ADVISORY COMMITTEE
ON
CIVIL RULES

Chicago, IL
November 18, 2005
Meeting/Hearing

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October 31, 2005

MEMORANDUM TO CIVIL RULES COMMITTEE

SUBJECT: *Comments on Restyling Project*

I have attached the comments frm Professor Burbank and Gregory Joseph on the restyled civil rules. The materials will be discussed at the committee's November 19 hearing/meeting in Chicago.

John K. Rabiej

Attachments

cc: Standing Committee Style Subcommitee

MEMORANDUM

To: Committee on Rules of Practice and Procedure
From: Stephen B. Burbank & Gregory P. Joseph
Date: October 24, 2005
Subject: Restyled Federal Rules of Civil Procedure

We are pleased to submit, on behalf of a group of eleven law professors and ten practitioners (the "Restyling Project"), comments on the preliminary draft of the proposed style revision of the Federal Rules of Civil Procedure and the proposed amendments in the "Style-Substance Track," both of which were published for comment in February 2005. Our comments on the proposed style revision are presented in two formats, one in which they follow the Committee Notes to the individual rules, and another in which they are presented as a stand-alone document. Our comments on the proposed amendments in the "Style-Substance Track" are presented only in the former format.

The Restyling Project grew out of our concern that the effort required to provide useful comments on the proposed style revision would be so time-consuming that, even with the long comment period, few if any individuals would undertake to do the necessary work, and that if organizations made the necessary investment of time, they might approach the endeavor from a particular perspective. At the same time, the need for informed comment seemed to us critical in connection with a project of such immense potential importance to and impact on the course of civil litigation. We did not undertake the Restyling Project as an effort to support the proposed style revision, nor to undermine it, but rather carefully to evaluate it.

After discussions with a number of colleagues in practice and the academy, and after consultation with Judge Levi and Judge Rosenthal, we divided the restyled rules into nine groups, roughly corresponding to the table of rules, with the proposed amendments in the "Style-Substance Track" constituting a tenth group. For each group we recruited one academic (and for one group two academics) and one lawyer in practice to serve as a team to review the restyled rules/proposed amendments. We recruited people on the basis of their demonstrated knowledge and experience, intelligence and common sense, not of any knowledge as to their attitudes or likely attitudes toward the restyling effort. We were able to enlist people of distinction; only one person whom we approached was unable to participate.

As to the charge given to the teams — the criteria to guide their work — we decided to keep it simple. The main risk presented by the restyling effort, one of which we know the

rulemakers have been acutely aware, is that it will yield unintended changes in the meaning of the rules (which most refer to as "unintended substantive changes"). We asked the teams to review the restyled rules from that perspective, to see whether the rulemakers have been successful in doing what they set out to do — namely, to restyle the Federal Rules without changing their meaning, with particular attention to the transaction costs that ambiguity regarding a change in meaning might engender. Thus, the goal we set for the Restyling Project was to identify proposed changes that unquestionably would change the meaning of a rule, as well as those as to which there is a reasonable argument that meaning would be changed. In addition, although we discouraged second-guessing proposed changes from a purely stylistic perspective, we decided that, if a proposed change was particularly hard to read or would be hard to cite, including by reason of elaborate subdivision, that itself could engender unnecessary transaction costs and was fair ground for comment.

Our view that the major costs of the restyling are likely to be transaction costs — those that would ensue if a practitioner or trial judge read a restyled rule in a way that differed from the current interpretation and conducted litigation, or made rulings, accordingly — informed our decision not to burden the reviewing teams with any of the working papers of those engaged in the actual work, even if those papers were otherwise available. We thus sought to avoid the possible anchoring effect that the working papers might have on the members of the Restyling Project. Another reason inclining us to that choice was the additional burden that becoming conversant with such papers would impose on the reviewing teams. Accordingly, we asked members of the Restyling Project to read only Professor Kimble's memorandum included with the rules published for comment and Professor Cooper's article in the NOTRE DAME LAW REVIEW, believing that these documents furnish an adequate statement of the goals of the restyling effort and of the criteria that have guided those involved in the work.

