.Ohio LR26.1; S.D.Ohio LR26.1; N.D.Okla. LR26.1A; D.Or. LR34.2; D.R.I. LR13(b); D.S.Car. LR26.02; E.D.Tenn. LR34.1; M.D.Tenn. LR9(b); W.D.Tenn. LR26.1; S.D.Tex. LR5(c); D.Utah LR204-3; E.D.Va. LR26(c); E.D.Wash. LR34.1; W.D.Wash. LR34.1; N.D.W.Va. LR3.05; S.D.W.Va. LR3.05; E.D.Wis. LR7.02; D.Wyo. LR34.1.

Rules.

Lastly, two courts impose time limits within which responses to requests for production must be provided. These limits are inconsistent with Rule 34.

DISCUSSION

Rule 34 allows a party to serve on any other party a request for documents and things or for permission to enter land.[23] The Rule defines with some specificity these "documents and things," explains how the requesting party can use or manipulate these documents and things, and explains the purposes for permitting the requesting party to enter property.[24]

The Rule explains the general procedure for making such requests and responding to them. It states that any request for production describe "with reasonable particularity" the items to be produced and set forth the "time, place, and manner of making the inspection."[25] The Rule 26 timing provisions come into play here so that, in the absence of a written stipulation or court order, any request for production cannot be served until the parties have met and conferred pursuant to Rule 26(f).[26]

The party responding to the request must serve a written response "within 30 days after the service of the request."[27] For each item, the response must either state that the party gives permission to inspect or enter or that the party objects to the request.[28] The reason for any objection must be provided, and any portion of a request to which

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[23] Fed.R.Civ.P. 34(a).

[24] *Id.*

[25] *Id.* at (b).

[26] Fed.R.Civ.P. 26(d).

[27] Fed.R.Civ.P. 34(b).

[28] *Id.*

there is no objection must be permitted.[29] The actual documents may be provided for inspection if they are kept in the ordinary course or organized and labeled according to the request for production.[30]

At least thirty-two courts have local rules concerning the form of the requests for production.[31] The original Local Rules Project suggested that there be a Model Local Rule setting forth the form of discovery documents including requests for production of documents and things.[32] Most of these courts have adopted, in some form, this Model Local Rule.

The Model Local Rule was consistent with the Federal Rules of Civil Procedure, which contain general requirements as to form for interrogatories, requests for admission, and requests for the production of documents and things.[33] It governed only the form of discovery documents and sought to provide a more efficient system without affecting the substantive rights of the litigants. If interrogatories or requests and their respective answers, responses, or objections, are on the same document, the parties and the court can examine them more easily. Requiring that the interrogatories and responses be numbered sequentially prevents attorneys from assigning the same numbers to interrogatories or requests in different sets, which can lead to confusion, particularly at

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[29] *Id.*

[30] *Id.*

[31] M.D.Ala. LR26.3; E.D.Cal. LR34-250; N.D.Cal. LR34-1; D.Del. LR26.1; D.D.C. LR207(d); S.D.Ga. LR26.7; D.Haw. LR26.2; N.D.Ind. LR26.1; S.D.Ind. LR26.1; E.D.Ky. LR34.1; W.D.Ky. LR34.1; D.Md. LR104.6; D.Mass. LR34.1; E.D.Mich. LR26.1; D.Minn. LR26.2; W.D.Mo. LR26.2; D.Mont. LR200-5; D.Neb. LR34.1; D.N.H. LR26.1(h); D.N.Mex. LR26.1; N.D.N.Y. LR26.1; S.D.Ohio LR26.1; N.D.Okla. LR26.1A; D.Or. LR34.2; D.R.I. LR13(b); M.D.Tenn. LR9(b); W.D.Tenn. LR26.1; S.D.Tex. LR5(c); D.Utah LR204-3; N.D.W.Va. LR3.05; S.D.W.Va. LR3.05; E.D.Wis. LR7.02.

[32] *See* Report at Suggested Local Rules, p.68.

[33] *See generally* Fed.R.Civ.P. 33(a); 34(b); 36(a).

trial. A sequential numbering system also deters the use of "stock" requests that may be inappropriate in a particular case.

The first sentence of the suggested Rule required that the party propounding the requests leave a space before each request so that the responding party could insert an answer or objection. Seven courts have local rules that provide for this form.[34] The second sentence of the Model Local Rule required that the response or objection to a request for production quote the actual request directly before such response or objection. Thirty-two of the district courts have local rules requiring this form.[35] The last sentence of the Model Local Rule provided that the request for production be numbered sequentially. Eleven courts have this same requirement at present.[36]

Several courts have local rules that concern the form of the request for production and repeat existing law. One court has a local rule requiring that a certificate of service accompany any request for production.[37] This rule repeats Rule 5(d) of the Federal Rules of Civil Procedure, that papers be filed "together with a certificate of service."[38] Three courts have local rules reminding litigants that form requests not be

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[34] D.Haw. LR26.2; M.D.La. LR26.2; W.D.La. LR26.2; E.D.Mich. LR26.1; D.N.H. LR26.1(h); D.N.Mex. LR26.1; S.D.Ohio LR26.1.

[35] M.D.Ala. LR26.3; E.D.Cal. LR34-250; N.D.Cal. LR34-1; D.Del. LR26.1; D.D.C. LR207(d); S.D.Ga. LR26.7; D.Haw. LR26.2; N.D.Ind. LR26.1; S.D.Ind. LR26.1; E.D.Ky. LR34.1; W.D.Ky. LR34.1; D.Md. LR104.6; D.Mass. LR34.1; E.D.Mich. LR26.1; D.Minn. LR26.2; W.D.Mo. LR26.2; D.Mont. LR200-5; D.Neb. LR34.1; D.N.H. LR26.1(h); D.N.Mex. LR26.1; N.D.N.Y. LR26.1; S.D.Ohio LR26.1; N.D.Okla. LR26.1A; D.Or. LR34.2; D.R.I. LR13(b); M.D.Tenn. LR9(b); W.D.Tenn. LR26.1; S.D.Tex. LR5(c); D.Utah LR204-3; N.D.W.Va. LR3.05; S.D.W.Va. LR3.05; E.D.Wis. LR7.02..

[36] M.D.Ala. LR26.3; D.Del. LR26.1; D.Mass. LR34.1; E.D.Mich. LR26.1; D.N.H. LR26.1(h); D.N.Mex. LR26.1; E.D.N.Car. LR23.02; S.D.Ohio LR26.1; N.D.Okla. LR26.1A; D.R.I. LR13(b); D.Utah LR204-3.

[37] D.Neb. LR34.1.

[38] Fed.R.Civ.P. 5(d).

used since they may be irrelevant.[39] Rule 26 already provides for discovery of any matter which is not privileged and which is relevant to the subject matter of the action.[40] These local rules should be rescinded.

Three courts have local rules that set forth what should be included in a request for production. These rules repeat existing law. For example, one court has a local rule requiring that insurance information be provided at the outset.[41] This rule repeats the requirement in Rule 26(a)(1)(D).[42] That local rule also requires that the party provide "a computation of any category of damages claimed by it" and provide the documents "not privileged or protected from disclosure, on which such computation is based.[43] This directive appears to simply repeat the portion of Rule 26(a) that requires disclosure of the computation of damages, including the documents needed for such computation.[44] Two other courts have local rules that simply repeat the applicability of Rule 26(a)(1) and are, therefore, unnecessary.[45]

There are rules in some districts that discuss when requests for production can be served. These rules either repeat existing law or are inconsistent with it and, as such, should be rescinded. For example, three courts have local rules that state that the timing constraints set forth in Rule 26(d),[46] that discovery cannot occur until the parties have

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[39] E.D.N.Y. LR26.6; N.D.Ohio LR26.1; D.Wyo. LR34.1.

[40] Fed.R.Civ.P. 26(b).

[41] N.D.Ala. LR26.1.

[42] Fed.R.Civ.P. 26(a)(1)(D).

[43] N.D.Ala. LR26.1.

[44] Fed.R.Civ.P. 26(a)(1)(C).

[45] S.D.Ala. LR26.1; C.D.Cal. LR6.2.

[46] Fed.R.Civ.P. 26(d) ("Except in categories of proceedings exempted from initial disclosure, ... a party may not seek discovery from any source before the parties have conferred as required by Rule 26(f).")

conferred pursuant to Rule 26(f), are simply not followed.[47] Rule 26(d) not longer permits a court to exempt cases from the discovery moratorium by local rule.[48] Another court has a local rule that forbids discovery until both parties have made an appearance.[49] This time constraint is also not sanctioned by the Federal Rules.[50] There are also rules in three district courts that repeat the time requirements of Rule 26 with respect to requests for production.[51]

There are seventeen district courts with local rules concerning objections that are made to requests for production. [52] All of these rules repeat existing law and should, therefore, be rescinded. Eight courts have local rules requiring that objections contain the reasons.[53] Rule 34 already has such a requirement.[54] Eight courts have local rules that require that the objections be specific.[55] Rule 34 also mandates that the objectionable item or category be specified.[56] Five courts have local rules that require that any claim of

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[47] S.D.Cal. LR34.1; D.Nev. LR34-1; S.D.N.Y. LR34.1.

[48] Fed.R.Civ.P. 26(d). *See also* Fed.R.Civ.P. 26(d) Note to 2000 Amendments: "The amendments remove the prior authority to exempt cases by local rule from the moratorium on discovery before the subdivision (f) conference, but the categories of proceedings exempted from initial disclosure under subdivision (a)(1)(E) are excluded from subdivision (d). The parties may agree to disregard the moratorium where it applies, and the court may so order in a case, but "standing" orders altering the moratorium are not authorized."

[49] N.D.Ala. LR26.1(a).

[50] *See e.g.*, Fed.R.Civ.P. 26(a)(1)(C) and (d).

[51] S.D.Ala. LR26.1; E.D.Wash. LR34.1; D.Wyo. LR34.1.

[52] E.D.Cal. LR34-250; N.D.Cal. LR34-1; D.Del. LR26.1; N.D.Fla. LR26.2; S.D.Fla. LR26.1G; S.D.Ga. LR26.7; D.Haw. LR26.2; D.Md. LR104.6; D.Mass. LR34.1; D.Mont. LR200-5; N.D.Okla. LR26.1A; D.Or. LR34.2, LR34.3; D.R.I. LR13(b); E.D.Va. LR26(c); N.D.W.Va. LR3.05; S.D.W.Va. LR3.05; D.Wyo. LR34.1.

[53] E.D.Cal. LR34-250; N.D.Cal. LR34-1; D.Del. LR26.1; S.D.Ga. LR26.7; D.Haw. LR26.2; D.Md. LR104.6; D.Mont. LR200-5; D.Or. LR34.2.

[54] Fed.R.Civ.P. 34(b) (If objection is made, "the reasons for the objection shall be stated").

[55] N.D.Fla. LR26.2; S.D.Fla. LR26.1G; S.D.Ga. LR26.7; D.Mass. LR34.1; D.R.I. LR13(b); E.D.Va. LR26(c); N.D.W.Va. LR3.05; S.D.W.Va. LR3.05.

[56] Fed.R.Civ.P. 34(b).

privilege be clear.[57] This provision is already set forth in Rule 26.[58]

In addition, four courts have local rules that explain that a failure to object to a request for production is a waiver of any such objection.[59] Two of these courts[60] are in the Ninth Circuit where case law already supports this view: "It is well established that a failure to object to discovery requests within the time required constitutes a waiver of any objection." [61] This position has been voiced in other courts as well.[62] The rules in these two courts, then, repeat this view and seem unnecessary. The other two courts are both in the Fourth Circuit where the case law is not as well established.[63] These rules, then, may provide guidance in those particular districts.[64]

Two courts have local rules that impose a limit on the number of requests for production that can be served of either 10,[65] or 30.[66] There is no local rule option available to courts to limit the requests for production in Rule 34 or in Rule 26 of the Federal Rules of Civil Procedure.[67] In fact, Rule 34(a) intimates that unlimited documents and things can be requested. Subsection (a) indicates that the request for

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[57] D.Haw. LR26.2; D.Mass. LR34.1; D.N.J. LR34.1; N.D.Okla. LR26.1A; D.Wyo. LR34.1.

[58] *See* Fed.R.Civ.P. (b)(5).

[59] D.Mont. LR200-5; D.Or. LR34.3; N.D.W.Va. LR3.05; S.D.W.Va. LR3.05.

[60] D.Mont. LR200-5; D.Or. LR34.3.

[61] *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1473, (9th Cir. 1992), *cert. dismissed sub nom. China Everbright Trading Co. v. Timber Falling Consultants, Inc.*, 506 U.S. 948, (1992).

[62] *Marx v. Kelly, Hart & Hallman*, 929 F.2d 8, 12 (1st Cir. 1991); *Smith v. Conway Org., Inc.*, 154 F.R.D. 73, 76 (S.D.N.Y. 1994); *Dunlap v. Midcoast-Little Rock, Inc.*, 66 F.R.D. 29, 30 (E.D.Ark. 1995); *Peat, Marwick, Mitchell & Co. v. West*, 748 F.2d 540, 541-41 (10th Cir. 1984) *cert. dismissed*, 469 U.S. 1199 (1985); *Perry v. Golub*, 74 F.R.D. 360, 363 (N.D.Ala. 1976).

[63] *See Mason C. Day Excavating v. Lumbermans Mutual Casualty Co.*, 143 F.R.D. 601 (M.D.N.Car. 1992).

[64] N.D.W.Va. LR3.05; S.D.W.Va. LR3.05..

[65] M.D.Ga. LR34.

[66] D.Md. LR104.1.

production may be made:

> to produce and permit the party making the request ... to inspect and copy, *any* designated documents ... or ... *any* tangible things which constitute or contain materials within the scope of Rule 26(b)....[68]

Moreover, the Advisory Committee amended Rule 34 on several occasions, most recently in 1993, and did not add a numerical limit on the number of requests that could be made. It should be noted that the Advisory Committee has considered limiting the use of discovery devices in the past and has recently changed the Federal Rules to incorporate national limits on the number of depositions and interrogatories and on the length of depositions.[69] As the Committee Note to the Rule 26 2000 Amendments explain:

> These amendments restore national uniformity to disclosure practice. Uniformity is also restored to other aspects of discovery by deleting most of the provisions authorizing local rules that vary the number of permitted discovery events or the length of depositions. Local rule options are also deleted from Rules 26(d) and (f).[70]

These disclosure rules require a party to provide, in the absence of any discovery request, "a copy of ... all documents ... that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses...."[71] Given that the current Federal Rules favor national uniformity and that the Federal Rules anticipate a free exchange of discoverable documents without relying on discovery requests, a strong argument can be made that any local rule intending to limit the number of requests is inconsistent with these Federal Rules. These local rules, then, should be rescinded.

There are two courts that impose time limits within which responses to

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[67] *See* Fed.R.Civ.P. 34, 26.

[68] Fed.R.Civ.P. 34(a) [emphasis added].

[69] *See* Fed.R.Civ.P. 30, 31, 33.

[70] Fed.R.Civ.P. 26 Note to 2000 Amendments.

requests for production must be provided.[72] Both of these rules are inconsistent with the clear wording of Rule 34, permitting a party to respond "within 30 days after the service of the request."[73] To the extent these local rules refer to initial disclosures made pursuant to Rule 26, these are also inconsistent with the required time limits in that Rule: "These disclosures must be made at or within 14 days after the Rule 26(f) conference...."[74] These local rules should be rescinded.

Rule 35. Physical and Mental Examinations of Persons

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[71] Fed.R.Civ.P. 26(a)(1)(B).

[72] D.Nev. LR34-1 (defendant need not respond sooner than forty-five days after service); D.S.Car. LR26.02, 26.03, 26.04 (plaintiff must file response to "standard directives to produce" at time of filing the first pleading).

[73] Fed.R.Civ.P. 34(b).

[74] Fed.R.Civ.P. 26(a)(1).

Only five jurisdictions have local rules concerning the physical and mental examination of a person.[1] Two of the courts have local rules that are appropriate in discussing the obligation of the parties to agree on the details of such examinations.[2] Another court's rule provides for an impartial medical examination; this directive is appropriate as a local rule.[3] One of the jurisdictions has a local rule that sets forth procedures to be used in ordering the physical and mental examination of person.[4] Because this local rule is inconsistent with Rule 35 of the Federal Rules of Civil Procedure, it should be rescinded. The other court has a local rule that repeats Rule 35 and should, therefore, be rescinded.[5]

DISCUSSION

Rule 35 provides that, when the mental or physical condition of a party or someone under the party's legal control is "in controversy", the court may order an examination of that person.[6] That order is made "only on motion for good cause shown" with appropriate notice provided to the person being examined.[7] The notice must specify "the time, place, manner, conditions, and scope of the examination and the person" making the examination.[8]

Two courts have rules that place the burden on the parties to attempt to agree

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[1] D.Kan. LR35.1; N.D.Miss. LR35.1; S.D.Miss. LR35.1; W.D.Pa. LR35.1; W.D.Wash. LR35.

[2] N.D.Miss. LR35.1; S.D.Miss. LR35.1.

[3] W.D.Pa. LR35.1.

[4] D.Kan. LR35.1.

[5] W.D.Wash. LR35.

[6] Fed.R.Civ.P. 35(a).

[7] *Id.*

[8] *Id.*

to the time, place, manner, and scope of the examination.[9] If the parties cannot agree on these details, the motion must explain their efforts to do so.[10] These rules are appropriate supplements to Rule 35 in imposing an obligation on the parties to try to reach an accommodation. This obligation is similar to those imposed at other times in the discovery process.[11]

Another court has a local rule that sets forth the procedure used to appoint an impartial expert witness and the circumstances under which that expert may testify.[12] This particular rule recognizes the court's inherent authority to appoint such an expert and seems to be an appropriate supplement to Rule 706 of the Federal Rules of Evidence.[13]

One court has a local rule entitled: "Trial Preparation After Close of Discovery" that simply acknowledges that "[p]ursuant to Fed.R.Civ.P. 35 the physical and mental examination of a party may be ordered at any time prior to trial."[14] This rule seems poorly drafted. It is true that the Federal Rule does not forbid an order for an examination after the close of discovery so the rule, read only in conjunction with its title, seems accurate. The rule standing alone, however, is inconsistent with the Federal Rules since Rule 26 indicates that, in at least most cases, there can be no discovery until after

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[9] N.D.Miss. LR35.1; S.D.Miss. LR35.1.

[10] *Id.*

[11] *See e.g.*, Fed.R.Civ.P. 26(f) (discovery conference); 29 (stipulations regarding discovery); 30(b) (stipulations regarding means of taking depositions); 33(a) (stipulations regarding number of interrogatories); 34(b) (agreement concerning inspection of documents and things and entry upon land); 36(a) (stipulations regarding timing of service of requests for admission).

[12] W.D.Pa. LR35.1.

[13] *See* Fed.R.Evid. 706; *Gallagher v. Latrobe Brewing v. Dill Construction Co.*, 31 F.R.D. 36 (W.D.Pa. 1962).

[14] D.Kan. LR35.1.

the Rule 26(f) discovery conference is held.[15] The rule is inaccurate, then, in stating that an examination can be ordered at any time.

Another court has a local rule that simply repeats Federal Rule 35.[16] This rule is unnecessary and should be rescinded.

Rule 36. Requests for Admission

[15] Fed.R.Civ.P. 26(d).

[16] W.D.Wash. LR35.

Sixty-two courts have local rules dealing with requests for admission.[1] Seventeen courts have local rules concerning when, in the litigation process, requests for admission may be served;[2] all of these rules are either inconsistent with or repeat the Federal Rules on discovery.

Forty-three courts have local rules that delineate the form of requests for admission.[3] The Local Rules Project originally suggested the courts consider a Model Local Rule concerning the form of discovery documents, including requests for admission.[4] Most of the existing local rules adopt at least some of the Model Local Rule. In addition, five courts have local rules concerning the form of requests for admission that either repeat existing law or are inconsistent with it.

Fourteen jurisdictions have local rules that define the content of the responses

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[1] M.D.Ala. LR26.2; N.D.Ala. LR26.1(c); S.D.Ala. LR26.1(c); D.Alaska LR8(D); D.Ariz. LR2.5(a); E.D.Ark. LR33.1; W.D.Ark. LR33.1; C.D.Cal. LR8.2; E.D.Cal. LR36-250; N.D.Cal. LR36-1; S.D.Cal. LR36.1; D.Del. LR26.1; D.D.C. LR207(d); N.D.Fla. LR26.2; M.D.Ga. LR36; S.D.Ga. LR26.7; D.Haw. LR26.1(c); S.D.Ind. LR26.1; E.D.Ky. LR36.1; W.D.Ky. LR36.1; E.D.La. LR36.1; M.D.La. LR36.1; W.D.La. LR36.1; D.Md. LR104; D.Mass. LR36.1; E.D.Mich. LR26.1; D.Minn. LR26.2; N.D.Miss. LR26.1; S.D.Miss. LR26.1; W.D.Mo. LR26.2; D.Neb. LR36.1; D.Nev. LR36-1; D.N.H. LR26.1; D.N.J. LR36.1; D.N.Mex. LR26.1; E.D.N.Y. LR26.6; N.D.N.Y. LR26.1; S.D.N.Y. LR36.1; W.D.N.Y. LR26; E.D.N.Car. LR23.02; M.D.N.Car. LR26.1; D.N.Mar.I LR26.9; N.D.Ohio LR36.1; S.D.Ohio LR36.1; N.D.Okla. LR26.1; W.D.Okla. LR36.1; D.Or. LR36.2; M.D.Pa. LR36.1; D.R.I. LR13(b); E.D.Tenn. LR26.1; M.D.Tenn. LR9(b); W.D.Tenn. LR26.1; S.D.Tex. LR5.C; W.D.Tex. LR36; D.Utah LR204-3; E.D.Va. LR26(c); E.D.Wash. LR36.1; W.D.Wash. LR36; N.D.W.Va. LR3.01; S.D.W.Va. LR3.01; E.D.Wis. LR7.02; D.Wyo. LR36.1.

[2] N.D.Ala. LR26.1(c); M.D.Ala. LR26.2; S.D.Ala. LR26.1(c); E.D.Ark. LR33.1; W.D.Ark. LR33.1; C.D.Cal. LR6.7; S.D.Cal. LR36.1; D.Haw. LR26.1(c); D.Minn. LR26.1; W.D.Mo. LR26.1; D.Nev. LR36-1; D.N.H. LR26.1; D.N.Mex. LR26.1; S.D.N.Y. LR36.1; W.D.N.Y. LR26; E.D.Tenn. LR26.1; D.Wyo. LR36.1.

3 D.Alaska LR8(D); D.Ariz. LR2.5(a); E.D.Ark. LR33.1; W.D.Ark. LR33.1; C.D.Cal. LR8.2; E.D.Cal. LR36-250; N.D.Cal. LR36-1; S.D.Cal. LR36.1; D.Del. LR26.1; D.D.C. LR207(d); S.D.Ga. LR26.7; S.D.Ind. LR26.1; E.D.Ky. LR36.1; W.D.Ky. LR36.1; E.D.La. LR36.1; M.D.La. LR36.1; W.D.La. LR36.1; D.Md. LR104; D.Mass. LR36.1; E.D.Mich. LR26.1; D.Minn. LR26.2; W.D.Mo. LR26.2; D.Neb. LR36.1; D.N.H. LR26.1; D.N.J. LR36.1; D.N.Mex. LR26.1; E.D.N.Y. LR26.6; N.D.N.Y. LR26.1; E.D.N.Car. LR23.02; M.D.N.Car. LR26.1; D.N.Mar.I LR26.9; N.D.Ohio LR36.1; N.D.Okla. LR26.1; M.D.Pa. LR36.1; D.R.I. LR13(b); M.D.Tenn. LR9(b); W.D.Tenn. LR26.1; S.D.Tex. LR5.C; W.D.Tex. LR36; D.Utah LR204-3; N.D.W.Va. LR3.01; S.D.W.Va. LR3.01E.D.Wis. LR7.02.

to requests for admission; all of these rules are either inconsistent with existing law or repeat it.[5]

Lastly, there are local rules in twelve courts that limit the number of requests for admission that can be served.[6] Although such local rulemaking may be consistent with existing law, the Local Rules Project recommends that the Advisory Committee on Civil Rules consider forbidding such limits since they thwart the intent of the discovery process, generally, and they prevent national uniformity in this aspect of discovery.

DISCUSSION

Rule 36 permits a party to serve on another party "a written request for the admission ... of the truth of any matters within the scope of Rule 26(b)(1).[7] The responding party has thirty days within which to answer or object to each matter in the request for admission.[8] Upon receiving the response, the party requesting the admissions may move "to determine the sufficiency of the answers or objections."[9] Any admission is applicable only for the pending action and is considered "conclusively established unless the court on motion permits withdrawal or amendment of the admission."[10] There is no limit in the rule on the number of requests that can be served.

Seventeen courts have local rules concerning when, in the litigation process,

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4 Report at Suggested Local Rules p.68.

5 E.D.Ark. LR33.1; W.D.Ark. LR33.1; E.D.Cal. LR36-250; N.D.Cal. LR36-1; S.D.Ga. LR26.7; D.Mass. LR36.1; D.N.J. LR36.1; D.Or. LR36.2; M.D.Pa. LR36.2; D.R.I. LR13(b); E.D.Va. LR26(c); E.D.Wash. LR36.1.

6 S.D.Cal. LR36.1; N.D.Fla. LR26.2; M.D.Ga. LR36; D.Md. LR104; N.D.Ohio LR36.1; S.D.Ohio LR36.1; W.D.Okla. LR36.1; M.D.Pa. LR36.1; W.D.Tex. LR36; E.D.Wash. LR36.1; N.D.W.Va. LR3.01; S.D.W.Va. LR3.01.

7 Fed.R.Civ.P. 36(a).

8 *Id.*

9 *Id.*

requests for admission may be served.[11] All of these rules are either inconsistent with or repeat the Federal Rules on discovery. Seven courts have local rules that are inconsistent with existing law. Four courts have local rules state that a party is not required to wait until the Rule 26(f) conference to serve requests for admission.[12] These local rules are inconsistent with Rule 26(d) which states that, unless "exempted from initial disclosure ... 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 Rules 26(f)."[13] Waiting until this conference before serving discovery is sensible given that one of the purposes of this conference is to develop a proposed discovery plan.[14] Allowing the parties to begin the discovery process in advance of the conference defeats at least in part the usefulness of the conference. The Committee Note to the 2000 Amendments to Rule 26 recognize that local rulemaking authority in this area is being removed: "The amendments remove the prior authority to exempt cases by local rule from the moratorium on discovery before the subdivision (f) conference...."[15]

Another court has a rule stating that discovery cannot occur until the self-executing discovery is complete.[16] This rule is also inconsistent with the current time sequences set forth in Rule 26: "These disclosures [initial, self-executing disclosures]

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[10] *Id.* at (b).

[11] N.D.Ala. LR26.1(c); M.D.Ala. LR26.2; S.D.Ala. LR26.1(c); E.D.Ark. LR33.1; W.D.Ark. LR33.1; C.D.Cal. LR6.7; S.D.Cal. LR36.1; D.Haw. LR26.1(c); D.Minn. LR26.1; W.D.Mo. LR26.1; D.Nev. LR36-1; D.N.H. LR26.1; D.N.Mex. LR26.1; S.D.N.Y. LR36.1; W.D.N.Y. LR26; E.D.Tenn. LR26.1; D.Wyo. LR36.1.

[12] S.D.Cal. LR36.1; D.Nev. LR36-1; S.D.N.Y. LR36.1; W.D.N.Y. LR26.

[13] Fed.R.Civ.P. 26(d).

[14] *See* Fed.R.Civ.P. 26(f).

[15] Fed.R.Civ.P. 26 Note to 2000 Amendments.

[16] D.Wyo. LR36.1.

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...."[17] Another rule requires that no request for admission be served until after a scheduling order is entered pursuant to Rule 16(b).[18] This rule is also contrary to the timing sequence of discovery explained in the Federal Rules. Rule 16(b) anticipates that the court will enter a scheduling order "after receiving the report from the parties under Rule 26(f)...."[19] That scheduling order will, among other things, set out time limits for completing discovery, not starting discovery, and define the extent of discovery that will be permitted.[20] The Rule 26(f) conference is the crucial event in determining the start of discovery, not the subsequent Rule 16(b) scheduling order.

Two other courts have local rules that limit discovery based on times that run from the service of pleadings rather than from the Rule 26(f) conference.[21] One of the rules indicates that there can be no discovery of the defendant until twenty days after service of the complaint on that defendant.[22] Again, this rule is inconsistent with the Rule 26 timing of discovery.[23] The other rule states that the defendant need not answer a request for admission sooner than forty-five days after service of the summons.[24] In 1970, Rule 36 provided this identical time constraint.[25] In 1993, however, the language

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[17] Fed.R.Civ.P. 26(a)(1).

[18] M.D.Ala. LR26.2.

[19] Fed.R.Civ.P. 16(b).

[20] *Id.*

[21] C.D.Cal. LR6.7; D.Nev. LR36-1.

[22] C.D.Cal. LR6.7.

[23] *See* Fed.R.Civ.P. 26.

[24] D.Nev. LR36-1.

[25] *See* Fed.R.Civ.P. 36(a) (1970).

was deleted "to reflect the change made by Rule 26(d), preventing a party from seeking formal discovery until after the meeting of the parties required by Rule 26(f)."[26] This local rule is also inconsistent with the new Rule 26(f).

Ten courts have local rules that address the timing issue and that repeat portions of various Federal Rules.[27] Eight courts have local rules that repeat Rule 26(d) by stating that requests for admission must not be served until after the Rule 26(f) discovery conference,[28] unless either ordered by the court[29] or unless agreed upon by the parties in writing.[30] Two other courts have local rules that merely highlight that a party must pay attention to the time limits in Rule 36.[31] All of these rules are unnecessary and should be rescinded.

Forty-three courts have local rules that discuss the required form of requests for admission.[32] Rules in all of these jurisdictions but one are appropriate as local rules. The first Local Rules Project Report suggested that those courts considering regulation in

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[26] Fed.R.Civ.P. 26 Note to 1993 Amendments.

[27] N.D.Ala. LR26.1(c); S.D.Ala. LR26.1(c); E.D.Ark. LR33.1; W.D.Ark. LR33.1; D.Haw. LR26.1(c); D.Minn. LR26.1; W.D.Mo. LR26.1; D.N.H. LR26.1; D.N.Mex. LR26.1; E.D.Tenn. LR26.1

[28] N.D.Ala. LR26.1(c); S.D.Ala. LR26.1(c); D.Haw. LR26.1(c); D.Minn. LR26.1; W.D.Mo. LR26.1; D.N.H. LR26.1; D.N.Mex. LR26.1; E.D.Tenn. LR26.1.

[29] N.D.Ala. LR26.1(c); S.D.Ala. LR26.1(c); D.Haw. LR26.1(c); D.Minn. LR26.1.

[30] N.D.Ala. LR26.1(c); S.D.Ala. LR26.1(c).

[31] E.D.Ark. LR33.1; W.D.Ark. LR33.1.

[32] D.Alaska LR8(D); D.Ariz. LR2.5(a); E.D.Ark. LR33.1; W.D.Ark. LR33.1; C.D.Cal. LR8.2; E.D.Cal. LR36-250; N.D.Cal. LR36-1; S.D.Cal. LR36.1; D.Del. LR26.1; D.D.C. LR207(d); S.D.Ga. LR26.7; S.D.Ind. LR26.1; E.D.Ky. LR36.1; W.D.Ky. LR36.1; E.D.La. LR36.1; M.D.La. LR36.1; W.D.La. LR36.1; D.Md. LR104; D.Mass. LR36.1; E.D.Mich. LR26.1; D.Minn. LR26.2; W.D.Mo. LR26.2; D.Neb. LR36.1; D.N.H. LR26.1; D.N.J. LR36.1; D.N.Mex. LR26.1; E.D.N.Y. LR26.6; N.D.N.Y. LR26.1; E.D.N.Car. LR23.02; M.D.N.Car. LR26.1; D.N.Mar.I LR26.9; N.D.Ohio LR36.1; N.D.Okla. LR26.1; M.D.Pa. LR36.1; D.R.I. LR13(b); M.D.Tenn. LR9(b); W.D.Tenn. LR26.1; S.D.Tex. LR5.C; W.D.Tex. LR36; D.Utah LR204-3; N.D.W.Va. LR3.01; S.D.W.Va. LR3.01E.D.Wis. LR7.02.

this area adopt the same local rule so that there would be uniformity among the courts.[33] The Model Local Rule regulated the form of many discovery documents, not just requests for admission. Many of the courts have already adopted, at least in part, this Model Local Rule. For example, the Model Local Rule required that the party serving requests for admission leave a space below each request where the party could answer or object and required the answering party to either respond in that space or repeat the request in full just before responding. Thirty-seven courts require that an answer to a request for admission quote the entire admission just above the answer.[34] Another six courts have local rules requiring that, when serving requests for admission, the party leave a space where the responding party can answer.[35] The last sentence of the Model Local Rule requires that the requests be numbered sequentially. Thirteen courts already have this requirement.[36]

These rules are consistent with the Federal Rules of Civil Procedure, which contain general requirements as to form for interrogatories, requests for admission, and requests for the production of documents and things.[37] They govern the form of discovery documents and seek to provide a more efficient system without affecting the

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[33] *See* Report at Suggested Local Rules p.68.

[34] D.Alaska LR8(D); D.Ariz. LR2.5(a); E.D.Ark. LR33.1; W.D.Ark. LR33.1; E.D.Cal. LR36-250; N.D.Cal. LR36-1; S.D.Cal. LR36.1; D.Del. LR26.1; D.D.C. LR207(d); S.D.Ga. LR26.7; S.D.Ind. LR26.1; E.D.Ky. LR36.1; W.D.Ky. LR36.1; E.D.La. LR36.1; M.D.La. LR36.1; W.D.La. LR36.1; D.Mass. LR36.1; E.D.Mich. LR26.1; D.Minn. LR26.2; W.D.Mo. LR26.2; D.Neb. LR36.1; D.N.H. LR26.1; D.N.J. LR36.1; D.N.Mex. LR26.1; N.D.N.Y. LR26.1; D.N.Mar.I LR26.9; N.D.Ohio LR36.1; N.D.Okla. LR26.1; M.D.Pa. LR36.1; D.R.I. LR13(b); M.D.Tenn. LR9(b); W.D.Tenn. LR26.1; S.D.Tex. LR5.C; D.Utah LR204-3; N.D.W.Va. LR3.01; S.D.W.Va. LR3.01E.D.Wis. LR7.02.

[35] D.Ariz. LR2.5(a); E.D.Mich. LR26.1; D.N.H. LR26.1; D.N.J. LR36.1; D.N.Mex. LR26.1; N.D.Ohio LR36.1.

[36] E.D.Ark. LR33.1; W.D.Ark. LR33.1; C.D.Cal. LR8.2; N.D.Cal. LR36-1; S.D.Ind. LR26.1; E.D.Mich. LR26.1; D.N.H. LR26.1; D.N.Mex. LR26.1; N.D.N.Y. LR26.1; E.D.N.Car. LR23.02; M.D.N.Car. LR26.1; N.D.Okla. LR26.1; D.Utah LR204-3.

substantive rights of the litigants. If interrogatories or requests and their respective answers, responses, or objections, are on the same document, the parties and the court can examine them more easily. Requiring that the interrogatories and responses be numbered sequentially prevents attorneys from assigning the same numbers to interrogatories or requests in different sets, which can lead to confusion, particularly at trial. A sequential numbering system also deters the use of "stock" requests that may be inappropriate in a particular case.

There are also rules that discuss the form of the requests that either repeat existing law or are inconsistent with it. Two courts have local rules that repeat portions of two Federal Rules by requiring that requests for admission be accompanied by a certificate of service,[38] or by requiring that form requests be relevant.[39] Another three courts have local rules that indicate that requests for admission cannot be combined with any other discovery.[40] These directives are inconsistent with Rule 26(d) that permits discovery in any order and while other discovery is taking place.[41] All of these directives should be rescinded.

Fourteen courts have local rules concerning the content of any responses to requests for admission.[42] Rules in eleven courts require that any objections be specific

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[37] *See generally* Fed.R.Civ.P. 33(a); 34(b); 36(a).

[38] D.Neb. LR36.1; *see* Fed.R.Civ.P. 5(d).

[39] E.D.N.Y. LR26.2; see Fed.R.Civ.P. 26(b)(1).

[40] E.D.Ark. LR33.1; W.D.Ark. LR33.1; E.D.Wash. LR36.1.

[41] Fed.R.Civ.P. 26(d).

[42] E.D.Ark. LR33.1; W.D.Ark. LR33.1; E.D.Cal. LR36-250; N.D.Cal. LR36-1; S.D.Ga. LR26.7; D.Mass. LR36.1; D.N.J. LR36.1; D.Or. LR36.2; M.D.Pa. LR36.2; D.R.I. LR13(b); E.D.Va. LR26(c); E.D.Wash. LR36.1.

and contain the reasons.[43] These rules repeat Rule 36(a) that reads, in relevant part:

> 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.[44]

Another court requires in its local rule that, when a privilege is claimed, the nature of that privilege be identified.[45] This rule repeats, generally, both Rules 26(b) and 36 of the Federal Rules of Civil Procedure.[46] These rules are unnecessary.

Rules in three courts require that objections to requests for admission be made earlier than responses to the requests.[47] These rules are inconsistent with Rule 36 that sets the same time limit for the parties to respond either by admitting, denying, or objecting.[48] These rules should be rescinded.

Twelve jurisdictions have local rules that limit the number of requests for admission a party can serve.[49] These limits vary from a low of ten[50] to a high of fifty[51] with the largest number of jurisdictions, five, imposing a limit of thirty.[52] Three of these

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[43] E.D.Ark. LR33.1; W.D.Ark. LR33.1; E.D.Cal. LR36-250; N.D.Cal. LR36-1; S.D.Ga. LR26.7; D.Mass. LR36.1; D.Or. LR36.2; M.D.Pa. LR36.2; D.R.I. LR13(b); E.D.Va. LR26(c).

[44] Fed.R.Civ.P. 36(a).

[45] D.N.J. LR36.1.

[46] Fed.R.Civ.P. 26(b), 36.

[47] E.D.Va. LR26(c).

[48] Fed.R.Civ.P. 36(a).

[49] S.D.Cal. LR36.1; N.D.Fla. LR26.2; M.D.Ga. LR36; D.Md. LR104; N.D.Ohio LR36.1; S.D.Ohio LR36.1; W.D.Okla. LR36.1; M.D.Pa. LR36.1; W.D.Tex. LR36; E.D.Wash. LR36.1; N.D.W.Va. LR3.01; S.D.W.Va. LR3.01.

[50] M.D.Ga. LR36.

[51] N.D.Fla. LR26.2.

[52] S.D.Cal. LR36.1; W.D.Okla. LR36.1; M.D.Pa. LR36.1; N.D.W.Va. LR3.01; S.D.W.Va. LR3.01; *see also* D.Md. LR104 (limit of thirty); W.D.Tex. LR36 (limit of thirty); S.D.Ohio LR36.1 (limit of thirty); E.D.Wash. LR36.1 (limit of 15).

courts also allow a different number of requests for good cause.[53] One court limits the number of requests based on the kind of case.[54] Because these local rules at least arguably conflict with the spirit and intent of the Federal Rules of Civil Procedure, the Local Rules Project recommends they be rescinded. The Local Rules Project suggests that the Advisory Committee on Civil Rules consider an amendment to Rule 36 of the Federal Rules of Civil Procedure forbidding a limitation on the number of requests for admission that may be made.

The purpose of Rule 36, as expressed by the Advisory Committee, is to simplify litigation by narrowing the issues, when possible, and facilitating proof with respect to issues that cannot be eliminated.[55] The 1970 Amendments furthered these objectives by resolving disputes about the scope of the requests in favor of a broader purpose. The amended rule specifically allows requests to encompass opinions of fact and the application of law to fact, in addition to merely "matters of fact."[56] These amendments also provide that any admissions have a conclusively binding effect for the purposes of the particular action.[57]

In the recent amendments to the Federal Rules on discovery, national limits on the numbers of depositions and interrogatories were established as well as a new national limit on the length of depositions.[58] The earlier version of Rule 26(b)(2) allowed the courts to establish different presumptive limits on the number of depositions and

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[53] S.D.Cal. LR36.1; N.D.Fla. LR26.2; M.D.Ga. LR36.

[54] N.D.Ohio LR36.1.

[55] Fed.R.Civ.P. 36 Note to 1970 Amendments.

[56] *Id.*

[57] *Id.*

[58] *See* Fed.R.Civ.P. 26 Note to 2000 Amendments.

interrogatories by local rule.[59] This rulemaking authority was taken away by the 2000 amendments:

> There is no reason to believe that unique circumstances justify varying these nationally applicable presumptive limits in certain districts. The limits can be modified by court order or agreement in an individual action, but "standing" orders imposing different presumptive limits are not authorized.[60]

With respect, specifically, to requests for admission, the Note continues:

> Because there is no national rule limiting the number of Rule 36 requests for admissions, the rule continues to authorize local rules that impose numerical limits on them.[61]

Although this statement reflects a clear willingness to allow local rules limiting the number of requests for admission, the Local Rules Project recommends that the Advisory Committee on Civil Rules specifically forbid limits on the number of requests for admission by local rule since such regulation is contrary to the intent of the Federal Rules on discovery.

Interrogatories and depositions are quite different from requests for admission and the reasons for limiting requests for admission are not as compelling as they may be for these other forms of discovery. In the first instance, requests for admission are not really discovery devices at all. They are different from discovery in that they presuppose known facts and seek only a concession from the responding party as to the truth of those facts.[62] As one commentator explains:

> Requests are not useful tools for discovering the unknown. They are best used to establish the undisputed, relieving the parties of the need

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[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] Wright & Miller, *Federal Practice and Procedure*, Civil §2253.

> to prove such matters and shortening the trial.[63]

Interrogatories and depositions, on the other hand, can seek information about material that is not yet known by inquiring of a party or, sometimes, of other persons. The purpose of discovery, as stated by the Advisory Committee in 1946 is:

> to allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case....[64]

Although there is potential for misuse of requests for admission, abuses cannot be determined by the number of requests submitted, but from the content of those requests.[65] Whether limitations on the number of requests for admission exist or not, the court retains its ability to sanction litigants if necessary.[66] The Committee Note recognizes the power of the district court to curb such abuses:

> Requests for admission involving the application of law to fact may create disputes between the parties which are best resolved in the presence of the judge after much or all of the other discovery has been completed. Power is therefore expressly conferred upon the court to defer decision until a pretrial conference is held or until a designated time prior to trial. On the other hand, the court should not automatically defer decision; in many instances, the importance of the admission lies in enabling the requesting party to avoid the burdensome accumulation of proof prior to the pretrial conference....
>
> On the other hand, requests to admit may be so voluminous and so framed that the answering party finds the task of identifying what is in dispute and what is not unduly burdensome. If so, the responding party may obtain a protective order under Rule 26(c).[67]

Because there are significant advantages to narrowing the issues for trial

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[63] Epstein, *Rule 36: In Praise of Requests to Admit*, 7 Litigation 30 (Spring, 1981).

[64] Fed.R.Civ.P. 26 Note to 1946 Amendments.

[65] *Baldwin v. Hartford Accident and Indemnity Co.*, 15 F.R.D. 84 (D.Neb. 1953).

[66] *Misco Inc. v. U.S. Steel Corp.*, 784 F.2d 198 (6th Cir. 1986), *Baldwin, supra.*

[67] Fed.R.Civ.P. 36 Note to 1970 Amendments.

through the use of requests for admission and because there are mechanisms to curb potential abuses, short of limiting the actual number of requests in all cases, the Local Rules Project suggests that the Advisory Committee consider forbidding local rule limits on the number of requests.

VI. Trials

Rule 38. Jury Trial of Right

Thirty-two jurisdictions have local rules governing civil jury demand.[1] The Local Rules Project originally recommended that there be a Model Local Rule requiring that any party who makes a jury demand on a pleading, as allowed by Rule 38(b), place that demand immediately below the title of the pleading in addition to, or instead of, any other indorsement on the pleading. Most of the courts have adopted some variation of this rule already. In addition five district courts have local rules concerning jury demand that are duplicative of Rule 38 of the Federal Rules of Civil Procedure and should be rescinded.

DISCUSSION

Rule 38(b) sets forth the procedure for making a demand for a jury trial:

> Any party ma 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

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[1] M.D.Ala. LR38.1; C.D.Cal. LR3.4.10; E.D.Cal. LR38-201; S.D.Cal. LR38.1; D.Del. LR38.1; D.Idaho LR38.1; C.D.Ill. LR38.1; S.D.Ill. LR38.1; S.D.Ind. LR38.1; E.D.La. LR38.1; M.D.La. LR38.1; W.D.La. LR38.1; D.Me. LR38; D.Minn. LR38.1; N.D.Miss. LR38.1; S.D.Miss. LR38.1; E.D.Mo. LR38-2.04; W.D.Mo. LR38.1; D.Neb. LR38.1; D.Nev. LR38-1; D.N.H. LR38.1; D.N.J. LR38.1; N.D.N.Y. LR38.1; W.D.N.Y. LR38; N.D.Ohio LR38.1; S.D.Ohio LR38.1; E.D.Okla. LR38.1A; N.D.Okla. LR38.1A; D.Or. LR38.1; E.D.Tex. LRCV-38(a); D.V.I. LR38.1; E.D.Va. LR38; E.D.Wash. LR38.1; W.D.Wash. LR38(b).

indorsed upon a pleading of the party.[2]

Rule 38 is silent about the physical placement of a jury demand on a pleading. Courts have, however, determined what is a sufficient demand under this subsection. For example, the Court of Appeals for the Second Circuit has held that an indorsement on the front of the last page of the defendants' answer is sufficient under Rule 38(b).[3] The court explained that, although the better practice may be to place the demand on the front of the pleading, the placement on the last page was consistent with Rule 38:

> The Rule does not state that the demand, if made on the pleading, must be made on the back thereof as the District Court found. While the etymology of the word "indorse" suggests a writing on the back, the modern meaning of the word is broad enough to encompass a writing on the face of the document as well. [Citation omitted.] Indeed, the recommended practice is to write the demand on the first page of the pleading. [Citations omitted.] While defendants' demand, made on the last page of their answer, was not in the preferred style, and its obscure placement perhaps caused the clerk of the court to overlook it, we nonetheless conclude that it complied with Rule 38(b).[4]

In fact, it has been recognized that, even though "endorsement of a demand for jury trial on the pleading would seem to be better practice," a demand in the body of the answer constitutes a proper demand.[5]

In determining the exercise of a waiver of the right to a jury trial, "[t]he service of a jury demand on the other parties in a case is central to the operation of Rule

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[2] Fed.R.Civ.P. 38(b).

[3] *Gargiulo v. Delsole*, 769 F.2d 7 (2d Cir. 1985).

[4] *Id.* at 78-79. *See also Rosen v. Dick*, 639 F.2d 82 (2d Cir. 1980), *reh'g denied* Feb. 10, 1981; *Rutledge v. Electric Hose and Rubber Company*, 511 F.2d 668, 674 (9th Cir. 1975) *corrected* March 3, 1975.

[5] *Allstate Insurance Company v. Cross*, 2 F.R.D. 120 (E.D.Pa. 1941). *Cf. Whitman Electric Inc. v. Local 363, International Brotherhood of Electrical Workers, AFL-CIO*, 398 F.Supp. 1218 (S.D.N.Y. 1974) (*dictum*).

38.[6] A notation, therefore, on the United States District Court civil cover sheet that a jury trial was demanded was insufficient in spite of the fact that the clerk's office was aware of the purported demand, because no demand was served on the defendants:

> The mere notation on the Cover Sheet and in the docket cannot substitute for service of notice upon the Defendants as required by the rule.[7]

Rule 38 is silent concerning the placement of the demand. There is case law, however, discussing whether a party who fails to comply with a technical requirement as to placement of a demand in a local rule waives the right to a jury trial, even though that party made a demand in a different form.[8] The Court of Appeals for the Eighth Circuit, for example, overturned a district court decision that the plaintiff had waived his right to a jury trial by failing to comply with a local rule of the Eastern District of Arkansas, since the plaintiff had complied with Rule 38(b) and since the local rule at issue was only suggestive:

> The quoted language recites no legal requirement applicable to jury trial demands and is suggestive only. The failure to comply with such a "suggestion" does not constitute waiver of a right to jury trial when one has been demanded in accordance with Federal Rule of Civil Procedure 38(b).[9]

In another case involving a local rule, *Pradier v. Elespuru*, the Court of Appeals for the Ninth Circuit conceded that the local rule of the District of Oregon was more than just

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[6] *Rosen v. Dick*, *supra*, at 89.

[7] *Biesencamp v. Atlantic Richfield Company*, 70 F.R.D. 365, 366 (E.D.Pa. 1976). *See also Cochran v. Birkel,* 651 F2d 1219 (6th Cir. 1981) *cert denied* 454 U.S. 1152, 102 S.Ct. 1020, 71 L.Ed.2 307 (1982); *Omawale v. WBZ*, 610 F.2d 20 (1st Cir. 1979); *Houston North Hospital Properties v. Telco Leasing, Inc.* 688 F.2d 408 (5th Cir. 1982) (words "Jury Requested" on docket cover sheet insufficient); *Early v. Bankers Life & Casualty Co.,* 853 F. Supp. 268 (N.D.Ill. 1994).