We recognize that this decision may result in comments/questions that may have been asked and, in the Committee's view, satisfactorily answered in the course of the restyling effort. But the fact that the Restyling Project participants expressed concern raises the question whether a problem lingers. In all events, that would be, or so it seems to us, a minor cost in comparison with the potential gain of comments by those approaching the project with fresh eyes and with minds unburdened by debates that may be far removed from what the average practitioner or judge will see. Moreover, it is our hope that the process we used in developing the final comments of the Restyling Project, described below, has reduced the number of "asked and answered" comments, although we are sure that it has not wholly eliminated them.

In June, following the distribution of the restyled rules (with Professor Kimble's memorandum) and of Professor Cooper's article, and after each team had the opportunity to engage in a preliminary review of its group of rules, we held a conference call to discuss possible refinements in the criteria to guide the work, the proper treatment of recurring

issues, and matters of administration. Thereafter, over the summer, we corresponded with team members about additional questions arising, sharing that correspondence with the Restyling Project as a whole when such questions seemed of overarching significance. In September each team submitted a draft of comments on the group of rules assigned to it. We edited those comments, eliminating those which seemed to us either not within the limited remit of the Restyling Project or misdirected, reducing the length of many others, and imposing a uniform format. We then distributed the edited comments to all participants and, in mid-October, held a second conference call, the major purpose of which was to discuss what Professor Cooper has called "the big picture question," to wit, whether the restyling effort augurs greater benefits than costs. Both prior to and during that conference call, we encouraged teams to raise again comments that they thought appropriate but that we had eliminated in editing, and the final comments include a number of such reconsidered items. Thus, although all members of the Restyling Project had considerable opportunity to shape the final document, and this memorandum reflects the work of the whole, we do not claim that each member agrees with every comment or with every statement in this memorandum.

Although a review of the Restyling Project's comments will reveal a number of recurring issues, and although we have endeavored to respond to those issues uniformly, it may be helpful here to bring up those that seem to arise most frequently and/or to be most important, and to address them somewhat more fully than is appropriate in comments on a particular restyled rule.

We applaud the quest to make the Federal Rules of Civil Procedure more accessible to all who use them and recognize the value that subdivisions can have for that purpose. Moreover, we know that the restyling effort has been sensitive to the problem of trying to wean users from numbers that have been burned in their memories (e.g., 12(b)(6)). It is not clear, however, that adequate attention has been paid to the potential costs, particularly in an age of electronic research, of elaborate articulation and subdivision, costs that include both the effort involved in citing with precision and the consequences of the greater number of errors in citation that are predictable the more highly articulated a rule becomes. We raise this concern in connection with Restyled Rules 12(a)(1)(A), 12(h)(1)(B), 15(c)(1)(C), 16(b)(3)(B), 17(a)&(c), 19(b)(2), 23(c)(2)(B), 23(d)(1)(B), 36(a)(5)-(6), and 64(b). It applies more broadly, however, and we encourage the rulemakers to reexamine the question generally.

We also applaud the quest to purge the Federal Rules of archaisms and to make them concise. These quests, however, also can defeat other, more important, purposes of (or constraints on) the restyling effort. Thus, the effort to eliminate apparently unnecessary words may lead to a deletion that changes meaning, as for example in Restyled Rule 49(a)(2), where "give to the jury such explanation and instruction" has yielded to "instruct".[1] In

[1] We here follow a punctuation convention adopted in our comments, placing quotation marks

addition, some instances of adherence to a style convention designed to reduce words may lead to unintended changes in meaning — *e.g.*, the use of "litigation costs" instead of "cost of litigation" in Restyled Rules 11(b)(1) and 26(g)(1)(B)(ii). In still other instances, the problem is not so much a change of meaning as the specter of unnecessary transaction costs, as where "written stipulation" has become "stipulation". See Restyled Rules 29, 30(a)(2)(A), 30(b)(4), 31(a)(2)(A), 33(a)(1), 33(b)(2), 36(a)(3), and 59(c). Compare Restyled Rule 39(a)(1) ("file a stipulation").[2]

There is bound to be some disagreement about the use of "must" as opposed to "shall", "should" or "may". This is covered in the Kimble memorandum and the Cooper article. One potential problem area identified by the Restyling Project involves changes from "shall" to "must" when that might be thought to deprive the judge of discretion that the existing language, at least as interpreted, confers. *See, e.g.*, Restyled Rules 65(c), 69(a)(1). The converse problem is also noted, see Restyled Rule 54(d)(1), as are the problems of using "must" when "should" is called for, see Restyled Rule 54(a), and "may" when "must" is called for. See Restyled Rules 10(a), 25(a)(1). *Cf.* Restyled Rule 15(c)(1)(heading).