[8] *See, e.g., Drone v. Hutto*, 565 F.2d 543 (8th Cir. 1977); *Pradier v. Elespuru*, 641 F.2d 808 (9th Cir. 1981).

[9] *Drone*, *supra*, at 544.

suggestive since it said that, when the demand is made on a pleading pursuant to Rule 38(b), the words "Demand for Jury Trial" or their equivalent were to be placed in the title of the pleading.[10] The court, however, held that such a notation did "not effect the substance of the demand itself" so that the failure to make such a notation was only a "minor deviation from the form required by the local rules."[11] The court explained:

> [T]he failure to fulfill an additional requirement of a local rule to place a notation to that effect in the title cannot constitute a waiver of a trial by jury. Because the right to a jury trial is a fundamental right guaranteed to our citizenry by the Constitution, courts should indulge every presumption against waiver.[12]

In 1975, however, the Court of Appeals for the Ninth Circuit allowed a waiver to stand upon a showing that the demanding party failed to comply with a local rule in *Rutledge v. Electric Hose and Rubber Company*.[13] In *Rutledge*, the court noted that Rule 38(b) used the phrase "indorsed upon a pleading" but was silent "as to the form and substance of the indorsement" so that the local rule which "merely refine[d] or prescribe[d] the form and substance of the indorsement" was reasonable and the district court was correct in insisting on compliance with the local rule.[14] The court held that the local rule did not conflict with Rule 38 and did not "impose additional basic procedural requirements beyond the local rule making power."[15] The Rutledge opinion seems grounded on a belief that the district court can alter the intent of the jury demand requirement:

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[10] *Pradier, supra*, at 810-811.

[11] *Id.* at 811.

[12] *Id. and cases cited therein.*

[13] 511 F.2d 668 (9th Cir. 1975).

[14] *Id.* at 674.

[15] *Id. citing Colgrove v. Battin*, 413 U.S. 149, 93 S.Ct. 2448, 37 L.Ed.2d 522 (1973).

> [T]he demand for jury trial on the face of the pleading is to alert the clerk in the docket process, and the signed statement at the end is to constitute the affirmative action required by Rule 38.[16]

Yet, it must be stressed that the Supreme Court, as well as other inferior courts, have maintained that, because of the constitutional implications inherent in Rule 38, a court must "indulge every reasonable presumption against waiver"[17] and should "not presume acquiescence in the loss of fundamental rights."[18] Further, the decision in *Rutledge* has been criticized but not overruled by the Court of Appeals for the Ninth Circuit which noted:

> serious concern with the alternate holding in the *Rutledge* majority opinion wherein it was stated that a failure to comply with Local Rule 13 constituted a waiver of a jury trial.[19]

The Court of Appeals for the Seventh Circuit has also recently rejected the Rutledge reasoning:

> [W]e chose to adopt the reasoning in [*Pradier*] ... because there was a proper jury demand under Rule 38(b) which Local Rule 5(f) could not invalidate, and ... because the right to a jury trial is 'fundamental'."[20]

Of the thirty-two jurisdictions that now have local rules governing civil jury demands, twenty-nine courts have local rules that stipulate the form of the demand when

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[16] *Rutledge, supra*, at 674.

[17] *Aetna Insurance Company v. Kennedy*, 301 U.S. 389, 393, 57 S.Ct. 809, 811, 81 L.Ed. 1177, 1180 (1937). *See also In Re Zweibon*, 565 F.2d 742, 746 (D.C. Cir. 1977) ("These procedural rules are not intended to diminish this right ... and should be interpreted, where possible to avoid giving effect to dubious waivers of rights," (citations omitted).)

[18] *Ohio Bell Telephone Co., v. Public Utilities Commission*, 301 U.S. 292, 307, 57 S.Ct. 724, 81 L.Ed. 1093 (1937).

[19] *Pradier*, supra, at 811 n.3.

[20] *Partee v. Buch*, 28 F.3d 636 (7th Cir. 1994) (citations omitted).

it is placed on the pleading.[21] Twenty-two of these courts have rules that allow an indorsement on the front page of the pleading immediately following the title by using the words "Demand for Jury Trial" or the equivalent.[22] This language tracks the Model Local Rule that was originally proposed in the first Local Rules Project Report.[23] The other seven courts have local rules that vary from this requirement. For example, one court requires that the demand be made at the conclusion of the appropriate pleading,[24] while two other courts require that an indorsement be made in the document title and also "asserted in the last paragraph of the document."[25] Two courts mandate that the demand be in capital letters.[26] The remaining two courts have local rules that require the demand be in the upper right hand corner[27] and consist of the word "jury".[28]

Nine of the courts that have adopted the Model Local Rule previously proposed explicitly note in their local rules that failure to use the suggested language is not a waiver of the right to a jury trial.[29] The remaining twenty courts do not have local rules addressing this issue. These omissions may be problematic. On the basis of the

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[21] M.D.Ala. LR38.1; C.D.Cal. LR3.4.10; E.D.Cal. LR38-201; S.D.Cal. LR38.1; D.Del. LR38.1; D.Idaho LR38.1; C.D.Ill. LR38.1; S.D.Ill. LR38.1; S.D.Ind. LR38.1; E.D.La. LR38.1; M.D.La. LR38.1; W.D.La. LR38.1; D.Me. LR38; D.Minn. LR38.1; E.D.Mo. LR38-2.04; W.D.Mo. LR38.1; D.Neb. LR38.1; D.Nev. LR38-1; D.N.H. LR38.1; D.N.J. LR38.1; N.D.N.Y. LR38.1; N.D.Ohio LR38.1; S.D.Ohio LR38.1; E.D.Okla. LR38.1A; N.D.Okla. LR38.1A; D.Or. LR38.1; E.D.Tex. LRCV-38(a); D.V.I. LR38.1; W.D.Wash. LR38(b).

[22] M.D.Ala. LR38.1; C.D.Cal. LR3.4.10; D.Del. LR38.1; D.Idaho LR38.1; S.D.Ill. LR38.1; S.D.Ind. LR38.1; D.Minn. LR38.1; E.D.Mo. LR38-2.04; W.D.Mo. LR38.1; D.Neb. LR38.1; D.Nev. LR38-1; D.N.H. LR38.1; D.N.J. LR38.1; N.D.N.Y. LR38.1; N.D.Ohio LR38.1; D.Or. LR38.1; E.D.Tex. LRCV-38(a); D.V.I. LR38.1; W.D.Wash. LR38(b)..

[23] See Report, Suggested Local Rules at p.35.

[24] W.D.Mo. LR 38.1.

[25] D.Or. LR38.1; *see also* C.D.Cal. LR3.4.10.

[26] D.Nev. LR38-1; W.D.Wash. LR38(b).

[27] E.D.Mo. LR2.04.

[28] E.D.Tex. LR38.

case law, an argument can be made that a local rule, which dictates the form for a demand and which, if not followed, may result in an inadvertent waiver of the right to a jury trial, is inconsistent with the intent and wording of Rule 38. Rule 38 acknowledges a constitutional right and sets forth the procedure to exercise that right. Moreover, such a local rule maybe inconsistent with Rule 8 of the Federal Rules of Civil Procedure which provides that technical forms of pleading are not required and that all pleadings shall be interpreted "so as to do substantial justice."[30]

The content of these local rules satisfy both the Rule 38(b) requirement of an affirmative demand and the local courts' need for clear notification. They are also helpful in providing notice to the clerk.

Twenty-two of the courts have already adopted the language concerning the placement of the demand.[31] Only nine of the courts, however, have acknowledged that a failure to comply with this rule does not operate as a waiver of the right to a jury trial. This sentence is a key addition to any local rule on this subject because of the constitutional dimension recognized by Rule 38:

> The right to trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statue of the United States shall be preserved to the parties inviolate.[32]

Three courts have local rules that simply repeat a portion of Rule 38(b)

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[29] M.D.Ala. LR38.1; D.Idaho LR38.1; S.D.Ill. LR38.1; S.D.Ind. LR38.1; D.Minn. LR38.1; D.Neb. LR38.1; D.N.H. LR38.1; N.D.Ohio LR38.1; D.V.I. LR38.1.

[30] Fed.R.Civ.P. 8(f).

[31] M.D.Ala. LR38.1; C.D.Cal. LR3.4.10; E.D.Cal. LR38-201; S.D.Cal. LR38.1; D.Del. LR38.1; D.Idaho LR38.1; C.D.Ill. LR38.1; S.D.Ill. LR38.1; S.D.Ind. LR38.1; E.D.La. LR38.1; M.D.La. LR38.1; W.D.La. LR38.1; D.Me. LR38; D.Minn. LR38.1; E.D.Mo. LR38-2.04; W.D.Mo. LR38.1; D.Neb. LR38.1; D.Nev. LR38-1; D.N.H. LR38.1; D.N.J. LR38.1; N.D.N.Y. LR38.1; N.D.Ohio LR38.1; S.D.Ohio LR38.1; E.D.Okla. LR38.1A; N.D.Okla. LR38.1A; D.Or. LR38.1; E.D.Tex. LRCV-38(a); D.V.I. LR38.1; W.D.Wash. LR38(b)..

[32] Fed.R.Civ.P. 38(a).

acknowledging that any party may make a demand.[33] These rules should be rescinded.

Five courts have local rules stating that checking off a box on the civil cover sheet indicating that a jury trial is requested is insufficient as a demand for a jury trial.[34] There is extensive case law, as mentioned above, indicating that, although the civil cover sheet does alert the clerk of the interest in a jury trial, the civil cover sheet is not served on the opposing parties and does not provide notice to them of the demand as required by Rule 38.[35] Because these rules repeat existing law, they should be rescinded.

Rule 39—Trial by Jury or by the Court

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[33] C.D.Cal. LR3.4.10l; N.D.Miss. LR38.1; S.D.Miss. LR38.1; *see also* Fed.R.Civ.P. 38(b).

[34] C.D.Cal. LR3.4.10; E.D.Cal. LR38-201; S.D.Cal. LR38.1; N.D.Miss. LR38.1; S.D.Miss. LR38.1d.

[35] *See, e.g., Omawale v. WBZ*, 610 F.2d 20 (1st Cir. 1979); *Houston North Hospital Properties v. Telco Leasing, Inc.* 688 F.2d 408 (5th Cir. 1982); *Biesencamp v. Atlantic Richfield Company*, 70 F.R.D. 365, 366 (E.D.Pa. 1976); *Cochran v. Birkel,* 651 F2d 1219 (6th Cir. 1981) *cert denied* 454 U.S. 1152, 102 S.Ct. 1020, 71 L.Ed.2 307 (1982); *Early v. Bankers Life & Casualty Co.,* 853 F. Supp. 268 (N.D.Ill. 1994).

Four courts have local rules concerning the parties' right to a trial by jury or by the court.[1] Two of these rules are appropriate as local rules. The other two rules repeat existing law and should, therefore, be rescinded.

DISCUSSION

Three of these courts have local rules that refer to the applicability of a bankruptcy judge to conduct a jury trial.[2] Section 157 of Title 28 indicates, in relevant part:

> If the right to a jury trial applies in a proceeding that may be held under this section by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdictions by the district court and with the express consent of all the parties.[3]

Two of the courts have appropriate rules that provide this specific authorization to bankruptcy judges.[4] The other court's local rule seems to simply repeat this statutory provision and, as such, is unnecessary.[5]

One court has a local rule that simply repeats almost the entire Federal Rule 39.[6] This rule is unnecessary.

Rule 41—Dismissal of Actions

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[1] D. Conn. LR 12(f); D.Guam LR39; S.D.Ind. LR39.1; W.D.Va. SO.

[2] D. Conn. LR 12(f); S.D.Ind. LR39.1; W.D.Va. SO.

[3] 28 U.S.C. §157(e).

[4] D.Conn. LR12(f); W.D.Va. SO.

[5] S.D.Ind. LR39.1.

[6] D.Guam LR39.

Fifty-six courts have local rules concerning voluntary and involuntary dismissal of actions.[1] Approximately twenty of these courts have rules that address voluntary dismissals. Approximately thirteen courts have rules on this subject that should remain subject to local variation. The remaining rules are either inconsistent with or duplicative of existing law. Most of the fifty-six courts have rules that address involuntary dismissals. Many of those rules are appropriate local directives. Rules in twenty-one courts, however, are problematic.

DISCUSSION

Rule 41 of the Federal Rules of Civil Procedure addresses both voluntary and involuntary dismissals.[2] In essence, subsection (a) provides that the plaintiff, or all the parties by filing a stipulation, may seek a voluntary dismissal.[3] Unless otherwise stated, this dismissal is without prejudice except in one situation.[4] If a plaintiff has already once dismissed the action in a state or federal court, then a dismissal pursuant to Rule 41(a) "operates as a adjudication upon the merits."[5] This rule also provides that the voluntary dismissal occurs only "upon order of the court and upon such terms and conditions as the

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[1] D.Alaska LRGR 24; D.Ariz. LRLR2.6; C.D.Cal. LRLR12; S.D.Cal. LRLR41.1; D.Colo. LRLR41.1; D.Conn. LRCiv.R16(a); D.Del. LRLR41.1; D.D.C. LRLR211; M.D.Fla. LRLR3.10; N.D.Fla. LRLR41.1; S.D.Fla. LRLR41.1; N.D.Ga. LRLR41.1; S.D.Ga. LRLR41.1; D.Guam LRLR41; D.Idaho LRLR41.1; N.D.Ill. LRGR21; N.D.Ind. LRLR41.1; S.D.Ind. LRLR41.1; N.D.Iowa LRLR41.1; S.D.Iowa LRLR41.1; D.Kan. LRLR41.1; E.D.Ky. LRLR41.1; W.D.Ky. LRLR41.1; E.D.La. LRLR41.1; M.D.La. LRLR41.1; W.D.La. LRLR41.1; D.Me. LRLR41.1; D.Mass. LRLR41.1; E.D.Mich. LRLR41.2; W.D.Mich. LRLR41.1; E.D.Mo. LRLR8.01; D.Neb. LRLR41.1; D.Nev. LRLR41-1; D.N.H. LRLR41.1; D.N.J. LRLR41.1; D.N.Mex. LRLR41.1; N.D.N.Y. LRLR41.2; W.D.N.Y. LRLR41.2; D.N.Mar.I LRLR41.1; E.D.Okla. LRLR41.1; N.D.Okla. LRLR41.0; W.D.Okla. LRLR41.1; D.Or. LRLR41.1; E.D.Pa. LRLR41.1; M.D.Pa. LRLR41.1; D.P.R. LR313; D.R.I. LRLR21(b); E.D.Tex. LRCV-41; N.D.Tex. LRLR41.1; D.Utah LRLR115; E.D.Wash. LRLR41.1; W.D.Wash. LRLR41; N.D.W.Va. LRLR7.01; S.D.W.Va. LRLR8-01; E.D.Wis. LRLR10; D.Wyo. LRLR41.1.

[2] Fed.R.Civ.P. 41.

[3] *Id.* at (a)(1).

[4] *Id.*

court deems proper."[6]

Subsection (b) provides that the defendant may seek an involuntary dismissal if the plaintiff fails "to prosecute or to comply with these rules or any order of court."[7] Unless otherwise states, this type of dismissal is with prejudice except "a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under rule 19."[8]

This Rule is also applicable to counter claims, cross-claims, and third-party claims.[9] If an action is previously dismissed under this rule and the plaintiff brings the same claim again against the same defendant, that defendant may seek payment of costs pursuant to this Rule.[10]

Many courts have local rules concerning the voluntary dismissal of cases. Rules in some of these jurisdictions are appropriate supplements to Rule 41 and should remain. For example, eleven courts have local rules explaining how cases are dismissed after settlement.[11] Two courts allow the clerk to grant orders of voluntary dismissal.[12]

Some of the courts have rules that are inconsistent with Rule 41 and should be abrogated. For example, two courts have local rules that provide that a voluntary dismissed action is dismissed with prejudice.[13] These rules are inconsistent with the clear

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[5] *Id.*

[6] *Id.* at (a)(2).

[7] *Id* at (b).

[8] *Id.*

[9] *Id.* at (c).

[10] *Id.* at (d).

[11] N.D.Iowa LRLR41.1; S.D.Iowa LRLR41.1; E.D.La. LR41.2; M.D.La. LR41.2; D.Me. LRLR41.1; D.N.H. LRLR41.1; D.N.J. LRLR41.1; D.Or. LRLR41.1; E.D.Pa. LRLR41.1; N.D.W.Va. LRLR7.01; S.D.W.Va. LRLR8-01.

[12] N.D.Ga. LR41.1; S.D.Ga. LR41.1.

[13] N.D.Iowa LR41.1; S.D.Iowa LR41.1.

language of Rule 41(a) that, in the absence of certain circumstances, a voluntary dismissal is without prejudice.[14] Three courts have local rules that require a party, wanting to refile after a voluntary dismissal, to seek permission to do so.[15] This requirement is also inconsistent with Rule 41.[16] Rule 41 does discuss how a dismissal operates on an action when there was a previously dismissed similar case, and it provides no constraint on the party's ability to file the second action in the first instance.[17]

Several other courts have local rules on voluntary dismissal that repeat the existing Federal Rule. Three courts have local rules that simply acknowledge the option to seek a voluntary dismissal.[18] These rules should be rescinded.

Most of the fifty-six courts with rules on dismissal have local rules concerning involuntary dismissals. The Rule does not specifically permit the court to dismiss on its own motion. The "inherent power" of a court *sua sponte* to order an involuntary dismissal is not, however, abrogated by the existence of this Rule.[19] Local Rules providing guidance to the litigants concerning when the court may exercise this power to dismiss has been upheld on various occasions.[20]

Local rules in twenty-seven of the jurisdictions indicate that the court may dismiss a case for failure to prosecute if there has been no action on the case within a set

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[14] Fed.R.Civ.P. 41(a)(1).

[15] E.D.La. LRLR41.1; M.D.La. LRLR41.1; W.D.La. LRLR41.1.

[16] Fed.R.Civ.P. 41(a).

[17] *Id.*

[18] D.Guam LRLR41; N.D.Iowa LRLR41.1; S.D.Iowa LRLR41.1.

[19] *Link v. Wabash Railway Company*, 370 U.S.626, 630, 82 S.Ct. 1386, 1389, I L.Ed.2d 734, 738 (1962).

[20] *See, e.g., Sperling v. Texas Butadiene and Chemical Corporation*, 434 F.2d 677, 14 Fed.R.Serv.2d 769 (3rd Cir. 1970), *cert. den'd* 404 U.S. 854, 92S.Ct. 97, 30 L.Ed.2d 95 (1971); *Allied Air Freight, Inc. v. Pan American World Airways, Inc.*, 393 RF.2d 441 (2d Cir. 1960), *cert. den'd* 393 U.S. 846, 89 S.Ct. 131, 21 L.Ed.2d 117 (1968).

period of time: three months[21]; four months[22]; six months[23]; nine months[24]; and one year.[25] Another twelve courts have local rules that permit involuntary dismissals for "unreasonable delay" without specifying a precise time frame.[26] Another two jurisdictions allow motions for involuntary dismissal to be filed at any time.[27] These rules should remain subject to local variation.

Sixteen jurisdictions have local rules that list criteria other than time, which the court may use in determining whether the plaintiff has failed to prosecute the claim so that dismissal is warranted.[28] For example, seven courts have local rules permitting involuntary dismissal for failure to effect service[29]; seven courts permit involuntary dismissal for failure of the party or party's attorney to update an address[30]; and, five courts allow involuntary dismissal for a willful failure to prepare the case.[31] Other courts have specified particular reasons for allowing involuntary dismissal such as for filing a

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[21] D.Del. LRLR41.1; N.D.Fla. LRLR41.1; S.D.Fla. LRLR41.1; D.N.Mex. LRLR41.1; D.Wyo. LRLR41.1.

[22] D.N.J. LR41.1.

[23] D.Ariz. LRLR2.6; S.D.Cal. LRLR41.1; D.Conn. LRCiv.R16(a); D.Idaho LRLR41.1; N.D.Ill. LRGR21; N.D.Ind. LRLR41.1; S.D.Ind. LRLR41.1; D.Kan. LRLR41.1; E.D.Mo. LRLR8.01; W.D.N.Y. LRLR41.2; D.N.Mar.I LRLR41.1.

[24] D.Nev. LR41-1.

[25] D.Alaska LRGR 24; E.D.Ky. LRLR41.1; W.D.Ky. LRLR41.1; D.Mass. LRLR41.1; D.Neb. LRLR41.1; E.D.Pa. LRLR41.1; M.D.Pa. LRLR41.1; E.D.Wash. LRLR41.1; W.D.Wash. LRLR41.

[26] C.D.Cal. LRLR12; S.D.Ga. LRLR41.1; D.Kan. LRLR41.1; E.D.La. LR41.3; D.Me. LRLR41.1; E.D.Mich. LRLR41.2; N.D.N.Y. LRLR41.2; D.Or. LR41.2; D.R.I. LRLR21(b); D.Utah LRLR115; N.D.W.Va. LRLR7.01; S.D.W.Va. LRLR8-01.

[27] D.Alaska LRGR 24; S.D.Fla. LRLR41.1.

[28] C.D.Cal. LR12; S.D.Cal. LR41.1; N.D.Ga. LR41.2; S.D.Ga. LRLR41.1; N.D.Ill. GR21; N.D.Iowa LRLR41.1; S.D.Iowa LRLR41.1; M.D.La. LR41.3; W.D.La. LR41.3; W.D.Mich. LRLR41.1; D.Neb. LRLR41.1; D.N.Mex. LR41.2; N.D.N.Y. LRLR41.2; D.P.R. LR313; W.D.Wash. LRLR41; E.D.Wis. LRLR10.

[29] N.D.Ga. LR41.2; N.D.Iowa LRLR41.1; S.D.Iowa LRLR41.1; M.D.La. LR41.3; W.D.La. LR41.3; D.P.R. LR313; E.D.Wis. LRLR10.

[30] C.D.Cal. LR12; N.D.Ga. LR41.2; M.D.La. LR41.3; W.D.La. LR41.3; W.D.Mich. LRLR41.1; N.D.N.Y. LRLR41.2; W.D.Wash. LRLR41.

frivolous case[32], a failure to furnish security[33], a failure to remedy non-conforming papers[34], a failure to meet a deadline[35], a failure to comply with the local rules[36], a failure to appeal[37], and a failure to engage in discovery.[38] These rules are also appropriate exercises of local district court rulemaking.

Thirty-eight jurisdictions have local rules that explicitly provide some type of procedure that the court will follow in deciding to order a dismissal.[39] These rules should also remain subject to local variation.

There are rules in twenty-one courts that either conflict with, or duplicate, a portion of rule 41(b) and should, therefore, be rescinded.[40] For example, rules in thirteen jurisdictions indicate that an involuntary dismissal is made without prejudice unless the

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[31] S.D.Ga. LRLR41.1; D.Neb. LRLR41.1; D.P.R. LR313; E.D.Wis. LRLR10.

[32] E.D.Wis. LR10.

[33] D.P.R. LR313.

[34] D.N.Mex. LR41.2.

[35] N.D.Iowa LR41.1; S.D.Iowa LR41.1.

[36] S.D.Cal. LR41.1.

[37] C.D.Cal. LR12; N.D.Ga. LR41.3; N.D.Ill. GR21.

[38] S.D.Ga. LR41.1.

[39] C.D.Cal. LRLR12; S.D.Cal. LRLR41.1; D.Colo. LRLR41.1; D.Conn. LRCiv.R16(a); D.Del. LRLR41.1; M.D.Fla. LRLR3.10; N.D.Fla. LRLR41.1; S.D.Ga. LRLR41.1; N.D.Ind. LRLR41.1; S.D.Ind. LRLR41.1; N.D.Iowa LRLR41.1; S.D.Iowa LRLR41.1; D.Kan. LRLR41.1; E.D.Ky. LRLR41.1; W.D.Ky. LRLR41.1; W.D.La. LR41.3; D.Me. LRLR41.1; D.Mass. LRLR41.1; E.D.Mich. LRLR41.2; W.D.Mich. LRLR41.1; E.D.Mo. LRLR8.01; D.Neb. LRLR41.1; D.Nev. LR41-1; D.N.J. LRLR41.1; D.N.Mex. LRLR41.1; N.D.N.Y. LRLR41.2; W.D.N.Y. LRLR41.2; D.N.Mar.I LRLR41.1; D.Or. LR41.2; E.D.Pa. LRLR41.1; M.D.Pa. LRLR41.1; D.R.I. LRLR21(b); D.Utah LRLR115; E.D.Wash. LRLR41.1; W.D.Wash. LRLR41; N.D.W.Va. LRLR7.01; S.D.W.Va. LRLR8-01; D.Wyo. LRLR41.1.

[40] D.Ariz. LRLR2.6; C.D.Cal. LRLR12; S.D.Cal. LRLR41.1; D.Colo. LRLR41.1; D.D.C. LRLR211; N.D.Ga. LR41.2, 41.3; D.Idaho LRLR41.1; N.D.Iowa LR41.1; S.D.Iowa LR41.1; D.Kan. LRLR41.1; M.D.La. Lr41.3; W.D.La. LR41.3; D.Me. LRLR41.1; D.Mass. LRLR41.1; E.D.Mo. LRLR8.01; D.N.Mar.I LRLR41.1; E.D.Pa. LRLR41.1; D.P.R. LR313; D.R.I. LRLR21(b); D.Utah LRLR115; E.D.Wash. LRLR41.1; W.D.Wash. LRLR41; E.D.Wis. LRLR10.

court states otherwise.[41] These rules are inconsistent with Rule 41 that explains that an involuntary dismissal "operates as a adjudication upon the merits."[42] In addition, three courts have local rules that simply repeat this requirement and are unnecessary.[43] Local rules in six courts provide that the involuntary dismissal may be determined with or without prejudice.[44] To the extent these rules repeat that the dismissal is with prejudice, they are repetitious and unnecessary. To the extent, however, that they allow involuntary dismissal to be without prejudice, they are inconsistent. In either event, the rules should be rescinded.

Rule 42. Consolidation; Separate Trials

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[41] D.Ariz. LRLR2.6; C.D.Cal. LRLR12; S.D.Cal. LRLR41.1; D.D.C. LRLR211; N.D.Ga. LR41.2; D.Idaho LRLR41.1; M.D.La. Lr41.3; W.D.La. LR41.3; D.Mass. LRLR41.1; D.N.Mar.I LRLR41.1; E.D.Pa. LRLR41.1; D.P.R. LR313; E.D.Wash. LRLR41.1.

[42] Fed.R.Civ.P. 41(b).

[43] N.D.Ga. LR41.3; N.D.Iowa LR41.1; S.D.Iowa LR41.1; D.Kan. LRLR41.1; W.D.Wash. LRLR41.

[44] D.Colo. LRLR41.1; D.Me. LRLR41.1; E.D.Mo. LRLR8.01; D.R.I. LRLR21(b); D.Utah LRLR115; E.D.Wis. LRLR10.

Eleven courts have local rules concerning consolidation and separate trials.[1] All of the rules concerning the procedure to consolidate should remain subject to local variation. In addition, there are two local rules relating to consolidation that repeat existing and should be abrogated. The rule concerning bifurcation simply repeats existing law and should also be rescinded.

DISCUSSION

Rule 42 gives the court authority to order that there be a joint hearing or trial "[w]hen actions involving a common question of law or fact are pending before the court."[2] Subsection (b) gives the court permission to order that there be separate trials "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy."[3]

Most of the rules that relate to Rule 42 explain the procedure used to seek consolidation of two or more issues or claims for purposes of a trial or hearing. The first issues concerns who can seek consolidation. Three courts have local rules permitting any party to move for consolidation.[4] Two other courts recognize that the court may consolidate *sua sponte* absent objection.[5]

There are also local rules explaining how to actually make the motion to consolidate. For example, the content of the motion to consolidate is set forth in one

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[1] N.D.Miss. LRLR42.1; E.D.Mo. LRLR42-4.03; D.N.H. LRLR42.1; D.N.J. LRLR42.1; D.Or. LRLR42.1-42.5; M.D.Pa. LRLR42.1; D.R.I. LRLR7(f); E.D.Tex. LRCV-42; N.D.Tex. LRLR42.1; D.Vt. LRLR42.1; D.Wyo. LRLR42.1.

[2] Fed.R.Civ.P 42(a).

[3] *Id.* at (b).

[4] D.N.H. LRLR42.1; D.Or. LRLR42.1-42.5; D.Vt. LRLR42.1.

[5] D.N.H. LRLR42.1; D.Vt. LRLR42.1.

court's local rule.[6] The related[7] and complex[8] cases must be identified to the court, and the motion made to the lowest numbered case in another ___ courts.[9] The lowest case number is the one that controls[10] and even cases from other divisions are controlled by the earliest filing date.[11] Three courts also set forth three different ways of referring to cases after consolidation: in one court the caption is only of the first case[12]; in another court, the caption must also say "consolidated with ..."[13]; in another court the caption must list all cases, beginning with the oldest.[14]

There are local rules in two courts that require that copies of these papers be served on all parties.[15] These directives simply repeat the service requirement of Rule 5 of the Federal Rules of Civil Procedure[16] and should, therefore, be rescinded.

One court has a rule repeating Rule 42(b) that the court has authority to bifurcate.[17] This rule is unnecessary.

Rule 47. Selection of Jurors

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[6] D.Or. LRLR42.1-42.5.

[7] D.N.H. LRLR42.1; D.Or. LRLR42.1-42.5; E.D.Tex. LRCV-42; D.Vt. LRLR42.1.

[8] D.Or. LRLR42.1-42.5.

[9] E.D.Mo. LRLR42-4.03; D.N.J. LRLR42.1; D.R.I. LRLR7(f); D.Wyo. LRLR42.1.

[10] N.D.Miss. LRLR42.1; D.N.J. LRLR42.1; D.N.H. LRLR42.1; D.Or. LRLR42.1-42.5; E.D.Tex. LRCV-42; D.Vt. LRLR42.1.

[11] N.D.Miss. LRLR42.1.

[12] N.D.Tex. LRLR42.1.

[13] N.D.Tex. LRLR42.1.

[14] D.Vt. LRLR42.1.

[15] D.N.J. LRLR42.1; N.D.Tex. LRLR42.1.

[16] Fed.R.Civ.P. 5(a).

[17] M.D.Pa. LRLR42.1.

Rules in seventy-five jurisdictions relate to Rule 46 of the Federal Rules of Civil Procedure concerning the selection of jurors.[1] These rules explain the voir dire procedure used by the court and the general issue of outside communication with jurors before, during, and after the trial. All of these rules are appropriate as local rule directives. In addition, two courts have local rules that are inconsistent with existing law and should be rescinded.

DISCUSSION

Rule 47 explains that the court may conduct the questioning of potential jurors or permit the parties and/or their attorneys to do so.[2] If the court performs the voir dire, the Rule also allows the parties or attorneys to supplement the court's inquiry with additional questions; these questions are used if the court determines they are "proper".[3] The Rule also refers to the applicable statue on the number of preemptory challenges allowed[4] and allows the court, "for good cause" to excuse a juror during the trial or

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[1] M.D.Ala. LR47.1; N.D.Ala.LR47.1; S.D.Ala. LR47.2; D.Alaska LR14; D.Ariz. LR1.11; E.D.Ark. LR47.1; W.D.Ark. LR47.1; E.D.Cal. LR47-162; S.D.Cal. LR47.1; D.Colo. LR47.2; D.Conn. LR12; D.Del. LR47.1; D.D.C. LR115; M.D.Fla. LR5.01(b); N.D.Ga. LR47.2; S.D.Ga. LR47.1; D.Idaho LR47.1; C.D.Ill. LR47.3; N.D.Ill. LR1.3; S.D.Ill. LR48.2; N.D.Ind. LR47.1; S.D.Ind. LR47.1; N.D.Iowa LR47.1; S.D.Iowa LR47.1; D.Kan. LR47.1; E.D.Ky. LR47.1; W.D.Ky. LR47.1; E.D.La. LR47.1; M.D.La. LR47.2; W.D.La. LR47.1; D.Me. LR47; D.Md. LR107.16; W.D.Mich. LR34; D.Minn. LR47.2; E.D.Mo. LR7.01; W.D.Mo. LR47.1; D.Mont. LR245-1; D.Neb. LR47.1; D.Nev. LR48-1; D.N.H. LR47.3; D.N.J. LR47.1; N.D.N.Y. LR47.1; W.D.N.Y. LR47.1; E.D.N.Car. LR6; M.D.N.Car. LR47.1; W.D.N.Car. LR47.1; D.N.Dak. LR47.1; N.D.Ohio LR47.1; S.D.Ohio LR47.1; E.D.Okla. LR47.1; N.D.Okla. LR47.1; W.D.Okla. LR47.1; D.Or. LR47.2; E.D.Pa. LR48.1; W.D.Pa. LR47.1; D.P.R. LR322;

D.R.I. LR15; D.S.Car. LR47.01-47.05; E.D.Tenn. LR48.1; M.D.Tenn. LR12(h); W.D.Tenn. LR47.1; E.D.Tex. LRCV-38(b); N.D.Tex. LR47.1; S.D.Tex. LR12; W.D.Tex. LRCV-47; D.Utah LR113; D.V.I. LR47.1; E.D.Va. LR47; E.D.Wash. LR47.1; W.D.Wash. LR47; N.D.W.Va. LR6.01; S.D.W.Va. LR6.04; E.D.Wis. LR8.03; W.D.Wis. LR4; D.Wyo. LR47.1.

[2] Fed.R.Civ.P. 47(a).

[3] *Id.*

[4] *Id* at (b).

deliberation.[5]

Most of the local rules concern the procedure for conducting the voir dire. For example, thirty-six courts have local rules stating that the court will conduct the voir dire.[6] Twenty-five courts have local rules that explain the voir dire procedure generally.[7] Eighteen courts have local rules explaining the procedure for making challenges to the venire.[8] Forty-two courts have local rules that speak, in a general way, to the entire jury selection process.[9] All of these rules are appropriate.

Two courts have local rules that state, in relevant party, "[n]o attorney ... may request a judge to excuse any person lawfully summoned for jury service."[10] To the extent these rules forbid a party from exercising a preemptory challenge already

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[5] *Id* at (c).

[6] D.Alaska LR14; E.D.Cal. LR47-162; S.D.Cal. LR47.1; D.Conn. LR12; D.Del. LR47.1; N.D.Ga. LR47.2; D.Idaho LR47.1; N.D.Ind. LR47.1; S.D.Ind. LR47.1; N.D.Iowa LR47.1; S.D.Iowa LR47.1; E.D.La. LR47.2; M.D.La. LR47.2; W.D.La. LR47.2; D.Me. LR47; D.Mont. LR245-1; D.Neb. LR47.1; D.N.H. LR47.2; N.D.N.Y. LR47.2; W.D.N.Y. LR47.1; E.D.N.Car. LR6; M.D.N.Car. LR47.1; W.D.N.Car. LR47.1; N.D.Ohio LR47.2, 47.3; E.D.Okla. LR47.1; D.Or. LR47.2; W.D.Pa. LR47.1; D.R.I. LR15; D.S.Car. LR47.01-47.05; D.Utah LR113; E.D.Wash. LR47.1; W.D.Wash. LR47; N.D.W.Va. LR6.01; S.D.W.Va. LR6.04; E.D.Wis. LR8.03; D.Wyo. LR47.1.

[7] D.Alaska LR14; E.D.Cal. LR47-162; S.D.Cal. LR47.1; D.Conn. LR12; D.Del. LR47.1; M.D.Fla. LR5.01(b); D.Idaho LR47.1; N.D.Ind. LR47.1; S.D.Ind. LR47.1; N.D.Iowa LR47.1; S.D.Iowa LR47.1; D.Me. LR47; E.D.Mo. LR7.01; W.D.N.Y. LR47.1; E.D.N.Car. LR6; M.D.N.Car. LR47.1; W.D.N.Car. LR47.1; D.N.Dak. LR47.1; N.D.Ohio LR47.2, 47.3; W.D.Pa. LR47.1; D.R.I. LR15; D.S.Car. LR47.01-47.05; D.Utah LR113; E.D.Wash. LR47.1; D.Wyo. LR47.1.

[8] D.Conn. LR12; D.Del. LR47.1; E.D.Ky. LR47.2; W.D.Ky. LR47.2; D.Me. LR47; W.D.Mo. LR47.1; D.Neb. LR47.1; D.N.H. LR47.2; D.N.J. LR47.1; N.D.N.Y. LR47.2; W.D.N.Y. LR47.2; D.N.Dak. LR47.1; N.D.Ohio LR47.4; D.Or. LR47.3, 47.4; D.R.I. LR15; M.D.Tenn. LR12(j); E.D.Va. LR47.

[9] D.Alaska LR14; E.D.Cal. LR47-161, 48-162; D.D.C. LR114(a); N.D.Ga. LR47.1, 47.2; S.D.Ga. LR47.1; D.Idaho LR47.1; N.D.Ill. LR1.3; S.D.Ill. LR48.2; N.D.Iowa LR47.1; S.D.Iowa LR47.1; E.D.La. LR47.1; W.D.La. LR47.1; W.D.Mich. LR34; D.Neb. LR47.1; D.N.H. LR47.1; D.N.J. LR47.1; N.D.N.Y. LR47.1, 47.2; W.D.N.Y. LR47.1, 47.2; D.N.Dak. LR47.1; N.D.Ohio LR47.1, 47.2, 47.3; N.D.Okla. LR47.1; E.D.Pa. LR48.1; D.R.I. LR15; D.S.Car. LR47.01-47.05; E.D.Tex. LRCV-38(b); W.D.Tex. LRCV-47; D.V.I. LR47.1l D.Utah LR113; E.D.Va. LR47l N.D.W.Va. LR6.01l S.D.W.Va. LR6.04; W.D.Wash. LR47; E.D.Wis. LR8.02; D.Wyo. LR48.1.

[10] E.D.Ky. LR47.3; W.D.Ky. LR47.3.

permitted by federal statute, they are inconsistent with that statute.[11] To the extent they forbid a party from asking the court to excuse a juror during the trial or deliberation, as permitted by Rule 47(c), they are inconsistent with that Federal Rule.[12]

Many of the local rules concern communication with jurors outside of the courtroom, before, during, or after the trial. Forty-eight courts have local rules forbidding post-verdict interviews with jurors without the court's permission.[13] Thirty-six courts forbid such communication with a juror both before and during the trial.[14] Eight courts articulate the fact that the juror has a right not to communicate with anyone outside of the courtroom setting.[15] All of these rules are appropriate as local directives.

Rule 48. Number of Jurors

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[11] 28 U.S.C. §1870; *see* Fed.R.Civ.P. 47(b).

[12] Fed.R.Civ.P. 47(b); trial court's action in deciding whether juror should be excused was prompted by a party's request to excuse the juror (*Murray v. Laborers Union Local 324*, 55 F.3d 1445, 1451 (9th Cir. 1995); *United States v. Hernandez*, 862 F.2d 17, 23 (2d Cir. 1988) *cert. den'd* 489 U.S. 1032 (1989); *Port Terminal & Warehousing Co. v. John S. James Co.*, 695 F.2d 1320 (11th Cir. 1983)).

[13] M.D.Ala. LR47.1; N.D.Ala. LR47.1; S.D.Ala. LR47.2; D.Ariz. LR1.11 E.D.Ark. LR47.1; W.D.Ark. LR47.1; D.Colo. LR47.2; D.Conn. LR12; D.D.C. LR115; M.D.Fla. LR5.1(d); C.D.Ill. LR47.2; N.D.Ind. LR47.2; S.D.Ind. LR47.2; N.D.Iowa LR47.2; S.D.Iowa LR47.2; D.Kan. LR47.1; E.D.Ky. LR47.1; W.D.Ky. LR47.1; E.D.La. LR47.4, 47.5; M.D.La. LR47.5; W.D.La. LR47.4, 47.5; D.Md. LR107.16; D.Minn. LR47.2; E.D.Mo. LR7.01; D.Mont. LR245-5; D.N.H. LR47.3; D.N.J. LR47.1; N.D.N.Y. LR47.5; E.D.N.Car. LR6; M.D.N.Car. LR47.1; S.D.Ohio LR47.1; E.D.Okla. LR47.2; N.D.Okla. LR47.2; W.D.Okla. LR47.1; D.P.R. LR322; D.R.I. LR15; D.S.Car. LR47.01-47.05; E.D.Tenn. LR48.1; M.D.Tenn. LR12(h); W.D.Tenn. LR47.1; E.D.Tex. LRCV-47; N.D.Tex. LR47.1 S.D.Tex. LR12; E.D.Wash. LR47.1; W.D.Wash. LR47; E.D.Wis. LR8.07; W.D.Wis. LR4; D.Wyo. LR47.2.

[14] D.Ariz. LR1.11; E.D.Ark. LR47.1; W.D.Ark. LR47.1; D.Colo. LR47.2; D.Conn. LR12; D.D.C. LR115; C.D.Ill. LR47.2, 47.3; N.D.Ind. LR47.2; S.D.Ind. LR47.2; N.D.Iowa LR47.2; S.D.Iowa LR47.2; E.D.Ky. LR47.1; W.D.Ky. LR47.1; E.D.La. LR47.4, 47.5; M.D.La. LR47.4; W.D.La. LR47.4, 47.5; D.Minn. LR47.2; E.D.Mo. LR7.01; D.Mont. LR245-5; D.Nev. LR48-1; D.N.H. LR47.3; D.N.J. LR47.1; N.D.N.Y. LR47.5; M.D.N.Car. LR47.1; W.D.N.Car. LR47.2; E.D.Okla. LR47.2; N.D.Okla. LR47.2; W.D.Okla. LR47.1; D.R.I. LR15; D.S.Car. LR47.01-47.05; M.D.Tenn. LR12(g); N.D.Tex. LR47.1; E.D.Wis. LR8.07; W.D.Wis. LR4; D.Wyo. LR47.2.

[15] D.Ariz. LR1.11; E.D.Ark. LR47.1; W.D.Ark. LR47.1; D.Colo. LR47.2; D.Conn. LR12; D.D.C. LR115; C.D.Ill. LR47.2, 47.3; N.D.Ind. LR47.2; S.D.Ind. LR47.2; N.D.Iowa LR47.2; S.D.Iowa LR47.2; E.D.Ky. LR47.1; W.D.Ky. LR47.1; E.D.La. LR47.4, 47.5; M.D.La. LR47.4; W.D.La. LR47.4, 47.5; D.Minn. LR47.2; E.D.Mo. LR7.01; D.Mont. LR245-5; D.Nev. LR48-1; D.N.H. LR47.3; D.N.J. LR47.1; N.D.N.Y. LR47.5; M.D.N.Car. LR47.1; W.D.N.Car. LR47.2; E.D.Okla. LR47.2; N.D.Okla. LR47.2; W.D.Okla. LR47.1; D.R.I. LR15; D.S.Car. LR47.01-47.05; M.D.Tenn. LR12(g); N.D.Tex. LR47.1; E.D.Wis. LR8.07; W.D.Wis. LR4; D.Wyo. LR47.2.

Forty-eight courts have local rules explaining the number of jurors seated in a civil trial.[1] At least twenty-four of those courts have rules that are appropriate supplements to Rule 48 and should remain subject to local variation. Some of the courts have rules that repeat portions of Rule 48 and should, therefore, be rescinded. Seven courts have local rules that are either inconsistent with or duplicative of Rule 48.[2] These rules should also be rescinded. Lastly, two courts have local rules that are inconsistent with Rule 47 and should not remain.[3]

DISCUSSION

Rule 48 of the Federal Rules of Civil Procedure was amended effective December 1, 1991 to require that the court set a jury of "not fewer than six and not more than twelve members" and that all jurors participate in the verdict unless excused pursuant to Rule 47.[4] The prior rule had allowed the parties to stipulate to a jury of "any number less than twelve" and to stipulate to a finding from a state majority of the jurors rather than a unanimous verdict.[5] Rule 47 was also amended effective December 1, 1991 to dispense with alternate jurors.[6] This change is consistent with the requirement in Rule 48 that all jurors participate in the verdict.[7] The Advisory Committee noted that, with the

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[1] N.D.Ala. LR48.1; D.Alaska LRGR14; C.D.Cal. LRLR13.1; E.D.Cal. LR48-162; D.Conn. LR12(a); D.Del. LR48.1; M.D.Fla. LR5.01(a); S.D.Fla. LR47.1; M.D.Ga. LR48; S.D.Ga. LR48.1; D.Haw. LR48; D.Idaho LR47.1; C.D.Ill. LR48.1; S.D.Ill. LR48.1; N.D.Ind. LR48.1; S.D.Ind. LR47.4; N.D.Iowa LR48.1; S.D.Iowa LR48.1; E.D.La. LR48.1; M.D.La. LR48.1; W.D.La. LR48.1; D.Me. LR47; N.D.Miss. LR48.1.

[2] C.D.Ill. LR48.1; M.D.N.Car. LR47.1; E.D.Pa. LR48.1; D.S.Car. LR48.01; W.D.Tex. LRCV-47; E.D.Wis. LR8.01; D.Wyo. LR48.1.

[3] D.P.R. LR321; M.D.Tenn. LR12(j).

[4] Fed.R.Civ.P. 48.

[5] Fed.R.Civ.P. 48 as originally drafted in 1937.

[6] Fed.R.Civ.P. 47.

[7] *See* Fed.R.Civ.P. 48.

abolition of the idea of an alternate jurors, "it will ordinarily be prudent and necessary, in order to provide for sickness or disability among jurors, to seat more than six jurors."[8]

Approximately fifteen courts have local rules setting the number of jurors at six people[9], ten people[10], or twelve people.[11] Five courts require that eight members be seated at the beginning of a trial.[12] Another court explains that the number of jurors will be determined at the final pretrial conference.[13] Two more courts provide that the court fix the number.[14] Assuming, of course, that the number selected pursuant to these rules is not fewer than six or more than twelve, they are appropriate as local directives.

Many of the courts have local rules that repeat Rule 48 and are, therefore, unnecessary. Fifteen courts have local rules that require the jury to consist of no fewer than six members and no more than twelve.[15] Eight courts provide that a jury may, by stipulation, be less than six.[16] Six jurisdictions indicate that a verdict must be unanimous unless otherwise stipulated.[17] Eight courts require that the jury consist of a minimum of

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[8] Fed.R.Civ.P. 48 Advisory Committee Note to 1991 Amendment.

[9] N.D.Ala. LR48.1; D.Alaska LRGR14; S.D.Fla. LR47.1; S.D.Ga. LR48.1; N.D.Ind. LR48.1; S.D.Ind. LR47.4; D.Mont. LR245-1; D.P.R. LR321; D.R.I. LR15; D.S.Car. LR48.01; M.D.Tenn. LR12(j).

[10] S.D.Ind. LR47.4; D.Utah LR113.

[11] M.D.Ga. LR48; D.S.Car. LR48.01; D.Utah LR113; *see also* S.D.Ga. LR48.1 (may stipulate to twelve members).

[12] E.D.Pa. LR48.1; M.D.Pa. LR48.1; D.S.Car. LR48.01; W.D.Tenn. LR47.1; D.V.I. LR48.1.

[13] D.N.H. LR48.1.

[14] D.Or. LR48.1; E.D.Pa. LR48.1.

[15] E.D.Cal. LR48-162; D.Conn. LR12(a); D.Del. LR48.1; M.D.Fla. LR5.01(a); D.Idaho LR47.1; S.D.Ill. LR48.1; N.D.Miss. LR48.1; S.D.Miss. LR48.1; D.Neb. LR48.1; D.N.J. LR48.1; N.D.N.Y. LR48.1; W.D.N.Y. LR47.1; N.D.Ohio LR48.1; N.D.Okla. LR48.1; E.D.Va. LR48.

[16] D.Del. LR48.1; M.D.Ga. LR48; N.D.Okla. LR48.1; E.D.Pa. LR48.1; M.D.Pa. LR48.1; D.S.Car. LR48.01; W.D.Tex. LRCV-47; D.V.I. LR48.1.

[17] M.D.Ga. LR48; N.D.Ind. LR48; S.D.Ind. LR47.4; D.N.J. LR48.1; W.D.N.Y. LR47.1; D.V.I. LR48.1.

six members.[18] Four courts simply refer to the applicability of Rule 48 in determining the number of jurors.[19] Lastly, three courts have local rules requiring that all jury members participate in the verdict.[20] All of these rules should be rescinded.

Seven courts have local rules that require a jury to consist of no less than six members.[21] To the extent these rules simply repeat the requirement of Rule 48 that the court should set a jury of not less than six members, they are unnecessary. To the extent, however, that they forbid the parties from stipulating to a jury of fewer than six members, they are inconsistent with Rule 48. In either case, these rules should be rescinded.

Two courts have local rules that assume alternate jurors may be seated in determining how many jurors to seat.[22] Rule 46, as amended in 1991, no longer allows the practice of seating alternative jurors so these rules are inconsistent with the current law and should be rescinded.

Rule 51. Instructions to Jury; Objections

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[18] S.D.Ind. LR47.4; N.D.Iowa LR48.1; S.D.Iowa LR48.1; E.D.La. LR48.1; M.D.La. LR48.1; W.D.La. LR48.1; D.Me. LR47; M.D.Pa. LR48.1.

[19] C.D.Cal. LRLR13.1; D.Haw. LR48; N.D.Ind. LR48.1; D.N.Dak. LR47.1.

[20] D.Conn. LR12(a); M.D.Ga. LR48; D.V.I. LR48.1.

[21] C.D.Ill. LR48.1; M.D.N.Car. LR47.1; E.D.Pa. LR48.1; D.S.Car. LR48.01; W.D.Tex. LRCV-47; E.D.Wis. LR8.01; D.Wyo. LR48.1.

[22] D.P.R. LR321 (jury consists of "six persons, excluding alternates"); M.D.Tenn. LR12(j) (jury has "alternates as the court may determine").

Forty-two jurisdictions have local rules concerning counsel's ability to submit jury instructions to the court.[1] Local Rules in approximately thirty of these courts are appropriate supplements to Rule 51 of the Federal Rules of Civil Procedure and should, therefore, remain subject to local variation. The local rules in about twelve courts either conflict with existing law or repeat it and are, therefore, unnecessary.

DISCUSSION

> Rule 51 permits any party to file written requests for jury instructions "
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> At the close of the evidence or at such earlier time during the trial as the court reasonably directs.... No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict....[2]

Many of the local rules discuss the form of the jury instructions. For example, twenty-three courts require that the instructions be numbered consecutively.[3] Seventeen courts require that each instruction be accompanied with adequate citation.[4] Twelve

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[1] D.Alaska LRGR15; D.Ariz. LR2.16; C.D.Cal. LR13.2; E.D.Cal. LR51-163; S.D.Cal. LR51.1; D.Del. LR51.1; M.D.Fla. LR5.01(c); N.D.Ga. LR51.1; S.D.Ga. LR51.1; D.Guam LR51; D.Haw. LR51.1; D.Idaho LR51.1; C.D.Ill. LR51.1; S.D.Ill. LR51.1; N.D.Ind. LR51.1; N.D.Iowa LR51.1; S.D.Iowa LR51.1; D.Kan. LR51.1; W.D.La. LR51.1; D.Md. LR106.8; E.D.Mich. LR51.1; N.D.Miss. LR51.1;S.D.Miss. LR51.1; W.D.Mo. LR51.1; D.Mont. LR245-2; D.Neb. LR51.1; N.D.N.Y. LR51.1; E.D.N.Car. LR25.02; M.D.N.Car. LR51.1(b); D.Or. LR51.1; M.D.Pa. LR51.1; D.R.I. LR18(a); D.S.Dak. LR51.1; E.D.Tenn. LR51.1; M.D.Tenn. LR12(f); D.Utah LR114; D.Vt. LR51.1(a); E.D.Va. LR51; E.D.Wash. LR51.1; W.D.Wash. LR51; E.D.Wis. LR8.05; D.Wyo. LR51.1.

[2] Fed.R.Civ.P. 51.

[3] D.Alaska LRGR15; D.Ariz. LR2.16; M.D.Fla. LR5.01(c); N.D.Ga. LR51.1; S.D.Ga. LR51.1; D.Idaho LR51.1; S.D.Ill. LR51.1; N.D.Iowa LR51.1; S.D.Iowa LR51.1; D.Kan. LR51.1; D.Md. LR106.8; E.D.Mich. LR51.1; N.D.Miss. LR51.1; S.D.Miss. LR51.1; W.D.Mo. LR51.1; D.Neb. LR51.1; E.D.N.Car. LR25.02; D.Or. LR51.1; M.D.Pa. LR51.1; D.R.I. LR18(a); D.Utah LR114; E.D.Va. LR51; W.D.Wash. LR51.

[4] D.Alaska LRGR15; C.D.Cal. LR13.2; E.D.Cal. LR51-163; S.D.Cal. LR51.1; D.Del. LR51.1; M.D.Fla. LR5.01(c); N.D.Ga. LR51.1; S.D.Ga. LR51.1; D.Idaho LR51.1; N.D.Iowa LR51.1; S.D.Iowa LR51.1; D.Kan. LR51.1; W.D.La. LR51.1; D.Md. LR106.8; E.D.Mich. LR51.1; N.D.Miss. LR51.1; S.D.Miss. LR51.1; D.Mont. LR245-2; D.Neb. LR51.1; D.Or. LR51.1; M.D.Pa. LR51.1; D.R.I. LR18(a); D.S.Dak. LR51.1; E.D.Tenn. LR51.1; M.D.Tenn. LR12(f); D.Utah LR114; E.D.Va. LR51; W.D.Wash. LR51; D.Wyo. LR51.1.

courts require that each instruction be placed on a single page.[5] Twelve courts require that each instruction be brief and clear and cover only one subject.[6] Six courts require that the name of the party submitting the instructions be on the cover page and not elsewhere.[7] Eight courts indicate that form instructions are appropriate and even preferred[8], but three of those courts state that, if a party deviates in some way from the form instructions, the court must be notified.[9] Two courts impose a duty on the parties to meet and confer on the jury instructions[10] with a view toward providing joint instructions.[11] Three courts require that the instructions be on letter-size paper.[12] These rules are appropriate as supplements to Rule 51.

Twenty-one courts require that copies of the instructions be served on the other parties.[13] Eight other courts require that two copies of the instructions be submitted to the court[14] while one court requires four copies.[15] These directives are also appropriate

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[5] C.D.Cal. LR13.2; E.D.Cal. LR51-163; S.D.Cal. LR51.1; D.Kan. LR51.1; E.D.Mich. LR51.1; N.D.Miss. LR51.1; S.D.Miss. LR51.1; D.Or. LR51.1; M.D.Pa. LR51.1; E.D.Tenn. LR51.1; E.D.Va. LR51; E.D.Wash. LR51.1.

[6] D.Alaska LRGR15; D.Ariz. LR2.16; C.D.Cal. LR13.2; E.D.Cal. LR51-163; S.D.Cal. LR51.1; D.Haw. LR51.1; S.D.Ill. LR51.1; D.Kan. LR51.1; E.D.Mich. LR51.1; D.Or. LR51.1; D.R.I. LR18(a); D.Utah LR114.

[7] C.D.Cal. LR13.2; E.D.Cal. LR51-163; N.D.Iowa LR51.1; S.D.Iowa LR51.1; W.D.Mo. LR51.1; E.D.Wash. LR51.1.

[8] E.D.Cal. LR51-163; S.D.Cal. LR51.1; N.D.Ga. LR51.1; D.Haw. LR51.1; S.D.Ill. LR51.1; N.D.Ind. LR51.1; E.D.N.Car. LR25.02; D.Or. LR51.1.

[9] E.D.Cal. LR51-163; S.D.Cal. LR51.1; D.Haw. LR51.1.

[10] D.Haw. LR51.1; W.D.La. LR51.1.

[11] D.Haw. LR51.1.

[12] S.D.Ga. LR51.1; S.D.Ill. LR51.1; E.D.Wash. LR51.1.

[13] D.Ariz. LR2.16; C.D.Cal. LR13.2; E.D.Cal. LR51-163; D.Idaho LR51.1; C.D.Ill. LR51.1; S.D.Ill. LR51.1; N.D.Iowa LR51.1; S.D.Iowa LR51.1; D.Md. LR106.8; E.D.Mich. LR51.1; N.D.Miss. LR51.1; S.D.Miss. LR51.1; W.D.Mo. LR51.1; D.Mont. LR245-2; M.D.Pa. LR51.1; D.R.I. LR18(b); D.S.Dak. LR51.1; E.D.Tenn. LR51.1; M.D.Tenn. LR12(f); E.D.Va. LR51; D.Wyo. LR51.1.

[14] S.D.Ga. LR51.1; D.Haw. LR51.1; S.D.Ill. LR51.1; D.Kan. LR51.1; W.D.La. LR51.1; E.D.Mich. LR51.1; D.Mont. LR245-2; E.D.Va. LR51.

as local rules.

Eleven courts have local rules that seek to limit the number of instructions either by limiting the actual number of instructions to twelve[16] or by limiting the number of pages of instructions to three pages[17] or one page.[18] These rules appear to serve no useful purpose. In a complicated case, for example, it may be impossible to reduce the number or volume of instructions as required. In that situation, the party will have to seek permission to file more instructions, which activity will further burden the court and the parties. In the event the court is not of the opinion that more than the required number of instructions or pages is needed, the party will be denied the permission to file more requests and should be able to argue effectively a denial of the right set out in Rule 51 to file requests. If, in fact, a particular instruction is unnecessary or cumulative, the court always has the power, regardless of the existence of these local rules, to refuse to give the instruction. In addition, these local rules seem inconsistent with the intent of Rule 51, in permitting counsel to submit the proposed instructions in the first instance, that the Rule "expedite the administration of justice."[19] These rules should be rescinded.

Rule 51 requires that the party object to any instruction before the jury retires to provide an opportunity for the court to correct the instruction and to preserve that issue for later appeal.[20] There are local rules in some courts that require a specific form for these objections. For example, five courts have local rules that require the objection be

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[15] W.D.Wash. LR51.

[16] M.D.Pa. LR51.1.

[17] E.D.Cal. LR51-163; D.Del. LR51.1; N.D.Ga. LR51.1; D.Idaho LR51.1; D.Md. LR106.8; W.D.Mo. LR51.1; M.D.Pa. LR51.1; D.Utah LR114; E.D.Wash. LR51.1.

[18] D.Ariz. LR2.16.

[19] *Curko v. William Spencer & Son, Corporation*, 294 F.2d 410, 414 (2d Cir. 1961).

accompanied by appropriate case citations.[21] Two courts require that written objections be numbered consecutively.[22] Two courts require that any objection set forth alternative language.[23]

Objections, of course, do not need to be made only in writing, and there are rules in some courts outlining the procedure for making oral objections. For example, seventeen courts provide that objections need be made only once, at the initial conference, and not again at trial.[24] Two courts have local rules that explain that the clerk or reporter will note the objections.[25] All of these rules are appropriate supplements to Rule 51.

Four courts have local rules that discuss oral objections and that are problematic.[26] These rules explain that objections are made out of the hearing of the jury. These rules repeat the last sentence of Rule 51, which provides an opportunity for objections to be made out of the hearing of the jury.[27] They are, therefore, unnecessary.

Approximately seven courts have local rules that set forth the time by which the jury instructions must be filed. Many of these rules conflict with Rule 51 by requiring that the proposed instructions be filed by a designated time before trial. For example, five jurisdictions require that proposed instructions be submitted at least five

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[20] Fed.R.Civ.P. 51.

[21] C.D.Cal. LR13.3; E.D.Cal. LR51-163; S.D.Cal. LR51.1; D.Haw. LR51.1; D.Idaho LR51.1.

[22] C.D.Cal. LR13.3; D.Idaho LR51.1.

[23] C.D.Cal. LR13.3; D.Haw. LR51.1.

[24] E.D.Cal. LR51-163; S.D.Cal. LR51.1; D.Guam LR51; N.D.Ind. LR51.1; D.Kan. LR51.1; W.D.La. LR51.1; E.D.Mich. LR51.1; N.D.Miss. LR51.1; S.D.Miss. LR51.1; D.Mont. LR245-2; D.Neb. LR51.1; M.D.Pa. LR51.1; M.D.Tenn. LR12(f);; D.Utah LR114; E.D.Wash. LR51.1; W.D.Wash. LR51; E.D.Wis. LR8.05.

[25] D.Ariz. LR2.16; D.Idaho, LR51.1.

[26] D.Ariz. LR2.16; E.D.Cal. LR51-163; D.Guam LR51; D.Idaho LR51.1.

days before trial.[28] Three jurisdictions require they be submitted seven days before trial.[29] One court requires they be submitted three days before the pretrial conference.[30] Two courts require they be submitted ten days before trial.[31] Another court requires they be submitted fourteen days before trial. [32] All of these rules are inconsistent with the clear wording of Rule 51 indicating the instructions should be submitted "[a]t the close of the evidence or at such earlier time *during the trial* as the court reasonably directs."[33] All of these rules require submission before the trial.

Another ten courts have local rules requiring that the instructions be submitted at the opening of the trial.[34] These rules are also inconsistent since the Federal Rule contemplates that instructions will either be submitted at the close of the evidence or as determined by the court in an individual case. A local rule providing a different procedure in all cases is inconsistent with Rule 51.

Six courts have local rules providing that the judge decides when the instructions are due.[35] These directives are appropriate assuming that the time stated by the judge is always "during the trial" as required by Rule 51.[36]

Two courts have local rules that simply repeat that the judge will instruct the

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[27] *See* Fed.R.Civ.P. 51.

[28] D.Alaska LRGR15; C.D.Cal. LR13.2; E.D.Va. LR51; E.D.Wash. LR51.1; D.Wyo. LR51.1.

[29] D.Haw. LR51.1; W.D.La. LR51.1; D.Vt. LR51.1(a).

[30] D.Del. LR51.1.

[31] N.D.Miss. LR51.1; S.D.Miss. LR51.1.

[32] D.Idaho LR51.1.

[33] Fed.R.Civ.P. 51 (emphasis added).

[34] D.Ariz. LR2.16; E.D.Cal. LR51-163; N.D.Ga. LR51.1; S.D.Ga. LR51.1; D.Kan. LR51.1; E.D.Mich. LR51.1; D.Neb. LR51.1; M.D.Pa. LR51.1; M.D.Tenn. LR12(f); E.D.Wis. LR8.05.

[35] M.D.Fla. LR5.01(c); S.D.Ga. LR51.1; D.Guam LR51; D.Mont. LR245-2; N.D.N.Y. LR51.1; D.R.I. LR18(a).

jury.[37] Another three courts have local rules that repeat various portions of Rule 51.[38] These rules are unnecessary.

VII. Judgment

Rule 54. Judgment; Costs

Rule 54—Jury Cost Assessment

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[36] Fed.R.Civ.P. 51.

[37] D.Idaho LR51.1; E.D.Wash. LR51.1.

[38] M.D.N.Car. LR51.1(b); D.S.Dak. LR51.1; D.Utah LR114.

Fifty-six courts have local rules explaining the procedures used to assess costs in calling a jury when one is not actually needed because the case has already settled.[1] All of these rules are appropriate as local directives.

DISCUSSION

There is no particular federal rule or statute covering this issue although there are several provisions relating to taxation of costs and fees, generally. Rule 54 of the Federal Rules of Civil Procedure provides that the prevailing party may seek costs and attorneys fees by following certain general procedures.[2] A list of what costs may be taxed is set forth in Section 1920 of Title 28.[3] Another provision in Title 28 allows the court to assess costs and fees against an attorney, personally, if that attorney "multiplies the proceedings in any case unreasonably and vexatiously."[4]

Specific local directive is unnecessary since the courts have inherent authority to impose this type of sanction.[5] At least one court has suggested that, although a court need not rely on a local rule to provide authority for imposing jury costs: "a local rule on

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[1] N.D.Ala. LR54.2; C.D.Cal. LR11.3; E.D.Cal. LR16-272; N.D.Cal. LR404; S.D.Cal. LR16.4; D.Colo. LR54.2; D.Del. LR54.2; S.D.Fla. LR47.1(B); N.D.Ga. LR39.2; D.Haw. LR54.1; D.Idaho LR54.2; C.D.Ill. LR83.14; S.D.Ill. LR54.1; N.D.Ind. LR47.3; S.D.Ind. LR42.1; N.D.Iowa LR83.8; S.D.Iowa LR83.8; E.D.Ky. LR54.1; W.D.Ky. LR54.1; E.D.La. LR54.1; M.D.La. LR54.1; W.D.La. LR54.1; D.Mass. LR40.3; E.D.Mich. LR38.2; W.D.Mich. LR40.3; N.D.Miss. LR54.1; S.D.Miss. LR54.1; E.D.Mo. LR41-8.04; D.Neb. LR54.2; D.N.H. LR54.2; D.N.Mex. LR54.4; E.D.N.Y. LR47.1; N.D.N.Y. LR47.3; S.D.N.Y. LR47.1; W.D.N.Y. LR11(c); E.D.N.Car. LR16.00; M.D.N.Car. LR83.3; D.N.Mar.I LR54.2; N.D.Ohio LR54.1; E.D.Okla. LR38.1; N.D.Okla. LR38.1; D.Or. LR47.1; M.D.Pa. LR83.3.2; W.D.Pa. LR54.1; D.P.R. LR323; D.S.Car. LR54.01; E.D.Tenn. LR68.2; E.D.Tex. LRCV-38(c); S.D.Tex. LR10; D.Vt. LR47.1; E.D.Va. LR54(G); E.D.Wash. LR1.1; W.D.Wash. LR39; N.D.W.Va. LRCiv2.04(f); S.D.W.Va. LRCiv2.04(f); D.Wyo. LR54.4.

[2] Fed.R.Civ.P. 54.

[3] 28 U.S.C. §1920.

[4] 28 U.S.C. §1927.

[5] *See e.g., U.S. v. Claros*, 17 F.3d 1041 (7th Cir. 1994); *Eash v. Riggin Trucking, Inc.*, 757 F.2d 557 (3rd Cir. 1985); *White v. Raymark Industries, Inc.* 783 F.2d 1175 (4th Cir. 1986).

the imposition of such a sanction might well be salutary."[6]

All of the fifty-six courts have local rules explaining how the parties can dispose of the case before trial without incurring any costs for the jury. Twenty-one of these courts require that notice of settlement be provided one full day before the day the jury is set to be selected or the day the trial is scheduled to commence.[7] Six courts require that notice be provided by 3:00 pm of the day immediately prior to the trial,[8] and another six courts require notice by noon on the last business day before trial.[9] Four courts require that notice be given several days in advance of the scheduled trial date.[10] Five courts require notice of settlement before the jurors have reported to try the case.[11] Twelve of the courts simply require that notice be timely[12] or made promptly.[13]

Most of the jurisdictions acknowledge the court's power to assess these costs and identify the specific costs that may be assessed. Fifty-two of the courts have local rules that allow the court to assess all jury costs.[14] Many of these courts articulate

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[6] *Eash, supra*, at 569.

[7] N.D.Ala. LR54.2; S.D.Fla. LR47.1(B); N.D.Ga. LR39.2; D.Haw. LR54.1; N.D.Ind. LR47.3; S.D.Ind. LR42.1; N.D.Iowa LR83.8; S.D.Iowa LR83.8; E.D.La. LR54.1; M.D.La. LR54.1; W.D.La. LR54.1; N.D.Miss. LR54.1; S.D.Miss. LR54.1; D.Neb. LR54.2; N.D.N.Y. LR47.3; E.D.N.Car. LR16.00; M.D.N.Car. LR83.3; D.S.Car. LR54.01; E.D.Tex. LRCV-38(c); E.D.Va. LR54(G); E.D.Wash. LR1.1.

[8] D.Idaho LR54.2; S.D.Ill. LR54.1; D.N.H. LR54.2; D.Or. LR47.1; N.D.W.Va. LRCiv2.04(f); S.D.W.Va. LRCiv2.04(f).

[9] D.Colo. LR54.2; D.N.Mex. LR54.4; E.D.N.Y. LR47.1; S.D.N.Y. LR47.1; N.D.Ohio LR54.1; D.P.R. LR323.

[10] D.Del. LR54.2 (three business days); W.D.Wash. LR39 (three business days); D.Wyo. LR54.4 (five business days); D.N.Mar.I. LR54.2 (ten business days).

[11] E.D.Cal. LR16-272; S.D.Cal. LR16.4; C.D.Ill. LR83.14; E.D.Mich. LR38.2; D.Vt. LR47.1.

[12] N.D.Cal. LR404; E.D.Mich. LR38.2; W.D.Mich. LR40.3; E.D.Okla. LR38.1; N.D.Okla. LR38.1; E.D.Tenn. LR68.2.

[13] C.D.Cal LR11.2; E.D.Ky. LR54.1; W.D.Ky. LR54.1; E.D.Mo. LR41-8.04; D.Or. LR47.1; S.D.Tex. LR10.

[14] N.D.Ala. LR54.2; C.D.Cal. LR11.3; E.D.Cal. LR16-272; N.D.Cal. LR404; S.D.Cal. LR16.4; D.Colo. LR54.2; D.Del. LR54.2; S.D.Fla. LR47.1(B); N.D.Ga. LR39.2; D.Haw. LR54.1;

precisely what those costs are such as, for example, the per diem,[15] mileage,[16] marshal's fees,[17] and parking.[18]

These rules also explain who may be made financially responsible for these costs. For example, forty-eight of the courts allow an assessment to be made against the parties, counsel, or both.[19] Two courts have local rules that require the assessment be

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D.Idaho LR54.2; C.D.Ill. LR83.14; S.D.Ill. LR54.1; N.D.Ind. LR47.3; S.D.Ind. LR42.1; N.D.Iowa LR83.8; S.D.Iowa LR83.8; E.D.Ky. LR54.1; W.D.Ky. LR54.1; E.D.La. LR54.1; M.D.La. LR54.1; W.D.La. LR54.1; E.D.Mich. LR38.2; W.D.Mich. LR40.3; N.D.Miss. LR54.1; S.D.Miss. LR54.1; D.Neb. LR54.2; D.N.H. LR54.2; D.N.Mex. LR54.4; E.D.N.Y. LR47.1; N.D.N.Y. LR47.3; S.D.N.Y. LR47.1; W.D.N.Y. LR11(c); E.D.N.Car. LR16.00; M.D.N.Car. LR83.3; D.N.Mar.I LR54.2; N.D.Ohio LR54.1; E.D.Okla. LR38.1; N.D.Okla. LR38.1; M.D.Pa. LR83.3.2; W.D.Pa. LR54.1; D.P.R. LR323; D.S.Car. LR54.01; E.D.Tenn. LR68.2; E.D.Tex. LRCV-38(c); D.Vt. LR47.1; E.D.Va. LR54(G); E.D.Wash. LR1.1; W.D.Wash. LR39; N.D.W.Va. LRCiv2.04(f); S.D.W.Va. LRCiv2.04(f); D.Wyo. LR54.4.

[15] N.D.Ala. LR54.2; C.D.Cal. LR11.3; D.Del. LR54.2; S.D.Fla. LR47.1(B); N.D.Ga. LR39.2; D.Haw. LR54.1; D.Idaho LR54.2; C.D.Ill. LR83.14; N.D.Ind. LR47.3; S.D.Ind. LR42.1; N.D.Iowa LR83.8; S.D.Iowa LR83.8; E.D.La. LR54.1; M.D.La. LR54.1; W.D.La. LR54.1; N.D.Miss. LR54.1; S.D.Miss. LR54.1; E.D.Mo. LR41-8.04; D.N.Mex. LR54.4; N.D.N.Y. LR47.3; E.D.N.Car. LR16.00; M.D.N.Car. LR83.3; D.N.Mar.I LR54.2; D.Or. LR47.1; M.D.Pa. LR83.3.2; W.D.Pa. LR54.1; D.P.R. LR323; D.S.Car. LR54.01; E.D.Tenn. LR68.2; E.D.Tex. LRCV-38(c); E.D.Va. LR54(G); E.D.Wash. LR1.1; D.Wyo. LR54.4.

[16] N.D.Ala. LR54.2; D.Del. LR54.2; S.D.Fla. LR47.1(B); N.D.Ga. LR39.2; D.Haw. LR54.1; C.D.Ill. LR83.14; N.D.Ind. LR47.3; S.D.Ind. LR42.1; N.D.Iowa LR83.8; S.D.Iowa LR83.8; E.D.La. LR54.1; M.D.La. LR54.1; W.D.La. LR54.1; W.D.Mich. LR40.3; N.D.Miss. LR54.1; S.D.Miss. LR54.1; E.D.Mo. LR41-8.04; D.N.H. LR54.2; D.N.Mex. LR54.4; N.D.N.Y. LR47.3; E.D.N.Car. LR16.00; M.D.N.Car. LR83.3; D.N.Mar.I LR54.2; M.D.Pa. LR83.3.2; W.D.Pa. LR54.1; D.P.R. LR323; D.S.Car. LR54.01; E.D.Tenn. LR68.2; E.D.Tex. LRCV-38(c); E.D.Va. LR54(G); E.D.Wash. LR1.1; D.Wyo. LR54.4.

[17] D.Del. LR54.2; D.Haw. LR54.1; N.D.Ind. LR47.3; S.D.Ind. LR42.1; N.D.Iowa LR83.8; S.D.Iowa LR83.8; E.D.La. LR54.1; M.D.La. LR54.1; W.D.La. LR54.1; D.Neb. LR54.2; D.N.H. LR54.2; N.D.N.Y. LR47.3; M.D.N.Car. LR83.3; D.N.Mar.I LR54.2; D.Or. LR47.1; D.P.R. LR323; D.S.Car. LR54.01; E.D.Va. LR54(G)E.D.Wash. LR1.1; D.Wyo. LR54.4rt.

[18] N.D.Ga. LR39.2; E.D.Mo. LR41-8.04; E.D.N.Car. LR16.00; E.D.Tenn. LR68.2.

[19] N.D.Ala. LR54.2; E.D.Cal. LR16-272; N.D.Cal. LR404; S.D.Cal. LR16.4; D.Colo. LR54.2; D.Del. LR54.2; S.D.Fla. LR47.1(B); N.D.Ga. LR39.2; D.Haw. LR54.1; C.D.Ill. LR83.14; N.D.Ind. LR47.3; S.D.Ind. LR42.1; N.D.Iowa LR83.8; S.D.Iowa LR83.8; E.D.Ky. LR54.1; W.D.Ky. LR54.1; E.D.La. LR54.1; M.D.La. LR54.1; W.D.La. LR54.1; E.D.Mich. LR38; W.D.Mich. LR40.3; N.D.Miss. LR54.1; S.D.Miss. LR54.1; E.D.Mo. LR41-8.04; D.Neb. LR54.2; D.N.Mex. LR54.4; E.D.N.Y. LR47.1; N.D.N.Y. LR47.3; S.D.N.Y. LR47.1; W.D.N.Y. LR11(c); E.D.N.Car. LR16.00; M.D.N.Car. LR83.3; N.D.Ohio LR54.1; E.D.Okla. LR38.1; N.D.Okla. LR38.1; M.D.Pa. LR83.3.2; W.D.Pa. LR54.1; D.P.R. LR323; D.S.Car. LR54.01; E.D.Tenn. LR68.2; E.D.Tex. LRCV-38(c); E.D.Va. LR54(G); E.D.Wash. LR1.1; .W.D.Wash. LR39; N.D.W.Va. LRCiv2.04(f); S.D.W.Va. LRCiv2.04(f); D.Wyo. LR54.4.

made against counsel alone.[20] Another two courts allow the parties to agree to divide the responsibility.[21]

Some of the courts explain the standard used to avoid a sanction even if a case is settled at the last minute. Twenty-four courts specifically state that an assessment will not be made upon a showing of good faith for the delay.[22]

Some courts also explain that an assessment of juror costs may be made during the trial itself. Eleven courts extend the operation of this rule to any settlement that occurs after the start of the trial and up to the verdict.[23]

XI. General Provisions

Rule 81. Applicability in General

Rule 81—Naturalization

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[20] C.D.Cal. LR11.3; D.Idaho LR54.2..

[21] N.D.Ind. LR47.3; S.D.Ind. LR42.1. .

[22] N.D.Ala. LR54.2; D.Del. LR54.2; S.D.Fla. LR47.1(B); N.D.Ga. LR39.2; D.Haw. LR54.1; N.D.Ind. LR47.3; S.D.Ind. LR42.1; N.D.Iowa LR83.8; S.D.Iowa LR83.8; E.D.La. LR54.1; M.D.La. LR54.1; W.D.La. LR54.1; N.D.N.Y. LR47.3; E.D.N.Car. LR16.00; M.D.N.Car. LR83.3; D.N.Mar.I LR54.2; M.D.Pa. LR883.3.; W.D.Pa. LR54.1; D.P.R. LR323; E.D.Tex. LRCV-38(c); S.D.Tex. LR10; E.D.Va. LR54(G); E.D.Wash. LR1.1; D.Wyo. LR54.4.

[23] D.Colo. LR54.2; N.D.Ga. LR39.2; N.D.Miss. LR54.1; S.D.Miss. LR54.1; D.Neb. LR54.2; D.N.Mex. LR54.4; E.D.N.Car. LR16.00; N.D.Ohio LR54.1; E.D.Tex. LRCV-38(c); E.D.Va. LR54(G); D.Wyo. LR54.4.

Eleven courts have local rules outlining various procedures used to hear naturalization petitions.[1] All of these rules should be rescinded since the district courts no longer have authority to hear naturalization petitions.

DISCUSSION

Prior to 1990 the federal district courts had jurisdiction to hear petitions for naturalization.[2] The procedure for filing those petitions was regulated by section 1445 of the Immigration and Nationality Act which, among other things, set forth the form of the petition, who may file the petition, where petitions were to be filed, and the use and purpose of any declaration of intention.[3] The local rules which explain how and when petitions are filed and heard may have been appropriate as supplements to this law.

The Immigration and Nationality Act was amended, however, in significant respects effective November 29, 1990 so that these rules are now inappropriate. The district courts no longer have nationalization authority: "The full authority to naturalize persons as citizens of the United States is conferred upon the Attorney General."[4] The application for naturalization is now filed with the Attorney General and investigated and determined by the Attorney General.[5]The district court's role now is to administer the oath of allegiance if requested by the applicant.[6] These local rules explain where the petitions are filed and when they are heard. They are inconsistent with the clear wording of the relevant statutes and, as such, should be rescinded.

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[1] D.Alaska LR28; N.D.Ga. LR83.10; E.D.La. LR83.1; M.D.La. LR83.1; W.D.La. LR83.1; D.N.J. LR81.1; W.D.N.Y. LR78; E.D.N.Car. LR14.00; M.D.N.Car. LR77.1(c); D.Utah LR120; D.Wyo. LR83.8.

[2] *See* 8 U.S.C. §1421 (1989).

[3] 8 U.S.C. §1445 (1989).

[4] 8 U.S.C. §1421 (2001).

[5] *See* 8 U.S.C. §§1445, 1446, and 1447 (2001).

[6] 8 U.S.C. §§1421(b) (2001).

Rule 81—Jury Demand in Removed Cases

Local rules in ten courts address the procedure used to secure a jury trial in a removed case. Rules in five of these courts repeat existing law. Rules in six jurisdictions may be inconsistent with existing law. Rules in two courts are flatly contradictory with existing law and should be rescinded.

DISCUSSION

Rule 81(c) regulates the procedure used to obtain a jury trial when a case has been removed from state court.[1] Three specific circumstances are set forth in that Rule. The first concerns the procedure for making an actual demand:

> If at the time of removal all necessary pleadings have been served, a party entitled to trial by jury under Rule 38 shall be accorded it, if the party's demand therefor is served within 10 days after the petition for removal is filed if the party is the petitioner, or if not the petitioner within 10 days after service on the party of the notice of filing the petition.[2]

The second situation arises when the party already made an express demand for a jury trial in state court. In this instance, Rule 81 provides that the party need not make a demand at all after removal.[3] The last situation arises when state law did not require that a specific jury demand be made. Rule 81 provides, in these cases, that the parties

> need not make demands after removal unless the court directs that they do so within a specified time if they desire to claim trial by jury. The court may make this direction on its own motion and shall do so as a matter of course at the request of any party.[4]

Local rules in five courts either repeat the language of Rule 81(c) and Rule

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[1] Fed.R.Civ.P. 81(c).

[2] *Id.*

[3] *Id.*

[4] *Id.*

38(b) or repeat that these Federal Rules are applicable to removed cases generally.[5] Rule 83 of the Federal Rules of Civil Procedure does not permit such repetition.[6]

Local rules in four district courts appear to discuss a party's obligation to reassert its demand for a jury trial after removal.[7] For example, one court specifically requires a new jury demand even if one was already made pursuant to state law: "Notwithstanding state law, trial by jury is waived ... [in a removed case] unless a demand for a jury trial is filed...."[8] One local rule also requires an additional jury demand after removal by stating that a failure to make a demand as directed in the local rule is a waiver of the right to a jury trial.[9] Another local rule acknowledges that the party may have already filed a demand pursuant to state law but still requires that a party reassert its request for a jury unless that demand "is in the removed case file."[10] Another local rule requires that a written jury demand be filed within thirty days of the clerk's notice of removal or the right to a jury trial will be deemed waived.[11] A party is under no obligation to reassert its demand for a jury trial if one was properly made pursuant to state law. To the extent these local rules require exactly that, they are inconsistent with Rule 81 and should, therefore, be rescinded. To the extent, however, these rules are in states where there is no need to make specific demand in state court, then these rules fall under the third circumstance where district court regulation is appropriate.

Two courts have local rules that set forth times within which the parties must

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[5] C.D.Cal. LR3.4.10; N.D.N.Y. LR81.3; D.Me. LR38; E.D.Va. LR38; E.D.Wash. LR38.1.

[6] Fed.R.Civ.P. 83(a)(1).

[7] D.Neb. LR81.2; W.D.N.Y. LR38; N.D.Okla. LR38.1A; W.D.Okla. LR81.1.

[8] W.D.Okla. LR81.1.

[9] D.Neb. LR81.2.

[10] N.D.Okla. LR81.2.

file jury demands after removal.[12] For example, one local rule provides thirty days from the date of removal to make a demand or it is deemed waived unless Rule 38 gives a longer time.[13] These time limits are different from those set forth in Rule 81(c).[14] Because they flatly contradict the stated time limits in the Federal Rule, these local rules should be rescinded.

Two courts have local rules that seem suggestive only.[15] The significance of these rules is not apparent. One of the rules simply states that a "party may file a 'Demand for Jury Trial.'"[16] The other rule states that, if a demand for a jury trial was made already in state court, the removing party "shall include the word 'jury' with the caption of the notice of removal."[17] If these rules are only trying to suggest what a party could do, perhaps to assist the clerk in determining what cases should be given jury trials, the rules are not problematic. If, on the other hand, they are actually requirements and a failure to comply with them will act as a waiver, then they are inconsistent with existing law and should be rescinded.

Rule 83. Rules by District Courts; Judges' Directives

Rule 83—Availability of Local Rules

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[11] W.D.N.Y. LR38.

[12] N.D.Okla. LR81.2; D.Neb. LR81.2.

[13] N.D.Okla. LR81.2.

[14] *See* Fed.R.Civ.P. 81(c) (demand must be served "within 10 days after the petition for removal is filed if the party is the petitioner, or if not the petitioner within 10 days after service on the party of the notice of filing the petition").

[15] N.D.N.Y. LR38.1; E.D.Tex. LR81(b).

[16] N.D.N.Y. LR38.1.

[17] E.D.Tex. LR81(b).

Seventeen district courts have local rules concerning the availability of local rules.[1] Some of these rules are appropriate supplements to the Federal Rules. Rules in three courts, however, repeat existing law and are, therefore, unnecessary.

DISCUSSION

Rule 83 of the Federal Rules of Civil Procedure requires that copies of local rules be made available to the public.[2] Five courts have local rules indicating that the rules are provided at no charge to people.[3] Seven courts provide free copies of the local rules to new attorneys.[4] Six of these courts explain that there is a charge for local rules when sought by attorneys who are not new to the jurisdiction.[5] These rules supplement Rule 83 and should remain local directives.

Rules in three courts simply restate the Rule 83 provision that copies of local rules are available.[6] These rules are unnecessary and should be rescinded.

Rule 83—Sanctions

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[1] S.D.Ala. LR1.2; E.D.Cal. GR1-102; S.D.Cal. LR1.2; D.Del. LR1.2; D.Idaho LR1.2; N.D.Ind. LR1.2; S.D.Ind. LR1.2; E.D.Mich. LR1.3; D.Neb. LR1.2; D.N.H. LR1.2; N.D.N.Y. LR1.2; D.N.Mar.I LR1.2; E.D.Okla. LR1.2; N.D.Okla. LR1.2; W.D.Pa. LR1.2; D.Utah LR102; D.V.I. LR1.2.

[2] Fed.R.Civ.P. 83(a)(1).

[3] D.Del. LR1.2; D.Idaho LR1.2; N.D.Ind. LR1.2; S.D.Ind. LR1.2; D.Neb. LR1.2; D.N.H. LR1.2; D.N.Mar.I LR1.2; W.D.Pa. LR1.2.

[4] S.D.Ala. LR1.2; E.D.Cal. GR1-102; S.D.Cal. LR1.2; E.D.Okla. LR1.2; N.D.Okla. LR1.2; D.Utah LR102; D.V.I. LR1.2.

[5] S.D.Ala. LR1.2; S.D.Cal. LR1.2; N.D.Okla. LR1.2; D.Utah LR102; D.V.I. LR1.2.

[6] E.D.Mich. LR1.3; N.D.N.Y. LR1.2; E.D.Okla. LR1.2.

Sixteen courts have local rules concerning sanctions for some local rule violations.[1] Seven of these courts have rules that are appropriate supplements to Rule 83 of the Federal Rules of Civil Procedure. Rules in some of the jurisdictions may be appropriate but, depending upon how the rules are applied in a specific case, they may be problematic.

DISCUSSION

Rule 83 was amended in 1995 based, at least in part, on suggestions in the original Local Rules Project Report[2] by the addition of the following requirement:

> A local rule imposing a requirement of form shall not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement.[3]

Rule 5 of the Federal Rules of Civil Procedure was also amended around that time to forbid rejection of a paper presented for filing "solely because it is not presented in proper form as required by these rules or any local rules or practices."[4]

Six courts have local rules that specifically provide sanctions for incorrect forms of pleadings and other papers consisting only of the imposition of a fine against the attorney or a person proceeding *pro se*.[5] Another court requires that a sanction for any form violation be contested only prior to the payment of any fine.[6] These rules supplement Rule 83 and should remain subject to local variation.

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[1] M.D.Ala. LR1.2; N.D.Cal. LR04-Jan ; D.Del. LR1.3; D.Idaho LR1.3; N.D.Ind. LR1.3; S.D.Ind. LR1.3; N.D.Iowa LR1.1; S.D.Iowa LR1.1; D.Mass. LR1.3; D.Minn. LR1.3; D.Nev. LR1A. 4-1; D.N.H. LR1.3; N.D.N.Y. LR1.1; D.N.Mar.I LR1.3; D.V.I. LR1.3; E.D.Wash. LR1.1.

[2] *See* Report at Suggested Local Rules p.9.

[3] Fed.R.Civ.P. 83(a)(2).

[4] Fed.R.Civ.P. 5(e).

[5] D.Idaho LR1.3; N.D.Ind. LR1.3; S.D.Ind. LR1.3; D.N.H. LR1.3; D.N.Mar.I LR1.3; D.V.I. LR1.3.

Rules in eleven jurisdictions may also supplement this Federal Rule but, depending on their application in specific cases, they may be inconsistent with this Rule.[7] Rules in nine courts set forth the sanctions available for violations of any local rules.[8] Rules in four courts acknowledge that the issue of sanctions is within the sound discretion of the judge whose case is affected.[9] Of course, the court does have discretion to determine appropriate sanctions, but this discretion is tempered by Rule 83 and the requirement of Rule 5.[10] To the extent, then, that these local rules allow sanctions otherwise forbidden by these Federal Rules, they should be rescinded.

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[6] D.N.H. LR1.3.

[7] M.D.Ala. LR1.2; N.D.Cal. LR04-Jan ; D.Del. LR1.3; N.D.Iowa LR1.1; S.D.Iowa LR1.1; D.Mass. LR1.3; D.Minn. LR1.3; D.Nev. LR1A. 4-1; D.N.H. LR1.3; N.D.N.Y. LR1.1; E.D.Wash. LR1.1.

[8] M.D.Ala. LR1.2; N.D.Cal. LR04-Jan ; D.Del. LR1.3; N.D.Iowa LR1.1; S.D.Iowa LR1.1; D.Mass. LR1.3; D.Minn. LR1.3; D.Nev. LR1A. 4-1; D.N.H. LR1.3; N.D.N.Y. LR1.1; E.D.Wash. LR1.1.

[9] M.D.Ala. LR1.2; D.Del. LR1.3; Nev. LR1A 4-1; D.N.H. LR1.3.

[10] Fed.R.Civ.P. 83(a)(2); 5(e).

DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

OCTOBER 3-4, 2002

The Civil Rules Advisory Committee met on October 3 and 4, 2002, at La Posada de Santa Fe in Santa Fe, New Mexico. The meeting was attended by Judge David F. Levi, Chair; Sheila Birnbaum, Esq.; Justice Nathan L. Hecht; Robert C. Heim, Esq.; Professor John C. Jeffries, Jr.; Mark O. Kasanin, Esq.; Judge Paul J. Kelly, Jr.; Judge Richard H. Kyle; Professor Myles V. Lynk; Hon. Robert D. McCallum, Jr.; Judge H. Brent McKnight; Judge Lee H. Rosenthal; Judge Thomas B. Russell; and Judge Shira Ann Scheindlin. Professor Edward H. Cooper was present as Reporter, Professor Richard L. Marcus was present as Special Reporter, and Professor Thomas D. Rowe, Jr., was present as Consultant. Judge Anthony J. Scirica, Chair, and Judge Sidney A. Fitzwater represented the Standing Committee. Judge James D. Walker, Jr., attended as liaison from the Bankruptcy Rules Committee. Judge J. Garvan Murtha, chair of the Standing Committee Style Subcommittee, attended by telephone; Professor R. Joseph Kimble, Style Consultant to the Standing Committee, also attended. Peter G. McCabe, John K. Rabiej, Jeffrey Hennemuth, and James Ishida represented the Administrative Office. Thomas E. Willging, Robert Niemic, Kenneth J. Withers, and Molly Treadway Johnson (by telephone) represented the Federal Judicial Center. Ted Hirt, Esq., Department of Justice, was present. Observers included Francis Fox (American College of Trial Lawyers); Lorna Schofield (ABA Litigation Section); Peter Freeman (ABA Litigation Section); Ira Schochet; and Alfred W. Cortese, Jr.

Judge Levi opened the meeting by observing that the Committee has accomplished much this year, but still has much to do. He noted that Robert Heim was present for the first time as a Committee member, but has been a good friend of the committee over the years, often attending meetings and also offering advice to the Class Action Subcommittee.

Judge Levi further noted that Mark Kasanin, inconceivably, is concluding service as a member after ten years; the Committee feels profound gratitude for all of his work from 1992 to 2002. The ten-year span of service happened because it was so difficult for the Committee to let go. He participated diligently and to great effect as a committee member, always concerned to find the best answers for the operation of the system and without "carrying a brief" for any particular point of view. He has been a good ambassador to bar groups, and an invaluable liaison to the Maritime Law Association in dealing with the Admiralty Rules. Member Kasanin responded that the Committee's work has been a very worthwhile effort. The Committee has had fine leadership. Members from different backgrounds of experience and perspectives have shared their views and have worked well together. There have been a few disappointments about proposals that could not be carried through to adoption, but some of the things not done may yet reemerge. Much has been accomplished in these ten years.

Good news was noted. Sol Schreiber, former member of the Standing Committee and liaison to this Committee, is soon to be married; the Committee expressed its congratulations, best wishes, and sense of joy to a long-time friend. So too, Alfred W. Cortese, Jr., a constant observer, is to marry soon. The Committee extended its congratulations and best wishes to him as well.

A certificate of appreciation for ten years of service as Reporter was presented to Professor Cooper.

Francis Fox presented a memorial minute to John P. Frank, who passed away in September, replete with quoted "Frankisms." Mr. Frank, one of the country's leading lawyers, was a member of this Committee forty years ago. He continued to pay close attention to the Committee's work, and to provide valuable help. His contributions to the work on class actions informed the Committee throughout the process that led to the amendments proposed for adoption in 2002. Fox first met

Frank in 1991, when the American College of Trial Lawyers began an effort to support Rule 11 amendments, to "put Rule 11 back in its cage after the 1983 amendments." The 1983 changes were designed to encourage more sanctions. They encouraged not only sanctions, but too many sanctions proceedings. In a matter of days, Frank created a coalition of judges and lawyers, marshalling not only facts and evidence but also people. Frank framed arguments as well: "Judges like Rule 11. Lawyers do not. In a world of cats and mice, it is better to be a cat. But Rule 11 is institutionally bad for all of us." In the Rule 23 review, he advised the Committee in 1996 that the settlement class is a perversion. "In my view, this rule has turned the courts into merchants of res judicata, turned courts into 'Uncle Santa Claus for lawyers,' and has done little good for many classes." His institutional memory of the social currents at work that carried the committee to the 1966 amendments of Rules 23(b)(1) and (2) was constantly before us. And then "Judge Wyzanski had his flash of genius." He recreated for the Committee the exchanges that led to creation of the opt-out as a protection for members of what became (b)(3) classes, from Wyzanski to Moore to Frank and back. Beyond constant reminders that no one had foreseen what Rule 23(b)(3) would become, Frank provided continuing advice on the danger of unintended consequences. A proposal to permit a preliminary evaluation of the merits as part of a (b)(3) certification determination, for example, was challenged as a horrible idea. It will be difficult to get by without John Frank. We need to reinvent him.

Judge Levi noted that Professor Rowe is back with the Committee as a consultant on the style project. He served six years as a member of the Committee. He does the hard work. He was particularly engaged in the discovery work. He sees both the big picture and the details. Professor Rowe responded that it is good to be back with the Committee.

Report on Standing Committee and Judicial Conference

Judge Levi reported that Rules 51 and 53 were approved by the Judicial Conference as consent-calendar items, without discussion. The Rule 23(e)(3) "second opt-out" from a proposed settlement was on the discussion calendar because it was seen to be important and potentially controversial. But it too was approved without difficulty. The New York Times published a favorable article about the class-action proposals on the day following Judicial Conference approval.

The Standing Committee discussion of Rule 23 focused primarily on the 23(e)(3) second opt-out. The language was changed to rely on the power to disapprove a settlement that does not, by its terms, provide a second opt-out opportunity. This change leaves the matter unambiguously within party control: the court cannot, by directing a second opt-out opportunity in the notice of settlement, force the parties to accept a settlement that they would not have agreed to if it included a second opt-out opportunity. The Committee Note was shortened and revised to emphasize that lapse of time and changed circumstances are particular reasons for permitting a second opt-out opportunity. The Standing Committee did not want to encourage use of the second opt-out as a means of avoiding doubts about the fairness of the settlement: the trial court should be forced to confront the fairness question directly, without assuaging its doubts by relying on the opportunity to request exclusion.

Rule 53 was changed by the Standing Committee by deleting a late-added part of Rule 53(b)(2)(B). The change restored the open direction that the order appointing a master must state "the circumstances — if any — in which the master may communicate ex parte with the court or a party," eliminating the qualification that ex parte communications with the court must be limited to administrative matters unless the court, in its discretion, permits ex parte communications on other matters. Concerns were expressed that the deleted portion might suggest greater room for ex parte communications than is appropriate, and that there might be some intrusion on matters of professional responsibility. Another change restored verbatim the provision of present Rule 53(f)

that Rule 53 applies to a magistrate judge only if the order referring a matter to the magistrate judge expressly provides that the reference is made under Rule 53. The Advisory Committee had developed a complex provision addressing appointment of magistrate judges as special masters. The provision was opposed by the magistrate judges association and by the Judicial Conference committee on magistrate judges, and the Advisory Committee acted to delete all references to magistrate judges. In the Standing Committee, concerns were expressed that magistrate judges are routinely appointed as special masters in some districts for certain kinds of cases. Present Rule 53(f) was restored to the new rule as subdivision (i) to address this concern.

In all, the Standing Committee meeting went very well.

Judge Scirica praised as "brilliant" Judge Levi's presentation of Rule 23(e)(3) in the Judicial Conference. He also noted that the Administrative Office memorandum submitting the Civil Rules proposals to the Judicial Conference was very good, easing the path to the consent calendar. The Standing Committee submitted to the Judicial Conference the Advisory Committee report on minimum-diversity class-action legislation. The Federal-State Jurisdiction Committee also has devoted much time to studying such legislation over the last few years, and continues to take an approach somewhat different from the Advisory Committee recommendations.

Mass Torts Proposals: Bankruptcy and Minimal Diversity

Judge Levi summarized a meeting with representatives of the Judicial Conference Bankruptcy Administration Committee on the eve of the Judicial Conference meeting. The National Bankruptcy Review Commission made proposals to address future mass tort claims in bankruptcy. The Bankruptcy Administration Committee formed a committee to consider the proposals — Judge Rosenthal was the Advisory Committee member of the committee. The central difficulty arose in addressing the question whether the Amchem and Ortiz decisions that have limited the use of Rule 23 in addressing future claimants should apply differently in bankruptcy. The Civil Rules Committee has expressed doubts and reservations about the Review Commission proposals. The Bankruptcy Committee report did not assuage those doubts, in part because the scope of the recommendations was not clear. The recommendations might be read to imply that bankruptcy proceedings should be used to address not only future claims, but also the related present mass tort claims. The September meeting representatives of the Civil Rules Committee were Judge Levi, Judge Rosenthal, Sheila Birnbaum, and David Bernick (a member of the Standing Committee). The Bankruptcy Committee seemed to be persuaded that it would not be wise to recommend that Congress adopt the Review Commission proposals. Rather, they seem likely to advise that the Judicial Conference position should be that if Congress is interested, specified problems must be addressed. The sense of the meeting was that no one knows enough about how these matters are in fact handled in bankruptcy.