We also encountered a number of problems involving the relationship between the restyled rules and statutes. Perhaps the least troublesome concern the restyling of existing rules that were originally written with the aim of closely tracking a federal statute. We believe that the costs of severing the linguistic cord would outweigh the benefits and thus suggest retention of the statutory terms in Restyled Rules 72-73. More serious problems are presented in connection with the restyling of existing rules that were fashioned at a time when the extent of the authority to make prospective evidence law by court rules was unclear and before the enactment by Congress of the Federal Rules of Evidence in 1975. Given the decision not to restyle the Evidence Rules and the problem of supersession that exists because most of those rules are statutory, we suggest that Restyled Rules 61 and 80 be placed in the "Style-Substance Track" or referred to the Evidence Rules Committee.

The most difficult problems we confronted involving the relationship between the restyled rules and statutes arise from the Enabling Act's supersession clause. Apart from possible changes to the Evidence Rules discussed above, we have identified supersession problems in connection with Restyled Rules 65(c), 68(a) and 68(d), but it is clear that they are more extensive. Thus, for instance, a number of courts have refused to apply existing Rule 68 in actions under the Clean Water Act. *See, e.g.*, North Carolina Shellfish Growers

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before a period or comma when quoting from a rule or restyled rule.

[2] As an example from the "Style/Substance Track" package, it is proposed to change Rule 8's "a demand for the relief sought, which may include relief in the alternative or different types of relief" to "demand for the relief sought, which may include alternative forms or different types of relief". The original formulation was written to provide authority for a pleading like that in Form 10. The proposed change would eliminate that authority.

Assoc. v. Holly Ridge Associates, 278 F. Supp.2d 654 (E.D. N.C. 2003). Although the stated rationales for that result have differed, the decisions could be justified on the ground that the act postdated the rule. Once Restyled Rule 68 were effective, that rationale would no longer be available. Similarly, there are a number of inconsistencies between the Private Securities Litigation Reform Act of 1995 and the existing rules, the resolution of which turns on the last-in-time rule. The same may be true of the Class Action Fairness Act of 2005.

There is no obvious solution to this problem. It appears that the original rulemakers addressed it by stating in Committee Notes an intent not to affect certain statutes, as they did, for instance, in the Committee Note to Rule 65. That seems to us to have been wishful thinking in 1938 and to be even more obviously so today when such materials are not universally used in interpretation. The safest way to insure that restyled rules did not supersede statutes simply by reason of being later-in-time would be to secure legislation so providing, but we can understand why the rulemakers might be reluctant to seek such legislation. We doubt that the Enabling Act confers power on the Court directly to change the terms of its rulemaking charter —to supersede the supersession clause — by providing by rule that the restyled rules do not supersede statutes with which they are in conflict. Perhaps the same result can be achieved by including in the restyled rules an amendment to Rule 81 providing that the rules shall not be interpreted to be inconsistent with any statute to the extent that such inconsistency would arise solely as a result of the amendments effective on ____. We are not confident about the legitimacy of that approach, however, and we are in any event concerned about the archaeological expeditions that it might require, and the transaction costs it might entail, for litigants and courts trying to determine whether supersession occurred as a result of conflict between statutes and pre-restyled rules.

We have taken two approaches to restyled rules that in our view would effect changes in meaning. In some instances our response has simply been to suggest retention of the language in the existing rule. In other instances we have recommended putting the proposed changes in the "Style-Substance Track." There are quite a number of the latter recommendations. See Restyled Rules 7(a)(7), 11(b)(1), 15(c)(1)(C), 23(d), 26(g)(1)(B)(ii), 30(f)(1), 31(b)(3), 61, 65(a), 65(c), 65(d) (twice), 68(a), 68(c), and 78(a). We think it likely that some of these changes in meaning are sufficiently significant that even treatment in the "Style-Substance Track" would exceed the limited purposes of that track and thus that the proposed changes are not appropriate for either track at this time. Moreover, we note with considerable concern the number of problems of this type that we have identified in connection with the restyling of Rules 65 and 68, concern that is the greater because those rules are also the focus of our concerns about supersession.