Judge Levi called attention to the Advisory Committee's earlier conclusion that the problems presented by overlapping, duplicating, and competing class actions in state and federal courts are better addressed by Congress than by Civil Rules changes. But it is not only the devil that lurks in the details — it also is the politics. The Committee has said only that minimum diversity is an approach worth considering. The Federal-State Jurisdiction Committee has responded positively. They have not withdrawn their opposition to pending bills, but do support further exploration of a different approach that would create a new joint federal-state panel to help coordinate parallel actions. The central concept seems to be an augmented version of the Judicial Panel on Multidistrict Litigation, adding state-court judges and recognizing authority to assign cases to state courts as well as to federal courts. This topic was not on the Judicial Conference discussion calendar, but interested groups sent memoranda to the Conference. The Public Citizen memorandum approved

the approach taken by The American Law Institute in its Complex Litigation project, looking toward creation of an expanded Judicial Panel that would include state participation. This approach is seen as "more modest" than sweeping minimum-diversity provisions. Whether it is more modest may depend on perspective: it might bring fewer cases to federal courts, but it could raise troubling questions whether Congress can force unwilling states to participate in the panel process or to accept transferred cases. For the present, the important point is to remember that the Committee's only position is that these are questions for deliberation by Congress.

Sealing Orders

The District of South Carolina is considering a local rule that would prohibit entry of an order sealing a settlement agreement filed with the court. Senator Kohl has asked whether this question will be considered in the Enabling Act process. The Administrative Office has responded on behalf of the rules committees that the question will be considered. The questions surrounding this practice would benefit from empirical work. The Federal Judicial Center is beginning to consider the forms of assistance it might provide. The central questions go to the frequency of sealing orders; the reasons that lead parties to wish to file a settlement agreement with the court — and whether filing is undertaken for reasons other than implementation of an agreement that the court's jurisdiction will continue for purposes of enforcing the settlement; how often the public interest in information about the litigation can be satisfied by access to materials in the court file, such as the pleadings, that have not been sealed; and what privacy concerns the parties may have apart from the amount of the settlement. Other questions may arise as well. The questions are highly important, and equally sensitive. This project will demand a significant part of the Committee's attention.

Approval of Minutes

The Committee approved the Minutes of the May 6-7, 2002, meeting.

Style Project

Judge Levi introduced the Style Project by noting that it has come to the Advisory Committee by direction of the Standing Committee. Although the ordinary course is that projects originate in the Advisory Committee, tasks are occasionally assigned by the Standing Committee. This is one of them. The decision has been made that in the rules styling cycle, the time to do the Civil Rules has come.

The project goes back ten years. Judge Keeton, then chair of the Standing Committee, decided that the rules should be restyled. All of the sets of procedural rules include archaic and unfamiliar language. There are provisions that are simply out-of-date. There are many opportunities to clarify opaque language. But style changes can change meaning, even unintentionally. There is a risk that we will excise language that seems no longer useful, and that we will be wrong for failure to remember a use that continues still.

The Civil Rules were initially offered as the first style project. After Judge Pointer revised Bryan Garner's restyled version of the Civil Rules, the first approach was to address a few rules after completion of other agenda items at regular meetings. That approach did not work well in the press of competing business. The next approach was to schedule a special meeting devoted solely to style. This meeting at Sea Island, Georgia, has grown in legend to be described as "fabled," or less neutrally as "notorious." The Committee found many ambiguities in the rules confronted at that meeting. The uncertainty of resolving these ambiguities convinced the Committee that the style process would require more time than could be taken from other projects. There are many Civil Rules. They are "surrounded by a sea of case law." Inordinate amounts of time may be required to

determine how far all identified ambiguities have been resolved or exacerbated by reported decisions.

After the decision to defer the style project for the Civil Rules, the Appellate Rules were restyled. The process went well, and the product has been well received. The Criminal Rules came next; barring last-minute action by Congress, they will take effect December 1, 2002. Those who have viewed the Criminal Rules believe the product is successful. The Chief Justice has concluded that neither the Bankruptcy Rules nor the Evidence Rules should be restyled. The Standing Committee has concluded that the time has come to return to the Civil Rules.

The process will begin with the Garner-Pointer draft, including changes adopted in the first stages of the Advisory Committee review. The Style Subcommittee consultants, Professor R. Joseph Kimble and Joseph Spaniol, will suggest revisions of that draft. The suggested revisions will be reviewed by the Advisory Committee Reporter and by Professors Marcus and Rowe. Professors Marcus and Rowe will identify research questions, and may be able to provide answers to some of them, before the package is sent to the Style Subcommittee. The research questions identified at this stage and later typically will involve questions as to the meaning and origin of present rule provisions, particularly those that at first inspection seem ambiguous or unnecessary. The Style Subcommittee will review the package, will resolve style questions, and may identify further research questions for Professors Marcus and Rowe. The resulting package will be sent to the Reporter, who will prepare footnotes that identify issues that remain to be resolved in the Advisory Committee process.

The footnoted version will go to one of two Style Subcommittees, to be chaired by Judge Kelly and Judge Russell. It is not clear that anyone really knows what they have agreed to do in committing themselves to this undertaking. It is clear that arduous work must be done in the subcommittees. The subcommittees have been constituted with an eye to other subcommittee assignments, geography, and the balance between lawyers and judges.

All of the Civil Rules will be restyled. "We cannot spend a half day on each semicolon. As in many matters, we cannot let the best be enemy of the good."

The project will require frequent meetings if it is to be accomplished in a reasonable period. The proposed program calls for four meetings a year: one style subcommittee meets on the first day, the full Committee meets on the second day, and the other style subcommittee meets on the third day. The day of the full Committee meeting will be devoted to continuing work, and such style business as needs the attention of the full Committee.

The Civil Rules project will benefit from the experience of the other rules committees. Some of the battles have been fought; the winners and losers are identified. "Must" has replaced "shall" as a term of mandatory duty.

John Rabiej reviewed the experience of the Appellate and Criminal Rules restyling projects. The process started in the early 1990s under the leadership of Judge Keeton and Professor Charles Alan Wright. They chose Bryan Garner as style consultant. Garner is author of many authoritative works on legal writing. He restyled the Civil Rules first. Then the process turned to the Appellate Rules from 1994 to 1998; Judge Logan chaired the advisory committee, and Professor Mooney was Reporter. When the Appellate Rules were completed, the Criminal Rules came next. The Criminal Rules process began in 1999; the restyled rules are now before Congress. Judge Davis chaired the advisory committee for the first part of the process, and was succeeded by Judge Carnes. Professor Schlueter was Reporter.

The process for the earlier rules efforts began with revision and refining of the Garner draft by the Style Subcommittee. The result went to the advisory committee, then to publication. Comments were reviewed. The advisory committee then adopted a final style version that went to the Standing Committee and thence up the line to the Judicial Conference, Supreme Court, and Congress. The advisory committee work took about three years for each project; the whole process took four or five years.

Judge James Parker, who chaired the Standing Committee Style Subcommittee while the Criminal Rules were restyled, described the process around the framework of discussion questions prepared by John Rabiej.

The last question was addressed first: did the result justify the effort? "No and yes." "No," if you focus on the project as one yielding short-term benefits. Practitioners must bear a heavy cost in relearning a complete set of restyled rules. The Advisory Committee work on the Civil Rules will stretch out over many years. "Yes," if you focus on long-term benefits, fifteen or twenty years from now. The new rules will unquestionably be more user-friendly. They will ease automated research, even by measures as simple as adding more and better titles and headings for subdivisions and paragraphs.

Pride in the quality of the product is important. Professor Wright chaired the Style Subcommittee when it was formed. His writing is wonderfully clear. The question can be illustrated in the familiar comparison of a sturdy compact automobile to a luxury sport sedan. Each does the basic job, but one does it better. The project is more worthwhile if we want the polished end product.

The care required to distinguish substantive changes from style improvements will yield a separable benefit. The need for substantive changes will appear, to be addressed separately either as the style project wends along or later when more time is available. Some, perhaps most, changes will need to be deferred. An illustration is provided by Criminal Rule 11. Rule 11 states that "the court" must not be involved in plea negotiations. Different judges interpret the rule differently — some conclude that it prohibits participation only by the sentencing judge, and permits another judge of the same district to mediate plea negotiations. This question was identified in the style project, treated as a matter going beyond mere style, and deferred.

As to procedures, the first caution is to make sure that the schedule is not too tight. The next is to avoid assigning too much work all at once to the consultants — Kimble and Spaniol should not be charged with doing a complete rule set all at once. And nit-picking edits should be avoided in the Advisory Committee and forbidden in the Standing Committee.

The question whether new procedures should be adopted remains open. The subcommittee structure looks very good. Internet communications can be used more effectively now than ten years ago. Teleconferencing should be considered — there are real benefits as compared to telephone conferences. A teleconference can be used to show a rule and proposed changes on a screen. Simply seeing each other can help. The Appellate Rules were done in large part by telephone, with handwritten edits that were hard to decipher (particularly when transmitted by facsimile). In the Criminal Rules, word processing edits encountered some breakdowns, but overall the process worked. Computerized research can help. In the Criminal Rules, for example, a question arose whether it is better to refer to an "attorney" or to "counsel" — a computer search can quickly identify each place the term is used. The Criminal Rules use eight different ways to describe the government or attorney for the government. Is it necessary to have consistency if everyone understands the word in its context? Yes, consistency is a worthy goal. And other resources can be used. A law clerk, for example, may provide good help.

How demanding is the project in time and energy? "Very."

Face-to-face meetings generally are more efficient. Telephone conferencing can be a help — so long as you remember the time-zone problems. The face-to-face meetings also have important socializing benefits.

How many hours should be scheduled for a single day? It is difficult to say. Some participants prefer a one-day, intense, "get-it-over-with" approach. Two-day meetings are more humane, but they are more difficult to schedule and "there will be departures." (A Committee member who participated in the Sea Island meeting suggested with feeling that "one day is enough.")

Would it have helped to stretch the process out over more years? More time probably would yield a better product, but the result may be that the product is never finished. The proposed time series prepared by John Rabiej seems reasonable — it is longer than the time taken for the Appellate Rules or Criminal Rules, but the Civil Rules will be much more difficult.

Turnover in Committee membership must be addressed. "You need one driving force to get you through all this." With the Appellate Rules, Judge Logan was the driving force. With the Criminal Rules, Judge Davis initially was reluctant, but became an enthusiastic and driving force. The consultants and researchers should not change. Changes in general Committee membership are not as important.

On matters that involve style alone, not meaning at all, the Committee should give almost complete deference to the Style Subcommittee.

As to other issues identified in the agenda book: Renumbering the rules will be controversial, causing short-term grief but perhaps yielding long-term benefit. Renumbering deserves some consideration. This question was faced in one part of the Criminal Rules: Rule 60 was the final rule, but was the one that established the title of the rules. The Committee decided simply to abrogate Rule 60 as part of transferring the title to the front. Obsolete terms should be abolished — language does change over time. Our generation would say "I am eager to do that," while many of a younger generation would convey the same thought by being "anxious" to do that. The meaning of "anxious" has changed.

It would be wise to enlist a volunteer who could provide a non-lawyer perspective. When Arizona revised its jury instructions, it sought help from jurors. A majority of the jurors thought that "subsequent to" meant "before"; the phrase was eliminated. As to "negligence," a majority chose "inattentive" over "careless"; the word was not dropped, in deference to its deep roots in tradition. A high-school English teacher or someone similar might be a good resource to read draft rules and identify confusing expressions.

Judge Parker concluded his remarks by confessing that in retrospect, "I still wonder whether it all was worth it."

Professor Schlueter observed that it was very helpful to have Judge Parker attend the Criminal Rules style meetings, most often by telephone.

John Rabiej then turned to a more detailed review of the process. The agenda materials include Rule 4 in the form adopted by Bryan Garner. Each rule is divided into boxes corresponding to subdivisions or paragraphs. The text of the present rule is presented on the left side of the page, with the restyled rule on the right. The object is to simplify, clarify, make parallel expressions consistent, remove ambiguities, and avoid substantive changes. The format provides much more "white space," and gives a uniform structure to the rules.

The Garner drafting Guidelines have been adopted for all of the sets of rules.

When the Garner draft of the Criminal Rules was submitted to the Style Subcommittee, Judge Parker refined the style work and also identified at least one hundred substantive issues. Professor Saltzburg, a veteran of the Criminal Rules process, was retained to find answers to the questions. An example of several questions and responses is included in the agenda book. So it was asked why the rules still refer to "hard labor"; an answer was found in some residual use of boot camps — there was a reason for retaining a seemingly antiquated expression. More generally, the research was helpful in addressing the meaning of provisions that had no readily identifiable meaning or reason.

The Style Subcommittee reviewed the research questions and responses, and "gave it their best shot." The drafts then went to the Criminal Rules style subcommittees, who resolved what they could and reported both resolutions and important questions to the full Criminal Rules Advisory Committee.

On the Civil Rules, Judge Pointer revised the Garner draft, making many changes and improvements. Some further changes were adopted at the Sea Island meeting, and they too have been added to the draft that will go to the Style Subcommittee.

The Appellate and Criminal Rules Committees developed time tables, as will be done for the Civil Rules. They divided the rules into batches, assigned to the subcommittees. In the subcommittees, each rule was assigned to one subcommittee member who became responsible for presenting the rule at the subcommittee meeting and shepherding it through. A primary focus was to search for inadvertent substantive changes, and to discuss the deliberate substantive changes. When deliberate substantive changes seemed desirable, a choice was made whether to classify them as minor changes that could be adopted in the style package and identified in the style Committee Notes, or instead to classify them as so important as to require presentation on a separate track.

The Appellate Rules presented style changes, minor substantive changes, and major substantive changes in a single package for the Judicial Conference. The Criminal Rules presented the style changes (including minor substantive changes) in one package, and major substantive changes in a separate but parallel package. The purpose of the separate tracks was to be prepared with a styled version of the current rule for adoption if the substantive change in the parallel rule were rejected.

The timetable for the Criminal Rules package is described in the agenda materials. In a 28-month period they held ten subcommittee and six full committee meetings. Both the Appellate and Criminal Rules Committees adopted an "all deliberate speed" policy.

After making assignments to individual members, the subcommittee chair set meeting dates. Although each rule was assigned to one member for presentation, all members reviewed every rule in the package to be considered at each meeting. All comments from subcommittee members were routed through the Administrative Office. Each comment was inserted, identifying its author, on a single master draft. The consolidated master draft went to the full subcommittee meeting. Discussion focused on the comments made by the subcommittee members as reflected on the master draft.

The focus of subcommittee discussions was policy issues more than style issues. Often policy issues were identified for discussion by the full Committee. After full subcommittee meetings, the final product was sent to the full committee.

Formal records were not kept during the Criminal Rules process. Although notes were taken, the lack of more formal records was a mistake. (Professor Schlueter noted that the Criminal Rules Committee recognized the need to get on with the work.) Records will be kept during the Civil Rules project. The Reporter and consultants will work together to devise the best means of noting all significant decisions. The Reporter will attempt to attend all meetings.

Judge Levi noted that although ordinarily the Civil Rules Committee has viewed subcommittee meetings as matters for executive session, the style subcommittees are different. Representatives from concerned groups, such as the American Bar Association, will be welcome to attend.

In the Criminal Rules process, Committee Notes were developed only after a styled rule had been considered by the full Committee. In contrast the Civil Rules project will attempt to frame draft notes before Committee consideration, at least to the extent possible within the time between subcommittee meetings and Committee meetings.

Both the Appellate and Criminal Rules Committees presented their style drafts to the Standing Committee in two separate packages with the recommendations for publication. Actual publication, however, was deferred so that all rules could be published together. The public comment period for the Appellate Rules was nine months; for the Criminal Rules, the period was six months. The Criminal Rules drew only 20 or so comments on the style package; even the National Association of Criminal Defense Lawyers, an active participant in the rulemaking process, addressed only two or three rules. In addition to the usual thousands of people and groups who receive direct mailings of published proposals, the proposals were sent directly to approximately 100 law professors. Even the professors provided few comments.

The low level of comments won by the Appellate and Criminal Rules suggests that it may be better to publish smaller sets of rules for comment on a running basis. This is the plan for the Civil Rules.

It remains to be decided whether substantive proposals should be separated from style changes in the publication stage.

The Criminal Rules packages illustrated the challenges that may be encountered. The Supreme Court rejected one of the changes proposed on the major-substantive-change track, Criminal Rule 26(b). The Committee had addressed the constitutional confrontation issue that gave the Court pause. This experience simply reflects the differences of judgment that may attend resolution of specific doubts in any rulemaking enterprise. Quite a different problem arose from the inadvertent omission of a sentence from Rule 16. The difficulty arose because the original Rule 16 version considered by the original style draft was different from a later Rule 16 that superseded the one that persisted through the style process. The Administrative Office legislation staff persuaded Congress to attach a corrective provision to the Department of Justice appropriations bill. Although the bill must be passed at some early time, it has become a Christmas tree. The Administrative Office received a copy of the bill only an hour before it passed the House, and discovered that not only had legislative staff changed all the "musts" to "shall," it also had changed a Rule dealing with "mental" condition to "medical" condition. The present hope is that these changes can be corrected by a technical amendments rule. But the point remains: correction of inadvertent gaffes will be increasingly difficult as the rules pass from the Standing Committee to the Judicial Conference, to the Supreme Court, and finally to Congress.

Judge Scirica commented that he attended the Sea Island drafting meeting while a member of the Civil Rules Committee. Judge Higginbotham concluded after that experience that it was more

important to devote the Committee's time to Rule 23 and other pressing subjects. Style could not be done at the same time.

The style project was effectively launched after Judge Keeton and Professor Wright met with Chief Justice Rehnquist. The Chief Justice agreed that the style project made sense. It was decided not to do the Bankruptcy Rules or Evidence Rules at any point. The Appellate Rules became the bellwether because they are easiest to deal with. The styled rules were well received by bench and bar.

Turning to the Criminal Rules, the method of dealing with substantive changes was considered. The Supreme Court wanted to get all proposals, both of style and substance, at the same time. Judge Davis began guiding the Criminal Rules through the process as a skeptic, but became a strong believer in the project.

Last winter Judge Scirica took some restyled Criminal Rules to Chief Justice Rehnquist and suggested that it was a good idea to go ahead with the Civil Rules, recognizing that the project would be more difficult and beset with more pitfalls than the earlier style projects had encountered. One concern was framed by asking what the Civil Rules would look like in 25 years if the project is not undertaken. An opportunity was recognized in the need to examine every rule systematically. Both Professor Hazard and Professor Wright have thought it important to undertake periodic review of all rules. To paraphrase Professor Hazard, it is important to involve professors for ideas, lawyers for knowledge, and judges for responsibility. The project has to be open to input from all.

It will be possible to publish subsets of the rules in packages to afford several opportunities to comment in a more manageable framework. But the Supreme Court will want to receive a single package of the entire Civil Rules when the time comes to submit them for adoption. Substantive changes should not be part of the style package. At the same time, it is proper to effect substantive changes when necessary to resolve ambiguity in a present rule.

Although it was surprising to have so few comments on the Criminal Rules, the dearth of comment may have resulted from the high quality of the work.

Professor Schlueter described the Criminal Rules style project from the Reporter's perspective. Their first exposure to style problems began at the December 1992 Standing Committee meeting, long before the formal project. A very detailed style discussion almost persuaded the Criminal Rules Committee chair to withdraw the proposal; only an on-the-spot revision by Garner, chair, and reporter saved the proposal. "It was not a happy introduction.' But the style project made converts of the Committee.

In 1998 the Criminal Rules Committee made a commitment to get into the project and get it done. It recognized that it could not afford to get bogged down in minutiae. When the Committee came to reflect on the experience in 2002, it realized that only a few of those present in 2002 had been present in 1998.

"Time is your enemy. You can gain a lot by more time. But there is no guarantee." Getting people interested in revisiting long-ago work from the first phases of a style project "is tough — there may be rebellion." Committee and subcommittee membership will change; if new members are allowed to reopen past decisions, the process may be effectively derailed.

Criminal Rules Committee members found the style project a rewarding experience. It felt, at the end, like graduating from college.

"Keep your sense of humor. It is essential." We had tense times when Committee members wanted to change a rule they had disliked on substantive grounds for many years.

It is critical to retain the advisory committee chair in place for as long as possible. The Chief Justice should be persuaded to extend the chair's term for this purpose.

The goal is to send to the Supreme Court a style package, not a substantive change package. The Criminal Rules Committee had major substantive changes to do, and put them on a separate track. It was prepared to drop them if need be. The Department of Justice was much concerned about the style project. "They had won and lost many battles. They feared losing the victories, even as they hoped to reverse the losses." These concerns added to the reasons for putting aside many substantive matters.

The Administrative Office — and especially John Rabiej — made the project possible. It was Rabiej, not the Reporter, who kept the authentic master copy. It is difficult for a Reporter to adjust to this loss of "control," but it is essential that it happen.

The Criminal Rules Committee really appreciated the subcommittee structure, and particularly the one-person-per-rule assignments of responsibility. Although there are many people looking at each rule, it is a mistake to rely on a multiplicity of eyes to catch up inadvertent omissions. Some one or two persons must bear special responsibility for the completeness and correctness of the entire set.

The experience with Criminal Rule 16 underscores the vital importance of making sure that the "left column" is the current version of the rule, not some earlier version copied into the left column when the column is first compiled.

Often individual Committee members took on the research issues. "We did not go looking for the issues: they came to us." The Style Committee found ambiguities, which were sent to Professor Saltzburg. The Subcommittee accepted that, but found further ambiguities without intentionally looking for them. The research was spread out. "It has to be."

If something is to be taken out from the present rule, it is important to decide the reason for the deletion to enable explanation in the Committee Note.

Continuity is important. Style conventions should be identified at the outset, and adhered to. To the extent possible, a choice of preferred terms should be made; in the Criminal Rules, it became necessary at the end of the process to go back to the beginning to redefine the meaning of "court."

Deference is important at a number of levels. The Standing Committee today defers to the advisory committees more than in some earlier days. The Criminal Rules Advisory Committee deferred to the judgments of its subcommittees, but did make changes when they seemed good. To some extent, the subcommittee deferred to the single member who was responsible for a particular rule. That worked, and indeed seemed important.

The packages presented to the Standing Committee seemed a bit overwhelming. The first 30 rules were presented in one package, the remaining rules later in a second package. The advisory committee attempted to focus the presentation on the problem points.

Institutional memory is a problem. It is easy to lose the details. "You should plan." It is not clear whether the best form of record would look like minutes, or like something else. "Time and information management is the key. Keep your papers and notes."

When something is deleted from a rule, identify the deletion and explain it in the Committee Note. In deciding whether to delete something, it is wise to defer to the committee that created it: you should assume that there was a good reason, and should not assume that there is no good reason simply because you cannot discover what it was. "There are a lot of cases and tradition."

It is difficult to distinguish between "little" substantive changes and style changes. It would have been overwhelming to identify every minuscule change in a Committee Note. The test adopted for identification was whether a rule revision would lead to a change in practice. And boilerplate language was developed for the Note to each Rule: "The language of Rule _ has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic. No substantive change is intended." (The final paragraph of the Committee Note to Criminal Rule 1 varied this statement to some extent.) Revisions that seemed likely to work a change in practice were not disqualified from the style package, but were identified in the Note. Major substantive changes, on the other hand, were taken out for separate treatment. An example was video teleconferencing for arraignments.

At times a subcommittee would appoint an ad hoc group to address a specific question. One example was the question where a defendant should be taken after arrest when a judicial officer is more readily accessible in a different district.

Responding to a question, Professor Schlueter noted that as people looked at the rules, they came up with substantive ideas. This was not a deliberate focus; the project was not viewed as an occasion to reconsider all the rules. There is a cost in frustration, as with the Rule 11 example identified by Judge Parker.

And there was a special reluctance to change language that had been mandated by Congress. Changes nevertheless were made on a few occasions.

Another Committee member observed that the distinction between style and substance can blur. Clarification can change meaning and practice. Is it proper, within the scope of this project, to tell the Supreme Court that we are changing practice? Judge Scirica responded that the direction is that the Committee should resolve ambiguities — that is properly within the scope of a style project even though it may change meaning. Good judgment is called for. "You will know the major changes."

Professor Schlueter added that the Criminal Rules Committee struggled often with this problem. An attempt was made to reduce the potential confusion that could arise from presenting simultaneous "style" and revised "substantive" versions by adding a Reporter's Note to each rule in the style package that had a parallel rule in the substantive track. The Reporter's Note simply directed attention to the parallel substantive rule.

Judge Scirica observed that two of the tests that measure the appropriateness of changes in meaning as part of the style package are that it is proper to make noncontroversial changes, and that it is proper to express present practice as it has evolved from an uncertain rule basis.

Professor Kimble suggested that there is a continuum of infinite shading. At one end are matters that seem pure style: should we refer to an "attorney fee" or to an "attorney's fee"? Seemingly similar matters may not be so pure — the rules refer often to an "opposing party," but also refer to an "adverse party." Is there a difference? An intentional difference? If the Committee reaches a confident conclusion that there is no intended difference of meaning, it might adopt a consistent style convention and not identify the change in the Committee Note. Another example

of the minor change questions is whether to delete the requirement that a Rule 4 summons bear the court's seal.

Judge Levi expressed concern that the very concept of "minor" substantive changes could undermine the credibility of the project. And it is important not to waste Committee time on marginal substantive changes. Many of these things could be deferred for attention after the style project is concluded.

Professor Schlueter noted that ultimately Judge Davis, Judge Scirica, and the Administrative Office agreed that consensus and concessions must be made in order to get the style package to the Supreme Court. "The key is to decide how much time to spend on the components. If extensive discussion is required in subcommittee, let go of the question."

Judge Scirica agreed. "You are going to have to decide to leave some ambiguities as you find them." Judge Levi also agreed, noting the Criminal Rule 11 question whether a judge who will not be imposing sentence can mediate plea negotiations — "there is a conflict in the case law. Let the issue continue to percolate in the courts, or put it on the separate substantive track."

Professor Schlueter noted that Professor Kimble "came in late." He was asked to go through the entire Criminal Rules package, and did. The Committee had been feeling a sense of impending relief and release, but he found a lot of inconsistencies the Committee had missed. Some of them caused real consternation. At times the "do-overs" are necessary. But "honor the committee's weariness."

Professor Kimble suggested that it is critical to follow an authoritative set of style guidelines. It would be wise to adopt them formally. And it would be useful to state them in an Introductory Note to the style package. Part of the conventions should be to adopt Bryan Garner's Dictionary of Modern Legal Usage. This makes life easier not only in drafting but in later application of the rules.

We need in every way possible to head off unintended changes of meaning. The boilerplate language denying changes of meaning should be in the Committee Note for each rule.

It is wise to defer to the Style Subcommittee. Deference should approach the level of presumption on issues of pure style. If you decide to say "can" to mean "is able," do not look back. "After a certain point you run out of steam." Do not readdress issues already resolved, but recognize that new perspectives and insights may emerge as you progress through the rules.

The advantages of the style project will far outweigh the disadvantages. You will make mistakes. The mistakes will be corrected with time.

And remember that improving style will inevitably improve substantive meaning in many ways.

Professor Schlueter stated that once an issue has been consciously resolved, whether by vote or consensus, it is important to regard it as res judicata. Revisit the decision only for good reason.

There are many things that can distract attention. It is important to establish a specific deadline for submission to the Supreme Court. The timetable can be set by working backward from that date. The deadline and timetables give power to committee chairs to force a conclusion of discussion.

This discussion of past experience was followed by presentation of a set of "overarching issues" identified as growing out of the experience. Because much of the discussion followed the order of the agenda materials, the agenda memorandum is adopted as the minutes of the discussion with occasional interpolations to reflect such discussion as there was:

CIVIL RULES STYLE PROJECT: INTRODUCTORY QUESTIONS

Some of the generic questions that will recur throughout the Style Project can be anticipated. They range from simple needs for consistency to more important issues. The examples that follow are not ranked in order of importance, frequency of probable appearance, or interest. All deserve some attention. Specific examples — many of them drawn from a first review of Rules 1 through 7 — will be used to illustrate the choices.

Structure

The structure of the whole Civil Rules package is at times eccentric. Summary judgment is a pretrial device, but it appears as Rule 56 in the chapter dealing with judgments. It might make better sense to locate it after the discovery rules and before the trial rules. Rule 16, for that matter, occupies an odd place between the pleading rules and the party- and claim-joinder rules. For that matter, the counterclaim, cross-claim, and third-party claim rules seem to fit better between Rule 18 and Rule 19 than in their present place. Do we have any appetite for restructuring the whole?

One advantage of restructuring would be that we would be free to adopt, at least for the time being, a set of whole-number designations. No more Rule 4.1, 23.2, or (eccentrically) Rule 71A. We would no longer need to jump from Rule 73 to Rule 77.

These proposals almost inevitably will be defeated by the familiarity of Rule 56, Rule 13(a), and so on. The conservative inertia that has slowed procedural reform applies to the small as well as the large. And now we have a further argument: nothing can change, not ever, because that will foul up computer searches.

A much smaller-scale version of the structure question will arise when good style would rearrange subdivisions within a rule, or perhaps combine two or more subdivisions. If we combine subdivision (b) with subdivision (c), do we continue to describe subdivision (d) as (d), showing (c) as "abrogated," or do we re-letter (d) as new (c)?

Probably it is too late to consider the designation of subparts. Our limit has been Rule 15(c)(3)(D)(ii): (c) is subdivision, (3) is paragraph, (D) is subparagraph, and (ii) is item. Occasionally a rule might be easier to follow if we had further designations, if after the subparagraph (D) we could have one more sequence of numbers and letters. But there are several arguments against adding further designations. One is conformity to other sets of rules. Another is the need to find words to describe them: sub-subparagraph is unattractive, and the alternatives are at least as unattractive. Still another arises from the indent style we have adopted; it is helpful to set each smaller item in further from the left margin. But by the time we get to items we are already left with very short lines. Still further insetting could lead to minuscule lines.

[The question whether to redesignate rule subdivisions provoked some discussion. One purpose of the project is to advance clarity by providing a clear structure. Clear structure will involve physical layout, more white space, and more frequent use of sub-parts: a single subdivision may be broken into paragraphs, a paragraph may be broken into subparagraphs, and so on. The present rules often combine quite distinct propositions in a single subdivision or paragraph; clarity will be improved by establishing separate subdivisions or paragraphs. Additions will require renumbering. This course was often chosen in the Appellate Rules. Further discussion pointed to

the Garner-Pointer draft of Civil Rule 4(b), which makes many separations of material previously run together. This example demonstrates that the rule should be to do whatever makes good style sense.

[It was asked whether the advantages of preserving familiar designations deserve some weight: should a change be made if it seems only a little better? In the Criminal Rules project, there was some major reorganizing. But they chose to work around the problems that arise when the present designation seems too well-known to change. An illustration in the Civil Rules might be Rule 13(a).

[A related question is illustrated at several places in the Civil Rules, among them Rule 80(a): since 1948, subdivision (a) has been carried forward only to show that it has been abrogated. The Criminal Rules Committee decided against preserving present designations when the only purpose is to avoid carrying forward an otherwise deleted subdivision. But there may be occasions when it is better to carry forward the designation for an abrogated part in order to preserve a related and well-known designation: Style should not be the occasion for redesignating Rule 12(b)(6). One alternative might be to show a former designation in brackets for a lengthy period — for example, if summary judgment were to be relocated as a pretrial device, it might be designated as "Rule 39.1 [Former Rule 56]." The Criminal Rules Committee did something like this in the Committee Notes. Another alternative would be to request that publishers include conversion tables with the rules.]

Sacred Phrases

It has been accepted that we must not tinker with some sacred phrases in the rules. "Transaction or occurrence" must be used to define the relationships that make a counterclaim compulsory under Rule 13(a). One challenge will be to be sure that we recognize all of the phrases that have taken on such settled elaborations that we must not attempt change in the name of style.

This approach raises the question whether we can forgive ourselves for not asking why variations are introduced on these familiar phrases. "Transaction or occurrence" persists in Rule 14, but in Rule 15(c)(2) it becomes "conduct, transaction, or occurrence." By Rule 20 it expands to "transaction, occurrence, or series of transactions or occurrences." What subtle distinctions are implied?

Definitions

Definitions presented recurring tests in the Criminal Rules style project. As later rules were styled, the committee was driven to consider again, and yet again, the definitions adopted in earlier rules. There are more definitions in the Civil Rules than many of us realize. Rule 3 defines what it means to "commence" an action. The Rule 5(e) tag line is "Filing with the Court Defined," but the rule does not really define filing — it directs how filing is to be accomplished. At the same time, it does define an electronic "paper" as "written paper." Rule 7 defines what is a "pleading." Buried in Rule 28(a) is a definition of "officer" for purposes of Rules 30, 31, and 32. The Rule 54(a) definition of "judgment" presents questions so horrendous that we abandoned any attempt even to think about them in the recent revision of Rule 58. The District of Columbia is made a "state" by Rule 81(e), "if appropriate." Rule 81(f) sets out a curiously limited definition of "officer" of the United States (including, at least on its face, a beginning that includes reference to an "agency," followed by a definition only of "officer"). Other definitions may lurk in the Rules. We may be stuck with the ones we have, except to the extent that we are prepared to make substantive amendments as part of the process. But at least we should be wary of adding new definitions. And perhaps we need to consider the need to reduce reliance on definitions.

"Legacy" Provisions

Old Practices Abolished. The Civil Rules have abolished many earlier procedural devices. The generic question is whether it is necessary to forever continue to abolish these things. Specific answers may vary.

Rule 7(c) is an example: "**(C) DEMURRERS, PLEAS, ETC., ABOLISHED.** Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used." We could spend some time debating whether devices are "abolished" by a rule that says only that they shall not be used. But why not abandon this subdivision entirely? Even if someone decides to describe an act as a demurrer rather than a Rule 12(b)(6) motion to dismiss, a 12(c) motion to strike an insufficient defense, a Rule 50(a) motion for judgment as a matter of law, or whatever, the court is likely to understand and respond appropriately.

A more familiar example is Rule 60(b), but it may be more complex. The final sentence says: "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." This one does abolish something. We may wonder whether there is much risk that a modern lawyer will think to reinvent these archaic procedures. Perhaps there is — the criminal law crowd continues to have questions about the persistence of coram nobis relief. However that may be, the last part of the sentence is a specific direction: relief from a judgment must be sought by motion or by independent action. We may need to keep that (and perhaps to note that an appeal — surely neither a motion as prescribed in these rules nor an independent action — is not what we mean by "relief from a judgment"?).

A less familiar example is Rule 81(b), which abolishes the writs of scire facias and mandamus.

Old Distinctions Superseded. Less direct means may be used to supersede old practices. Rule 1 is a fine example: "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 * * *." "Suits"? "of a civil nature"? "cases" at law or in equity or in admiralty? The Style version uses "civil action" to replace suits of a civil nature, drops "cases," and raises the question whether we still need say "whether arising at law, in equity, or in admiralty." Merger of law and equity was accomplished in 1938; admiralty was brought into the fold in 1966. Is there a risk that the merger will dissolve without continued support? Whether or not we continue it, is "civil action" good enough? A very quick look at the subject-matter jurisdiction statutes that begin at 28 U.S.C. § 1330 shows that "civil action" is the most common expression. But § 1333 refers to "any civil case of admiralty or maritime jurisdiction"; § 1334(a) refers to "cases" under title 11; § 1334(b) refers to "civil proceedings arising under title 11"; § 1337 refers to "any civil action or proceeding"; § 1345, covering the United States as plaintiff, refers to "all civil actions, suits or proceedings"; § 1346(a)(2) — the Little Tucker Act — refers to "[a]ny other civil action or claim against the United States"; § 1351 refers to "all civil actions and proceedings" against consuls, etc.; § 1352 refers to "any action on a bond"; § 1354 to "actions between citizens of the same state"; § 1355 to "any action or proceeding; § 1356 to "any seizure"; § 1358 to "all proceedings to condemn real estate"; and § 1361 to "any action in the nature of mandamus" [this one is an interesting contrast with the abolition of mandamus by Rule 81(b)]. New Rule 7.1(a) refers to an "action or proceeding." Perhaps that is the phrase that should appear in Rule 1.

Familiar Terms and Concepts. Rule 4(*l*) provides for "proof of service." The Garner-Pointer draft says service must be proved to the court. Why abandon a familiar and well-understood term, substituting a phrase that may generate arguments that a different process is contemplated? There

may be times when we should not abandon a well-understood term simply because it somehow seems archaic.

Familiarity goes beyond language to concept. Justice Jackson put it well: "It is true that the literal language of the Rule would admit of an interpretation that would sustain the district court's order. * * * But all such procedural measures have a background of custom and practice which was assumed by those who wrote and should be by those who apply them." *Hickman v. Taylor*, 1947, 329 U.S. 495, 518 (concurring). As time moves on, however, the shared background of custom and practice may fade away. Reading a rule today, we may fail to understand the intended meaning, and in rewriting seemingly clear language effect a change. An illustration is the provision in Rule 19(a) that a necessary party plaintiff "may be made a defendant, or, in a proper case, an involuntary plaintiff." It is easy to pick this illustration because it is familiar — the understanding that the "proper case" is much more restricted than the words might indicate has been preserved. The more meaningful illustrations will be those that we overlook because the original understanding has been lost. The ignorant assumption of a new meaning and its expression in contemporary style may be an improvement, but it still will be a change.

[Brief discussion began by asking what harm lies in deleting antique provisions. A safeguard could be provided by establishing an appendix of materials to self-destruct in a period of perhaps twenty years if no use is found; this ploy will be considered. The Criminal Rules chose the path of deleting apparently antiquated material, stating in the Committee Note that the material is no longer needed.]

Ambiguities

The most common lament during the fabled Sea Island Style Festival was that time and again, ambiguity engulfs the meaning of a present rule. What to do?

An obvious approach is to exhaust the research possibilities that may dispel the ambiguity. If a clear present meaning is identified, the only remaining challenge is to express it clearly. How frequently this approach should be taken, all the way to the bitter and often disappointing end, is debatable. If indeed we find many ambiguities, we might slow progress more than we care to endure. The alternatives begin with identifying the ambiguity, and explaining in the Committee Note what has been done. One approach will be to carry the ambiguity forward — we do not know what it means, and we do not care to invest the energy to decide what clear meaning is better. Another approach will be to imagine a good clear answer and adopt that. No doubt each of these alternatives will be adopted in circumstances that seem appropriate.

Rule 4(d) — a relatively new rule — provides illustrations that tie to the discussion of Rule 4. The last sentence of (d)(2) refers to a plaintiff "located within the United States." (d)(3) refers to a defendant "addressed outside any judicial district of the United States." Rule 4(e) speaks of service "in any judicial district of the United States." Rule 4(f) refers to "a place not within any judicial district of the United States." Is there a difference between "within the United States" and "in any judicial district of the United States"? Are United States flag vessels, embassies, or other enclaves "within the United States" but outside any judicial district? Puerto Rico clearly is within a judicial district of the United States: is it within the United States? What subtle thoughts inspired these various phrases?

Rule 4(h)(1) is another illustration. Service on a corporation may be made by delivering process 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." Is there a difference between "by law" and "by statute"? One possibility

is that "by law" refers to federal law, while "statute" refers to the many state statutes on serving a corporation; see 4B Federal Practice & Procedure § 1116. Another possibility is that "law" is a broader reference to all manner of laws.

[Discussion of ambiguities and inconsistencies began with the suggestion that it is better to assume that the original drafters knew what they were doing. But it was responded that successive committees may inadvertently confuse original meanings and create inconsistencies. Another champion of the earlier drafters agreed that we should assume they knew what they were doing, but recognized that often it will be necessary to consult history to guess what it was that they knew they were doing. It must be recognized that in drafting rules, just as in legislative processes, ambiguities may result from deliberate choice. Policy disputes that cannot be resolved at the drafting stage are put off for resolution in application. When policy disputes of this character emerge in the styling process, it may again be wise to carry the ambiguity forward without change, and perhaps without comment in the Committee Note. There will be occasions, on the other hand, when it is clear that inconsistencies are no more than inconsistent style choices — it makes no difference in meaning whether we say "the court in which" or "the court where."]

Substantive Change

There will be many occasions when a rule seems to cry out for substantive change. The answer can be direct when Advisory Committee capacity allows: the rule is revised in the ordinary way, adopting current style conventions. Rule 56 is a good example. We have long deferred the project to reopen Rule 56 following the Judicial Conference rejection of revisions that were slated to take effect along with the 1991 Rule 50 amendments. Simply restyling present Rule 56 and deferring the project still further until the entire Style Project is completed seems a shame.

Other changes of meaning may well be relatively trivial, and well within the charge given to the relevant style subcommittee. In this context, there is no meaningful line between resolving ambiguity and substantive change. Rule 27(a)(2) provides a good example. Rule 27(a)(2) now provides that notice of the hearing on a petition to perpetuate testimony must be served "in the manner provided in Rule 4(d) for service of summons and complaint." Rule 4 has been revised, and Rule 4(d) now provides for waiver of service. A look at current Rule 4 presents a puzzle. It is tempting to cross-refer to all of Rule 4, but that course may entail a change of meaning as to defendants in other countries. Something must be done, and any choice may change the meaning. (A brief note is included in the October agenda materials.)

Such "small" changes present a question touched upon by Judge Higginbotham at the January 2002 Standing Committee meeting. He suggested that the style project presents the opportunity for "many small changes aimed at coherence and consistency, while bigger problems continue to be agitated." Is it proper to undertake a relatively large number of "small" changes that go beyond what can be justified in the name of style alone?

Redundant Reassurances

Time and again, we persuade ourselves that it is wise to add words we believe to be unnecessary. The purpose may be to anticipate and forestall predictable misreadings — predictable because we do not trust people to apprehend the "plain meaning," or because we do not trust people to admit to a plain meaning they do not like. Instead, the purpose may be to provide reassurance. Rule 4(j)(2), for example, provides for "[s]ervice upon a state, municipal corporation, or other governmental organization subject to suit * * *." There is no need to add "subject to suit": Rule 4 prescribes the method of service, and does not purport to address such matters as Eleventh Amendment immunity or "sovereign" immunity. But these words protect against arguments that

Rule 4 somehow limits sovereign immunity, and reassures those who fear that the arguments will be made. Should we adopt a general policy that prohibits intentional redundancy? That sets a high threshold? Or that permits whenever at least a few of us fear that language plain to us may not be plain to all?

Integration With Other Rules: Style

How far are we bound to adhere to style conventions developed in the Appellate Rules and hardened in the Criminal Rules? The Standing Committee has long favored adopting identical language for rules that address the same subject unless a substantive reason can be shown for distinguishing civil practice from some other practice. But the approach has been relatively flexible: at times justification can be found in the view that somehow the civil problem feels different. The "plain error" provision in revised Civil Rule 51, for example, was redrafted in a number of steps that culminated in adoption of the plain error language of Criminal Rule 52. But the Committee Note states that application of the rule may be affected by the differences between criminal and civil contexts. Would it be better to adopt deliberately different language when different meanings may be appropriate, even though we cannot articulate the differences?

The question whether accepted style can continue to evolve is separate, and troubling. Unshakable stability has great virtue. But continued improvement is possible, and will be inevitable unless we erect an impermeable barrier. At first the Supreme Court did not want us to adopt new style conventions as we amended rules before taking on the Style project. Now we are writing "must" into rules with abandon. And we seem to be living well enough with the blend. How far should we attempt to adopt clear rules at the beginning, and adhere to them without fail unless we are prepared to revisit all of the earlier drafting?

Integration With Other Rules: Content

Rule 5(a) now requires service of every "designation of record on appeal." Appellate Rule 10 is a self-contained provision dealing with the record on appeal; it includes a service requirement; and it does not seem to require designation. There may be archaic provisions like this that have to be weeded out. This prospect does not seem to present any distinctive policy question: we simply must be alert to the risk.

Internal Cross-References

Current editorial suggestions raise the question whether we are in the middle of another change in cross-reference style. Within the last few years we have been trained to cross-refer by full reference to "Rule 15(c)(2)," even in Rule 15(c)(1)(3): "if the requirements of Rule 15(c)(2) are satisfied and * * *," not "if the requirements of paragraph (2) are satisfied and * * *." I had supposed that this was because we were not confident that all readers can easily remember the distinctions between subdivisions, paragraphs, subparagraphs, and items. It also simplifies the question whether we should cross-refer to Rule 15(c)(1)(A), to subdivision (c)(1)(A), to paragraph (1)(A), or to subparagraph (A). After getting over initial shock, there is a good argument for adhering to "Rule 15(c)(2)."

Committee Notes

One of the central difficulties of the style enterprise is that new words are capable of bearing new meanings. Advocates will seize on every nuance and attempt to wring advantage from it. In the first years, the effort often will be wilful: the advocate knows what the prior language was, knows what it had come to mean, and knows that no change in meaning was intended. As time passes, memory of the style project will fade. New meaning will be found without any awareness of the

earlier language or meaning. In part that will be a good thing: substantive changes will be made because the new meaning is better than perpetuating the old. We cannot effectively prevent that process, and we may not wish to. But the Committee Notes are a vehicle for attempting to restrain these impulses. No doubt the Notes will vanish from sight, and with them the reminders they might provide. How far should we elaborate on the limited purposes of style changes in each Note? Is it best simply to note the more important of the ambiguities consciously resolved? Should there be a prefatory Note that somehow is expected to carry forward with the entire 200X[1] body of restyled Rules?

The style project may justify a new approach to the rule that we cannot change a Note without amending the Rule. The involuntary plaintiff provision of Rule 19 is an example. This provision has a history that suggests a very narrow application. The face of the rule, however, has no apparent limit. Any attempt to revise the rule will encounter grave difficulty. But it might be sensible to attempt to reduce the occasions for inadvertent misapplication by explaining in the Note that no change has been made in the inherited language because it is difficult to state the intended limits, but that it is important to remember the intended limits. (Part of the difficulty lies in figuring out just what the intended limits were or are; it may be impolitic to say that in a Note.)

[It was noted that in the Criminal Rules, Committee Notes were not modified unless a rule was modified. At times a statement was added to a Note that an issue was considered without, in the end, acting on it. The Standing Committee deleted some of these statements.]

Forms

What should we do about restyling the forms? Many of the forms use antique dates for illustration — perhaps the most familiar is the June 1, 1936 date in Form 9. That date recurs throughout the forms. Fixing that is easy enough. Perhaps style changes are also desirable. But here again we may face substantive concerns. The most obvious example is the Form 17 complaint for copyright infringement, which has not been amended since 1948 — long before the transformation of copyright law by the 1976 Copyright Act. There are similar grounds for anxiety about the Form 16 complaint for patent infringement, and some others. The Forms could be left for last. Or an attempt could be made to bring them into the regular process — most of them would attach to the bundle of Rules 8 through 15.

Statutory References

The Rules occasionally refer to specific federal statutes. The "applicability" provisions of Rule 81 provide many examples. The risks of this practice are apparent — it may be difficult to be sure that the initial reference is accurate, and statutes may change. But there may be real advantages. Specific statutory provisions may be the least ambiguous means of expression, particularly in the Rule 81 statements that identify proceedings that do — or do not — come within the Rules. The Criminal Rules Committee suggested that specific references might be helpful in pointing toward the proper statute, saving research time and reducing anxiety. Perhaps we can do no better than to resolve to be careful about this practice.

Further Process Discussion

More general discussion following the "overarching issues" focused on the flow of style work through the many groups and stages involved, and on the timetable proposed for the project.

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[1] A note of optimism here.

To the extent possible, it will be important to have the Reporter and consultants provide initial reviews and answer research questions before the Style Subcommittee considers a rule set. The Style Subcommittee consultants, Kimble and Spaniol, will send their edits of the Garner-Pointer draft to Reporter and consultants. The Styling Subcommittee should be presented with the reactions of Kimble and Spaniol to the style suggestions made by the Reporter and consultants, along with the research questions and answers already available. The Style Subcommittee will identify additional research questions for the consultants. All of these materials will go to the chair of the Advisory Committee and the chairs of the Advisory Committee Style Subcommittees. Every subcommittee member will review all of the rules in the package being considered by that subcommittee, and send suggestions to John Rabiej. Rabiej will produce a single integrated document that incorporates all of the suggestions. This document, including footnotes prepared by the Reporter to identify the issues, will then go to the style subcommittees for discussion at a meeting. It is anticipated that the style subcommittees will emulate the Criminal Rules model, assigning each rule in a package to a single subcommittee member who will be responsible for guiding discussion of that rule.

The draft timetable, aiming at final submission to the Standing Committee in June 2008, looking toward an effective date on December 1, 2009, was discussed. The most ambitious part of the timetable appears at the beginning. It is important, however, to get the project in gear. Recognizing that the dates can be adjusted, the timetable was accepted as a desirable goal.

Class-Action Subcommittee Report

Judge Rosenthal began the report of the Rule 23 Subcommittee by observing that although there is ground for serious debate over the directions that might be taken by continuing work on Rule 23, the debate is not yet ripe. We await Supreme Court action on the amendments currently proposed. If the amendments are adopted, we will want time to see how they work.