Finally, it is appropriate here briefly to summarize the views expressed by the members of the Restyling Project concerning the "big picture question." There were, to be sure, a number of members who favored continuing the effort. They noted that the restyling of other sets of rules appears to have been successful and voiced their agreement with the

basic rationale for the enterprise. They acknowledged that there will inevitably be some unintended changes in meaning but thought that, particularly with the improvements that should follow from these comments, the advantages outweigh the disadvantages. Those advantages include the greater accessibility of the restyled rules, particularly to younger and less experienced practitioners, and the mandatory continuing legal education that would necessarily follow the promulgation of the restyled rules.

A greater number of participants were either mildly or strongly negative. A commonly expressed view was that the work of the Restyling Project has revealed some serious problems and that, however careful that work has been, there must be many more problems that have not yet been identified. In addition, some members doubt that the benefits of restyled rules will be substantial, and they are convinced that such benefits will pale in comparison with the transaction costs, not just those engendered by uncertainty about a change in meaning, but those generated by the need to learn the new rules (and pay for the new treatises), together with the additional transaction costs that will follow when local rules and standing orders are changed to conform to the restyled rules. Finally, there was concern that restyling might retard or make more difficult the more important task of determining whether we have an appropriate set of rules for litigation in the twenty-first century. Some members were of the view that this substantive enterprise should take priority, that it could include restyling as a component, and that the bar would not tolerate having to relearn the rules more than once in a generation.

As the organizers of the Restyling Project, we regret to say that we share the views of those opposed to the continuation of the restyling work. We acknowledge the potential benefits, but we believe that they will be dwarfed by the likely costs. Moreover, and speaking solely on our own behalf, although much attention has been paid to transaction costs, we are equally if not more disturbed by some of the problems unearthed in this work that have negative implications for access to court (*e.g.*, Rule 68) and/or for the protection of individual rights (*e.g.*, Rule 65), as we are by the prospect that the Restyling Project has missed other similar problems.

We look forward to meeting with you on November 18.

RESTYLING PROJECT PARTICIPANTS

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FEDERAL RULES OF CIVIL PROCEDURE RESTYLING PROJECT

Ad Hoc Committee of Academics and Practitioners

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Restyling Project Comments

Restyled Rule 1. Introduction of "and proceedings" may support an argument for expansion of the rules' applicability. To be sure, the Committee disclaims such a purpose. But the decision in *SEC v. McCarthy*, 322 F.3d 650 (9th Cir. 2003), to which the Note refers, placed some emphasis on the statutory distinction between "actions" on the one hand and "applications" and summary proceedings on the other. Including "proceedings" in the definition of the scope of the civil rules may suggest a different answer in a future case. That would not necessarily be a bad thing, but it may go beyond restyling.

To be sure, the word "proceedings" appears in various jurisdictional statutes, nicely summarized in Professor Cooper's article (79 NOTRE DAME L. REV. 1761). It also appears in many of the provisions of existing and Restyled Rule 81. But then Rule 2's proclamation ("There is one form of action – the civil action") may leave the reader wondering what Rule 1 means by "proceedings". As the forms of action recede into history, Rule 2 may take on greater significance for the interpretation of Rule 1's reference to "civil actions". Perhaps Restyled Rule 2 should face that likelihood squarely, and declare that all civil actions and proceedings within the scope of the rules will be referred to generally as civil actions.

Restyled Rule 2. See our comment above about Rule 2's relevance to Rule 1.

Restyled Rule 4(e). It may make sense to drop the old formulation "dwelling house" in favor of "dwelling". But Restyled Rule 4(e)(2)(B) may introduce a new uncertainty. It retains alternative references to "dwelling" and "usual place of abode". In the existing rule, "usual place of abode" serves as an alternative to "house", in recognition that some may abide in an apartment or other structure that would not qualify as a "dwelling house". Dropping "house" from the restyled rule means that "usual place of abode" will now operate as an alternative to "dwelling". Of course, some readers may regard these terms as defining one another. Others may contend that the restyled rule contemplates two alternative places where substituted service might be permissible. Current law provides some support for an alternative reading already, and a leading treatise endorses that view. See 4A Wright & Miller, Federal Practice and Procedure § 1096, at 530-31 (2002). Restyled Rule 4(e)(2)(B) may encourage this alternative reading.