Although this is not the time to propose further changes, the protests that have been voiced since the Committee took up class-action work in 1991 continue unabated. Many observers assert that serious problems remain. Some of the problems may prove amenable to Rule 23 revisions. The most fundamental task would be to start over with Rule 23, as John Frank often urged, but there is no apparent wish to do so. We should, however, remain open to suggestions on any aspect of Rule 23.

One set of pressing problems has been taken off the table. The Committee has decided not to pursue rule-based solutions to the problems of state-court class actions that duplicate and compete with actions in federal court. This topic is not likely to be reopened unless Congress fails to find a solution.

Standards for certifying settlement classes deserve continued examination, with help from the Federal Judicial Center. In 1996 a new Rule 23(b)(4) on settlement classes was published for comment. Further consideration was deferred in 1997 after certiorari was granted in what came to be known as the Amchem case. Extensive comments were provided on the published proposal. Many of the comments expressed fear that settlement classes would foster collusive deals that favor class counsel at the expense of class members — the fear that courts would enter deeper into the market for the sale of res judicata. Another concern was that lowering the bar for certification of settlement classes not only would encourage more class actions but also would wash over to lower the standards for certifying classes for trial. But suggestions continue to be made that the Committee should consider standards for certifying settlement classes. The guidance provided by Amchem and Ortiz may not suffice. There is a fear that some cases will go to state courts where settlement is easier. Others note that although many class actions continue to be settled in federal courts, that is because the courts are not really doing what Amchem requires. In addition, it is said that to the

extent that Amchem and Ortiz make settlements more vulnerable, objectors win increased leverage and take unfair advantage. Still others believe that Amchem has not had any significant deterrent effect on settling cases that should be settled. There are many cases that invoke Amchem; perhaps the lower courts have found that indeed they are free to do what should be done. Amchem requires scrutiny of adequate representation and lack of conflicting interests. It requires close consideration of any attempt to settle future claims. Future claims, however, are a discrete phenomenon encountered in a small set of cases.

All of these considerations show the need for empirical inquiry. Do Amchem and Ortiz prevent settlement of cases that can and should settle on appropriate terms? If proposed Rule 23(e) takes effect on December 1, 2003, we will have additional support for increased scrutiny of settlements. That may reduce the riskiness of settlement classes.

If we do come to consider a settlement-class rule, one approach would be to go beyond Amchem in permitting certification for settlement of a class that could not be certified for trial. Another approach would be simply to clarify the statement in Amchem that a case can be certified for settlement if the only problems that defeat certification for trial arise from manageability concerns — as observed by the dissent, the meaning of this Amchem statement is not entirely clear. The effect of choice-of-law problems, for example, might be seen as a matter of manageability; it also might be seen as something more profound. The effort might be something like the recent Evidence Rule 702 revisions to absorb the practices that emerged from the Daubert and Kumho decisions on admitting expert testimony.

The Subcommittee asked the Federal Judicial Center to assist in determining the effects of Amchem and Ortiz on settlements. The Center has done a study, directed by Thomas Willging and Robert Niemic. The review of filing and settlement rates has been completed; they are now working on the design of questionnaires to be used to elicit specific information from attorneys about the reasons for choosing between state and federal courts.

Robert Niemic led the presentation of the FJC study. The numerical-empirical phase was designed to test the predictions: What has happened to filings of federal class actions, particularly those that do not involve securities law? To removals? To settlements? To dismissals?

It would have been good to include state class-action filing statistics in the study. Data, however, are not available. The study does not reveal what has happened in state class-action filings. There may have been a dramatic increase, as some have hypothesized. There may not. We cannot tell.

The data for the study represent 82 federal districts; the data for the remaining 12 districts were insufficient. The study covered the period from January 1, 1994 to June 30, 2001. Prisoner cases and pro-se attempts were not included (a pro se litigant cannot represent a class).

The data include 1,648 lead class actions that emerged from intradistrict consolidations; 192 lead class actions that emerged from interdistrict MDL consolidations; and 13,197 "unique" class actions that did not result from transfer or consolidations. This method of counting eliminates duplicate filings — the 1,648 intradistrict lead class actions, for example, gathered together a total of 8,335 separate class actions. The 192 interdistrict and MDL lead class actions provide a more dramatic illustration — they drew together 4,182 member class actions.

A time-series analysis was done of these filings. The analysis showed very few correlations that are statistically significant. And such statistically significant correlations as were found to not demonstrate causation: it is not possible to conclude whether either the Amchem or Ortiz decision

actually caused any of the trends observed. There are many factors other than these two Supreme Court decisions that affect the rate of class-action filings. The change after Ortiz, for example, was an increase in filings — not the change anticipated in launching the study. So filings went down in the period after Amchem, but it cannot be determined what causal influence Amchem exerted, if any. Something went on that is statistically significant if we go back to six months before the Amchem decision.

The rates of class-action filings are quite similar to the filing rates for all actions in federal court.

Personal injury and property damage class actions combined — with personal injury actions dominating in all periods — rose from a filing rate of 30 at the beginning of the study to a rate greater than 80 at the end.

Removals quadrupled over the study period.

For all class actions other than securities, there was about a doubling of the filing rate over the study period. Filing rates remained reasonably steady after the Amchem decision.

Diversity filings and removals more than doubled; "the line is reasonably straight."

Settlements and dismissals were counted over the period within two and one-half years of filing. For that reason, the counting stopped with January 1, 1999. There was little change in the rate from 1994 to 1999 in considering rates over six-month intervals. The pattern is more erratic if considered over one-month intervals.

There was an abrupt decrease in securities class-action filings after the 1995 legislation, as expected. But there was an increase both before and after the 1998 legislation; it is difficult to guess why there was an increase before 1998.

In short summary, class-action filing activity decreased after Amchem and increased after Ortiz.

Discussion of the FJC report began with the observation that some lawyers believe that the Ortiz decision caused many companies involved in the third and fourth waves of asbestos litigation to go into bankruptcy. If it can be known, it would be important to know whether bankruptcies could have been avoided under a different class-action regime. What is left now is to re-do the same settlement after limited-fund class treatment is denied, providing an opportunity to opt out. Another member agreed that "those who are knowledgeable think Ortiz caused the recent round of asbestos bankruptcies." It would be difficult, however, to gather sound empirical information on this subject. Lawyer interviews might provide some answers, but the results would not be rigorous.

It also was observed that the more general questions about the effects of the Amchem and Ortiz decisions cannot be answered without knowing what is happening in state courts. We hear anecdotes that plaintiffs are going to state court, but nothing more than anecdotes.

A draft of the survey instrument that will be used to gather information from plaintiffs who filed in federal courts was discussed. A different instrument will be used for cases that were removed from state court. The purpose is to go behind the filing data compiled for the first phase of the FJC study to explore how the Amchem and Ortiz decisions figured as factors in attorney decisions on court selection. So in cases removed from state court, the FJC will talk to the lawyer who chose to file in a state court and to the lawyer who decided to remove to a federal court. The survey instruments will be sent to lawyers in all the cases in the data base that were removed from state court.

The survey instruments posit a wide range of factors that may influence the choice of court. Have the right factors been chosen? One response was that many lawyers believe plaintiffs choose state courts because they dislike the Daubert limits on expert testimony — perhaps that should be made a specific item in the survey.

Noting that the survey proposes to ask about lawyers' perceptions of favoritism in state or federal court, it was asked whether lawyers would respond openly to such questions. The first suggestion was that the "not applicable" column in this set of questions was confusing. It was further observed that it is important to avoid an appearance of shopping for answers that will reflect unfavorably on state judges. Attention to the phrasing of the question is important. The first sentence in this item, referring to favoritism "(including bias)" might be eliminated.

The ABA representatives might be asked both to review the survey questions with an eye to considering how lawyers are likely to understand them, and also to consider whether other questions might be added.

The Federal Judicial Center also has continued to work on its model class-action notices. Todd Hillsee, who testified on earlier drafts, has volunteered to participate on a pro bono basis, and has offered real improvements in putting the FJC content into an attention-getting format.

Judge Rosenthal concluded the class-action discussion by observing that the FJC information will help the Subcommittee in deciding whether to recommend to the full Committee whether work toward further Rule 23 amendments should be resumed. There may be no justification, in light of developing case law, for going forward. Or reasons may appear for going forward. If there is to be further work, however, it does not seem likely that the time has come to pursue further the concept of opt-in classes, whether for small claims or for large claims.

Discovery Subcommittee

Professor Lynk reported on the Discovery Subcommittee meeting during the first day of this Committee meeting. Four agenda items were discussed.

Judge Irenas has suggested adoption of rules changes to support more general use of a "de bene esse" deposition practice that he has found useful. With consent of the parties and court authorization, videotaped depositions can be taken shortly before trial to be used in place of live witness testimony. Examination and cross-examination of the witness would proceed as at trial, not in the quite different modes common in depositions taken for discovery purposes. All objections to admissibility would be made at the deposition. Objections are reviewed by the court before trial, to enable editing of the deposition to delete inadmissible portions. This process may make more work for the judge, but it can make it much easier to schedule a trial. The subcommittee discussed the question on the assumption that such trial depositions could be taken only with the consent of all parties, but did not explore that issue. It also wondered whether the question is as much one to be considered by the Evidence Rules Committee as the Civil Rules Committee — there is a rather eccentric allocation of trial issues between the two sets of rules. And concern was expressed about encouraging non-live testimony. The only decision for the present has been to ask the Evidence Rules Committee to comment on the question. (In response to a question, it was observed that the concern with the Evidence Rules was not with any specific Rule of Evidence, but with the more general question of the mode of presenting evidence at trial. The reason for considering rules amendments is that there is no express authority for this practice, and there are a number of points at which present rules seem inconsistent with it — it seems to work only because all parties consent. But it can be done now; one judge observed "we do it all the time." It also was observed that the Subcommittee did not go into the problems that will arise when a party, having participated in a

videotape trial deposition, is disappointed with the results and wants to substitute live trial testimony. The conclusion was that the question will be put to the Evidence Rules Committee. No one is suggesting a rule that would authorize this practice over dissent of any party.)

The question of disclosing "core work-product" under the expert-trial-witness provisions of Rule 26(a)(2)(B) has been posed by the New York State Bar Association. Most Subcommittee members have believed that any information disclosed to an expert trial witness as a basis for shaping opinions to be expressed at trial is subject to disclosure and exploration at deposition. The disclosure Rule and Committee Note seem to contemplate this result, but are not entirely clear. Lower courts have disagreed, although perhaps a majority of the reported decisions think disclosure is required. This topic could be considered without reopening the entire area of work-product protection. Some Subcommittee members believe that disclosure is not wise. The proper rule is not immediately apparent. The Subcommittee will continue to explore the question, and will reach out to bar groups for further information on general practice and suggestions about desirable practice.

Another question is whether a nonparty deponent should be notified that a deposition is to be videotaped. There have been a few cases in which a "high profile" witness has won a protective order barring videotaping for fear that the tape may be used for inappropriate invasions of privacy. The general nonfiling rule may reduce the privacy concern to some extent, although use of the deposition in the proceedings will lead to filing. Apart from special interests in privacy, there is an interest of fairness to the deponent, who may need to prepare emotionally for a performance "on camera." The Subcommittee agreed unanimously that a rule amendment is appropriate. A proposed amendment will be brought to the full Committee, perhaps at the January meeting.

Finally, an old proposal for use of written testimony at trial was revisited because of the connection to the de bene esse deposition proposal. A draft Rule 43(a) was prepared that would authorize part of a trial on written materials with the consent of all parties and the court's approval. Some district judges are doing this in nonjury cases. The Subcommittee discussion began with uncertainty whether this trial issue is a proper matter for consideration by the Discovery Subcommittee. It is not clear in any event whether this practice should be encouraged by adopting an express rule. The Subcommittee, however, will continue to study the issue. But there will be no suggestion that this practice could be employed over objection by a party who prefers trial with live witnesses.

All agreed that the Discovery Subcommittee should proceed as planned.

Computer-Based Discovery

The agenda materials include a letter from Professor Marcus to "interested others" asking for advice on the prospect of making rules specifically aimed at discovery of computer-based information. The mailing list is extensive; Kenneth Withers provided much help in compiling it. But the list can be supplemented. Because there will be duplications, it is desirable to suggest additional recipients to the Discovery Subcommittee.

The Discovery Subcommittee plans to make recommendations at a spring meeting in 2003 with respect to new proposals. It may prove desirable to have a Subcommittee meeting to help shape proposals.

Molly Johnson and Kenneth Withers reported on the FJC Qualitative Study of Issues Raised by The Discovery of Computer-Based Information in Civil Litigation. They noted that Meghan A. Dunn is a third author of the study, and that Thomas Willging provided invaluable help.

The Discovery Subcommittee was consulted in looking for in-depth illustrations of how these issues play out in particular cases. The Study was divided into three parts — a survey of magistrate judges, a survey of computer consultants, and ten case studies.

Magistrate judges were selected for surveying because the Subcommittee thought they are likely to have more experience with computer-based discovery issues than district judges have. In addition, there is an e-mail list that makes it easy to reach all magistrate judges. They were asked about their experiences, including types of cases and the types of issues that had come up. They also were asked to suggest cases that might be good for in-depth study.

The survey of consultants was designed to supplement the survey of magistrate judges. The rate of return was disappointing: 75 experts were addressed, but only 10 usable responses emerged. Among the problems were timing — the survey was sent out just before September 11, 2001; responses received in free form that could not be translated to the survey format; and confidentiality agreements with clients.

The researchers also reached out the Defense Research Institute, the American Trial Lawyers Association, and others for nominations of cases to be considered for in-depth study.

The case study sought cases recently closed or settled in federal courts in which at least the judge and one attorney were willing to participate in the study. The first step was study of the case file. Then the participants were interviewed. The interview protocol was designed to facilitate cross-case comparison.

The results of the case study cannot be taken as completely representative of federal-court experience. The participants were mainly magistrate judges; it is possible that district judges encounter different case types and problems. The focus was on cases with problems that came to a judge; there are many cases that do not present such problems. The study involved interviews with only ten judges and seventeen attorneys; the number is too small to ensure full representation.

The magistrate-judge survey showed that three out of five who responded had encountered computer-based discovery problems. (The three-out-of-five number is taken from a sample limited to magistrate judges who do discovery work.) The case types that most frequently generated problems were individual-plaintiff employment cases, general commercial cases, and patent or copyright cases. The employment and general commercial cases are relatively frequent in overall case filings. The problems in patent and copyright cases are disproportionate to overall case filings, but it may be that these cases generate a disproportionate share of general discovery disputes as well as computer-based discovery disputes.

Sixty-nine percent of the magistrate judges identified as an "issue" that the case involved a computer consultant or expert; they did not say whether this was a cause of problems, a relief from problems, or a neutral factor. Privilege waiver, on-site inspection, requests for sharing retrieval costs, and concerns about spoliation were other problems that "led the pack." But again there is no basis in the study for comparing the frequency of these problems to cases involving discovery of other sorts of material.

In the case studies, the judges and attorneys were asked whether it would be useful to amend the discovery rules to account for computer-based information. Seven of the ten judges did not favor rule changes. Twelve of the seventeen attorneys did favor rules changes. A majority of the participants thought that the present rules had no effect on their cases.

Specific rules changes suggested by more than one participant included a rule that the court can designate the form of production — this seems particularly important in directing production in all-electronic form if the records are kept that way. The rules might provide for early data-preservation orders, entered before the scope of discovery is determined: this is done under the current rules, but a specific rule would help. It was suggested that Rule 26(a) disclosures, Rule 26(f) discovery plans, and Rule 16 pretrial orders should be directed to consider computer-based discovery directly. And it might be possible to clarify the extent of the obligation to review computer records for discovery responses.

The case studies show that many judges are willing to use their powers to manage discovery. One judge developed a questionnaire for all of a party's employees exploring the extent to which they used e-mail for business purposes. The same judge scheduled a one-day "computer summit meeting" to help set the directions of discovery. The parties may be ordered to provide frequent reports on the progress of discovery. Another judge provided for discovery of e-mail "headers" alone, not the body of the messages, for purposes akin to a privilege log: the headers reveal the sender, recipient, time, and subject of the message. This information can be used to channel further discovery.

Many of the case-study participants thought that judges and attorneys need more education.

The FJC education system has provided every federal judge an opportunity to attend a conference on computer-based discovery. Many FJC publications devote increasing attention to these issues. Speakers and materials have been provided for circuit and district conferences. And, working with the Federal Bar Association, a kit has been prepared for local seminars. The kit includes a DVD demonstration in which Committee Member Judge McKnight presides over five problem presentations. Federal Bar Association chapters will have these kits, and every district court chief judge. The kit can support a program with a local panel. The FJC web site will soon provide resources.

The FJC has compiled information from more than 180 CLE conferences on computer-based discovery. Arrangements will soon be made to provide access to this data base for every Civil Rules Committee member.

The National Center for State Courts is pursuing a research project parallel to the FJC efforts, based on focus groups of judges. The FJC is cooperating in this study.

A working group of the Sedona Conference will formulate the views of defense attorneys. The ABA Section of Science and Technology Law is preparing a treatise. And groups of records managers and information technology professionals are creating programs. Many special-interest bar groups also have programs.

No specific rules proposals have yet emerged from these multifarious projects.

"Rule 5.1" — Intervention Notice to Government

Civil Rule 24(c) implements the provisions of 28 U.S.C. § 2403 that direct that a court give notice to the United States Attorney General when the constitutionality of a federal statute affecting the public interest is drawn in question, and likewise give notice to a state attorney general when a state statute is challenged. Appellate Rule 44 implements the statute in somewhat different terms. A "mailbox" suggestion that the Civil Rules might be made parallel to the Appellate Rule has been supported by the Department of Justice on the ground that there still are a worrisome number of cases in which notice is not provided.

One source of difficulty with Rule 24(c) may arise from its location in the general intervention rule: it is more likely to be noticed by parties who are thinking of intervention possibilities than by parties who are focusing only on challenging a statute. The drafts that have been prepared to illustrate possible changes accordingly have been designated provisionally as a new Rule 5.1.

The Department of Justice has suggested several revisions of the first draft. Responses to those suggestions were not reviewed in time to support further development by the Department. The topic is not yet ripe for consideration by the Committee.

One specific issue was noted. Section 2403 directs the court to certify to the Attorney General the fact that a challenge to a federal statute has been made. Appellate Rule 44 supplements this by directing a party who makes the challenge to notify the circuit clerk, and then directs the clerk to certify the fact of the challenge to the Attorney General. It has been suggested that although the statute imposes the notice obligation on the court, the Rule should impose a parallel obligation on the party. If the party must notify the court, as in Appellate Rule 44, it is simple enough to require that the notice also be sent to the Attorney General. Although the result would be duplicating notices to the Attorney General unless we are prepared to discard the statutory requirement that the court certify the fact of the challenge, the double notice may be valuable.

The Rule 5.1 draft includes several departures from Appellate Rule 44. Because of the general policy that parallel provisions in separate sets of Rules should be parallel, the need to work with the Appellate Rules Committee will be explored.

As with many other ongoing projects to amend the rules, this project will be on a separate track from the style track.

Rule 6(e): "3 days shall be added to the prescribed period"

The Appellate Rules Committee has pointed out the ambiguity of the provision in Civil Rule 6(e) that directs that when service has been made under Rule 5(b)(2)(B), (C), or (D), "3 days shall be added to the prescribed period" for responding. The ambiguity arises from the interplay between this provision and the Rule 6(a) provision that intervening Saturdays, Sundays, and legal holidays are excluded in computing a time period that is less than 11 days. This ambiguity has not been ironed out in the reported cases, which take different approaches.

An additional three days are provided to recognize that there may be some delay when service is made by mail, by deposit with the court clerk, or by electronic means or other means agreed to by the parties. This purpose is served most clearly by providing that the prescribed period begins three days after service is made, or else by providing that it ends three days later than it otherwise would end. Either approach avoids the absurdities that may arise from alternative constructions.

In some circumstances it makes a difference whether three days are added at the beginning or the end of the period, at least when the prescribed term for responding is less than 11 days after service.

It was agreed that the most important consideration is to achieve a clear statement that eliminates any ambiguity.

The central argument for starting the prescribed period three days after service is made — e.g., by mailing — is that the purpose is to reflect the fact that as many as three days may be needed for delivery. And clear, simple drafting is possible.

Some of the lawyers suggested that they had assumed that the three days are added at the end of the period. In some circumstances this will give a greater extension of time than would result from starting the period three days late. It was urged that if this version can be drafted clearly, it is better to achieve clarity on terms that conform with the mode of current practice. Absent any clear reason for making one choice or the other, it is better to adopt the approach that will cause least disruption during the period when many lawyers will continue to adhere to old habits without considering a new rule provision.

It was asked why the problem should not be solved by undoing all of the complicated calculation rules and expanding the periods that now seem too brief unless we exclude weekends and holidays and add time when in-hand or at-home service is not made. This question is frequently asked in discussion of these problems, and has always been resisted. The reasons for resistance are not entirely clear. One problem may be the difficulty of rethinking all of the relevant time periods and setting new, longer, but still arbitrary periods. Another may be that the present system works to set shorter periods in many situations than would result if general periods were set with an eye to accommodating all situations. However that may be, no support was voiced for taking up this chore.

The American Bar Association representatives volunteered to conduct an informal survey of Litigation Section leaders to determine whether there is any common understanding in practice.

Alternative Rule 6(e) drafts will be presented at a 2003 winter or spring Advisory Committee meeting, one starting the period three days late and the other ending the period three days late.

Rule 15(c)(3)

In *Singletary v. Pennsylvania Department of Corrections*, 3d Cir.2001, 266 F.3d 186, the court invited this Committee to consider an amendment of Rule 15(c)(3) identified in an earlier Committee agenda item. The problem arises from the provision that allows relation back of an amendment changing the party or the naming of a party against whom a claim is asserted when, among other things, the new party had notice that but for some "mistake" concerning the identity of the proper party, the action would have been brought against the new party. Several courts of appeals have agreed that when a plaintiff is aware that the plaintiff cannot identify an intended defendant, there is no "mistake." The problem has arisen in a variety of settings. A common illustration is provided by a plaintiff who believes that police officers have used excessive force against the plaintiff but who cannot identify the police officers to sue. A direct approach to this problem would be to add a few words to Rule 15(c)(3): "but for some mistake or lack of information concerning the identity of the proper party * * *."

The apparently easy amendment may not be so easy. The cases that evoke sympathy are those in which a plaintiff has made diligent efforts to identify the proper defendant within the limitations period, but has failed. There is less reason for concern when a plaintiff simply waits to file on the last day of the limitations period and then sets about identifying a proper defendant. If this omission is to be addressed, the amendment is not quite so simple.

If Rule 15(c)(3) is to be amended, it also must be asked whether some of its other apparent problems should be addressed. Truly perplexing puzzles are posed by the 1991 amendment that set the time for getting notice to the new defendant as "the period provided by Rule 4(m) for service of the summons and complaint." Unraveling these puzzles will be difficult, in part perhaps because they do not appear to have caused any general problems in actual practice.

Yet other questions might be addressed. Rule 15(c)(3) has never been used to address the problems that arise from changing plaintiffs after a limitations period has expired; these problems

are not much less difficult than the problems that attend changing defendants. Counterclaims might be addressed. Still other clarifications seem desirable.

A more fundamental set of questions also besets Rule 15(c)(3). Rule 15(c)(1) allows relation back of an amendment whenever relation back is permitted by the law that provides the statute of limitations applicable to the action. The sole purpose of Rule 15(c)(3) is to permit relation back when the statute cannot be interpreted to permit it. This result may seem at odds with the Enabling Act provision that a rule must not abridge, enlarge, or modify any substantive right.

Brief discussion noted that "Doe" pleading in California is disruptive, posing real problems for the courts. It may be used for cases in which the plaintiff knows the identity of an intended defendant but does not know whether there is a cause of action.

But it also was noted that the "lack of information" provision would address a real problem. There are many cases in which a diligent plaintiff is not able, without the help of discovery, to identify a proper defendant. These questions are of interest not only to plaintiffs but also to judges, municipal entities, and many others.

These problems are difficult. It may prove desirable to appoint a subcommittee to consider them in greater depth before the Committee considers them further.

Rule 68

A proposal to amend Rule 68 was included in the consent calendar items. The proposal was to make the rule more effective by allowing plaintiffs to make offers; providing sanctions when a plaintiff rejects an offer and then wins nothing; making it clear that the clerk can enter judgment as to part of a multiparty or multiclaim case; and increasing sanctions by allowing an award of expenses (although not attorney fees) in addition to costs.

It was noted that "Rule 68 has been with us for a long time." The earlier consideration bogged down in elaboration of a complicated proposal to establish a limited provision for attorney-fee sanctions. In its present form, Rule 68 "is an embarrassment." We should either get rid of it, or we should reform it. California practice has an offer-of-judgment provision that is used regularly because it "has teeth" in the form of a discretionary award of expenses, not attorney fees. Expenses for expert witnesses can be a "huge weapon" in encouraging settlement. Plaintiffs as well as defendants can make offers. The device is useful after judgment as well as before trial — expense sanctions are traded away for dismissal of an appeal.

It was observed that any proposal that includes attorney-fee sanctions will produce strong reactions.

It was asked whether an improved Rule 68 should address the issue-preclusion effects of a judgment based on an offer of settlement. One possibility would be to permit an offer that includes an agreement on issue preclusion as a means of making settlement more nearly equivalent to victory at trial.

It was decided to carry the Rule 68 questions forward for consideration at a later meeting.

Admiralty Rules

Rule B: Admiralty Rule B(1)(a) provides for attachment in an in personam admiralty action. Attachment serves two purposes. It can establish quasi-in-rem jurisdiction in an action that cannot be supported by personal jurisdiction. It also provides security. The security function can be served even in an action supported by personal jurisdiction because B(1)(a) attachment is available even

when a defendant is subject to personal jurisdiction, so long as the defendant is not "found" in the district. A defendant is "found" only if subject to service in person or through an agent. This circumstance makes it important to fix the moment for determining whether a defendant can be "found" in the district. A defendant not found in the district when an demand for attachment is made may seek to appoint an agent for service so as to avoid attachment. Two courts of appeals have ruled that the determination should be made at the moment when a verified complaint praying for attachment is filed. It was suggested at a Standing Committee meeting that Rule B should be amended to reflect these rulings. The Maritime Law Association has joined in supporting the recommendation.

Discussion noted that the Rule B concept of finding a defendant in the district does not depend on temporary absence — a defendant generally to be found in the district is not subject to attachment simply because absent for a day.

It also was noted that there may be special reasons for affording a special pre-judgment security remedy in admiralty cases: "enforcement of a personal judgment may be more difficult, more often."

The proposed amendment was recommended to the Standing Committee for publication, aiming toward adoption in the ordinary course.

Rule C: Admiralty Rule C(6)(b)(i)(A) has recently been amended as part of the process that separated forfeiture proceedings from true maritime proceedings in many parts of the Supplemental Rules. Unfortunately, unthinking parallelism with the provisions adopted for forfeiture led to inclusion of a provision that has no meaning. As adopted, a person who asserts a right of possession or an ownership interest in property that is the subject of an admiralty in rem action must file a verified statement "within 10 days after the earlier of (1) the execution of process, or (2) completed publication of notice under Rule C(4)." The difficulty is that Rule C(4) requires publication of notice only if attached property is not released within 10 days after execution of process. Because notice does not even begin until 10 days after execution of process, there cannot be any situation in which Rule C(4) notice is completed earlier than the execution of process.

This drafting oversight is easily corrected: "within 10 days after ~~the earlier of (1)~~ the execution of process, ~~or (2) completed publication of notice under Rule C(4),~~ or * * *."

It was asked whether this change should be pursued without publication, as a technical amendment. Immediate correction would be helpful to protect practitioners against the waste of time entailed in a fruitless effort to find meaning for the material proposed to be stricken. Publication, on the other hand, will do the same job: the admiralty bar is small, and pays attention to these matters. Publication of the proposal will call attention to the issue and resolve it effectively in practice. Publication, indeed, can be accomplished earlier than an amendment could be made with no publication — the seemingly longer process may in fact provide earlier effective relief. Since the Rule B proposal is appropriate for publication, this proposal may better be published as well.

Proposed Rule G: The Department of Justice has proposed that all the explicit Supplemental Rules provisions for civil forfeiture proceedings be stripped out of Rules A through E and gathered together in a new Rule G. The Maritime Law Association position is that this approach is appropriate so long as nothing is done to alter procedures for maritime cases; there is some uncertainty whether it would be better to make Rule G entirely self-contained, or whether instead to permit it to incorporate by reference any provisions in Rules A through E that may be useful to supplement its explicit provisions.

Drafting in this sensitive area is not a simple matter. After several revisions of the initial draft, a polished version was circulated for comment to the National Association of Criminal Defense Lawyers and an American Bar Association section. The National Association of Criminal Defense Lawyers was active in commenting on the forfeiture provisions in the Criminal Rules, pursuing its comments to the level of the Judicial Conference, and responded to the Rule G draft with lengthy, detailed, and thoughtful comments. The Admiralty Rules Subcommittee will be reconstituted as a forfeiture rule subcommittee for the purpose of considering the best ways to consider these comments, and whether to reach out to other groups for further comments. It is difficult to predict whether this process can lead to a draft ready for publication by the time of the spring 2003 meeting.

Respectfully submitted,

Edward H. Cooper
Reporter

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JOHN K. RABIEJ
Chief

Rules Committee Support Office

April 11, 2003
Via Fax

MEMORANDUM TO JUDGE DAVID F. LEVI AND PROFESSOR EDWARD H. COOPER

SUBJECT: *Senator Kohl's Bill*

Senator Kohl's "Sunshine in Litigation Act of 2003" (S. 817) has not yet been posted on *Thomas*. But we received the attached faxed version of the bill from Senator Kohl's office. It applies to protective discovery orders and to court orders approving a sealed-settlement agreement.

John K. Rabiej

Attachment

O.\MDM\MDM03.123

S.L.C.

108TH CONGRESS
1ST SESSION

S. _____

IN THE SENATE OF THE UNITED STATES

Mr. KOHL introduced the following bill; which was read twice and referred to the Committee on _____

A BILL

To amend chapter 111 of title 28, United States Code, relating to protective orders, sealing of cases, disclosures of discovery information in civil actions, and for other purposes.

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

SECTION 1. SHORT TITLE.

This Act may be cited as the "Sunshine in Litigation Act of 2003".

SEC. 2. RESTRICTIONS ON PROTECTIVE ORDERS AND SEALING OF CASES AND SETTLEMENTS.

(a) IN GENERAL.—Chapter 111 of title 28, United States Code, is amended by adding at the end the following new section:

"§ 1660. Restrictions on protective orders and sealing of cases and settlements

"(a)(1) A court shall not enter an order under rule 26(c) of the Federal Rules of Civil Procedure restricting the disclosure of information obtained through discovery, an order approving a settlement agreement that would restrict the disclosure of such information, or an order restricting access to court records in a civil case unless the court has made findings of fact that—

"(A) such order would not restrict the disclosure of information which is relevant to the protection of public health or safety; or

"(B)(i) the public interest in the disclosure of potential health or safety hazards is outweighed by a specific and substantial interest in maintaining the confidentiality of the information or records in question; and

"(ii) the requested protective order is no broader than necessary to protect the privacy interest asserted.

"(2) No order entered in accordance with paragraph (1), other than an order approving a settlement agreement, shall continue in effect after the entry of final judgment, unless at the time of, or after, such entry the court makes a separate finding of fact that the requirements of paragraph (1) have been met.

"(3) The party who is the proponent for the entry of an order, as provided under this section, shall have the burden of proof in obtaining such an order

"(4) This section shall apply even if an order under paragraph (1) is requested—

"(A) by motion pursuant to rule 26(c) of the Federal Rules of Civil Procedure; or

"(B) by application pursuant to the stipulation of the parties.

"(5)(A) The provisions of this section shall not constitute grounds for the withholding of information in discovery that is otherwise discoverable under rule 26 of the Federal Rules of Civil Procedure.

"(B) No party shall request, as a condition for the production of discovery, that another party stipulate to an order that would violate this section.

"(b)(1) A court shall not approve or enforce any provision of an agreement between or among parties to a civil action, or approve or enforce an order subject to sub-

section (a)(1), that prohibits or otherwise restricts a party from disclosing any information relevant to such civil action to any Federal or State agency with authority to enforce laws regulating an activity relating to such information.

"(2) Any such information disclosed to a Federal or State agency shall be confidential to the extent provided by law.

"(c)(1) Subject to paragraph (2), a court shall not enforce any provision of a settlement agreement between or among parties that prohibits 1 or more parties from—

"(A) disclosing that a settlement was reached or the terms of such settlement, other than the amount of money paid; or

"(B) discussing a case, or evidence produced in the case, that involves matters related to public health or safety.

"(2) Paragraph (1) does not apply if the court has made findings of fact that the public interest in the disclosure of potential health or safety hazards is outweighed by a specific and substantial interest in maintaining the confidentiality of the information.".

(b) TECHNICAL AND CONFORMING AMENDMENT.—The table of sections for chapter 111 of title 28, United

States Code, is amended by adding after the item relating to section 1659 the following:

"1660. Restrictions on protective orders and sealing of cases and settlements ".

SEC. 3. EFFECTIVE DATE.

The amendments made by this Act shall—

(1) take effect 30 days after the date of enactment of this Act; and

(2) apply only to orders entered in civil actions or agreements entered into on or after such date.

108TH CONGRESS
1ST SESSION

S. 274

To amend the procedures that apply to consideration of interstate class actions to assure fairer outcomes for class members and defendants, and for other purposes.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 4, 2003

Mr. GRASSLEY (for himself, Mr. KOHL, Mr. HATCH, Mr. CARPER, Mr. SPECTER, Mr. MILLER, Mr. CHAFEE, and Mr. LUGAR) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend the procedures that apply to consideration of interstate class actions to assure fairer outcomes for class members and defendants, and for other purposes.

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

SECTION 1. SHORT TITLE; REFERENCE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Class Action Fairness Act of 2003".

(b) REFERENCE.—Whenever in this Act reference is made to an amendment to, or repeal of, a section or other

provision, the reference shall be considered to be made to a section or other provision of title 28, United States Code.

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

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS.—Congress finds the following:

(1) Class action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm.

(2) Over the past decade, there have been abuses of the class action device that have—

(A) harmed class members with legitimate claims and defendants that have acted responsibly;

(B) adversely affected interstate commerce; and

(C) undermined public respect for our judicial system.

(3) Class members often receive little or no benefit from class actions, and are sometimes harmed, such as where—

(A) counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value;

(B) unjustified awards are made to certain plaintiffs at the expense of other class members; and

(C) confusing notices are published that prevent class members from being able to fully understand and effectively exercise their rights.

(4) Abuses in class actions undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution, in that State and local courts are—

(A) keeping cases of national importance out of Federal court;

(B) sometimes acting in ways that demonstrate bias against out-of-State defendants; and

(C) making judgments that impose their view of the law on other States and bind the rights of the residents of those States.

(b) PURPOSES.—The purposes of this Act are to—

(1) assure fair and prompt recoveries for class members with legitimate claims;

(2) restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction; and

(3) benefit society by encouraging innovation and lowering consumer prices.

SEC. 3. CONSUMER CLASS ACTION BILL OF RIGHTS AND IMPROVED PROCEDURES FOR INTERSTATE CLASS ACTIONS.

(a) IN GENERAL.—Part V is amended by inserting after chapter 113 the following:

"CHAPTER 114—CLASS ACTIONS

"§ 1711. Definitions

"In this chapter:

"(1) CLASS.—The term 'class' means all of the class members in a class action.

"(2) CLASS ACTION.—The term 'class action' means any civil action filed in a district court of the United States under rule 23 of the Federal Rules of Civil Procedure or any civil action that is removed to a district court of the United States that was originally filed under a State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representatives as a class action.

"(3) CLASS COUNSEL.—The term 'class counsel' means the persons who serve as the attorneys for the class members in a proposed or certified class action.

"(4) CLASS MEMBERS.—The term 'class members' means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

"(5) PLAINTIFF CLASS ACTION.—The term 'plaintiff class action' means a class action in which class members are plaintiffs.

"(6) PROPOSED SETTLEMENT.—The term 'proposed settlement' means an agreement regarding a class action that is subject to court approval and

that, if approved, would be binding on some or all class members.

"§ 1712. Judicial scrutiny of coupon and other noncash settlements

"The court may approve a proposed settlement under which the class members would receive noncash benefits or would otherwise be required to expend funds in order to obtain part or all of the proposed benefits only after a hearing to determine whether, and making a written finding that, the settlement is fair, reasonable, and adequate for class members.

"§ 1713. Protection against loss by class members

"The court may approve a proposed settlement under which any class member is obligated to pay sums to class counsel that would result in a net loss to the class member only if the court makes a written finding that nonmonetary benefits to the class member substantially outweigh the monetary loss.

"§ 1714. Protection against discrimination based on geographic location

"The court may not approve a proposed settlement that provides for the payment of greater sums to some class members than to others solely on the basis that the class members to whom the greater sums are to be paid are located in closer geographic proximity to the court.

"§ 1715. Prohibition on the payment of bounties

"(a) IN GENERAL.—The court may not approve a proposed settlement that provides for the payment of a greater share of the award to a class representative serving on behalf of a class, on the basis of the formula for distribution to all other class members, than that awarded to the other class members.

"(b) RULE OF CONSTRUCTION.—The limitation in subsection (a) shall not be construed to prohibit a payment approved by the court for reasonable time or costs that a person was required to expend in fulfilling the obligations of that person as a class representative.

"§ 1716. Clearer and simpler settlement information

"(a) PLAIN ENGLISH REQUIREMENTS.—Any court with jurisdiction over a plaintiff class action shall require that any written notice concerning a proposed settlement of the class action provided to the class through the mail or publication in printed media contain—

"(1) at the beginning of such notice, a statement in 18-point or greater bold type, stating 'LEGAL NOTICE: YOU ARE A PLAINTIFF IN A CLASS ACTION LAWSUIT AND YOUR LEGAL RIGHTS ARE AFFECTED BY THE SETTLEMENT DESCRIBED IN THIS NOTICE.';

"(2) a short summary written in plain, easily understood language, describing—

"(A) the subject matter of the class action;

"(B) the members of the class;

"(C) the legal consequences of being a member of the class action;

"(D) if the notice is informing class members of a proposed settlement agreement—

"(i) the benefits that will accrue to the class due to the settlement;

"(ii) the rights that class members will lose or waive through the settlement;

"(iii) obligations that will be imposed on the defendants by the settlement;

"(iv) the dollar amount of any attorney's fee class counsel will be seeking, or if not possible, a good faith estimate of the dollar amount of any attorney's fee class counsel will be seeking; and

"(v) an explanation of how any attorney's fee will be calculated and funded; and

"(E) any other material matter.

"(b) TABULAR FORMAT.—Any court with jurisdiction over a plaintiff class action shall require that the information described in subsection (a)—

"(1) be placed in a conspicuous and prominent location on the notice;

"(2) contain clear and concise headings for each item of information; and

"(3) provide a clear and concise form for stating each item of information required to be disclosed under each heading.

"(c) TELEVISION OR RADIO NOTICE.—Any notice provided through television or radio (including transmissions by cable or satellite) to inform the class members in a class action of the right of each member to be excluded from a class action or a proposed settlement, if such right exists, shall, in plain, easily understood language—

"(1) describe the persons who may potentially become class members in the class action; and

"(2) explain that the failure of a class member to exercise his or her right to be excluded from a class action will result in the person's inclusion in the class action.

"§ 1717. Notifications to appropriate Federal and State officials

"(a) DEFINITIONS.—

"(1) APPROPRIATE FEDERAL OFFICIAL.—In this section, the term 'appropriate Federal official' means—

"(A) the Attorney General of the United States; or

"(B) in any case in which the defendant is a Federal depository institution, a State depository institution, a depository institution holding company, a foreign bank, or a nondepository institution subsidiary of the foregoing (as such terms are defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)), the person who has the primary Federal regulatory or supervisory responsibility with respect to the defendant, if some or all of the matters alleged in the class action are subject to regulation or supervision by that person.

"(2) APPROPRIATE STATE OFFICIAL.—In this section, the term 'appropriate State official' means the person in the State who has the primary regulatory or supervisory responsibility with respect to the defendant, or who licenses or otherwise authorizes the defendant to conduct business in the State,

if some or all of the matters alleged in the class action are subject to regulation by that person. If there is no primary regulator, supervisor, or licensing authority, or the matters alleged in the class action are not subject to regulation or supervision by that person, then the appropriate State official shall be the State attorney general.

"(b) IN GENERAL.—Not later than 10 days after a proposed settlement of a class action is filed in court, each defendant that is participating in the proposed settlement shall serve upon the appropriate State official of each State in which a class member resides and the appropriate Federal official, a notice of the proposed settlement consisting of—

"(1) a copy of the complaint and any materials filed with the complaint and any amended complaints (except such materials shall not be required to be served if such materials are made electronically available through the Internet and such service includes notice of how to electronically access such material);

"(2) notice of any scheduled judicial hearing in the class action;

"(3) any proposed or final notification to class members of—

"(A)(i) the members' rights to request exclusion from the class action; or

"(ii) if no right to request exclusion exists, a statement that no such right exists; and

"(B) a proposed settlement of a class action;

"(4) any proposed or final class action settlement;

"(5) any settlement or other agreement contemporaneously made between class counsel and counsel for the defendants;

"(6) any final judgment or notice of dismissal;

"(7)(A) if feasible, the names of class members who reside in each State and the estimated proportionate share of the claims of such members to the entire settlement to that State's appropriate State official; or

"(B) if the provision of information under subparagraph (A) is not feasible, a reasonable estimate of the number of class members residing in each State and the estimated proportionate share of the claims of such members to the entire settlement; and

"(8) any written judicial opinion relating to the materials described under subparagraphs (3) through (6).

"(c) DEPOSITORY INSTITUTIONS NOTIFICATION.—

"(1) FEDERAL AND OTHER DEPOSITORY INSTITUTIONS.—In any case in which the defendant is a Federal depository institution, a depository institution holding company, a foreign bank, or a non-depository institution subsidiary of the foregoing, the notice requirements of this section are satisfied by serving the notice required under subsection (b) upon the person who has the primary Federal regulatory or supervisory responsibility with respect to the defendant, if some or all of the matters alleged in the class action are subject to regulation or supervision by that person.

"(2) STATE DEPOSITORY INSTITUTIONS.—In any case in which the defendant is a State depository institution (as that term is defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)), the notice requirements of this section are satisfied by serving the notice required under subsection (b) upon the State bank supervisor (as that term is defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)) of the State in which the defendant is incorporated or chartered, if some or all of the matters alleged in the class action

are subject to regulation or supervision by that person, and upon the appropriate Federal official.

"(d) FINAL APPROVAL.—An order giving final approval of a proposed settlement may not be issued earlier than 90 days after the later of the dates on which the appropriate Federal official and the appropriate State official are served with the notice required under subsection (b).

"(e) NONCOMPLIANCE IF NOTICE NOT PROVIDED.—

"(1) IN GENERAL.—A class member may refuse to comply with and may choose not to be bound by a settlement agreement or consent decree in a class action if the class member demonstrates that the notice required under subsection (b) has not been provided.

"(2) LIMITATION.—A class member may not refuse to comply with or to be bound by a settlement agreement or consent decree under paragraph (1) if the notice required under subsection (b) was directed to the appropriate Federal official and to either the State attorney general or the person that has primary regulatory, supervisory, or licensing authority over the defendant.

"(3) APPLICATION OF RIGHTS.—The rights created by this subsection shall apply only to class

members or any person acting on a class member's behalf, and shall not be construed to limit any other rights affecting a class member's participation in the settlement.

"(f) RULE OF CONSTRUCTION.—Nothing in this section shall be construed to expand the authority of, or impose any obligations, duties, or responsibilities upon, Federal or State officials.".

(b) TECHNICAL AND CONFORMING AMENDMENT.—The table of chapters for part V is amended by inserting after the item relating to chapter 113 the following:

"114. Class Actions ..... 1711".

SEC. 4. FEDERAL DISTRICT COURT JURISDICTION FOR INTERSTATE CLASS ACTIONS.

(a) APPLICATION OF FEDERAL DIVERSITY JURISDICTION.—Section 1332 is amended—

(1) by redesignating subsection (d) as subsection (e); and

(2) by inserting after subsection (c) the following:

"(d)(1) In this subsection—

"(A) the term 'class' means all of the class members in a class action;

"(B) the term 'class action' means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial

procedure authorizing an action to be brought by 1 or more representative persons as a class action;

"(C) the term 'class certification order' means an order issued by a court approving the treatment of some or all aspects of a civil action as a class action; and

"(D) the term 'class members' means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

"(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $2,000,000, exclusive of interest and costs, and is a class action in which—

"(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

"(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

"(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

"(3) Paragraph (2) shall not apply to any civil action in which—

"(A)(i) the substantial majority of the members of the proposed plaintiff class and the primary defendants are citizens of the State in which the action was originally filed; and

"(ii) the claims asserted therein will be governed primarily by the laws of the State in which the action was originally filed;

"(B) the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief; or

"(C) the number of members of all proposed plaintiff classes in the aggregate is less than 100.

"(4) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $2,000,000, exclusive of interest and costs.

"(5) This subsection shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.

"(6)(A) A district court shall dismiss any civil action that is subject to the jurisdiction of the court solely under this subsection if the court determines the action may not proceed as a class action based on a failure to satisfy the

prerequisites of rule 23 of the Federal Rules of Civil Procedure.

"(B) Nothing in subparagraph (A) shall prohibit plaintiffs from filing an amended class action in Federal court or filing an action in State court, except that any such action filed in State court may be removed to the appropriate district court if it is an action of which the district courts of the United States have original jurisdiction.

"(C) In any action that is dismissed under this paragraph and is filed by any of the original named plaintiffs therein in the same State court venue in which the dismissed action was originally filed, the limitations periods on all reasserted claims shall be deemed tolled for the period during which the dismissed class action was pending. The limitations periods on any claims that were asserted in a class action dismissed under this paragraph that are subsequently asserted in an individual action shall be deemed tolled for the period during which the dismissed action was pending.

"(7) Paragraph (2) shall not apply to any class action that solely involves a claim—

"(A) concerning a covered security as defined under 16(f)(3) of the Securities Act of 1933 and

section 28(f)(5)(E) of the Securities Exchange Act of 1934;

"(B) that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

"(C) that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 and the regulations issued thereunder).

"(8) For purposes of this subsection and section 1453 of this title, an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized.

"(9)(A) For purposes of this section and section 1453 of this title, a civil action that is not otherwise a class action as defined in paragraph (1)(B) shall nevertheless be deemed a class action if—

"(i) the named plaintiff purports to act for the interests of its members (who are not named parties to the action) or for the interests of the general public, seeks a remedy of damages, restitution,

disgorgement, or any other form of monetary relief, and is not a State attorney general; or

"(ii) monetary relief claims in the action are proposed to be tried jointly in any respect with the claims of 100 or more other persons on the ground that the claims involve common questions of law or fact.

"(B)(i) In any civil action described under subparagraph (A)(ii), the persons who allegedly were injured shall be treated as members of a proposed plaintiff class and the monetary relief that is sought shall be treated as the claims of individual class members.

"(ii) Paragraphs (3) and (6) of this subsection and subsections (b)(2) and (d) of section 1453 shall not apply to any civil action described under subparagraph (A)(i).

"(iii) Paragraph (6) of this subsection, and subsections (b)(2) and (d) of section 1453 shall not apply to any civil action described under subparagraph (A)(ii).".

(b) CONFORMING AMENDMENTS.—

(1) Section 1335(a)(1) is amended by inserting "(a) or (d)" after "1332".

(2) Section 1603(b)(3) is amended by striking "(d)" and inserting "(e)".

SEC. 5. REMOVAL OF INTERSTATE CLASS ACTIONS TO FEDERAL DISTRICT COURT.

(a) IN GENERAL.—Chapter 89 is amended by adding after section 1452 the following:

"§ 1453. Removal of class actions

"(a) DEFINITIONS.—In this section, the terms 'class', 'class action', 'class certification order', and 'class member' shall have the meanings given such terms under section 1332(d)(1).

"(b) IN GENERAL.—A class action may be removed to a district court of the United States in accordance with this chapter, without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed—

"(1) by any defendant without the consent of all defendants; or

"(2) by any plaintiff class member who is not a named or representative class member without the consent of all members of such class.

"(c) WHEN REMOVABLE.—This section shall apply to any class action before or after the entry of a class certification order in the action.

"(d) PROCEDURE FOR REMOVAL.—Section 1446 relating to a defendant removing a case shall apply to a plaintiff removing a case under this section, except that in the application of subsection (b) of such section the re-

quirement relating to the 30-day filing period shall be met if a plaintiff class member files notice of removal within 30 days after receipt by such class member, through service or otherwise, of the initial written notice of the class action.

"(e) REVIEW OF ORDERS REMANDING CLASS ACTIONS TO STATE COURTS.—Section 1447 shall apply to any removal of a case under this section, except that notwithstanding section 1447(d), an order remanding a class action to the State court from which it was removed shall be reviewable by appeal or otherwise.

"(f) EXCEPTION.—This section shall not apply to any class action that solely involves—

"(1) a claim concerning a covered security as defined under section 16(f)(3) of the Securities Act of 1933 and section 28(f)(5)(E) of the Securities Exchange Act of 1934;

"(2) a claim that relates to the internal affairs or governance of a corporation or other form of business enterprise and arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

"(3) a claim that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as de-

fined under section 2(a)(1) of the Securities Act of 1933 and the regulations issued thereunder).".

(b) REMOVAL LIMITATION.—Section 1446(b) is amended in the second sentence by inserting "(a)" after "section 1332".

(c) TECHNICAL AND CONFORMING AMENDMENTS.—The table of sections for chapter 89 is amended by adding after the item relating to section 1452 the following:

"1453. Removal of class actions.".

SEC. 6. REPORT ON CLASS ACTION SETTLEMENTS.

(a) IN GENERAL.—Not later than 12 months after the date of enactment of this Act, the Judicial Conference of the United States, with the assistance of the Director of the Federal Judicial Center and the Director of the Administrative Office of the United States Courts, shall prepare and transmit to the Committees on the Judiciary of the Senate and the House of Representatives a report on class action settlements.

(b) CONTENT.—The report under subsection (a) shall contain—

(1) recommendations on the best practices that courts can use to ensure that proposed class action settlements are fair to the class members that the settlements are supposed to benefit;

(2) recommendations on the best practices that courts can use to ensure that—

(A) the fees and expenses awarded to counsel in connection with a class action settlement appropriately reflect the extent to which counsel succeeded in obtaining full redress for the injuries alleged and the time, expense, and risk that counsel devoted to the litigation; and

(B) the class members on whose behalf the settlement is proposed are the primary beneficiaries of the settlement; and

(3) the actions that the Judicial Conference of the United States has taken and intends to take toward having the Federal judiciary implement any or all of the recommendations contained in the report.

(c) AUTHORITY OF FEDERAL COURTS.—Nothing in this section shall be construed to alter the authority of the Federal courts to supervise attorneys' fees.

SEC. 7. EFFECTIVE DATE.

The amendments made by this Act shall apply to any civil action commenced on or after the date of enactment of this Act.

○

COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT
of the
JUDICIAL CONFERENCE OF THE UNITED STATES

MEMORANDUM TO: **JUDGES, UNITED STATES COURTS OF APPEALS**
JUDGES, UNITED STATES DISTRICT COURTS
UNITED STATES MAGISTRATE JUDGES

SUBJECT: **Effect of E-Government Act on Implementation of the Judicial Conference Policy on Privacy and Public Access to Electronic Case Files (ACTION BY APRIL 16, 2003)**

DATE: **April 2, 2003**

This memorandum is to advise you that the E-Government Act of 2002 (Pub. L. No. 107-347), enacted on December 17, 2002, contains provisions on privacy and electronic case filing which are inconsistent with procedures contained in the privacy policy adopted by the Judicial Conference in September/October 2001, and that beginning April 16, 2003, you will have to conform any notice, standing order, local rule or other method you may have used to implement the privacy policy to the new law. [1]

The E-Government Act of 2002 requires the Supreme Court, in accordance with the federal judicial rulemaking process, to develop rules to protect privacy and security concerns relating to electronic filing of documents and the public availability of documents filed electronically. The law specifies that if such federal rules provide for the redaction of information, they shall also allow a party wishing to file a document containing such information to file an unredacted copy of the document under seal, which the court must retain as part of the record. The court retains the discretion to require a party to file a redacted copy of the same document for placement in the public file. The Judicial Conference policy, on the other hand, requires litigants in civil cases to modify or partially redact personal data identifiers, such as Social Security numbers and dates of birth, contained in documents that will be made available

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[1] A memorandum from Administrative Office Director Leonidas Ralph Mecham, dated March 5, 2003 explains the general requirements of the new law and noted its impact on the redaction provisions of the privacy policy. A copy of that memorandum may be accessed at http://jnet.ao.dcn/library/memo/2003/dir3-030.pdf

electronically. While the E-Government Act permits the Judicial Conference to issue interim rules and interpretive statements pending the adoption of rules, **beginning April 16, 2003, any such interim provisions, as well as any rules or orders of the court, to the extent they provide for redaction of information, must be applied consistent with the statutory procedures for redaction as stated above.** Therefore, beginning April 16, 2003, **courts can no longer require parties to file only redacted versions of pleadings.** This will require your court to alter any notice, standing order, local rule or other method you may have used to implement redaction procedures to allow for the filing of unredacted versions of documents under seal as set forth in the statute. A court may require a redacted version of a document to be filed for inclusion in the public file. A sample amended notice and guidance for an amended local rule are attached to this memo.

The Judicial Conference and the Administrative Office were aware that Congress was developing e-government legislation and that the courts were included. The Judicial Conference had commented on, and generally supported, an earlier version of the legislation that allowed the Conference to develop its own rules to address privacy and security concerns. The language of the E-Government Act regarding specific redaction procedures was added to the legislation at the eleventh hour and without consulting the judiciary. Efforts are under way to amend the current E-Government Act to restore this authority to the Conference. However, it is not certain that such an amendment will be enacted or that it will be done before the April 16, 2003 effective date for the relevant section of the law. We will keep you informed of our progress in seeking an amendment, but your court should plan on implementing the statutorily required redaction procedures by April 16, 2003.

If you have any questions regarding this memorandum, please contact Katie Simon, Attorney Advisor, Court Administration Policy Staff via e-mail at Katie Simon/DCA/AO/USCOURTS, phone at 202-502-1560 or fax at 202-502-1022.

John W. Lungstrum

Attachments

cc: Judges, United States Bankruptcy Courts
Circuit Executives
District Court Executives
Clerks, United States Courts

Proposed Model Notice of Electronic Availability of Case File Information
AMENDED TO COMPLY WITH THE E-GOVERNMENT ACT OF 2002
(New material underscored; deleted material struck through)

For WebPACER/RACER Imaging Courts

The Office of the Clerk is now imaging pleadings for posting to WebPACER/RACER, through the court's Internet website. Any subscriber to WebPACER will be able to read, download, store and print the full content of imaged documents. The clerk's office is not imaging or posting documents sealed or otherwise restricted by court order.

For CM/ECF Courts

The Office of the Clerk is now accepting electronically filed pleadings and making the content of these pleadings available on the court's Internet website via WebPACER. Any subscriber to WebPACER will be able to read, download, store and print the full content of electronically filed documents. The clerk's office will not make electronically available documents that have been sealed or otherwise restricted by court order.

For all courts

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. You must remember that any ~~other~~ personal information not otherwise protected will be made available over the Internet via WebPACER. If sensitive information must be included, the following ~~certain~~ personal data ~~and~~ identifiers must be partially redacted from the pleading, whether it is filed traditionally or electronically: ~~information, i.e.,~~ Social Security numbers, financial account numbers, dates of birth and the names of minor children. (See *Proposed Guideline for a Local Rule for United States District Courts Addressing Judicial Conference Privacy Policy Regarding Public Access to Electronic Case Files*.)

In compliance with the E-Government Act of 2002, a party wishing to file a document containing the personal data identifiers specified above may file an unredacted document under seal. This document shall be retained by the court as part of the record. The court may, however, still require the party to file a redacted copy for the public file.

In addition, exercise caution when filing documents that contain the following:

1) Personal identifying number, such as driver's license number;
2) medical records, treatment and diagnosis;
3) employment history;
4) individual financial information; and
5) proprietary or trade secret information.

Counsel is strongly urged to share this notice with all clients so that an informed decision about the inclusion of certain materials may be made. If a redacted document is filed, it is the sole responsibility of counsel and the parties to be sure that all pleadings comply with the rules of this court requiring redaction of personal data identifiers. (See *Proposed Guideline for a Local Rule for United States District Courts Addressing Judicial Conference Privacy Policy Regarding Public Access to Electronic Case Files.*) The clerk will not review each pleading for redaction. ~~Counsel and the parties are cautioned that failure to redact personal identifiers and/or the inclusion of irrelevant personal information in a pleading or exhibit filed with the court may subject them to the full disciplinary and remedial power of the court, including sanctions pursuant to Fed. R. Civ. P. 11.~~

Proposed Guideline for a Local Rule for United States District Courts
Addressing Judicial Conference Privacy Policy
Regarding Public Access to Electronic Case Files
AMENDED TO COMPLY WITH THE E-GOVERNMENT ACT 2002
(New material underscored; deleted material struck through)

To be inserted into the local rules of the district that address general rules of pleading in civil cases:

In compliance with the policy of the Judicial Conference of the United States, and the E-Government Act of 2002, and in order to promote electronic access to case files while also protecting personal privacy and other legitimate interests, parties shall refrain from including, or shall partially redact where inclusion is necessary, the following personal data identifiers from all pleadings filed with the court, including exhibits thereto, whether filed electronically or in paper, unless otherwise ordered by the Court.

a. **Social Security numbers.** If an individual's social security number must be included in a pleading, only the last four digits of that number should be used.

b. **Names of minor children.** If the involvement of a minor child must be mentioned, only the initials of that child should be used.

c. **Dates of birth.** If an individual's date of birth must be included in a pleading, only the year should be used.

d. **Financial account numbers.** If financial account numbers are relevant, only the last four digits of these numbers should be used.

In compliance with the E-Government Act of 2002, a party wishing to file a document containing the personal data identifiers listed above may file an unredacted document under seal. This document shall be retained by the court as part of the record. The court may, however, still require the party to file a redacted copy for the public file.

The responsibility for redacting these personal identifiers rests solely with counsel and the parties. The Clerk will not review each pleading for compliance with this rule. ~~Counsel and the parties are cautioned that failure to redact these personal identifiers may subject them to the full disciplinary power of the court.~~

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

PETER G. McCABE
Assistant Director

Office of Judges Programs

April 15, 2003

MEMORANDUM TO THE ADVISORY COMMITTEE ON CIVIL RULES

FROM: Jeffrey A. Hennemuth, Deputy Assistant Director

SUBJECT: Style Project Materials (Agenda Item 4)

The following items from the Civil Rules style project are presented to the Advisory Committee for consideration at the meeting in Washington, D.C., on May 1-2, 2003:

A. a revised style draft of Civil Rules 1 through 15 adopted by the Style Subcommittee of the Standing Committee on Rules of Practice and Procedure and annotated by Professor Cooper (STYLE 221), together with three background documents:
   - the consultant and staff research reports mentioned on page 8, notes 2 and 4, of the style draft (STYLE 196 & 209i); and
   - a consultant research report on the appropriate use of "adverse party" and "opposing party" in the restyled Civil Rules (STYLE 232)

B. a set of draft Committee Notes for the restyled Rules 1-15, prepared by Professor Cooper to illustrate and generate discussion on ways in which Notes might be used in the restyling process

C. Professor Cooper's draft notes on matters discussed at the meetings of the Civil Rules style Subcommittees on January 25-26, 2003 (STYLE 145 and 146) – provides background on the changes made in the new style draft of Rules 1-15 (see above).

The following items are presented for consideration by the Civil Rules style subcommittees on April 30 and May 2, 2003:

D. a style draft of Civil Rules 16 through 22 adopted by the Standing Style Subcommittee and annotated by Professor Cooper (STYLE 244A) – to be considered by Subcommittee A

E. a style draft of Civil Rules 23.1 through 25 adopted by the Standing Style Subcommittee and annotated by Professor Cooper (STYLE 244B) – to be considered by Subcommittee B.

STYLE 221

Style Draft of Rules 1 through 15, Federal Rules of Civil Procedure

As revised by Subcommittees A and B
of the Advisory Committee on Civil Rules

January 25-26, 2003

And further revised and annotated by the Style Subcommittee
of the Committee on Rules of Practice and Procedure
[Additions to rule text are double-underlined, deletions are ~~overstruck~~]

With annotations by Professor Cooper
[see footnote text in [ ] brackets]

March 20, 2003

FEDERAL RULES OF CIVIL PROCEDURE

Current wording (or wording in proposed amendments)	Potential Stylistic Revision
I. SCOPE OF RULES — ONE FORM OF ACTION	**TITLE I. SCOPE OF RULES; [1]FORM OF ACTION**
Rule 1. Scope and Purpose of Rules	**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 ~~economical~~ determination of every action.[2]

1. [Subcommittee A made an "earnest style suggestion" that this be "one form of action." The Style Subcommittee believes that the purpose of the Title captions is better served by brevity; full description should not be attempted. It did, however, revise the caption for Rule 2 to read "One Form of Action."]

2. [Subcommittee A recommended that "and proceeding" be added, so that the second sentence would reflect the change in the first sentence: "determination of every action and proceeding." The Style Subcommittee doubts whether speed and thrift are as relevant to proceedings as actions.]

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."

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.

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~~Form~~.** **(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~~in proper form~~, 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~~for that purpose~~. The court must so direct ~~make this appointment~~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	**(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 ~~who is subject to service under Rule 4(e), (f), or (h)~~ 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

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.	**(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)** ~~and~~ give the defendant a reasonable time of at least 30 days after that date — or at least 60 days if the defendant is addressed ~~sent~~ outside any judicial district of the United States — to return the waiver; and **(F~~E~~)** be sent by first-class mail or other reliable means.
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.	**(2)** ***Failure To Waive.*** ~~An individual, corporation, or association that is subject to service under Rule 4(e), (f), or (h) and receives notice of an action in the manner provided in Rule 4(d)(1) has a duty to avoid unnecessary costs of serving the summons.~~ 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.

(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.	**(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 that ~~the~~ date if ~~when the request was sent to~~ 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.	**(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) 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.	**(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 ~~in~~ the United States.** Unless federal law[1] provides otherwise, an individual ~~—~~(other than a minor[2] or an incompetent person)~~—~~ who has not waived service[3] may be served[4] 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 ~~lives~~ there; or **(C)** delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

1. The current Civil Rules are widely inconsistent in the terms used to identify applicable federal statutes and other laws. The term "federal law" is used in Rule 4(e), (f), (h), and (k)(2), and in Rule 83(b). "Constitution *and* laws of the United States" is used in Rule 4(k)(2)(B), while Rule 17(b) uses "Constitution *or* laws of the United States" and Rules 4.1(b), 28(a) & (b), and 71A(h), and Supplemental Admiralty Rule E(5)(a) simply use "laws [or "law"] of the United States." Similarly, the term "statute [or "statutes"] of the United States" is used in at least 22 separate provisions (including Rules 4(k)(1)(D) & (n)(1), 4.1(a), and 12(a)(1)), while Rule 43(a) uses "*a* federal law," Rules 24(c), 65(e), 71A(h), and 83(a)(1) use "Act [or "Acts"] of Congress," and Supplemental Admiralty Rule C(3)(a)(1) & (6)(a) uses "federal statute." To avoid substantive change, the Style Subcommittee has carried over to the restyled rules the varied usage in the current provisions, rendering "statute of the United States" as "United States statute" and "Constitution [and]{or} laws of the United States" as "United States Constitution [and]{or} laws." But further research is needed to determine whether (and to what extent) more consistent usage can be established — as in the restyled Criminal Rules, where the terms "federal law" and "federal statute" are used.

2. [Rowe has concluded that "minor" may be substituted for "infant" wherever "infant" appears in the present rules. "Infant" is used to mean "minor," and the style change will improve clarity. His messages are attached (STYLE 196).]

3. [Two questions. (1) Subcommittee A voted to restore the language of the present rule: "an individual * * * from whom a waiver has not been obtained and filed * * *." The Subcommittee believed that omission of this limitation would broaden the present meaning. Kimble asks that this vote be reconsidered here and also in 4(f) and 4(h). Rule 4(d)(4) says that when a plaintiff files a waiver, "these rules apply as if a summons and complaint had been served at the time of filing the waiver." There is no need to remind readers in later Rule 4 subdivisions that there is no need to serve a defendant who has waived service. The reminder, moreover, "further complicates three long sentences." The Subcommittee voted to restore the language because the deletion seemed to change the meaning — without this language Rule 4(e) becomes broader. Deletion of this language may seem more likely to change the meaning if, as Rowe suggested (see note 4), Rule 4(e) should say: "an individual * * * must be served." There is no need, much less compulsion, to serve a defendant who has waived service. (2) If the language is restored in some form, it is risky to delete "and filed." Rule 4(d)(4) turns on filing the waiver, not obtaining the waiver. But restoring "filing" will require some further style work. Something on the order of: " — other than a minor, ~~or~~ an incompetent person, or a person whose waiver of service has been filed — may be served * * *."]

4. [In February, Rowe concluded that "must" should be used in place of "shall" or "may" in the Rule 4 service provisions. Since then, he has talked with Paul Carrington, who served as reporter while the Rule 4 amendments that took effect in 1993 were being developed. Administrative Office staff have gone through the available records for that period. Rowe's messages and the staff notes are attached (STYLE 196, 209i). The choice of "may" in those amendments apparently was deliberate, but there is no clear indication of the underlying purposes. Since Rule 4(m) tells us what happens if service is not made, we may want to stick with "may": a plaintiff may choose not to make service after filing, and suffer dismissal. "Must" may overstate a non-existing obligation to make service once an action is filed. Some defendants, indeed, may be named in the complaint only to protect against the risk that the primary defendants cannot be served; the plaintiff may gladly omit service if the primary defendants are served.]

(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[1] provides otherwise, an individual ~~—(~~other than a minor or an incompetent person~~)—~~ who has not waived service[2] may be served[3] 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.

1. See note 1 to Rule 4(e).
2. [Here we have retained "who has not waived service," compare Rule 4(e) note 3. But as with Rule 4(e), present Rule 4(f) requires that the waiver be filed. One way to incorporate the present rule would be: "an individual — other than a minor, ~~or~~ an incompetent person, or a person whose waiver of service has been filed — may be served * * *."]
3. [See Rule 4(e) note 4.]

(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 ~~may be served~~ in a judicial district of the United States must be served by following state law for service of summons or [1/] 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 ~~may be served at~~ in a place not within any judicial district of the United States must be served[2/] in the manner prescribed by Rule 4(f)(2)(A), (f)(2)(B), or (f)(3).[3/]

1. [Subcommittee A voted to restore the full language of the present rule: "service of summons or other like process." Rowe's suggestion to delete "other" as redundant probably is safe. The idea seems to be process that is not a summons but is like a summons. "[L]ike process" adequately conveys that idea. (The same question appears in Rule 4(j)(2)(B).)]
2. [See Rule 4(e) note 4.]
3. [We should explain the addition of (f)(3) in a Committee Note. The present rule concludes by authorizing service "by such means as the court may direct." (f)(3) authorizes service "by other means not prohibited by international agreement, as the court directs." By incorporating (f)(3) we make it clear that the court cannot direct service under (g) by a means prohibited by international agreement.]

(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[1] provides otherwise or the defendant has waived service,[2] a domestic or foreign corporation, or a partnership or other unincorporated association that is subject to suit under a common name, must ~~may~~ be served[3]: **(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).

1. See note 1 to Rule 4(e).
2. [See Rule 4(e) note 3; 4(f) note 2. Here it might be: "or the defendant's waiver of service has been filed * * *."]
3. [See Rule 4(e) note 4.]

(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.	**(i) Serving the United States and Its Agencies, Corporations, Officers, or ~~and~~ Employees.** **(1)** ***United States.*** To serve the United States, a party ~~the plaintiff~~ must[1]: **(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 ~~in~~ 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) **(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.	**(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 ~~the plaintiff~~ must serve[1] 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 ~~the plaintiff~~ must serve[1] the United States and also serve the officer or employee under Rule 4(e), (f), or (g). **(4)** ***Extending Time.*** The court must allow the plaintiff a reasonable time to cure its failure to: **(A)** serve a person required to be served ~~defendant~~ under Rule 4(i)(2), if the plaintiff 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 plaintiff has served an officer or employee of the United States sued in an individual capacity.

1. [See Rule 4(e) note 4.]

(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 subdivisions, agencies, or instrumentalities must be served[1/] 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[1/] 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 service of summons or like process on such a defendant.

1. [See Rule 4(e) note 4.]

(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 ~~or returns the waiver from~~ 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.[1] **(2)** ***Federal Claim Outside State-Court Personal Jurisdiction.*** With respect to a claim that arises under federal law,[1] serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if: **(A)** the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and **(B)** exercising jurisdiction is consistent with the United States Constitution and laws.[1]
(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, pProof of service~~, unless waived,~~ 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 ~~international agreement~~; 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.

1. See note 1 to Rule 4(e).

(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 ~~who has not waived service~~ 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 ~~Property~~.*** The court may assert jurisdiction over property if authorized by a United States ~~federal~~ statute.[1] 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 ~~Assets~~.*** Upon a showing that ~~If~~ 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[2] ~~in accordance with the law of the state where the district court is located~~.

1. See note 1 to Rule 4(e).
2. ["State law in that district" is a new expression. Probably it works. It is difficult to imagine any confusion about just what law that is.]

Rule 4.1. Service of Other Process	Rule 4.1. Service of Other Process
(a) Generally. Process other than a summons as provided in Rule 4 or subpoena as provided in Rule 45 shall be served by a United States marshal, a deputy United States marshal, or a person specially appointed for that purpose, who shall make proof of service as provided in Rule 4(l). The process may be served anywhere within the territorial limits of the state in which the district court is located, and, when authorized by a statute of the United States, beyond the territorial limits of that state.	**(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,[1] beyond those limits. Proof of s~~S~~ervice must be made ~~proved~~ 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[1] 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.

1. See note 1 to Rule 4(e). [Subcommittee A voted to restore the language of the present rule in 4.1(b): "the laws of the United States." Is "United States law" ambiguous in a way that "United States statute" is not? Might some readers wonder whether this includes state law?]

Rule 5. Serving and Filing Pleadings and Other Papers	Rule 5. Servingce and Filing ~~of~~ Pleadings and Other Papers
(a) Service: When Required. Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4. In an action begun by seizure of property, in which no person need be or is named as defendant, any service required to be made prior to the filing of an answer, claim, or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.	**(a) Service: When Required~~; Upon Whom Made~~.** **(1)** ***In General.*** Except as these rules provide otherwise, each of the following papers must be served on every party:[1] **(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[2] offer of judgment, or a[2] 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 ~~in default~~ 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[3] 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. ~~**(4)** ***Service on 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.~~

1. [The Committee Note should explain that the reference to "designation of record on appeal" was deleted because Appellate Rule 10 is a self-contained provision that includes service.]

2. [These new words are departures from the prior text. The first "or" may engender some confusion by seeming to ally "offer of judgment" with "demand." The "a" is particularly unnecessary if the first "or" is deleted. The Style Subcommittee is concerned that "written" seems redundant with "paper." The idea of the "ors" is to achieve the same effect as: "(i) a written notice, appearance, demand, or offer of judgment, or (ii) a similar paper."]

3. [Subcommittee A voted to restore the language of the present rule: "no person need be or is named." The inversion may be an improvement in style.]

(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	**(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~~1~~)** ***Service ~~i~~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
(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.	**(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 ~~lives~~ there; **(C)** mailing it to the person's last known address — in which event ~~such~~ service is complete upon mailing; **(D)** leaving it with the court clerk if the person's address is unknown;
(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.	**(E)** sending it by electronic means if the person ~~has~~ consented in writing — in which event ~~such~~ 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 ~~has~~ consented to in writing — in which event ~~such~~ service is complete when the person making service delivers it to the agency designated to make delivery. **(3~~2~~)** ***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) ~~or (F)~~.

(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 ~~numerous~~ 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 ~~co~~defendants; **(B)** any cross-claim, counterclaim, avoidance, or affirmative defense in those pleadings and replies to them will be treated as denied or avoided by all ~~other~~ parties who are not served; 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	**(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 ~~upon~~onto[1/] land, and requests for admission. **(2)** ***How Made—In General.*** A paper is filed by delivering it: **(A)** to the clerk; or **(B)** to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk.

1. [If we change "upon" to "onto" here, we must remember to make the same change in Rule 34.]

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.	(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 ~~properly~~ 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.

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[1/] may for good cause extend the time: **(A)** with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or **(B)** on motion made after the time has expired if the party failed to act because of excusable neglect. **(2)** ***Exceptions.*** A court must not extend the time 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].	

1. [The "in its discretion" issue recurs frequently. Kimble believes that "may" implies discretion and needs no embellishment. See Rule 8(c) note 1.]

(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 fix a different period; or **(C)** when a court order — which a party may, for good cause, apply for ex parte — fixes 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.

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)** a third-party complaint; **(3)** an answer to a complaint, cross-claim,[1] or third-party complaint; **(4)** an answer ~~reply~~ to a counterclaim designated as a counterclaim; and **(5)** a reply to an answer or a third-party answer if the court so orders[2]~~; and~~ ~~**(6)** an answer to a reply to a counterclaim if the court so orders.~~[2]

1. Prof. Rowe has researched whether omitting the phrase "if the answer contains a cross-claim" would expand the present rule. He suggests adding "contained in an answer" to retain the present meaning in fewer words. If the Advisory Committee agrees, Rule 7(a)(3) should read as follows: "an answer to a complaint, to a crossclaim contained in an answer, or to a third-party complaint;".

2. As a possible alternative to this list, the Advisory Committee might want to consider a more broken-out list:
   (1) a complaint:
   (2) an answer to a complaint:
   (3) a reply to an answer if the court directs;
   (4) an answer to a counterclaim designated as a counterclaim;
   (5) an answer to a crossclaim [contained in an answer?] [designated as a crossclaim?] [designated as a crossclaim, if the answer contains a crossclaim?];
   (6) a third-party complaint;
   (7) an answer to a third-party complaint; and
   (8) a reply to a third-party answer if the court directs.

(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. ~~Unless made during a hearing or trial, the motion must be in writing, state its grounds with particularity, and state the relief sought. A motion may be combined with a written notice of hearing.~~[1] The motion must: **(A)** be in writing unless made during a hearing or trial;[2] **(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. [3]
(c) Demurrers, Pleas, etc., Abolished. Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used.	

1. [Subcommittee A accepted a final sentence in 7(b)(1): "A motion may be combined with a written notice of hearing." This sentence has been stricken out, without replacement. It must be restored in some fashion. The Style Subcommittee, however, opted for deletion in response to earlier comments on the January 21 working draft: both the present rule and the style rule describe an approach that does not apply to the practice in a number of courts.]
2. [This drafting resolves an ambiguity that Subcommittee A confided to the Style Subcommittee. Present Rule 7(b)(1) seems to say that a motion made during a hearing or trial need not state with particularity the grounds for the motion nor state the relief sought. That makes no sense, although application of the "particularity" requirement may be adjusted to the realities of orality.]
3. [Here, and again in 8(b) and 8(d), the Advisory Committee should consider the proposed deletion of redundant cross-references to Rule 11. Rule 11 is a prominent and sensitive rule. The redundancies were deliberately adopted. There is a risk that deletion will "send a message."]

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 to an action or proceeding in a district court[1] must file two copies of a disclosure statement that: **(1)** identifies any parent corporation and any publicly held corporation owning 10% or more of its stock; or **(2)** states that there is no such corporation.
(b) Time for Filing; Supplemental Filing. A party must: **(1)** file the Rule 7.1(a) statement with its first appearance, pleading, petition, motion, response, or other request addressed to the court, and **(2)** promptly file a supplemental statement upon any change in the information that the statement requires.	**(b) Time 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.

1. [Kimble believes that we should delete "in a district court." The Civil Rules apply only to district courts. Although the Criminal Rules retain this phrase, and the Appellate Rules refer to courts of appeals, consistency at this level is less important than avoiding redundancy.]

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	**(a) Claims for Relief.** A pleading that states a claim for relief — whether an original claim, a counterclaim, a cross-claim, or a third-party claim — must contain: **(1)** a short and plain statement of the grounds for the court's ~~subject-matter~~ jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;

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.	**(2)** a short and plain statement of the claim showing that the pleader ~~party~~ is entitled to relief; and **(3)** a demand for the relief sought, which may include relief in the alternative ~~forms~~ 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	**(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 ~~allegations~~ asserted against it by an opposing party.[1]

1. Prof. Marcus is researching the possible substantive difference between the terms "adverse party" and "opposing party" in various rules.

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;	(2) ***Denials — Meeting the Substance.*** A denial must fairly respond to ~~meet~~ the substance of the averment ~~allegation~~ denied. (3) ***General and Specific Denials.*** A party that intends in good faith to deny all the averments ~~allegations~~ of a pleading — including the jurisdictional grounds — may do so by a general denial.[2/] A party that does not intend to deny all the averments ~~allegations of a pleading~~ must either specifically deny designated averments ~~allegations~~ or generally deny all except those specifically admitted.

2. [Deletion of the cross-reference to Rule 11 in the present rule should be discussed with Rule 7(b).]

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.	(4) ***Denying Part of an Averment ~~Allegation~~.*** A party that intends in good faith to deny only part of an averment ~~allegation~~ must admit the part that is true[3] and ~~may~~ deny the rest. (5) ***Lacking Knowledge or Information.*** A party that lacks sufficient knowledge or information ~~sufficient~~[4] to form a belief about the truth of an averment ~~allegation~~ must so state, and the statement has the effect of a denial. (6) ***Effect of Failing to Deny.*** An averment ~~allegation~~ — other than one relating to the amount of damages — is admitted if a responsive pleading is required and the averment ~~allegation~~ is not denied. If a responsive pleading is not required, an averment ~~allegation~~ is considered denied or avoided.
(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative	**(c) Affirmative Defenses~~; Mistaken Designation~~.** (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 ~~or comparative~~ 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.

3. [Present Rule 8(b) requires that the answer specify so much of an averment "as is true and material." The Committee Note should state that deletion of "and material" is designed to defeat any implication that it is proper to deny an averment that is true on the theory that it is not material.]

4. [This transposition of "sufficient" was not before Subcommittee B. The change was suggested by Loren Kieve.]

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.	(2) ***Mistaken Designation.*** If a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court may treat the pleading as if the party had used the correct designation.[1]
(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	**(d) Pleading to Be Concise and Direct; Alternative Statements; Inconsistency ~~Consistency Not Required.~~** **(1)** ***In General.*** Each averment ~~allegation in a pleading~~ must be simple, concise, and direct. No technical form is required. **(2)** ***Alternative Statements of a Claim or Defense*** ~~***Consistency.***~~ 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

1. [The present rule is changed by the style rule in this way: "the court ~~on terms, if justice so requires, shall~~ may treat the pleading" as if properly designated. Subcommittee B asked the Style Subcommittee to reconsider, and suggested that the Advisory Committee should consider the change if the style draft is carried forward. This question is one illustration of the Style Subcommittee's belief that "may" standing alone expresses discretion, consideration of justice, good cause, and all related concepts. In addition, the Style Subcommittee finds confusion in the notion that a court must do something "if justice so requires" — the determination of what justice requires is so far discretionary that "must" is misleading.]

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.	statements, the pleading is sufficient if any one of them ~~statements~~ is sufficient. (3) ***Inconsistent Claims or Defenses.*** A party may ~~also~~ state as many separate claims or defenses as it has, regardless of consistency. 1/
(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.

1. [Deletion of the redundant cross-reference to Rule 11 will be discussed with Rules 7(b) and 8(b).]

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	**(a) Capacity or Authority to Sue; Legal Existence.** **(1)** ***In General.*** Except when required ~~as necessary~~ to show that the court has ~~subject-matter~~ jurisdiction, a pleading need not aver ~~allege~~: **(A)** a party's capacity to sue or be sued; **(B)** a party's authority to sue or be sued in a representative capacity; or **(C)** the legal existence of an organized association of persons ~~organization~~ that is made a party.

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.	(2) ***Raising ~~Contesting~~ Those Issues.*** To raise ~~contest~~ any of those issues, a party must do so by specific negative averment ~~denial in a responsive pleading or by motion,~~ and 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 ~~State~~ of Mind.**[1/] In averring fraud or mistake, a ~~A~~ party must state with particularity the circumstances constituting fraud or mistake. ~~But m~~Malice, intent, knowledge, and other conditions ~~states~~ of mind of a person may be averred ~~alleged~~ generally.
(c) Conditions Precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.	(c) **Conditions Precedent.** A party may aver ~~allege~~ generally that all conditions precedent have occurred or been performed. But when denying that a condition precedent has occurred or been performed, a party must do so with particularity.
(d) Official Document or Act. In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law.	(d) **Official Document or Act.** In pleading an official document or official act, a party may aver ~~allege~~ that the document was legally issued or the act legally done.
(e) Judgment. In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.	(e) **Judgment.** In pleading a judgment or decision of a domestic or foreign court, a judicial or quasi-judicial tribunal, or a board or officer, a party may 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 ~~allegation~~ of time or place is material when testing the sufficiency of a pleading.
(g) Special Damage. When items of special damage are claimed, they shall be specifically stated.	(g) **Special Damages.** If an item of special damage is claimed, it ~~A claim for special damages~~ must be specifically stated.

1. [Subcommittee B deferred to the Advisory Committee the question whether Rule 9(a) is so sensitive that no change should be made beyond substituting "must" for "shall."]

(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 ~~and~~ Maritime Claims.** **(1)** ***How Designated.*** If a claim for relief is within the admiralty or ~~and~~ maritime jurisdiction and also within the court's subject-matter jurisdiction on some other grounds, 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 ~~on~~ Appeal.*** A case that includes an admiralty or maritime claim within this subdivision[1] is an admiralty case within 28 U.S.C. § 1292(a)(3).

1. [This is one of many illustrations of a style issue yet to be resolved. Do we say: within "this subdivision"? "subdivision (h)(1)"? "Rule 9(h)(1)"? The Style Subcommittee continues to reflect on this issue, but will have a recommendation soon.]

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 ~~stating~~[1] 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 statement of~~ a single set of circumstances. A later pleading may refer by number to a paragraph in an earlier pleading. If it would promote ~~To facilitate~~ clarity, each claim founded on a separate transaction or occurrence — and each defense other than a denial — must ~~should~~ 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. ~~An~~ written exhibit attached to a pleading is a part of the pleading for all purposes.

1. [Why this style change? It was not before Subcommittee B. The change was suggested by Loren Kieve.]

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 attention of 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 ~~in the litigation~~[1/]; **(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.

1. [This style change was not before Subcommittee B. It was suggested by Loren Kieve.]

(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	~~**(c) Sanctions.** If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may sanction the attorneys, law firms, or parties that violated the rule or are responsible for the violation. Absent exceptional circumstances, a law firm should be held jointly responsible for a violation committed by a partner, associate, or employee.~~ ~~**(1) *How Initiated.***~~ ~~**(A)** *By Motion.* 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~~

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

~~must be served under Rule 5, but may be filed with or presented to the court only if within 21 days after its service — or within another time the court sets — 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.~~

~~**(B)** *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).~~

~~**(2)** ***Nature of a Sanction; Order.*** A sanction 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~~

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.

~~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. An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.~~

~~**(3)** ***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)(1)(B) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.~~

(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 the[1] attorney~~s~~, law firm~~s~~, or party~~ies~~ that violated the rule or is ~~are~~ responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its ~~a~~ 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 may be filed with or presented to the court only if[2] within 21 days after service — or within another time the court sets — 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.

(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 ~~Rule 11~~ 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.

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1. [The change to the singular was not before Subcommittee B. Should "the" become "any"?]

2. [The Style Subcommittee has not accepted the suggestion of several Subcommittee B members that the style change weakens the force of the safe-harbor provision. The present rule provides that the motion "shall not filed * * * unless * * *." The change to "may be filed * * * only if * * *" has a different tone. The Style Subcommittee wanted to avoid multiple negatives.]

(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.

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.	**(a) Time to Present a Responsive Pleading.**[1] **(1)** ***In General.*** Except when another time is prescribed by this rule or a United States ~~federal~~ statute,[2] the time for filing a responsive pleading is as follows ~~governed by the following provisions:~~: **(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 that date if the defendant ~~a request for a waiver~~ was addressed ~~sent to a place not within~~ 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.	**(B)** ~~A party must serve an answer to a cross-claim against that party within 20 days after being served with the pleading that states the claim.~~ ~~(C)~~ A party must serve an answer[3] ~~reply~~ 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 ~~if~~ the order specifies ~~does not specify~~ a different time ~~to reply~~.

1. [Subcommittee B urged that the Rule 12 reform agenda be taken up soon, so as to supersede mere restyling.]

2. See note 1 to Rule 4(e).

3. ["Answer" reflects Rule 7(a)(4), which changes "reply" to "answer."]

(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.	**(2)** ***United States and ~~or~~ Its Agencies, Officers, ~~or and~~ 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 cross-claim — or an answer ~~reply~~ to a counterclaim — within 60 days after service on the United States attorney ~~is served with the pleading that states the claim~~. **(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 ~~connected to~~ duties performed on behalf of[5] the United States must serve an answer to a complaint or cross-claim — or an answer ~~reply~~ to a counterclaim — within 60 days after service on the officer or employee or service on the United States attorney, whichever is later.
(4) Unless a different time is fixed by court order, the service of a motion permitted under this rule alters these periods of time as follows: **(A)** if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; or **(B)** if the court grants a motion for a more definite statement, the responsive pleading shall be served within 10 days after the service of the more definite statement.	**(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 ~~orders~~ its disposition until trial ~~at a later time~~, 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.

5. [A new question not raised in the Subcommittee A and B meetings: The present rule says "in connection with the performance of duties on behalf of the United States." Does that feel the same as the style "in connection with duties performed on behalf of the United States"? The style version may suggest actual performance — positive action — in a way not found in the present language.]

(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 ~~the~~ 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 ~~filing a responsive pleading~~ — 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 Rule 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 ~~support or oppose~~ 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 ~~it is not filed~~ 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 ~~appropriate~~ 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 ~~defense or objection~~ 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 12(f)~~; or **(C)** at trial. **(3)** ***Lack of Subject-Matter Jurisdiction.*** If the court determines ~~it is shown~~ at any time ~~— by a party's motion or otherwise —~~[1] that it ~~the court~~ 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.

1. [Subcommittee B thought it important that the rule continue to emphasize the court's independent obligation to ensure its subject-matter jurisdiction. Perhaps we should restore some equivalent of the present "appears by suggestion of the parties or otherwise." A simple possibility is shown in the words stricken out: "If the court determines at any time — [acting] on [a] motion or otherwise — that it lacks jurisdiction * * *."]

Rule 13. Counterclaim and Cross-Claim	Rule 13. Counterclaim and Cross-~~C~~claim
(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon the claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.	**(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~~, under Rule 19, the addition of~~ adding another party of ~~over~~ whom the court cannot acquire jurisdiction. **(2)** ***Exceptions***. The pleader need not state the claim if: **(A)** when the action was commenced, the claim was the subject of ~~had been stated in~~ 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.[1/]
(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 ~~Accruing~~ or Acquired After Pleading.** The court may permit a party to file a supplemental pleading asserting a counterclaim that matured ~~accrued~~ or was acquired by the party after serving an earlier pleading.

1. [The Committee Note should observe that there is no change. Present Rule 13(b) permits a counterclaim that arises out of the transaction or occurrence that is the subject matter of the opposing party's claim when the counterclaim is not compulsory because of an exception in Rule 13(a).]

(f) Omitted Counterclaim. When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, the pleader may by leave of court set up the counterclaim by amendment.	**(f) Omitted Counterclaim.** The court may permit a party to amend a pleading to add a counterclaim if it was omitted through oversight, inadvertence, or excusable neglect or if justice so requires.
(g) Cross-Claim Against Co-party. A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.	**(g) Cross-~~C~~claim Against a Coparty.** A pleading may state as a cross-claim 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 cross-claim may include a claim that the coparty is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.
(h) Joinder of Additional Parties. Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rules 19 and 20.	**(h) Joining Additional Parties.** Rules 19 and 20 govern the addition of a person as a party to a counterclaim or cross-claim.
(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 cross-claim under Rule 54(b)[1] when the court ~~it~~ has jurisdiction to do so, even if the opposing party's claims have been dismissed or otherwise resolved.

1. [We should restore the order of present Rule 13(i): "a court may render judgment under Rule 54(b) on a counterclaim or crossclaim ~~under Rule 54(b)~~ * * *." The current style text suggests that it is the counterclaim or crossclaim that is made under Rule 54(b). No one will be mistaken for long — a quick look at Rule 54(b) will dispel any doubt. Still, it is the judgment that is under Rule 54(b). The Style Subcommittee believes the transposition improves the flow, the smoothness of the Rule.]

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	**(a) When a Defending Party May Bring in a Third Party.** **(1)** ***Timing of the Summons and Complaint; ~~Summons, and Services~~.*** ~~At any time a~~[1]/After the action is commenced, 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

1. [Subcommittee B concluded that the style draft properly carried forward "At any time * * *." Literally, the words add nothing. But there is an emphasis that should not lightly be discarded in the name of style. The Style Subcommittee decided to accept the suggestions of two Subcommittee B members that these words can be deleted.]

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	plaintiff must, by motion, obtain the court's leave~~;~~ ~~by motion with notice to all parties,~~ if it files ~~seeks to serve~~ 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)** ~~may~~ must assert any defense against the third-party plaintiff's claim under Rule 12~~;~~; ~~and~~ **(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 cross-claim against another third-party defendant under Rule 13(g);

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	(CB) may assert against the plaintiff any defense that the third-party plaintiff has to the plaintiff's claim; and (DC) 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 ~~may~~ assert any defense under Rule 12 and any counterclaim under Rule 13(a), and may assert any counterclaim under Rule 13(b) or any cross-claim 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 ~~and~~ 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 ~~and~~ Maritime Claims.** (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.

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.*** Other than 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 ~~allow~~ 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 ~~of~~ 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 ~~sufficient~~ 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 ~~about~~ 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, ~~T~~the court may~~, when appropriate,~~ order that the adverse party plead to the supplemental pleading by a specified time.

To: <Jeffrey_Hennemuth@ao.uscourts.gov>
From: "Tom Rowe" <TROWE@law.duke.edu>
Date: 03/03/2003 01:33AM
cc: <John_Rabiej@ao.uscourts.gov>, <kimblej@cooley.edu>, <coopere@umich.edu>
Subject: Re: Pending research items

Jeff--Thanks. Answers interspersed below.

>>> <Jeffrey_Hennemuth@ao.uscourts.gov> 02/24/03 09:50AM >>>

Thanks, Tom. I have a few comments in response:

1. The term "infant" is currently used in Civil Rules 4(e) & (g), 17(c), and 55(b)(1) & (2). I double-checked this using the pdf version of the Government Printing Office edition of the Civil Rules (http://www.house.gov/judiciary/Civil2002.pdf).

> I think we could say "minor" in all these places with no change in meaning and while improving clarity.

2. The point about answers to crossclaims made in note 2 on page 39 of STYLE 135 originated in Ed Cooper's comments last June on the initial Kimble-Spaniol style edits to Civil Rules 1-7.1 (STYLE 7, p. 20). At the time, he mentioned that a crossclaim may be included in a reply to a counterclaim.

> Nothing to add now.

3. With respect to "service of summons or other like process," is it significant that the more succinct phrase "service of process" is currently used in Civil Rules 4(d)(2)(A), 4(h)(1), 12(b)(5), and 19(a)? Perhaps 4(g) and 4(j)(2) differ because they attempt to capture the potential variety of service requirements existing under state law?

> We might still want to keep "summons or like process" where "summons or other like process" now appears. That would avoid any whiff of substantive change, which others might suspect if it were just "service of process" because of the lack of restrictive force from leaving out "like". The other places you cite where "service of process" appears--those look like more generic references, and the lack of the restrictive force of "or other like process" makes no difference. So we may do best to keep the distinction.

Tom

From: "Tom Rowe" <TROWE@law.duke.edu>
Date: 02/24/03 02:36 AM
To: <Jeffrey_Hennemuth@ao.uscourts.gov>
cc: <John_Rabiej@ao.uscourts.gov>, <kimblej@cooley.edu>, <coopere@umich.edu>
Subject: Re: Pending research items

Jeff--It may be most efficient if I run my answers right after your questions, so see below:

>>> <Jeffrey_Hennemuth@ao.uscourts.gov> 02/18/03 03:09PM >>>

Tom,

During the January 26 meeting of Civil Rules Subcommittee A, you were asked to research and analyze the following issues:

1. Whether the Rule 4 service provisions should be restyled using the mandatory "must" or the permissive "may" in light of the variable use of "shall" and "may" in the current rule.

> I can find no indication that the variable use--"may" in several places, "must" in several others, and "is effected" in present Rule 4(i)(2)(A) and -(B)--is advertent or meant to suggest differences in mandatory or permissive character of modes of service. The idea always appears to be that the modes provided--although often including alternatives--are the sole authorized means of serving parties of the various enumerated types. My sense is that as long as we are careful to include all permitted modes and to state clearly when there are alternatives, the best term would be "must" because the enumerated means are exclusive. At some points the mandatory nature may be particularly important, as when in actions against an officer of the United States for acts within scope of duties the plaintiff must serve both the officer and the United States, but it seems to me no less accurate when service against others such as individuals within the US is being provided for.

The variations seem to have crept in in the revisions of 1963, 1993 (especially), and 2000. The original rule had a single introductory paragraph to Rule 4(d) for service on all types of parties, concluding with, "Service shall be made as follows:" and then proceeding to list the different types of parties and modes for serving them. See 1 Moore's Federal Practice §§ 4App.01[1], at 4App.-1 to 2 (3d ed. 2002). That universally applicable "shall" be made seems to me to translate today with "must." When Rule 4 was amended in 1963, the revisers kept this form for Rule 4(d) (as did Congress when it rewrote Rule 4 in 1983) but changed the language of Rule 4(e) on service outside the state under federal statute or court order from "shall be made" to "may be made," in the process of expanding somewhat the permissible modes of extraterritorial service. See id. §§ 4App.03[1][d], at 4App.-14. The Committee Note, id. §§ 4App.03[2][d], at 4App.-17 to -18, speaks of the alternative options

but without saying anything expressly about the "shall" to "may" change. I detect no intent to permit service by means other than those discussed in Rule 4(e) as then revised.

The disparity became much greater in 1993, when the revisers separated the different types of defendants out into different subdivisions, so that there no longer was introductory language applicable to all kinds of defendants. The "shall"-"may" variation could reflect a sense of emphasis about what one must do in serving, say, the United States, but I find nothing suggesting any substantive difference. See id. at 4App.-64 to -67. Finally, "is effected" in 4(i)(2)(A) and -(B) appeared in the 2000 revision on serving United States officers, etc., in official and individual capacities. See id. §§ 4App.10[1], at 4App.-70.1. Again, I find nothing indicating any substantive difference behind the different auxiliary verbs. Indeed, the Committee Note speaks of "requir[ing] service on the United States" when an officer or employee is sued in an individual capacity, etc. See id. §§ 4App.10[2], at 4App.-70.1.

If there is a reason not to change to a uniform "must," it has escaped me--as long, again, as we are careful to make sure that all permitted alternatives get listed in the disjunctive. To try to be as complete as possible, here is a list of all the appearances of the various forms that I have found, with references to pages of the 1/21/03 draft (Style 135): "may" in 4(e), p. 12; "may" in 4(f), p. 13; "shall" in present 4(g) (rendered as "may" in the styled version), p. 15; same for 4(h), p. 16; "shall" in 4(i)(1) (rendered as "must" in the styled version), p. 17; "is effected" in 4(i)(2)(A) and -(B) ("must" in the styled version), p. 18; and "shall" in 4(j)(1) and -(2) ("must" in the styled version), p. 19.

2. Whether it would be a substantive change to substitute "minor" for "infant" in Rule 4 (and also Rule 17).

> I haven't been able to find much beyond what I put into my memo of 11/3/02 at page 11, and I've looked up and KeyCited the cases I mentioned there as being cited in the treatises. Black's gives alternative definitions of "infant" as a newborn baby and a minor, with a 19th-century quotation about an infant in the eyes of the law being a person under the age of 21. The first definition given for "infancy" is a cross-reference to "minority" in the sense of being under legal age. For me, what clinches the case for changing to "minor" as an improvement in expression without substantive change is this sentence in the second edition of Garner's Dictionary of Modern Legal Usage, at 442: "The more usual--and less confusing--term is _minor_." (Emphasis in original.)

Good catch, Jeff, on "infant" being also in Rule 17(c); and I noticed it's in Rule 55(b)(2) on default judgments as well. Do we have the full text of the rules in searchable form so we can see if there are any more usages of the word?

3. Whether the phrase "service of summons or other like process," as used in Rule 4, can be restyled without substantive change as "service of process."

> I'm persuaded by the reference in Rule 4.1 to other forms of process that "like process" should probably be kept for its restrictive force. I don't see, though, that "other" adds anything useful, so I'd suggest "service of summons or like process" to track the present meaning as closely as possible while making the wording slightly less, well, wordy. From what I've been able to find, "summons or other like process" appears in just two places--existing 4(g) and existing 4(j)(2). I'd say the same thing, "service of summons or like process," in both places.

4. Whether including "an answer to a . . . cross-claim" in the Rule 7(a) list of authorized pleadings without the qualifying phrase "if the answer contains a cross-claim" would substantively expand the current rule.

> I think it would, so that we should find some way to keep the existing language or equivalent phrasing. The question seems to boil down to whether there can be an appropriate cross-claim contained elsewhere than in the answer; if so, that seems to be a cross-claim to which the existing rule does not require or permit an answer. (A distinction permitting/requiring an answer to some cross-claims but not others may not be particularly logical, but changing the distinction if the present rule makes it would be substantive.) I can imagine a cross-claim in, for example, a plaintiff's "reply to a counterclaim" (which may not be an "answer") if one plaintiff sought to add a cross-claim against a co-plaintiff.

> Whoever wrote footnote 2 on page 39 of Style 135, stating that, "Deleting 'if the answer contains a cross -claim' is a substantive change because it expands the existing rule," may have had further examples in mind. One such example could be a cross-claim for non-derivative relief by an original defendant against a third-party defendant: "Some courts permit cross-claims between original defendants and third-party defendants ...." 3 Moore's Federal Practice §§ 13.71[3], at 13-75 (3d ed. 2002). In any event, the qualifying phrase "if the answer contains a cross-claim" seems to have some possible restrictive effect, which could be lost if the phrase did not survive. Regretfully, I suggest that we may need to keep something to the same effect, which might be "cross-claim contained in an answer" to retain the present meaning with slightly less verbiage.

Can you tell me when you might have something to report on these issues? The Standing Committee's Style Subcommittee is presently considering changes to its style drafts of Rules 1-7.1 and 8-15 in light of the actions taken in Phoenix.

Thanks,
Jeff

To: "Tom Rowe" <TROWE@law.duke.edu>
From: Jeffrey Hennemuth/DCA/AO/USCOURTS
Date: 03/13/2003 09:39PM
cc: James Ishida/DCA/AO/USCOURTS@USCOURTS
Subject: Rule 4(e) & (f) -- "Must" vs. "May"

Tom,

As a follow-up to our exchange on this topic, my colleague James Ishida has reviewed the history of the 1993 amendments to Rule 4 and found circumstantial evidence that seems to confirm Prof. Carrington's recollection that the use of "may" rather than "shall" in the current Rule 4(e) and (f) was probably a deliberate choice.

As it turns out, the 1993 revision to Rule 4 originated with a proposal tentatively approved by the Advisory Committee on Civil Rules in the fall of 1988. That proposal used the phrase "service . . . shall be effected" in setting forth the service provisions now found in Rule 4(e)(2) and (f). When the Standing Committee reviewed it for publication in January 1989, some committee members pointed out that the proposed revision omitted language -- then found in Rule 4(c)(2)(C)(i) -- that allowed a state-law alternative to the personal delivery method of service then authorized in Rule 4(d)(1) (now Rule 4(e)(2)):

> A summons and complaint may be served . . . pursuant to the law of the State in which the district court is held for the service of summons or other like process . . . in an action brought in the court of general jurisdiction of that State.

As a result, the Standing Committee directed that the omitted provision be reinstated in the Rule 4 amendments published for public comment in September 1989. (The proposal was also broadened to allow service pursuant to the law of the State in which service is effected.) When it was redrafted, the proposed rule on methods of service was split into two subdivisions -- (e) for service within a judicial district of the United States and (f) for service in a foreign country -- and in each subdivision, the authorizing language was changed from "service . . . shall be effected" to "service . . . may be effected." The minutes of the January 1989 Standing Committee meeting do not explain (or even mention) the shift from "shall be effected" to "may be effected," but one might speculate that the change was made because: (1) the revised proposal now included alternative (instead of exclusive) methods of effecting service on individuals in the United States; and (2) the existing rule allowing plaintiffs to use service methods permitted under state law (which was enacted by Congress in 1983, see Pub. L. No. 97-462, 96 Stat. 2527) used "may" rather than "shall."

If you agree with this interpretation, does it alter your view about the use of "must" or "may" in the restyling of Rule 4(e) and 4(f)? Arguably, the drafting decision made in 1989 was stylistic, not substantive in nature (based on the drafters' view of the best way to describe alternatives), and thus a more consistent use of "must" in Rule 4 might also be a justified style choice. But the fact that the use of "may" in the current rule was not inadvertent might raise a yellow flag, too.

If you would like to review for yourself the pertinent documents (the Dec. 1988 Advisory Committee proposal, the Feb. 1989 revised proposal, the Jan. 1989 Standing Committee minutes), I can send them to you. Perhaps you can also use the above information to explore the issue a bit further with Prof. Carrington. In any case, I'm happy to discuss this by telephone if you wish. My direct office number is (202) 502-1817.

Jeff

To: "Tom Rowe" <TROWE@law.duke.edu>
From: Jeffrey Hennemuth/DCA/AO/USCOURTS
Date: 02/28/2003 06:04PM
Subject: Re: Style Rules 16-22

Tom,

It may be worth my taking a quick look through the documentary record (minutes, reporter memos, etc.) for the 1993 and 2000 amendments to see if there's anything pertinent to this issue. (Research into the 1963 amendments is possible but would take more time.) Otherwise, it might be a good idea to raise the issue with either Ed Cooper (when he returns from overseas travel in about 10 days) or Judge Pointer (who was the chair at the time of the '93 amendments).

Jeff

To: <Jeffrey_Hennemuth@ao.uscourts.gov>
From: "Tom Rowe" <TROWE@law.duke.edu>
Date: 02/28/2003 11:30AM
Subject: Re: Style Rules 16-22

Jeff--On Rule 4, I contacted Paul Carrington (who was reporter at the time) and asked if the variations that got introduced were advertent. Here's his reply:

There were several members of the committee intensely interested in that issue, and I always did as they bid me to do. I cannot reconstruct any of the conversations, but I doubt that any of the choices made were accidental.

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Paul's message leaves me puzzled about what to do. Should we be asking any of the others who were around at the time (was Sam Pointer chair of the Advisory Committee then?) if they can

recall anything? On the one hand, I hesitate to continue semantic distinctions when we can see no operational difference to them and can find no record (are there notes we could check?) of what was intended. On the other hand, what Paul says makes me wonder if we should think again before going to uniform treatment. ? ? ?

Best--Tom

MEMORANDUM

To: Advisory Committee on Civil Rules
CC: Standing Committee Style Subcommittee
From: Rick Marcus
Date: March 31, 2003
Re: "Adverse party" and "opposing party" in the rules

As the restyling project has gotten underway, a question has arisen about whether a uniform phrase might be used in all the places where the Civil Rules now refer to "adverse party" or "opposing party." The purpose of this memorandum is to provide background for answering that question. I have tried to identify those places. Because the various phrases that might be considered appear in such a large number of places, I have attached this listing as an Appendix to this memorandum. This listing is meant to be fairly full, and it may include too many things, but it may also have left out some that could be considered pertinent.

As a starting matter, the definitions in Black's Law dictionary for some phrases seem to suggest that there is no significant difference between the two phrases, although "opposing party" is not defined in that dictionary so far as I could find:

> **adversary.** An opponent; esp. opposing counsel. (p 54)
>
> **opponent. 1.** An adverse party in a contested matter. **2.** A party that is challenging the admissibility of evidence -- opposed to *proponent*. (p. 1120)
>
> **adverse party.** A party whose interests are opposed to the interests of another party to the action (p. 1144)

Somewhat in keeping with that notion of equivalence, some cases seem to display the view that either phrase can be used.

Thus, although Rule 15(a) calls for obtaining the consent of the "adverse party" for an amendment to obviate moving for court approval, there are reported cases that say that the consent of the "opposing party" is necessary. See Davis v. Coler, 601 F. Supp. 444, 447 (N.D. Ill. 1984) ("the party seeking to amend must obtain the written consent of the opposing party"); Baxter v. Strickland, 381 F. Supp. 487, 491 n.4 (N.D. Ga. 1974) ("if an amendment to the complaint that requires leave of court is served without obtaining such leave or the opposing party's consent").

In somewhat the same vein, courts sometimes use the phrases alternatively in regard to rules that don't use either. Although Rule 8(b) calls for admitting or denying the adverse party's averments, neither Rule 8(a) nor Rule 8(c) says either that or opposing party. Yet courts discussing those subdivisions do use these phrases, and in ways that are not consistent with each other. See Parsons v. Burns, 846 F. Supp. 1372, 1382 (W.D. Ark. 1993) (purpose of Rule 8(a) is "to give the opposing party fair notice"); Richmond Steel v. Legal and General Assur. Soc., Ltd., 821 F. Supp. 793, 797 (D.P.R. 1993) (purpose of Rule 8(c) is "to give the opposing party notice"); compare Rechsteiner v. Madison Fund, Inc., 75 F.R.D. 497, 498 (D.D.C. 1977) (purpose of Rule 8(a) is "to permit the adverse party the opportunity to file a responsive answer"); Kagle v. Pennsylvania R.R. 19 F.R.D. 196, 201 (N.D. Ohio 1956) (purpose of Rule 8(a) "is that the adversary party or parties have sufficient notice").

This judicial indifference to which phrase is actually used in a rule, or to whether either one is used in a rule, suggests that it may make no difference which is used.

On the other hand, one could see a significant difference between the two terms as used in the rules. "Opposing" could be used to denote the opposite side in a suit, while "adverse" could refer to the existence of contrary interests on a given question

without particular regard to the formality of being on opposite sides in a suit. Thus, in a case in which plaintiff alleged that one of two co-defendants had caused an injury, the co-defendants might have adverse interests (e.g., each would be better off if the jury found that the other one was responsible), but they might not be opposing parties unless one had filed a cross-claim against the other. And it might be that in some senses opposing parties would not be adverse to one another. Thus, in the hypothetical case in which plaintiff claims one of two co-defendants caused the injury, plaintiff and D2 might both try to prove that D1 was responsible, and in that effort to prove D1 was responsible they would not be adverse to one another even though they are opposing parties in the lawsuit.

A similar complication can arise in connection with motions. Most often the moving party and the party against whom a motion is directed are opposing parties in the lawsuit. Of course, if the motion is by or against a nonparty (perhaps resulting from nonparty discovery), this generalization does not apply. But among the actual parties to a case there may be situations in which they are opposing parties on a motion but not in the suit. For example, if one defendant seeks discovery from another defendant and that discovery effort leads to a motion for a protective order or to compel, these defendants would be opposing parties with regard to the motion even if there were no cross-claim between them. Similarly if there is a dispute between the co-defendants about when a deposition is to be taken, they could be opposing parties on that motion even though they are not opposing parties in the case. In the same vein, it could be that opposing parties in the case are not opposing parties on a motion. If plaintiff moves for summary judgment against D1, then D2 is not an opposing party with regard to that motion even though it is an opposing party in the case.

In this view, using the same phrase in all situations might seem to convey the wrong message. Some decisions, at least, suggest that courts are sensitive to those differences. Thus, Rule 65(a)(1), regarding preliminary injunctions, calls for notice to the "adverse party" before the injunction is issued. In Parker v. Ryan, 960 F.2d 543 (5th Cir. 1992), the injunction sought to freeze the assets of the wife of defendant. The court held that she was entitled to notice: "When dealing with a preliminary injunction, the 'adverse party' means the party adversely affected by the injunction, not the opponent in the underlying action." Id. at 545. This ruling seems consistent with the idea that a person can be an "adverse party" without being an "opposing party." To make the opposite point -- that actual adversity does not make one an "opposing party," consider the Tenth Circuit's explanation of Rule 13's reference to "opposing party":

> We think the rule, by its express terms, means that an "opposing party" must be one who asserts a claim against the prospective counter-claimant in the first instance. The very concept of a counterclaim presupposes the existence or assertion of a claim against the party filing it.

First Nat. Bank v. Johnson Country Nat. Bank, 331 F.2d 325, 327-28 (10th Cir. 1964).[1]

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[1] In a different vein, consider the Third Circuit's treatment of the terminology in Rule 13(g):

> The subsection's title, "Cross-claims against a Co-Party, indicates that cross-claims are filed against *co-parties* and not against *adverse* parties. Cross-claims are litigated by parties on the same side of the main litigation; counterclaims are litigated between opposing parties to the principal action.

Stahl v. Ohio River Co., 424 F.2d 52, 55 (3d Cir. 1970) (emphasis in original).

However attractive that theoretical explanation of the difference between "adverse party" and "opposing party," it does not seem that the Civil Rules' selection of one or the other of the terms routinely fits this theory (or any other that suggests itself). To the contrary, this reader can discern no systematic difference from the face of the rules that would explain the use of one term in one place and another in another. And some uses seem inconsistent with the Black's Law Dictionary views noted above. Perhaps others who scan the examples in the Appendix can do better.

At least some instances of "opposing party" do seem consistent with the theoretical analysis. The treatment in Rules 13(a), 13(b), and 13(c) fit because they talk about counterclaims against the "opposing party." Rule 13(g), on the other hand, allows a cross-claim against a "co-party." Once that claim is made, of course, the co-parties become opposing parties, and the compulsory counterclaim rule applies. And Rule 14(a), as to third-party practice, invokes Rule 13 to apply with regard to parties added in that manner. Similarly, Rule 18(a) permits a party to join as many claims as it has against the "opposing party." In keeping with that, Rule 23(b)(2) authorizes a class action if "the party opposing the class" has acted in a way

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Evidently the issue presented in this decision -- the assertion of claims between defendants and third-party defendants already brought into the case by another defendant -- has continued to plague courts in the Third Circuit. Thus, in Earle M. Jorgenson Co. v. T.I. United States, Ltd., 133 F.R.D. 472 (E.D.Pa. 1991), the court permitted assertion of such a claim by an original defendant on the ground that there was a "sufficiently non-adverse" relationship between third-party defendants and non-joining defendants so that they could be treated as co-parties within the meaning of Rule 13(g)'s permission for cross-claims against "co-parties." Id. at 473. On a related point, consider Finkel v. United States, 385 F.Supp. 333, 335 n.1 (S.D.N.Y. 1974) ("Technically, a third-party defendant does not counterclaim against the original plaintiff, since they are not 'opposing' parties within the meaning of Rule 13").

making equitable relief appropriate with regard to all members of the class. And Evidence Rule 801(d)(2) refers to "party-opponent" in the caption to that provision for admissions that are "not hearsay." Similarly, Evidence Rule 1003(3) refers to an original in the possession of the "opponent," though that is later explained to be "the party against whom offered."

But the term "adverse party" is used with regard to things that apply to the litigation opponent in the pleading rules. Thus, the duty to admit or deny averments in Rule 8(b) applies to "the averments upon which the adverse party relies." And Rule 12(b) says that, if the "adverse party" is not required to serve a responsive pleading, it may raise at trial any defenses it has despite having failed to plead them. So here the term "adverse party" seems to be used to refer to one responding to a claim. Similarly, in Rule 15(d) we are told that in regard to supplemental pleadings the court may order the "adverse party" to plead to the supplemental pleading. Rule 41(a)(1) makes unilateral dismissal without prejudice unavailable after "service by the adverse party of an answer." And Rule 68 permits an offer of judgment to an "adverse party" by a party defending against a claim. All of these uses of the phrase also seem to refer to the litigation opponent. In other situations, the question is murkier yet. Rule 15(a) says that permission to amend a pleading must come from an "adverse party." Treating that as referring to the party on the other side of the litigation ("opposing party"?) seems logical. But consider the desire of one defendant to amend its answer to assert a cross-claim against another defendant. At that point they are "co-parties," even though they would be "opposing parties" for purposes of Rule 13(a) if the amendment were allowed and the cross-claim were served.

The discovery rules also present a mixed bag. Rule 27, on discovery before litigation commences, requires notice of the application to do discovery to any expected "adverse party."

This could properly be interpreted to go beyond those parties on the other side of the litigation since a co-party might have interests that are not completely consonant with those of the party seeking discovery. Rule 30(a)(2)(A), meanwhile, seems to recognize three sides in the litigation by limiting depositions to ten for the plaintiffs, the defendants, and the third-party defendants.

But on some things that would seem to fit within Black's Law Dictionary's second definition of opponent -- a party challenging the admissibility of evidence -- Rules 32(a)(2) and 32(a)(4) use "adverse party" to describe the one against whom evidence can be offered. Similarly, the Evidence Rules use "adverse party" repeatedly to identify the one against whom evidence is offered. This is completely consistent with the idea that regarding admissibility one may be adverse without being the formal litigation opponent.

Regarding motions, however, the discovery rules are less helpful. Rule 26(c) says that a party must try to consult with "other affected parties" before moving for a protective order. Rule 37(a)(4) makes the party who loses a discovery motion pay the cost of the motion proceeding unless the "opposing party's" position on the motion was substantially justified. Other provisions of Rule 37 focus more particularly on the party opposing the motion: Rule 37(a)(2)(B) calls for consulting with "the person or party failing to make discovery," Rule 37(b)(2)(B) refers to the "disobedient party" in authorizing merits sanctions for failure to obey a discovery order, and Rule 37(d) regarding a complete failure to respond to a discovery request refers to "the party failing to answer."

Other motion provisions also seem not to reflect a clear distinction. Thus, Rule 56 refers repeatedly to the "adverse party" on summary judgment motions. But it would seem that a

party that is the subject of a summary judgment motion would have to be a litigation opponent of the moving party, and Rule 56 seems to recognize that by referring in 56(a) and (b) to a party "seeking to recover upon a claim" and a party against whom a claim has been asserted. Not all opposing parties may be affected by the motion, however, and Rule 56(f) thus refers to a "party opposing the motion" in providing a method for getting more time to respond. Yet Rule 56(e) refers to the "adverse party" in requiring that such a party opposing the motion go beyond the allegations of its pleading in responding if the motion is properly supported.

In somewhat the same confusing vein, Rule 59(c) says that if a motion for a new trial is filed the "opposing party" has ten days to file opposing affidavits, while Rule 60(b)(3) permits a motion to set aside an order or judgment for "misconduct of an adverse party."

With regard to relief granted by a court, "adverse party" seems to be the norm. Thus, Rule 65 says that a preliminary injunction should not be granted without notice to the adverse party. And Rule 62 permits a stay of execution of a judgment if security is provided for the adverse party. It is hard to believe that this would not be the litigation opponent. But Rule 70 says that, if a party disobeys a judgment to perform a specific act, "the disobedient party" can be required to pay for the cost of doing what was ordered and "the party entitled to performance" can obtain a writ of attachment.

In sum, a review of these provisions of the rules does not show any obvious basis for using one phrase or the other, or for believing that the use of one phrase or the other reflects a consistent conscious choice. That does not, however, necessarily lead to substituting one phrase globally in all places where one or the other appears.

If one took the phrase used more often, it would be "adverse party." That also has the advantage of being consistent with the Evidence Rules. So one reaction would be to pick "adverse party." If that were not done, there would be an odd tension between Rule 32 (regarding admissibility of depositions at trial) and the Evidence Rules, which refer to the party opposing the introduction of evidence as the "adverse party."

But the phrase "opposing party" has acquired something of a pedigree that might be disturbed by substitution of a different phrase. The most important example is in Rule 13(a). As Judge Alito has recently noted, "there are very few cases interpreting 'opposing party' in other circuits." Transamerica Occidental Life Ins. Co. v. Aviation Office of America, Inc., 292 F.3d 384, 390 (3d Cir. 2002). But reviewing these cases, the majority found that "[i]n each of these cases, courts interpreted 'opposing party' broadly for essentially the same reasons that courts have interpreted 'transaction or occurrence' liberally -- to give effect to the policy rationale of judicial economy underlying Rule 13." Id. at 391. Judge Rendell dissented, arguing that a more restrained interpretation of the phrase was more appropriate. To substitute a different phrase might unsettle the law made in this case and in similar cases.

A decision written by Judge Paul Kelley suggests similar concerns. In Avemco Ins. Co. v. Cessna Aircraft Cop. 11 F.3d 998 (10th Cir. 1993), the issue presented was whether an insurance company that had settled before litigation with one of two passengers injured when a plane piloted by its insured crashed could seek indemnity from the plane's manufacturer for the amount paid in settlement. The problem was that the other passenger had sued both the insured and the manufacturer, and the manufacturer had asserted a claim against the insured for indemnity, to which no counterclaim for the amount paid in settlement was asserted. The district court dismissed the suit against the manufacturer,

ruling that this was a compulsory counterclaim in the first case, and was therefore barred by Rule 13(a).

On the insurer's appeal, the majority held that because the insured did not assert a counterclaim for this amount the insurer, as his subrogee, could not either. Although that outcome seemed to follow from the applicable state law, Judge Holloway dissented, arguing that "because Cessna's third party claim was against [the insured] and not Avemco, Cessna cannot be characterized as Avemco's 'opposing party' within the meaning of Rule 13(a)." Id. at 1003. He also quoted a decision of a Washington state court interpreting that state's Rule 13 (modeled on the federal rule):

> Words contained in court rules which are not therein defined should, like statutory terms, be given their ordinary meaning. . . . To interpret the term "opposing party" in the context of the court rules so as to include a nonparty with an adverse interest is a non sequitur.

Nancy's Product, Inc. v. Fred Meyer, Inc., 811 P.2d 250, 253 (Wash. App. 1991). Note the distinction the Washington court drew between a nonparty with an "adverse interest" and an "opposing party."

To discard the term "opposing party" in Rule 13(a) might, therefore, be considered substantive because it could raise questions about the applicability of rulings such as these. Of course, a Committee Note might emphasize that the shift in language was intended to have no effect on the continued applicability of such cases, but where the cases themselves have focused on the exact words used in the rule that could be risky.[2]

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[2] For another case emphasizing the exact words of Rule 13(a), see Answering Service, Inc. v. Egan, 728 F.2d 1500, 1503

It may be that there are cases using "adverse party" that raise similar concerns about shifting throughout to "opposing party," but research to date has not unearthed them.

Another difficulty that is suggested by the listing in the Appendix is that shifting to "adverse party" or "opposing party" globally would leave open the question whether the variety of kindred phrases presently used in the rules should be changed. For example, the reference to "other affected parties" in Rule 26(c) might become "adverse parties," as might the consultation requirement of Rule 37(a)(2)(B) and the one in Rule 37(d). If the goal is uniformity, it may well be that these alternative phrases do not stand up. Similarly, if Rule 56 otherwise uses "adverse party," it might be that Rule 56(f)'s reference to "the party opposing the motion" could be reconsidered even though it seems the most accurate description of the party being identified.

Shifting away from at least some of those kindred phrases might raise touchy questions about possible substantive implications. For example, Rule 23(b)(2)'s reference to the "party opposing the class" has probably developed a sufficient set of interpretive barnacles so that changing the wording of the rule would be chancy.

In sum, if the sole reason for making the change is to accomplish the style objective of consistency, this review suggests some downside considerations that may warrant continuing to endure many of the somewhat inconsistent language choices made in the current rules.

(D.C. Cir. 1984) ("That this is so is evident from the compulsory counterclaim rule, which makes a claim compulsory only when it is asserted against an 'opposing party.'").

APPENDIX

There are many places where these terms appear in the rules, and other kindred phrases that one might have in mind in deciding whether a global phrase can be used. Below is an attempt to list many (but probably not all) the occasions when this sort of issue will appear.

Adverse party

Rule 8(b): A party must "admit or deny the averments upon which the adverse party relies."

Rule 12(b): "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."

Rule 15(a): After the time for amendment as of right has expired, a party may amend "by written consent of the adverse party."

Rule 15(d): When a supplemental pleading is filed, the court may order "that the adverse party plead to the supplemental pleading."

Rule 27(a): Party seeking to take deposition before action or pending appeal may file petition "in the district of the residence of any expected adverse party" and list the names of all "the petitioner expects will be adverse parties." Notice must be served on "each person named in the petition as an expected adverse party."

Rule 32(a)(2): A party's deposition may be used "by an adverse party for any purpose."[3]

Rule 32(a)(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 party introduced, and any party may introduce any other parts."

Rule 41(a)(1): Plaintiff may unilaterally dismiss an action "at any time before service by the adverse party of an answer or a motion for summary judgment . . ."

Rule 56(a): A party seeking to recover on a claim may move for summary judgment 20 days after commencement of the action or

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[3] Note that Rule 32(a) contains several invocations of "adverse party" and "any party."

"after service of a motion for summary judgment by the adverse party."

Rule 56(c): After the summary judgment motion is filed, "[t]he adverse party prior to the day of hearing may serve opposing affidavits."[4]

Rule 56(e): If the motion is supported as required in the rule, "an adverse party may not rest upon the mere allegations of the adverse party's pleading, but the adverse party's response . . . 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."

Rule 60(b)(3): A judgment or order may be set aside for "misconduct of an adverse party."

Rule 62(b): The court may stay execution of a judgment "on such conditions for the security of the adverse party as are proper."

Rule 62(c): During the appeal from an injunctive order, the court may stay the effect of its order "upon such terms at to bond or otherwise as it considers proper for the security of the rights of the adverse party."

Rule 65(a)(1): "No preliminary injunction shall be issued without notice to the adverse party."

Rule 65(b): A TRO can be granted without notice to the adverse party only based on a showing that irreparable injury will occur before that party can be heard.

Rule 68: "At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken . . ." The adverse party may then serve notice accepting the offer within ten days. The rule also provides, if there is a determination of liability made separately from the calculation of the amount of the liability, the "party adjudged liable" may make a Rule 68 offer that has the same effect as an offer before trial.

Supplemental Rule D: "In actions for possession, partition, and to try title maintainable according to the course of the admiralty practice with respect to a vessel, . . . the process shall be by a warrant of arrest of the vessel, cargo, or other property, and by notice in the manner provided by Rule B(2) to

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[4] Note that Rule 56(f) refers to "a party opposing the motion."

the adverse party or parties." Rule B(2) is entitled "Notice to Defendant."

Opposing party

Rule 13(a): A pleading must state as a counterclaim any claim 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 . . . [unless] the opposing party brought suit by attachment . . ."

Rule 13(b): "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."

Rule 13(c): Counterclaim need not diminish "recovery sought by the opposing party and may claim relief different from that "sought in the pleading of the opposing party."

Rule 13(i): If the court orders a separate trial under rule 42(b), it may enter judgment on a counterclaim or cross claim as provided in Rule 54(b) "even if the claims of the opposing party have been dismissed or otherwise disposed of."

Rule 18(a): A party may join as many claims "as the party has against the opposing party."

Rule 37(a)(4): After granting motion to compel, the court should impose the costs of the motion on the loser unless "the opposing party's nondisclosure, response, or objection was substantially justified."

Rule 59(c): After a motion for new trial is filed, "[t]he opposing party has 10 days after service to file opposing affidavits."

Kindred provisions of the Civil Rules

Rule 10(a): After the initial pleading, each pleading need only "state the name of the first party on each side."

Rule 13(g): A pleading may state as a cross-claim "any claim by one party against a co-party arising out of the transaction . . ."

Rule 22(1): In rule-based interpleader action, "[i]t 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."[5]

Rule 23(b)(2): A class action is appropriate if "the party opposing the class has acted or refused to act on grounds generally applicable . . ."

Rule 26(b)(3): Work product applies if materials were "prepared in anticipation of litigation or for trial by or for another party . . ."

Rule 26(c): Protective orders allowed only after party seeking order has "attempted to confer with other affected parties."[6]

Rule 29: "Unless otherwise directed by the court, the parties may by written stipulation" alter procedures for discovery.

Rule 30(a)(2)(A): Limits depositions to ten "by the plaintiffs, or by the defendants, or by the third-party defendants." (Thus, it seems that the "sides" are arrayed here into three categories.)

Rule 30(g)(1): If a party noticing a deposition fails to attend and proceed, "and another party attends in person or by attorney" the court may impose costs on the party that noticed the deposition.

Rule 32(a)(1): Depositions may be "used against any party who was present or represented" at the deposition.

Rule 32(a)(3): A deposition may not be used "against a party who showed that insufficient notice was given.

Rule 32(a)(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

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[5] Note that, as listed in the section below for other rules and statutes, the interpleader statute uses the phrase "adverse claimants." In the Tashire case, cited at the end of this Appendix, the Supreme Court upheld the constitutionality of this grant of subject-matter jurisdiction on the ground that Article III permits minimal diversity jurisdiction whenever two "adverse parties" are citizens of different states.

[6] Compare Rule 37(a)(2)(B), which refers to conferring with the "person or party" that failed to provide discovery.

with the party introduced, and any party may introduce any other parts."[7]

Rule 34(b): The time for responding to a document request may be shorter or longer than the prescribed 30 days if "agreed to in writing by the parties."

Rule 36(b)(1): "A party may serve upon any other party a written request for admission . . ."

Rule 37(a)(2)(B): Motion to compel discovery must show attempt "to confer with the person or party failing to make the discovery . . ."[8]

Rule 37(b)(2)(B): Sanctions for failure to comply with a discovery order include "[a]n order refusing to allow the disobedient party to support or oppose designated claims or defenses.

Rule 37(d): Before moving court for relief due to complete failure to respond to discovery, the moving party must attempt "to confer with the party failing to answer."

Rule 56(f): If affidavits cannot be obtained in time, "a party opposing the motion" may seek more time before ruling on the summary judgment motion.

Rule 70: If a judgment directs the performance of a specific act and a party fails to comply, "the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court." In addition, "[o]n application of the party entitled to performance, the clerk shall issue a writ of attachment or sequestration . . ."

Kindred provisions of other rules or statutes

Fed. R. Evid. 106: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction" of other parts.

Fed. R. Evid. 611(c): "When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions."

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[7] Note that the parallel provision in Fed. R. Evid. 106, noted below in the section on other rules and statutes, also uses "adverse party."

[8] Compare Rule 26(c), which refers to the "other affected parties."

Fed. R. Evid. 612: When a witness uses a writing while testifying, "an adverse party is entitled to have the writing produced . . ."

Fed. R. Evid. 801(d)(2): This provision applies to an "[a]dmission by a party-opponent."

Fed. R. Evid. 803(5): A memorandum of recorded recollection may be read into evidence "but may not itself be received as an exhibit unless offered by an adverse party."

Fed. R. Evid 807: Residual exception to the hearsay rule is available only if the proponent of the evidence "makes known to the adverse party sufficiently in advance of the trial" of the desire to utilize the exception.

Fed. R. Evid. 902(11) and (12): These new provisions on authentication of domestic and foreign records say that "[a] party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties . . ."

Fed. R. Evid 1004(3): This refers to whether the original is required when the original is "in possession of opponent" and says that it is sufficient when the original was "under the control of the party against whom offered" that this party was on notice that the contents would be a subject of proof.

Fed. R. Evid. 1006: When a summary of voluminous records is to be offered, the party who will use it must make the underlying records available for inspection "by other parties."

Interpleader statute: 28 U.S.C. § 1335(1) says that statutory interpleader is allowed if "[t]wo or more adverse claimants, of diverse citizenship . . ." In upholding the constitutionality of this grant of federal-court subject-matter jurisdiction, the Supreme Court said that "Article III poses no obstacle to the legislative extension of federal jurisdiction, founded on diversity, so long as any two adverse parties are not co-citizens." State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 531 (1967).

Professor Cooper prepared the following draft Committee Notes for restyled Rules 1 through 15 to illustrate the possible use of Notes in the restyling process. He invites suggestions for other matters that might be addressed in a Note. These draft Notes should not be viewed as recommendations on how to resolve particular issues.

Style Rules Committee Notes

[These notes do not include the every-Rule boilerplate disclaimer that will be attached to each rule. They cover only those matters that seem to deserve separate mention. Since we have resolved to make only style changes, there are should be few occasions for comment. The kinds of decisions that do deserve comment are illustrated by the Notes that follow.

[Remember the decision that we will not use these Committee Notes to comment on perplexities in the rules that we do not address. One example is provided by the Rule 4 references to service within, or not within, a judicial district of the United States. We avoided any change because we do not understand the present rule. We might say that in a Committee Note, but will not.]

Rule 1

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

Rule 4

Rule 4(d)(1)(B) corrects an inadvertent error in former Rule 4(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." Changing word usage suggests that "minor" will better maintain the intended meaning. And 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 5

Present Rule 5(b)(2)(D) literally provides 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)(2) restores the intended meaning — court transmission facilities can be used only for service by electronic means.

Rule 7

The cross-reference to Rule 11 is deleted as redundant. Rule 11 applies by its own terms. The force and application of Rule 11 are not diminished by the deletion.

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 8

The Rule 8(b) and 8(d) 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.

Deletion of "whether based on legal, equitable, or maritime grounds" reflects the parallel deletions in Rule 1 and elsewhere. Merger is now successfully accomplished.

Rule 13

The present meaning of 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

[Contingent: redrafting may make this clear, or we may decide to carry forward an ambiguity without comment]: Both Rule 14(a)(2)(B) and (3) refer 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.

DRAFT NOTES

CIVIL RULES STYLE SUBCOMMITTEE A

Style Subcommittee A of the Civil Rules Advisory Committee met on January 26, 2003, at the Hermosa Inn in Phoenix, Arizona. The meeting was attended by Judge Thomas B. Russell, Subcommittee Chair; Judge David F. Levi, Advisory Committee Chair; Sheila Birnbaum, Esq.; Ted Hirt, Esq. (for the Department of Justice); Dean John C. Jeffries, Jr.; Judge H. Brent McKnight; and Judge Lee H. Rosenthal. Judge J. Garvan Murtha and Dean Mary Kay Kane attended as members of the Standing Committee Style Subcommittee. Professor R. Joseph Kimble attended as Style Consultant. Professor Thomas D. Rowe, Jr., attended as special consultant to Subcommittee A, and Professor Edward H. Cooper attended as Advisory Committee Reporter. Peter G. McCabe, John K. Rabiej, and Jeffrey A. Hennemuth represented the Administrative Office. Observers included Alfred W. Cortese, Jr.; Peter Freeman (ABA); and Irwin Warren (ABA Litigation Section).

Judge Russell opened the meeting by welcoming all present.

Judge Levi stated that the Subcommittee B meeting on January 25 had been a great success. It got through the entire package of Style Rules 8 through 15. This progress was strongly supported by the fine work done by the Standing Committee Style Subcommittee. The support provided by the Administrative Office has been indispensable to the work of everyone involved in preparing the drafts of Rules 1 through 15.

Judge Levi went on to describe the way in which the style project has been defined. It is essential that we make only style changes. Whenever there is a risk that a change of language will lead to changed meaning, the change must not be made. It is not simply that the change is not to be made in the name of style. It is that the change is not to be made at all. This approach differs from the approach that was taken in styling the Criminal Rules, and that had been assumed in the early phases of the Civil Rules project. The Criminal Rules were approached with the thought that ambiguities could be resolved, even if that meant substantive change, and that other minor substantive changes also could be made so long as they were identified in the Committee Notes. That approach risks too much with the Civil Rules. As soon as substantive changes become possible, opposition will increase exponentially.

This conservative approach means that any significant doubt must be resolved by adhering to the present rule. It does not matter whether the risk is that new language will do harm or will do good. All changes of meaning are to be avoided. The aim is only to express present meaning more clearly. If present meaning cannot be fathomed, the vagueness or uncertainty — which may have been intentional — should be carried forward.

The role of the subcommittees and the advisory committee is to guard against changed meaning. Matters of style are to be finally

resolved by the Standing Committee and its Style Subcommittee. But the subcommittees and advisory committee are free to offer style suggestions for consideration and disposition by the Standing Committee.

Discussion followed the order of the footnoted questions in the Style Document 135 version of Rules 1 through 7.1.

Rule 1

n *: The name of the Rules is a matter of style.

n**: The subcommittee made an earnest style suggestion that Title I should refer to "one" form of action.

nn 1-5: Style.

n 6: Drop "economical," restoring "inexpensive."

n 7: A style suggestion that "and proceeding" be added at the end of the final sentence to reflect "and proceedings" in the first sentence.

Rule 2

n 1: It was agreed that Rule 2 should not be deleted.

nn 2-3: Style.

Rule 3

It was agreed that the Style Committee Notes should not be used to comment on the meaning of rule provisions that are not changed.

n 2: Style.

Rule 4(a)

n 1: Style. "Form" in the caption ties to "proper form" in Rule 4(b), but that need not control the style choices.

nn 2, 3, 5: The style draft adheres to the present rule. These notes suggest changes that may alter the meaning. None should be made.

n 4: Style; the style change is appropriate.

Rule 4(b)

n 1: The style draft properly retains "after" filing. If a plaintiff requests a waiver of service under Rule 4(d), the summons may be presented some time after filing.

n 2: Make no change in the style draft.

n 3: Style, but tie to the tag line for Rule 4(a) [see Rule 4(a) note 1.].

n 4: Adhere to the style draft, which restates the present rule. Any change would be substantive.

Rule 4(c)

n 1: "by the court" is restored to Rule 4(c)(3): "or by a person specially appointed by the court for that purpose." Although present Rule 4(c)(2) refers both to a "person" and to an "officer" appointed by the court, it is safe to delete "officer" because an "officer" is always a person.

n 2: A style question, but the Style Subcommittee will consider a change that makes it clear that the marshal is not a person "appointed."

n 3: no change in the style draft.

Rule 4(d)

n 1: As a matter of avoiding any possible change of meaning, the concept that a defendant has a duty to avoid unnecessary service costs will be restored to Rule 4(d). The restoration method will be, at least in large part, a matter of style. The subcommittee offered the style advice that "To avoid costs," which appears at the beginning of the second sentence in present Rule 4(d)(2), should be restored at the beginning of Style Rule 4(d)(1). "has a duty to avoid unnecessary costs,' which appears both in present Rule 4(d)(2) and Style Rule 4(d)(2), will likely remain.

n 2: This is a style choice. It was asked whether the rule should refer to a third-party defendant, since a summons is served on third-party defendants. It was decided that no change should be made — the present rule does not refer to third-party defendants, so the style rule should not.

nn 3-5: Style.

n 6: Style; to the extent that change from the present rule is suggested, no change should be made.

n 7: "Reasonable time" will be restored to the rule. The Style Subcommittee will determine how to style the present rule: "a reasonable time to return the waiver, which shall be at least 30 days * * *."

n 8: Style; the addition made in the style draft is good.

n 9: Style.

n. 10: See note 1. "has a duty to avoid unnecessary costs" is likely to remain. The Style Subcommittee will determine the style.

It was pointed out that Style 4(d)(1)(B) corrects a mistake in present 4(d)(2)(G). As in the style draft, the defendant should be served two copies of the waiver form, not an extra copy of the notice and request to waive. Compare Form 1A.

n 11: It was agreed that no change would be made to any of the various related phrases that appear in Rule 4: "located within the United States," "outside any judicial district of the United States," and the like. The purpose of adopting these phrases in

the present rule is obscure. Any change would risk a change of meaning. There is no indication that the perplexities that appear in theory have created any real difficulty in practice.

nn 12-14: Style, despite a stout defense of "attorney fees."

n 15: The style rule carries forward the word "process." It was agreed that no change should be made.

n. 16: "sent" in the style rule will be changed back to "addressed" in the present rule: "or until 90 days after ~~the~~ that date when the request was ~~sent~~ addressed to the defendant outside any judicial district of the United States."

nn 17-19: Style.

Rule 4(e)

The tag line will be augmented to reflect the present line: "Serving an Individual within a judicial district of ~~in~~ the United States."

n 1: the reference to waiver of service will be restored. Its deletion from the style draft would change the meaning. So: "an individual from whom a waiver has not been obtained and filed — other than a minor * * *." The "may be served" language in the style draft was discussed and retained. But in the discussion of Rule 4(g) it was decided to change "may" serve throughout Rule 4 to "must," subject to change if research by Professor Rowe suggests that "may" is after all a better rendition of "shall" in present Rule 4.

n 2: Style.

n 3: The language of the present rule was restored: "with someone * * * who ~~lives~~ resides there."

Rule 4(f)

n 1: The tag line will continue to refer to service "in a foreign country." Any change from the present tag line might work a change of meaning.

nn 2-4: Style.

In line with the decision made for Rule 4(e), see note 1, "from whom a waiver has not been obtained" will be restored to the style rule.

Rule 4(g)

The discussion of the translation of "shall" in the present rule, launched with Rule 4(e), was resumed. The decision is noted with Rule 4(e): "shall" will be translated as "must," not "may" as in the style draft. As a matter of style, the style draft likely will be rearranged: "or an incompetent person ~~may be served~~ in a judicial district of the United States must be served by following state law * * *." But Professor Rowe will undertake research to determine whether the style rule should revert to "may." A similar

style change will be made in the last sentence: "A minor or incompetent person ~~may be served~~ at a place not within any judicial district of the United States must be served in the manner * * *."

n 1: Professor Rowe will research the question whether it is safe to translate "infant" in the present rule to "minor." Preliminary research suggests that courts in fact read "infant" to mean "minor." If so, the style version will be retained because "minor" is a better way to ensure that the rule continues to distinguish people who have not become adults in legal contemplation from those who have.

n 2: "summons or other like" in the present rule will be restored to the style draft: "by following state law for service of summons or other like process * * *." The concern is that without this restriction, service might be accomplished in the manner provided by state law for such process as a subpoena. Professor Rowe will undertake research to determine whether there is any reason to do something different.

n 3: The style draft adds a reference to Rule 4(f)(3) that does not appear in the present rule. The reference will be retained. The omission of (f)(3) from the present rule seems not intentional — there is no indication that it was intended that the court should direct service by means prohibited by international agreement.

Rule 4(h)

In line with the decision made for Rule 4(e), see note 1, "from whom a waiver has not been obtained" will be restored to the style rule.

n 1: As with earlier portions of Rule 4, "shall" will be rendered as "must," subject to further research by Professor Rowe.

n 2: The distinction between an agent authorized "by law" and an agent "authorized by statute" is carried forward by the style rule from the present rule. No change will be made, lest an inadvertent change in meaning result.

n 3: style.

Rule 4(i)

n 1: The reference to "plaintiff" will be changed by the Style Subcommittee. It may be replaced by "party."

nn 2, 3: Style.

n 4: "at" will be restored from the present rule: "mail to the Attorney General of the United States ~~in~~ at Washington, D.C."

n 5: Style.

n 6: The language of the present rule will be restored; it resulted from careful and protracted deliberation: "sued in an individual capacity for acts or omissions occurring in connection with * * *."

nn 7, 8: Style.

n 9: "a defendant" in the style draft will give way to the language of the present rule, reduced to the singular: "serve a ~~defendant~~ person required to be served under Rule 4(i)(2) * * *." Rule 4(i)(2) requires service on the United States even when it is not a defendant.

n 10: Style.

Rule 4(j)

nn 1, 2: Style.

n 3: The Style Subcommittee will revise the style draft to ensure clear expression of the present meaning as expressed in the present tag line: "other governmental organization" is intended to refer only to organizations created within the United States.

n 4: "that is subject to suit" will be retained in the style draft. Deletion could easily change the meaning.

nn 5, 6: Style.

n 7: See Rule 4(g), note 2: Subject to research by Professor Rowe, the omitted language will be restored — "state's law for service of summons or other like process * * *."

Rule 4(k)

n 1: "or returns a waiver from" will be deleted: "and is served at ~~or returns the waiver from~~ a place within a judicial district * * *." Addition of those words might dilute the Rule 4(d)(1) proposition that a waiver of service does not waive an objection to personal jurisdiction.

n 2: The style draft carries forward the present language, and will not be changed.

n 3: Questions about the validity of "100-mile" bulge service seem unpersuasive, and in any event should not be addressed in the style process.

n 4: Although the 4(k)(1)(C) reference to the interpleader statute seems redundant in light of the (D) reference to authorization by federal [United States] statute, it will be retained.

The reference to "a federal statute" in (k)(1)(D) was questioned as a matter of style. Several subcommittee members prefer "United States statute." This preference may be subject to further consideration in light of the style convention adopted in the recently completed Criminal Rules style project. The Criminal Rules have few references to national statutes. They do occasionally refer to "federal law." Criminal Rule 57(a)(1) requires that a local rule be consistent with "federal statutes." [28 U.S.C. § 2071(a) requires that local rules be consistent with Acts of Congress, the term repeated in present Civil Rule 83.]

n 5: Style.

n 6: The Style rule carries forward the present rule. No change should be made.

n 7: "United States Constitution and laws" in the style draft is an acceptable rendition of "the Constitution and laws of the United States" in the present rule.

Rule 4(*l*)

n 1: Restore the words dropped from the present rule: "Proof of service, unless service is waived, must be made * * *." Without these words, the rule would seem to refer to waiver of proof of service, not waiver of service.

n 2: The style rule retains the language of the present rule and should be retained.

n 3: Restore "treaty or convention" from the present rule: "the applicable ~~international agreement~~ treaty or convention * * *." "International agreement" is a broader category than "treaty or convention," including executive agreements.

n 4: A provision for amending other process would be an addition beyond the style project's scope.

n 5: Addition of a provision for contradicting proof of service would be an addition beyond the style project's scope.

Rule 4(m)

nn 1, 2: Style.

n 3: Delete "who has not waived service." It seemed a sensible addition to the present rule, but is an addition of something not there. "If a defendant ~~who has not waived service~~ is not served within 120 days * * *." Rule 4(d)(4), moreover, states that when a waiver is filed the rules apply as if summons had been served at the time the waiver was filed.

n 4: Style.

n 5: The style rule retains the language of the present rule. Any word change would risk a meaning change.

Rule 4(n)

nn 1, 2: Style.

n 3: The present rule refers to serving summons, and the style rule carries this forward. No change should be made.

n 4: Restore the present rule: "~~If~~ Upon a showing that personal jurisdiction * * *."

n 5: Restore "found": "over the defendant's assets found within the district * * *."

n 6: Delete "in accordance with" and replace the language of the present rule: "by seizing assets ~~in accordance with~~ under the circumstances and in the manner provided by the law of the state *

* *." "In accordance with" might not carry forward the full restrictive impact of the present language.

n 7: Style.

Rule 4.1

n 1: Addition of a provision for amending process would be something new. It will not be done.

n 2: Style.

n 3: Style — whether "federal" statute or "United States statute" will be made uniform throughout the rules.

n 4: Revert to "the laws of the United States": "issued to enforce ~~federal law~~ the laws of the United States * * *."

n 5: Style.

n 6: The style draft conforms to the present language. No change should be made.

As a matter of style, the last sentence of 4.1(a) may be changed: "~~Service must be proved~~ Proof of service must be made under Rule 4(*l*)."

Rule 5(a)

n 1: The Committee Note should explain that the reference to "designation of record on appeal" was deleted because Appellate Rule 10 is a self-contained provision that includes service.

n 2: No change in the style draft.

n 3: The Style Subcommittee will correct (a)(2) to require that a pleading that asserts a new claim be served only on a party in default for failing to appear. The product may resemble this: "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 ~~in default~~ must be served on that party * * *."

nn 4, 5: Style

n 6: "need be" is restored: "begun by seizing property and no person need be or is named as a defendant * * *."

n 7: Style.

n 8: A strong recommendation was made to the Style Subcommittee that the style draft (a)(4) should be restored to its present position in 5(b). If that is done, the title of 5(a) will be changed.

Rule 5(b)

nn 1-4: Style.

n 5: As in Rule 4, "resides" will be restored: "of suitable age and discretion who ~~lives~~ resides there * * *."

n 6: The Style Subcommittee will reconsider these style suggestions.

n 7: Style.

n 8: "or (F)" will be deleted from the style rule. Although the present rule literally provides for service through the court's transmission facilities when the parties agree on non-electronic means, it was intended to refer only to electronic means. "to make service under Rule 5(b)(1)(E) ~~or (F)~~."

Rule 5(c)

n 1: The present rule will be restored: "If an action involves ~~numerous~~ an unusually large number of defendants * * *."

n 2: The Style Subcommittee will make some change to ensure that the present rule provision for omitting service "as between the defendants" is not changed by the present style draft reference to "codefendants."

n 3: Any problem with the reference to "replies" occurs in the present rule. The style rule carries forward the present rule, and should not be changed.

nn 4, 5: Style.

Rule 5(d)

nn 1-3: Style.

n 4: The present rule language will be restored: "A paper filed by electronic means in compliance with a local rule ~~properly filed by electronic means~~ is a written paper * * *."

n 5: This proposal for addressing a failure to comply with Rule 7.1 would be new material, beyond the scope of the style project.

Rule 6(a)

n 1: The questions raised as to the meaning of Rule 6(a) suggest issues that cannot be addressed in the style project. There was no sense that these issues have presented pressing problems in practice. There is no apparent need to place Rule 6(a) on a reform agenda unless consultation with clerks of courts and others reveals problems that should be addressed.

Rule 6(b)

n 1: "for cause" is one version of different expressions that recur throughout the Civil Rules. "For cause shown," "for good cause," and "for good cause shown" are common variations. Different measures of discretion, and perhaps different moving burdens, may be read into each phrase. There is little reason to believe that present usage invariably reflects intended distinctions. An attempt will be made to find a common convention, recognizing that different settings may justify different measures of discretion and different moving burdens.

n 2: The Style Subcommittee will revise (b)(1)(A) to ensure that the court's authority to act on its own is not restricted more narrowly than in the present rule.

Rule 6(c)

n 1: Style. Subcommittee B has already agreed that the Style Subcommittee should make case-by-case judgments whether to redesignate subdivisions when a subdivision is eliminated from the present rule, or when a subdivision has been eliminated by earlier amendments but carried forward as "abrogated." Generally it will be safe to change designations, but some subdivision designations may be so well known that no change should be made. Rule 12(b)(6) is a clear example.

n 2: "for good cause" in the style rule replaces "for cause shown" in the present rule. This phrase will be reconsidered here as elsewhere.

n 3: The provision for service "at least 1 day before the hearing" is carried forward from the present rule and will not be changed. But this is an issue that should be considered for substantive change — if service is made by mail, the affidavit may arrive after the hearing.

Rule 6(d)

n 1: This note is simply a reminder that present Rule 6(e) is already on the reform agenda.

n 2: This style question will be considered as present Rule 6(e) is pursued on the reform agenda.

Rule 7(a)

n 1, 4: The question whether a counterclaim should be made a separate pleading, and related questions, are not to be addressed in the style project. There was little sense that there is any urgent need for reform on this question or related questions.

n 2: The style draft deletes these words: "an answer to a cross-claim ~~if the answer contains a cross-claim~~." The deletion was approved, subject to further consideration if Professor Rowe's research shows that the deletion might work an unintended change of meaning.

n 3: An omission from the present rule will be restored: "(5) a reply to an answer or a third-party answer if the court so orders * * *."

n 4: Style draft 7(a)(6) will be deleted. The present rule does not provide for "~~(6) an answer to a reply to a counterclaim if the court so orders~~."

Rule 7(b)

n 1: The Style Subcommittee will consider whether it is within the scope of the style project to say that a motion during a hearing

should state its grounds with particularity and state the relief sought. The final sentence of (b)(1) in the style draft will remain as it is — it seems to convey the same meaning as the present language.

n 2: Extensive discussion provided significant support for retaining the redundant references to Rule 11 that appear at various places within the present rules. Although there is some risk that the absence of such redundant references in other places will lead to arguments that Rule 11 somehow applies with diminished force when it is not expressly invoked, these redundant references were deliberately adopted. Any deletion might be seen as an implicit diminution of Rule 11. The full Advisory Committee should consider this question, not only as to Rule 7(b)(3) but also as to the references to Rule 11 that Subcommittee B agreed to delete from Rules 8(b) and 8(d).

n 3: The deletion of present Rule 7(c) stands.

Rule 7.1

n 1: Style.

n 2: It is recommended that the Style Subcommittee restore deleted words: "party to an action or proceeding in a district court * * *." Although these words are made redundant by Rule 1, they parallel language in the cognate Appellate and Criminal Rules that were adopted at the same time as Rule 7.1.

n 3: The Style Subcommittee will decide whether to add one word in 7.1(a) to make it parallel to 7.1(b)(1): "file two copies of a disclosure statement * * *."

nn 4, 5: Style.

n 6: Addition of a new provision for failure to file a disclosure statement is beyond the scope of the style project.

— E.H.C.

DRAFT NOTES

CIVIL RULES STYLE SUBCOMMITTEE B

Style Subcommittee B of the Civil Rules Advisory Committee met on January 25, 2003, at the Hermosa Inn in Phoenix, Arizona. The meeting was attended by Judge Paul J. Kelly, Jr., Subcommittee Chair; Judge David F. Levi, Advisory Committee Chair; Justice Nathan L. Hecht; Robert C. Heim, Esq.; Ted Hirt, Esq. (for the Department of Justice); Judge Richard H. Kyle; Professor Myles V. Lynk; and Judge Shira Ann Scheindlin. Judge Thomas B. Russell, chair of Subcommittee A, also was present. Judge J. Garvan Murtha attended as chair of the Standing Committee Style Subcommittee. Professor R. Joseph Kimble attended as Style Consultant. Professor Richard L. Marcus attended as special consultant to Subcommittee B, and Professor Edward H. Cooper attended as Advisory Committee Reporter. Peter G. McCabe, John K. Rabiej, and Jeffrey A. Hennemuth represented the Administrative Office. Observers included Alfred W. Cortese, Jr.; Peter Freeman (ABA); and Loren Kieve (ABA Litigation Section).

Judge Levi noted that this meeting is the very first meeting to come to grips with the Civil Rules style draft since the project was reinstated on the Committee agenda. The Standing Committee Style Subcommittee is chaired by Judge Murtha and includes Standing Committee members Judge Thrash and Dean Kane as well as consultants R. Joseph Kimble and Joseph Spaniol. They have done wonderful work in editing the draft prepared by Bryan Garner and revised by Judge Pointer. The end result will be a great improvement in the language and structure of the Civil Rules.

Judge Murtha observed that the Style Subcommittee recognizes that care must be taken to avoid unintentional changes of meaning. In addition, the Civil Rules subcommittees should feel free to recommend style changes.

Judge Levi then stated that there has been a shift in thinking about the scope of the style project. He and Judge Scirica, chair of the Standing Committee, have discussed what is realistic, and what the Judicial Conference can be asked to consider. As compared to the Criminal Rules style project, the Civil Rules project should not attempt to make "minor" substantive improvements as it goes along. The role of the Civil Rules Committee is to identify inadvertent substantive changes, and the risk of inadvertent substantive changes, in the style draft. This close study of the present rules will inevitably suggest areas where substantive change is desirable, but substantive changes must be made outside the style project.

Judge Levi also expressed deep thanks to Judge Kelly and Judge Russell for taking on the responsibility of chairing the subcommittees.

Judge Kelly described the method of proceeding. Each rule in the package has been assigned to a subcommittee member. The assigned member will lead the discussion, focusing particularly on

possible substantive changes wrought by the style draft. The discussion will proceed issue-by-issue, recognizing that most of the issues have been identified as footnotes in Style Document 136. As to matters of style, the Civil Rules committee will defer to the Style Subcommittee, but will feel free to suggest style questions for consideration by the Style Subcommittee.

Discussion followed the order of the footnoted questions in the Style Document 136 version of Rules 8 through 15.

Rule 8(a)

nn 1, 2: Style.

n 3: "grounds for the" will be restored from the present rule: "(1) a short and plain statement of the grounds for the court's jurisdiction." There is a risk of changed meaning.

n 4: "subject-matter" will be deleted: "the court's ~~subject-matter~~ jurisdiction * * *." Again there is a risk of changed meaning.

n 5: The style draft carries forward the present rule's language — "unless the court already has jurisdiction." No attempt should be made to find a more graceful style.

nn 6, 7: Style.

n 8: Because there could be a change of meaning, "pleader" is restored: "showing that the ~~party~~ pleader is entitled to relief."

n 9: Whether to make the deletion made by the Style Subcommittee will be considered again as a matter of style: "a demand for ~~judgment for~~ the relief sought * * *." The question is whether anything is lost by the deletion.

n 10: Vigorous discussion was provoked by the proposal to change from "[r]elief in the alternative" to "alternative forms * * * of relief." It was suggested that the present rule is familiar to the bar, and that it is a mistake to make a change unless there is a pronounced improvement of clarity. It also was suggested that "the bar will think something has changed." But it was rejoined that the style project could become pointless if every word change is attacked as a possible change of meaning. We will have boilerplate language in the Committee Note for every rule stating that the changes are style changes only, and that no change of meaning is intended. In response, it was observed that the style project will achieve great gains even if we change only structure and the form of words. Still greater gains can flow from deleting surplus words. And the disclaimer does not really ensure that there will be no changes of meaning — lawyers in the future will argue from the extant rule language, without going back to the pre-style language as a new source of argument over the meaning of both old words and new words. This specific change has a "substantive feel" to many subcommittee members. The Style Subcommittee was asked to consider further the change from "relief in the alternative. Professor Kimble undertook to work on relief in the alternative."

n 11: It was agreed that the decision to delete "several" from "~~several~~ different types of relief" is a style judgment.

Rule 8(b)

n 1: Style.

n 2: The Style Subcommittee will reconsider the suggestion that style draft (1)(A) and (B) should be transposed, so that the duty to admit or deny comes before the duty to state defenses.

n 3: Style.

n 4:"against it" in the style draft has no parallel in the present rule, but seems a safe style addition.

n 5: The change from "averments" in the present rule to "allegations" in the style draft was discussed at length. Judge Scirica believes that the change may be substantive. Many of the matters stated in a pleading are not contested, and often many of them could not be contested. "Aver" carries a stronger connotation of truth than allege carries, and may underscore the message of Rule 11. Changes of language should not be made simply because a new word seems more modern; the old-fashioned message implied by an old-fashioned word may be important. The subcommitee expressed the view that the language of the present rules should be retained, whether "aver," "allege," or some variation. The Style Subcommittee is to consider this change further.

n 6: The change from "adverse" party in the present rule to "opposing party" in the style draft was made to further uniformity. Many rules now say "opposing party." It was urged that there is a well-developed meaning for opposing party, most particularly in Rule 13(a). The rules that refer to an adverse party may have been drafted for the very purpose of suggesting that there is a distinction, that the meaning of "opposing party" developed for some purposes is not suitable for every setting in which contesting parties are identified. But it was concluded that this is a matter for the Style Subcommittee. (At the end of the meeting, Professor Marcus was asked to do research on this issue. See Rule 15(d), note 2.)

n 7: Present Rule 8(b) adds an express reminder of Rule 11 obligations in the sentence permitting a general denial. The style draft deletes this reminder as redundant — Rule 11 expressly applies by its own terms. But the redundancy surely was recognized when the reference was initially included. A "strong minority" of the subcommittee believe that deletion is a significant change. But the conclusion was that this is a matter of style.

n 8: Style.

n 9: Deletion of the present rule reference to denying designated "paragraphs" is a matter of style. The rewriting of style 8(b)(3) seems to change the tone, but again this is for the Style Subcommittee.

n 10: Style.

n 11: Deletion of "and material" from the present rule is properly done as a matter of style, correcting the confusing implication of the present rule that it is proper to deny a true averment if the averment is not material.

n 12: It was concluded that the change from "shall" in the present rule to "may" risks a change of meaning. The cure is to delete "may" from the style rule, so all is governed by the initial "must": "must admit the part that is true and ~~may~~ deny the rest."

nn 13, 14: Style.

n 15: Present Rule 8(d) refers to averments "as to" the amount of damages. The change to "relating to" the amount of damages in style 8(b)(6) was defended by observing that "as to" is notoriously confused. The change was accepted as a matter of style.

Rule 8(c)

n 1: It was decided that any change in the Rule 8(c) list of affirmative defenses risks a change of meaning. No complete list could be drafted, and any additions would run the risk of unforeseen substantive consequences. Nor will it do to delete the entire list as antiquated and potentially misleading — that too could have unforeseen substantive consequences. But Rule 8(c) deserves a place on the agenda of substantive rules changes.

n 2: Style.

n 3: Although "contributory negligence" is a fast-disappearing concept, it will not do to supplement it by a reference to comparative negligence or — more usefully — comparative responsibility. Again, substantive consequences are possible.

n 4: Style. The Style Subcommittee will consider the suggestion that (c) should be divided into two paragraphs.

n 5: The style draft carries "designates" forward from the present rule. That is a wise choice that will be maintained.

n 6: The style rule makes this change: "the court ~~on terms, if justice so requires, shall~~ may treat the pleading" as if properly designated. This is a significant change of emphasis that may have substantive impact. The Style Subcommittee should consider this deletion again. If the deletion stands, the Advisory Committee will review the question.

Rule 8(d): Old and New

n 1: Present Rule 8(d) is transferred to Rule 8(b)(6) in the style draft. It fits better there. It was agreed that it is a style judgment whether to reletter the later subdivisions, and that ordinarily it is better to reletter.

n 2: The Style Subcommittee will decide whether to delete: "Each allegation [averment?] in a pleading must be simple * * *."

n 3: The style draft properly retains the final sentence of style (d)(1) :"No technical form is required." Deletion might effect a substantive change.

n 4: The choice between "alternately" in the present draft and "alternatively" in the style draft was concluded to involve only style.

n 5: The Style Subcommittee will consider the suggestion that the reference to "count" in (d)(2) might better be "claim," recognizing the danger of confusion with other meanings of "claim."

n 6: Style.

n 7: The practice of striking "shotgun" or "blunderbuss" pleadings, even if they contain a "sufficient statement," has emerged under the present rule. The style project should not undertake to draft explicit new language expressing the practice. The question can be considered on the reform agenda if a need for action appears.

n 8: Deletion of "whether based on legal, equitable, or maritime grounds" seems safe as a matter of style; the same deletion is made from Rule 1.

n 9: The Style Subcommittee will consider whether to separate out the final sentence of 8(d)(2) as a new paragraph.

n 10: As with Rule 8(b), note 7, the Style Subcommittee can choose whether to delete the redundant reference to Rule 11.

Rule 8(e)

n 1: Style.

Rule 9(a)

n 1: Style.

n 2: "~~subject-matter~~" is deleted; it may change meaning.

n 3: In (a)(1)(C), restore the language of the present rule: "the legal existence of an ~~organization~~ organized association of persons * * *." Substance.

n 4: The Style Subcommittee will rewrite. "Raise" should be restored, and "specific negative averment." See also note 6, setting out several changes, leaving the next drafting step open. There was support for Justice Hecht's approach as described in note 4.

n 5: Style.

n 6: "facts" will be amplified, perhaps as "supporting particulars" or as "supporting facts." With note 4, the Style Subcommittee will begin drafting from a basis something like this: "To ~~contest~~ raise any of those issues, a party must do so by specific ~~denial~~ negative averment ~~in a responsive pleading or by motion~~, and must state any supporting facts that are peculiarly within the party's knowledge."

Rule 9(b)

nn 1-4: The Advisory Committee must make the final decisions. There was substantial support for doing nothing to restyle Rule 9(b) apart from changing "shall" to "must." But there also was support for beginning the style rule: "When averring fraud or mistake, a party must state with particularity * * *." The style draft substitution of "state" for "condition" of mind was rejected, but some subcommittee members thought it might be proper to pluralize condition to "conditions of mind." And the final four words should be "may be ~~alleged~~ averred generally."

Rule 9(c)

nn 1-3: All three are style. Note 3 was commended to the Style Subcommittee for consideration as better style.

Rule 9(d)

n 1: The style draft properly refused to discard any element of present Rule 9(d).

Rule 9(e)

n 1: Again, the style draft properly refused to discard any element of present Rule 9(e).

Rule 9(f)

n 1: There is no reason to change the substance of Rule 9(f) in the style project. Judge Scheindlin's drafting suggestion was recommended for consideration by the Style Subcommittee.

nn 2, 3: Style.

Rule 9(g)

n 1: Pleading special damages cannot be dropped from Rule 9 without risk of substantive change. The cases reveal some "wandering around, but there is not a big problem." The question is what are special damages, not how far each item must be pleaded. Hospital expenses, for example, may be special damages, but there is no requirement that each individual charge on the hospital bill be pleaded separately. It was concluded that any style change would require review by the Advisory Committee, and that the best course would be to revert to the present rule in singular form: "When an item~~s~~ of special damage ~~are~~ is claimed, ~~they~~ it ~~shall~~ must be specifically stated."

Rule 9(h)

n 1: In both caption and text, "and" should be changed to "or": "the admiralty ~~and~~ or maritime jurisdiction." This convention should be followed throughout the rules.

nn 2, 3: Style.

n 4: The style rule properly carries forward the reference to Rule 15. Deletion on the theory that Rule 15 governs of its own force might work an unintended change of meaning.

nn 5, 6: Style.

Rule 10(a)

n 1: The question of pseudonymous pleading is not one for the style project. It might be approached as part of a Rule 15 revision, recognizing that there may be a tie to the problems that link "Doe" pleading to relation back under Rule 15(c)(3).

Rule 10(b)

n 1: Style, but the subcommittee recommends a deletion: "limited as far as practicable to ~~a statement of~~ a single set of circumstances."

n 2: Style.

nn 3-4: Style, but it was observed that the style version changes the tone and emphasis by deleting "whenever a separation facilitates clarity." The Style Subcommittee will redraft, and will hew close to the present language for the final sentence: "Each claim founded upon a separate transaction or occurrence and each defense other than a denial~~s~~ ~~shall~~ must be stated in a separate count or defense whenever a separation facilitates ~~the~~ clear presentation of these matters ~~set forth~~." (Apart from the substitution of "must" for "should" in the current style draft, the changes are tentative suggestions.)

Rule 10(c)

n 1: Style. The reform agenda might include consideration of amendments that require presentation of a complete amended pleading rather than the amended portions standing alone. It was noted that some courts have local rules that require complete amended pleadings. There was no sense of urgency about this question. A related question also might be considered — should one party be permitted to incorporate by reference the pleading of another party? Does this enhance clarity when most or all of a pleading is incorporated, or produce confusion when bits and pieces are incorporated?

n 2: The present rule refers to "a written instrument which is an exhibit." That is narrower than the style draft "an exhibit," so the style draft must be scaled back. Something like this: "An written exhibit attached to a pleading is a part of the pleading for all purposes." There was discussion of the value of placing these issues on the reform agenda. Documents referred to in a pleading are at times considered on a motion to dismiss even though not attached as exhibits, so long as there is no dispute as to the authenticity and completeness of the document. Courts have found this proper under the present rules, so perhaps there is no need for change. Similar issues are raised by style Rule 12(d), note 3, which consolidates the provisions in present Rules 12(b) and (c)

that govern conversion of a pleading motion to a summary-judgment motion.

Rule 11(a)

n 1: Style.

n 2: The suggestion that the signer's address should include an e-mail address is substantive. It can go on the reform agenda.

n 3: "specifically" is restored: "Unless a rule or statute specifically states otherwise * * *."

Rule 11(b)

n 1: Style.

n 2: It was wondered whether "unnecessary * * * expense" in the style draft has the same impact as "needless increase in the cost of litigation." But it was concluded that this choice should be left to the Style Subcommittee.

n 3: Style.

n 4: Substance is involved in any new requirement that a pleader specifically identify contentions based on an argument to extend existing law or create new law. This suggestion is not for the style project.

n 5: Style.

n 6: Substance would be changed by deleting the separate identification of fact contentions likely to have evidentiary support. No change.

n 7: The suggested change to make (b)(3) and (b)(4) language parallel might change meaning. No change.

Rule 11(c)

n 1: Judge Thrash's reorganization was commended for consideration by the Style Subcommittee.

n 2: Style.

n 3: The language deleted by the style draft has meaning and should be restored: "the court may, subject to the conditions stated below, impose an appropriate sanction on the attorneys * * *." The bar is sensitive to Rule 11, and will read any change with great concern.

n 4: "should" in the style draft will be replaced by "must": "a law firm ~~should~~ must be held jointly responsible * * *." It was noted that the 1993 Committee Note addresses the question whether an entity such as the Department of Justice is a "law firm" within Rule 11(c). It also was noted that many actions involve multiple firms and attorneys.

n 5: "a" in the style draft will be replaced by "its" from the present rule: a law firm is "responsible for a violation committed

by ~~a~~ its partner, associate, or employee." It was noted that complicated issues may arise when a party is an organization, or a public interest firm is involved. These issues should be considered, if at all, by the Advisory Committee as a matter of reform, not style.

n 6: Style.

n 7: There was no conclusion on the suggestion that new words be added in (1)(A):"A motion for sanctions must be made separately from any other motion or paper * * *." The Style Subcommittee may consider the suggestion.

n 8: Style.

n 9: The safe harbor in Rule 11(c) is stated in the present rule by providing that the motion "shall not be filed * * * unless * * *." The style draft is "may be filed * * * only if." Several subcommittee members suggested that although these phrases may bear the same literal meaning, the style draft weakens the emphasis. One possibility is "may not be filed * * * unless." The Style Subcommittee will consider this issue further.

n 10: Style.

n 11: Style. One member would restore "imposed": "A sanction imposed under this rule * * *." That is a matter of style.

nn 12-14: Style.

n 15: Style. But several subcommittee members prefer: "the conduct that violates this rule."

n 16: The style draft tracks the present rule and should not be changed.

Rule 12(a)

n *: The choice between "forfeit" and "waive" is for the Style Subcommittee. Although "forfeit" is technically the proper word, lawyers are accustomed to "waiver" in addressing procedural forfeitures and there is no sufficient reason to change.

nn 1, 2: Style.

n 3: As with Rule 4, the style draft properly adheres to the present rule in referring to a place "not within any judicial district." **[As a new matter not addressed by the subcommittee, 12(a)(1)(A)(ii) should be revised to conform to the change in Rule 4(d)(3), restoring the language of present Rule 12(a)(1)(B):** "within 60 days after the request for a waiver was sent, or within 90 days after that date if the defendant was addressed outside any judicial district of the United States ~~or within 90 days after a request for a waiver was sent to a place not within any judicial district of the United States~~."]

n 4: Style. But the subcommittee recommends that (C) and (B) be transposed, to reflect the fact that counterclaims appear before crossclaims in Rule 13.

n 5: Style, but it is recommended that the Style Subcommittee make the deletion: "serve an answer to a cross-claim ~~against that party~~ within 20 days * * *."

nn 6-9: Style.

n 10: Style. But it may be better to delete "~~the pleading that states the claim~~." One reason is that it seems to be redundant. Another is that this translation from the present rule — "asserting the claim" — may become confused with the concept that a pleading may be dismissed for failing to "state a claim [upon which relief can be granted]."

nn 11, 12: The language of the present rule must be restored, to parallel Rule 4(i)(3): "sued in an individual capacity for acts or omissions ~~connected to~~ occurring in connection with duties performed on behalf of the United States * * *."

n 13: The suggestion that the Rule 12(c) motion should be deleted from Rule 12(a)(4) is a matter of substance that should be considered as part of the Rule 12 reform agenda.

n 14: The style rule changes meaning. "orders disposition at a later time" is better than "postpones its disposition until the trial on the merits," but must be considered on the Rule 12 reform agenda. The Style Subcommittee will restore the meaning of the present rule.

n 15: Style.

n 16: The Reform Agenda will consider whether to change the requirement that a responsive pleading be served within 10 days "after notice of the court's action." Alternatives include a period after the order is entered or filed, or after the notice is sent.

Rule 12(b)

n 1: Reorganization, retaining 12(b)(6) as 12(b)(6), is for the Reform Agenda.

n 2: The inaccuracy of the statement that every defense must be asserted in a responsive pleading is for the Reform Agenda.

n 3: The inaccuracy of the statement that any of these seven defenses must be made before pleading if a responsive pleading is permitted is for the Reform Agenda.

n 4: Style.

n 5: Relocation of the "no waiver" - special appearance provision is for the Reform Agenda.

n 6: Style. One style change will be considered: "~~the~~ an adverse party may assert * * *."

n 7: Relocation of the final sentence of Rule 12(b) is for the Reform Agenda — part of the difficulty arises from the need to preserve the designation of 12(b)(6).

Rule 12(c)

n 1: The change that would permit a motion for judgment on the pleadings by a party who has filed a responsive pleading cannot be made in the style project. It is for the Reform Agenda. The style draft will be revised: "After ~~filing a responsive pleading~~ the pleadings are closed * * *."

Rule 12(d) [New; former 12(d) becomes style 12(i)]

n 1: Style.

n 2: Put aside.

n 3: The Reform Agenda will consider whether to revise the rule to make it clear that a pleading motion is not transformed into a summary-judgment motion by consideration of an undisputed document referred to in a pleading but not attached as an exhibit.

n 4: The style rule courts the risk of changed meaning. "present all material pertinent" should be restored from the present rule — something like: "All parties must be given a reasonable opportunity to present all material pertinent to support or oppose the motion."

Rule 12(e)

n 1: The style draft deleted an addition made in the Garner-Pointer draft, restoring the present rule. That was the proper choice.

n 2: The possibility that a motion for a more definite statement should be made available for the purpose of supporting a motion to dismiss for failure to state a claim is for the Reform Agenda.

n 3: Revise to restore the present rule: "If the court orders a more definite statement and ~~it~~ the order is not ~~filed~~ obeyed within 10 days * * *."

n 4: The same question as 12(a) note 16. The Reform Agenda will consider whether to start the time to obey an order for more definite statement from notice, entry or filing of the order, or sending the order.

n 5: The concluding clause will be amended: "the court may strike the pleading or make any ~~other appropriate~~ order it considers appropriate."

Rule 12(f)

n 1: The provision for striking "impertinent, or scandalous" matter will be considered as part of the current agenda item that addresses the proper effect of an order to strike. How often should the result be physical or electronic expunction, how often sealing, how often simple disregard?

n 2: The parallel suggestion that an order to strike be followed by an amended pleading will be part of the Reform Agenda.

Rule 12(g)

n 1: The effect of the style draft is complicated. The present rule says: "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." The style draft says: "A motion under this rule may include any defense or objection allowed under this rule." The complication arises from Rule 12(b), which says that every defense "must be asserted in the responsive pleading if one is required. But a party may assert" seven listed "defenses" by motion. Present Rule 12(g) does not appear to allow assertion by motion of the "every defense" that style draft 12(g)(1) allows to be made by motion. To correct this inadvertent expansion of motion practice, style draft 12(g)(1) should be revised in approximately this way: "A motion under this rule may include any other motion ~~defense or objection~~ allowed under this rule." The Style Subcommittee will consider this problem further.

n 2: Style.

nn 3, 4: The integration of Rules 12(g) and (h) remains awkward despite the earlier attempt to clarify the confusions. The Reform agenda will consider a comprehensive revision.

Rule 12(h)

n 1: Style.

n 2: This ties to the Reform Agenda item opened with Rule 12(g)(2).

n 3: Style.

n 4: Adding Rule 12(f) to style Rule 12(h)(2)(B) is an expansion of meaning that must be deferred to the Reform Agenda. "(B) by any motion under Rule 12(c) ~~or 12(f)~~; or * * *."

n 5: Style.

n 6: Style. There was strong support for restoring "appears" from the present rule, and some support for substituting "determines": "If it appears ~~is shown~~ at any time * * *." Or "If the court determines at any time * * *." The Reporter and Style Consultant will work on this. It is important that the rule emphasize the court's independent obligation to ensure its own subject-matter jurisdiction.

It was urged that the Rule 12 Reform Agenda be taken up soon, so that it can forereach on the style proposal.

Rule 12(i)

n 1: Style.

Rule 13(a)

n 1: Only a Reform Agenda should consider converting a counterclaim to status as an independent pleading. Some of the judges believed that the change would cause confusion and provide no real benefit.

n 2: Style.

n 3: Style. The Style Subcommittee will consider the suggested redraft.

n 4: The reference to Rule 19 in the style draft may change meaning. It will be deleted: "(B) does not require~~, under rule 19,~~ the addition of * * *."

n 5: "of" is recommended as better style: "addition of another party ~~over~~ of whom the court cannot acquire jurisdiction." By carrying forward the present rule this style avoids any risk of changed meaning.

nn 6, 7: Style.

n 8: Revert to the present rule to avoid changed meaning: "the claim ~~had been stated in~~ was the subject of another pending action * * *."

n 9: Style.

Rule 13(b)

n 1: Style.

n 2: The change improves the statement of what Rule 13(b) means now. Although Rule 13(b) seems to limit permissive counterclaims to those that do not arise out of the transaction or occurrence that is the subject matter of the opposing party's claim, it is clear that a party may state such a claim as a permissive counterclaim when Rule 13(a) does not make it compulsory. One example is a claim that grows out of the same transaction as the complaint but that is not a compulsory counterclaim because it is the subject of another pending action. The style change is properly within the scope of the style project.

Rule 13(c)

n 1: Style.

Rule 13(d)

n 1: Style.

Rule 13(e)

n 1: Restore "matured": "asserting a counterclaim that ~~accrued~~ matured or was acquired * * *."

Rule 13(f)

n 1: Possible abrogation of Rule 13(f), and the relation between Rule 15 and provisions for setting up an omitted counterclaim, are for the Reform Agenda.

n 2: Style.

Rule 13(g)

nn 1, 2: Style.

Rule 13(h)

n 1: There is no reason to add references to any other of the party-joinder rules. The style draft has it right.

Rule 13(i)

n 1: Abrogation or revision is for the Reform Agenda. For now, the reference to Rule 54(b) will be restored: "a court may render judgment under Rule 54(b) on a counterclaim or cross-claim * * *."

Rule 14(a)

n 1: Style.

n 2: The style draft properly carries forward "at any time" from the present rule.

n 3: The style draft remains within proper style limits. Only the Reform Agenda can consider whether to address the mess generated by providing for indemnification and contribution claims only against a "nonparty."

n 4: Style.

n 5: Restore "files": "if it ~~seeks to serve~~ files the third-party complaint more than 10 days after * * *." The style draft changed the meaning.

nn 6, 7: These suggestions are matters for a reform agenda, not style. The style draft properly does not make such changes.

n 8: Style.

nn 9, 12: In both places, "shall" in the present rule is rendered as "may" in the style draft. The problem here is different from most of the uncertainties created by "shall." Both style (a)(2)(A) and (3) say that a third-party defendant "may" make counterclaims and crossclaims. But in both settings the third-party defendant is an "opposing party," so that claims that arise out of the same transaction or occurrence are compulsory counterclaims. The answer may be to adopt "must," which would correspond to "must" in Rule 8(b)(1) — a party "must" admit or deny and state its defenses. There is some risk that "must" will create confusion as to permissive counterclaims and crossclaims, but "under Rule 13" may be protection enough. The Reporter and Style Subcommittee will consider these questions further.

n 10: The method by which a third-party defendant asserts defenses of the original defendant to the plaintiff's claim is for the Reform Agenda.

n 11: Only the Reform Agenda should consider adding a statement about the plaintiff's Rule 13(a) obligations when a third-party defendant makes a claim against the plaintiff.

n 12: See note 9 above.

n 13: The problems with limiting the reach of Rule 14 to persons not parties — "nonparties" — are for the Reform Agenda. See note 3 above.

new: Style Rule 14(a)(6) should be revised: "If within the admiralty ~~and~~ or maritime jurisdiction * * *." Consideration will be given to the question whether the style draft should restore: "may be in rem against a vessel, cargo, or other property subject to admiralty or maritime process in rem."

Rule 14(b)

n 1: Substitute the present rule: "When a ~~claim~~ counterclaim is asserted against a plaintiff * * *." "Claim" broadens the present rule. "claim" seems more desirable; this is a question for the reform agenda.

Rule 14(c)

n 1: Style.

n 2: The style draft correctly adheres to the present rule. We should not seek uniformity in the various rules that refer to transaction or occurrence; a series of transactions or occurrences; conduct, transaction or occurrence; and so on.

n 3: Style.

n 4: The style draft has it right; a reference to counterclaims would change the present rule.

n 5: Style.

Rule 15(a)

n 1: The style draft properly adheres to the present rule in referring to an action not yet "on the trial calendar." The Reform Agenda should consider a substitute limit, since the trial calendar is an obsolete concept.

n 2: The Reporter and Style Subcommittee will consider further the usages of "adverse party" and "opposing party." The desire for uniformity should yield if there is any risk that different concepts will be inappropriately bundled together in a uniform phrase. See Rule 15(d) note 2 — research will be done.

n 3: Although style, the subcommittee believes that "must" is a better expression: "The court ~~should~~ must freely give leave when justice so requires."

Rule 15(b)

nn 1-3: Style.

n 4: Whether the standard for trial amendments should be expressed in ways that sharply distinguish the standard for pretrial amendments is for the Reform Agenda.

n 5: Style.

n 6: Restore the present language as a matter of meaning: "may grant a continuance to ~~allow~~ enable the objecting party to meet the evidence."

n 7: Style.

Rule 15(c)

n 1: Style.

n 2: Restore the language of the present rule: "(i) received ~~sufficient~~ such notice of the action * * *."

n 3: Style.

n 4: Restore the language of the present rule: "that, but for a mistake ~~about~~ concerning the proper party's identity * * *."

Rule 15(d)

n 1: The Style Subcommittee will revise the draft to delete "may~~, when appropriate,~~ order * * *." A new style will be found to capture the meaning of the present language: "If the court deems it advisable that * * *."

n 2: Professor Marcus will undertake research to determine whether it is safe to achieve a uniform use of "opposing party," replacing "adverse" party in the many places where it appears in the present rules.

— E.H.C.

Rules 16 through 22 of the Federal Rules of Civil Procedure

As revised by the Style Subcommittee of the
Committee on Rules of Practice and Procedure
and further annotated by Professor Cooper

April 7, 2003

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[1/] for such purposes as: **(1)** expediting disposition of the action; **(2)** establishing early and continuing control so that the case[2/] 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 of the case.[2/]

1. There may be a subtle change of meaning in the change from "a conference or conferences before trial" to "one or more pretrial conferences." Rule 16(b)(1)(B), for example, refers to a "scheduling conference." It would be safer to say "for one or more conferences before trial."

2. (Style): Present Rule 16(a)(1) says "action"; (a)(2) and (a)(5) say "case." The style draft, after flirting with "case" in (a)(1), carries forward the current wording. The distinctions may be no more than a feeling for what is natural. "[C]ase" might, on the other hand, seem to have a broader meaning, referring not only to the action before the court but the whole dispute that generated the action. On this view, settlement of the "case" (read "dispute") in (a)(5) seems a reasonable deviation. It is not as clear that the court should assert control of the "case" rather than the "action" under (a)(2). It is unusual for the Style Subcommittee to deliberately avoid the advantages of consistent adherence to a single word, so doubly unusual to question the choice. Kimble feels strongly that we should use "case" in place of "action" when "case" seems more natural: "nobody talks about 'settling the action,' do they?" Since the style draft simply carries forward the present wording in each case, we should live with this. (Note that in 16(c)(2)(I) the style draft has "settling the case" and "resolving the dispute.")

(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	**(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 in the action.[1] **(3)** ***Contents of the Order.*** The scheduling order must[2] limit the time to join other parties, amend the pleadings, complete discovery, and file motions. In addition, the order may: **(A)** modify the timing[3] of disclosures under Rules 26(a) and 26(e)(1); **(B)** modify the extent of discovery; **(C)** fix dates for pretrial conferences[4] and for trial; and **(D)** include other appropriate matters.

1. (Style): Why add "in the action"?

2. (Style): Earlier style drafts tracked the structure of present (b). It seems a step backward to jumble the three mandatory items in a single sentence that is not divided into subparagraphs, and then in the same paragraph (3) switch to subparagraphs to enumerate the permissive items. It would be better to revert, or to make a new paragraph if we do want to insert text in the middle of a set of subparagraphs:
   (3) ***Mandatory Contents of the Order.*** The scheduling order must limit the time to:
   (A) join other parties;
   (B) amend the pleadings;
   (C) complete discovery; and
   (D) file motions.
   (4) ***Permissive Contents of the Order.*** The scheduling order may:
   (A) modify the timing or scope[3] of disclosures under Rules 26(a) and 26(e)(1);
   (B) modify the extent of discovery;
   (C) fix dates for [pretrial]{other}[4] conferences and for trial; and
   (D) include other appropriate matters.

3. An early draft recommended an addition to the present rule: "modify the timing or scope of disclosures." "Scope" of disclosures is not mentioned in the current rule. If the change is not considered substantive, the Style Subcommittee recommends adding the phrase and providing an explanation in the Committee Note.

4. See Rule 16(a), note 1. It is less dangerous to say "pretrial conferences" here than in 16(a), but it still seems better to stay with the present rule: "conferences before trial." A settlement conference, for example, should not be confused with a real pretrial conference.

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.	(4) ***Modifying an Order.*** A schedule may be modified only for good cause and by leave of the district judge or, when authorized by local rule, of a magistrate judge.

(c) Subjects for Consideration at Pretrial Conferences. At any conference under this rule consideration may be given, and the court may take appropriate action, with respect to **(1)** the formulation and simplification of the issues, including the elimination of frivolous claims or defenses; **(2)** the necessity or desirability of amendments to the pleadings; **(3)** the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence; **(4)** the avoidance of unnecessary proof and of cumulative evidence, and limitations or restrictions on the use of testimony under Rule 702 of the Federal Rules of Evidence; **(5)** the appropriateness and timing of summary adjudication under Rule 56; **(6)** the control and scheduling of discovery, including orders affecting disclosures and discovery pursuant to Rule 26 and Rules 29 through 37;	**(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[1] reasonably be anticipated for discussion at a pretrial conference.[2] If appropriate, the court may require that a party or its representative be present or reasonably available by telephone[3] to consider possible settlement. **(2)** ***Matters for Consideration.*** At any pretrial[4] conference, the court may consider and take appropriate action on the following matters: **(A)** formulating and simplifying the issues, and eliminating frivolous claims or defenses; **(B)** amending[5] the pleadings; **(C)** obtaining admissions and stipulations[5] regarding facts and documents to avoid unnecessary proof,[6] and ruling in advance on the admissibility of evidence; **(D)** avoiding unnecessary proof and cumulative evidence, and limiting[7] 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;

1. The present rule is all matters that the parties "may" reasonably anticipate. "Can" feels subtly different — it puts a more apparent emphasis on what is reasonably possible. Probably it is better; "may" seems loose. Probably we can make the change as if it were a matter of style.

2. Again the Rule 16(a) note 1 question: "pretrial" conference?

3. The potentially dated reference to "telephone" in this rule is beyond the scope of the restyling project, but the Advisory Committee may wish to consider a substantive update of the rule to reflect technological changes. Perhaps a change can be made within the style project, with a Committee Note explanation — something like "or reasonably available by communication device to consider * * *."

4. See note 1.

5. This seems a close call. The present rule allows consideration and appropriate action with respect to "the necessity or desirability of amendments to the pleadings," and "the possibility of obtaining admissions of fact." The style rule could be read to say that the court may take action on amending the pleadings or obtaining admissions and stipulations. It should not be read that way, because we all know that only the parties can initiate pleadings amendments, admissions, or stipulations. But there is a risk that particularly dedicated managerial judges will read more into the style rule than is intended.

6. It would be natural to read the style rule as if it read "admissions regarding facts and stipulations regarding documents." But it also can be read naturally to mean "admissions and stipulations regarding facts and documents and stipulations regarding facts and documents." On either reading, all of this clause is aimed "to avoid unnecessary proof." The present rule is confused. "admissions" relates to both fact and documents, and it is only admissions that are aimed to avoid unnecessary proof. Stipulations are directed only to the authenticity of documents and the purpose to avoid unnecessary proof is not stated. The style draft is an improvement, and seems within the reach of style without need for comment in a Committee Note.

7. "[O]r restricting" was deleted because it seems to add no meaning.

(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[8/] 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)** taking other steps to facilitate the just, speedy, and inexpensive disposition of the action.
At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed. If appropriate, the court may require that a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute.	

8. Compare Rule 16(a): "settling the case" should remain here if it remains in (a)(5). And "resolving the dispute" should not be changed, even if we substitute "action" for "case" as a general policy.

(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) **Final Pretrial Conference.** 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.
(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) **Pretrial Orders.** After every pretrial conference,[1/] the court must enter an order reciting the action taken. This order controls the course of the action. The court may modify it only to prevent manifest injustice.[2/]

1. Again, "pretrial conference" may be too narrow. See 16(a), note 1. 2 below is more important.

2. Here is a real meaning change. The last sentence of present Rule 16(e) applies only to "a final pretrial conference." The style draft allows modification of an order entered after any "pretrial conference" only to prevent manifest injustice. The change probably is undesirable, and probably is too far beyond the scope of the style project to accept even with a Committee Note.

(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)** a party or its attorney fails to appear at a scheduling or other pretrial conference[1/]; **(B)** a party or its attorney is substantially unprepared to participate — or does not participate in good faith — in a scheduling or other pretrial conference[1/]; or **(C)** a party or its attorney fails to obey a scheduling or other pretrial order.[1/] **(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[2/] the noncompliance was substantially justified or other circumstances make an award of expenses unjust.

1. Note that here we treat a scheduling conference as a variety of pretrial conference, but a distinct variety. Compare 16(a) note 1.

2. The Style Subcommittee regularly deletes "the court finds" as redundant: "unless ~~the court finds~~ the noncompliance * * *."

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[1] 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 United States statute so provides, an action for another's use or benefit must[2] 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,[3] a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action. After a ratification, joinder, or substitution, the action proceeds as if commenced by the real party in interest.

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* Emphasis added for purposes of comparison to the style draft.

1. Here we pay a price no matter which way we go. No doubt the Style Subcommittee should prevail. An earlier style draft had: "Each of the following may sue in that person's own name without joining * * *." That is correct, but not elegant. The current style version includes the unfortunate plural that frequently is used to avoid saying "his, hers, or its": "The following may sue in their own names," even though an executor has one name.

2. Present Rule 17(a) says the action "shall" be brought in the name of the United States. Translation to "must" remains uncertain — we should undertake a research project before we can assert confidently that every statute authorizing a use action excludes the alternative opportunity to bring a direct action. It is possible that the problem would be finessed by rearranging the rule:

   An action for another's use or benefit may be brought in the name of the United States when a United States statute so provides.

3. "[A]fter objection" is in the present rule, but it may be permissible to delete it. Surely a court can act on its own, and when acting on its own must allow a reasonable time to substitute the real party in interest. The rule reads better without these two words.

(b) Capacity to Sue or Be Sued. The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of the individual's domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held,*/ except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive*/ right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Title 28, U.S.C., Sections 754 and 959(a).	**(b) Capacity to Sue or Be Sued.** Capacity to sue or be sued is determined as follows: **(1)** for an individual who is not acting in a representative capacity, by the law of the individual's domicile; **(2)** for a corporation, by the law under which it was organized; and **(3)** for all other parties, by the law of the state where the court is located,1/ 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 2/right existing under the United States Constitution or laws; and **(B)** 28 U.S.C. §§ 754 and 959(a) govern the capacity of a receiver appointed by a United States court to sue or be sued in a United States court.3/
(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.

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* Emphasis added for purposes of comparison to the style draft.

1. There may be a peculiar need to write a Committee Note if we change from "held" in the current rule to "located". If an action is filed in one district but transferred to another district, capacity is determined by the law of the transferring district. *Van Dusen v. Barrack*, 1964, 376 U.S. 612, 640-643, 84 S. Ct. 805, 821-822. The Court concluded that the Rule 17(a) reference to the law of the state in which the district court "is held" is sufficiently ambiguous to support this result. The Committee Note would say that the change to "located" is not meant to upset this rule.

2. deletion of "substantive" seems safe: if you can sue or be sued in an action to enforce it, the right is substantive. It is difficult to believe that the change will affect third-party standing doctrine — an environmental organization still must borrow standing from an injured member, and so on.

3. This occasion is as good as any to note a peculiarity that will be encountered again. Rule 1 says that these rules govern procedure in the United States District Courts. Rule 17, both present and style, here speaks to all United States courts. The only adjustment that might be made in the style project would be to rewrite Rule 1. That does not seem desirable.

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 winning judgment on the other; but the court may grant relief only in accordance with the parties' relative 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 money judgment.

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 appears to have[1/] 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 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.

1. This change has been much discussed. Present Rule 19(a)(2) refers to a person who "claims an interest." The style draft "appears to have an interest" changes the focus. Joinder is required even though the absent person is not doing anything to assert the interest. That may be better — we want to protect a person who is not aware of the litigation that may impair her interests. The Style Subcommittee notes that "[t]he courts have interpreted 'claims an interest' in the current rule to mean only 'appears to have an interest,' not to require a prospective party to come forward with a claim and seek to be joined." But "appears to have an interest" will destroy the parallel with Rule 24(a)(2), where "claims" is clearly the better fit. Should we flag this in a Committee Note?

(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.1/ The factors that the court should 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 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.

* Emphasis added for purposes of comparison to the style draft.

1. This change should be noted in a Committee Note. In 1966 "indispensability" was demoted to a purely conclusory role: the court first decides whether to dismiss the action, and then labels the missing person an "indispensable" party if it has decided to dismiss. Some will mourn the final passing of the antique distinction between "necessary" and "indispensable" parties. The Note would provide a graceful condolence.

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.

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,[1] on just terms, add or drop a party. Any claim against a party may be severed and adjudicated separately.

1. "[A]t any time" in the style draft may be a safe substitute for "at any stage of the action" in the present rule. The only quibble is that "at any time" could include before an action is filed — the court names plaintiff and defendant — or after judgment is entered. We rely on common sense to exclude the pre-filing order. A post-judgment order is conceivable under both present language and style language.

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.[1] 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[2] 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.[3]

1. (a)(2) is active. Why not also make (a)(1) active: "A plaintiff may join as defendants any persons with claims that may expose the plaintiff to double or multiple liability and [the court may] require them to interplead." (Adding "the court may" reflects the common two-stage character of interpleader: 7 Federal Practice & Procedure: Civil 3d, § 1714, p. 626, says that typically the issues in the first stage of the interpleader are formulated by motion.)

2. Why is it that a plaintiff joins and requires, while a defendant "may seek" interpleader? The present rule says a defendant "may obtain" interpleader. Why not: "A defendant exposed to similar liability may interplead by a crossclaim or counterclaim"?

3. An earlier style draft was active: "These rules govern an action under those statutes." If that seems too imperious, we could have the rules apply — "These rules apply to an action under those statutes."

Rules 23.1 through 25 of the Federal Rules of Civil Procedure

As revised by the Style Subcommittee of the
Committee on Rules of Practice and Procedure
and further annotated by Professor Cooper

April 7, 2003

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 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[1/] 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[1/] 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, dismissed, or compromised only with the court's approval. Notice of a proposed settlement, dismissal, or compromise must be given to shareholders or members in the manner that the court directs.

1. Present Rule 23.1 says "allege." If we fall back on "aver" in Rule 8, we will need to consider the need for consistency.

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 order corresponding with those set forth in Rule 23(d), and the procedure for settlement, dismissal, or compromise must correspond with the procedure in Rule 23(e).

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[1/] who: **(1)** is given an unconditional right to intervene by a United States statute; or **(2)** claims[2/] 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.

1. The present rule says "intervene in an action." There is some ambiguity as to whether "in an action" can be omitted from the restyled rule as unnecessary, or whether leaving it out would substantively broaden the scope of the rule. Prof. Rowe should research the issue. The Civil Rules apply to proceedings as well as actions. There may be good reasons to intervene in something that is better described as a "proceeding" — a petition to perpetuate testimony under Rule 27 is a good example. It seems safe to delete "in an action" without adding a Committee Note; surely intervention would be permitted now in the various proceedings that are not easily described as actions.

2. Compare Rule 19(a) note 1. In Rule 24(a)(2), "claims" is surely the right word — we are talking about a person who has appeared and asked to intervene. Intervention by a person "who appears to have an interest" seems awkward. The Style Subcommittee notes: "'Claims an interest' is retained here even though 'appears to have an interest' is substituted in restyled Rule 19(a)(1)(B). Here, an intervenor is presenting itself and must be claiming an interest." But there are strong and intentional parallels between Rule 19 and Rule 24. That strengthens the argument for reverting to "claims" in Rule 19(a), although in the end we may choose to use different terms in each rule.

(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[1/] who: **(A)** is given a conditional right to intervene by a 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[1/] if a party's claim or defense is based on a statute or executive order administered by the officer or agency or is based on 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.

1. See Rule 24(a) note 1.

(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. 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. The same procedure must be followed when a United States statute gives a right to intervene.[1] **(2)** ***Challenge to Legislation; Court's Duty.***[2] When the constitutionality of legislation[3] 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 United States statute is challenged and neither the United States nor any of its officers, agencies, or employees is a party; and **(B)** the Attorney General of the state, if a state statute is challenged and neither the state nor any of its officers, agencies, or employees is a party. **(3)** ***Party's Duty.*** A party challenging the constitutionality of legislation[3] 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.

1. This sentence is superfluous. Rule 24(a)(1) provides a motion to intervene by a person who is given an unconditional right to intervene by a United States statute; Rule 24(b)(1)(A) provides permissive intervention on motion by a person who is given a conditional right to intervene by a United States statute. The first two sentences of Rule 24(c) set the procedure for the motion. We could delete the sentence, explaining in a Committee Note that there is no room to doubt the application of Rule 24(c) procedures.

2. Remember that the Advisory Committee is considering a new Rule 5.1 that would supersede Rule 24(c)(2).

3. Section 2403(a) applies to "any Act of Congress affecting the public interest." Section 2403(b) applies to "any statute of that State affecting the public interest." "[L]egislation" is used to ease the drafting problem, but it may include actions by Congress that are not technically an Act of Congress.

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)** ***Motion to Substitute.*** If a party dies and the claim is not extinguished[1] and if a statement suggesting the party's death is made on the record, the court may, on motion, order substitution of the proper party.[2] The motion 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 the statement suggesting death, the action must be dismissed with respect to the decedent. **(2)** ***Action Not Abated.*** An action does not abate upon a party's death even if the right sought to be enforced survives only to or against the remaining parties. The action proceeds in favor of or against the remaining parties, and abates only with respect to the decedent. **(3)** ***Service.*** A motion to substitute under Rule 25(a)(1), 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 suggesting 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, together with a notice of hearing, must be served as provided in Rule 25(a)(3).

1. Although there are a lot of commas in this sentence, it would help to have one here.

2. The first sentence of present Rule 25(a)(1) states that the court may order substitution. It does not require a statement of death or a motion to substitute. The first sentence of the style rule seems to condition the court's authority to order substitution: "if a statement * * * is made on the record, the court may, on motion, order substitution * * *." In many rules we are careful to say "on motion or on its own." In the present rule, moreover, the only function of the suggestion of death seems to be to start the time for a motion to substitute, not to limit the court's authority to act; see the 1963 Committee Note. We may be making an inadvertent change, although the final sentence of present (a)(1) might mean that the court cannot act on its own after death is suggested on the record. It would be better to go back to the present rule:

   > If a party dies and the claim is not extinguished, the court on motion or on its own may order substitution of the proper party. The motion may be made by any party or by the decedent's successor or representative. The action must be dismissed with respect to the decedent unless a motion to substitute is made, or substitution is ordered, within 90 days a statement suggesting death on the record is filed.

   (The time is set to filing, rather than service, in keeping with our general preference. This seems the kind of minor change that can be made in the style project.)

(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, together with a notice of hearing, 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 described by official title rather than by name, but the court may order that the officer's name be added.