Restyled Rule 4(m). The word "initiative" has been deleted from the phrase "on its own initiative". In this context "on its own initiative" is a widely used term of art (equivalent to "sua sponte"), and its deletion from the text may cause confusion, as we note elsewhere as well (*e.g.*, Rule 11(c)(3)). In a sense, even when a motion is made, a court issues or refuses to issue an order "on its own". Suggestion: insert "initiative" after "on its own".

Restyled Rule 5(b)(2)(B)(ii). See comment on "dwelling" instead of "dwelling house" in response to Restyled Rule 4(e)(2)(B).

Restyled Rule 5(b)(2)(D). The change from "the person ... has no known address" to "the person's address is unknown" may suggest a lower burden on the party. Suggestion : restore "if the person has no known address".

Note: The Restyling Project submits these comments on Proposed Style Forms 5 and 6 at the suggestion of one of the Committee's consultants. We have not examined the other proposed style forms.

Proposed Style Form 5 substitutes for existing Form 1A. The drafters should change Restyled Rule 4, which continues to refer to Form 1A. The second paragraph speaks of a duty to avoid "costs", which reflects the language of the existing rule but not the references to "expenses" in Restyled Rule 4(d) . "Expenses" may in any event better communicate the risk to a lay person. The third paragraph declares that the "action will then proceed", in keeping with the existing rule, instead of stating, as does Restyled Rule 4(d)(4), that the rules will apply. The fourth paragraph refers to formal service, a reference possibly lost on a lay person. This paragraph also refers to "costs" instead of "expenses". Suggestion: substitute "I will arrange to have the summons and complaint served on you and ask the court to require you, or the entity you represent, to pay the expenses of making service". The fifth paragraph requests that the party read the enclosed statement. Its phrasing should more closely track Restyled Rule 4(d) and the heading of the attachment to Proposed Style Form 6 (where, however, "costs" should be "expenses"). Suggestion: substitute "duty to avoid unnecessary expenses" for "duty to waive service".

Restyled Rule 7(a)(7). Given the wording of restyled Rule 7(a)(6), specifically including "an answer to a third party complaint", and in light of the intent expressed in the Committee Note, the phrase "or a third party answer" in Rule 7(a)(7) is redundant and raises the question of why other answers (e.g., to a counterclaim or crossclaim) are not also specifically referred to. Suggestion: delete the phrase "or a third party answer". In any event, we do not understand how this proposed change can be thought not to change the meaning of Rule 7 and therefore suggest that it be included in the style/substance track

Restyled Rule 7.1(a). The heading of this provision, like that of the existing provision, is incomplete. Suggestion: change the heading to read: "Who Must File; Contents".

Restyled Rule 8(a)(3). The restyled provision deletes the words "judgment for". The present forms appended to the rules use the word "judgment" in complaints for money damages but not for equitable relief, but given the provisions of Rules 58-60, as well as the nature of adjudication, the existence of a judgment is surely an integral part of the relief sought in any action. Suggestion: insert "judgment for" after "a demand for".

Restyled Rule 8(b). The heading of this provision, both in the existing and in the restyled rule, is incomplete, since the provision refers to admissions as well as to defenses and denials. Suggestion: change the heading to read: "Responding to a Pleading".

Restyled Rule 8(d)(3). The deletion of the reference to Rule 11 here may cause difficulty for courts and practitioners because, despite the disclaimer in the Committee Note, the specific authorization of inconsistent claims or defenses may be read (especially in view of the deletion) as overriding the general limitations imposed by Rule 11. Suggestion: begin this provision with the phrase "Subject to the obligations set forth in Rule 11", and explain in the Note the special reason for retaining the Rule 11 reference at this point.

Restyled Rule 9(a)(2). The word "denial", which does not appear in the existing provision, seems inappropriate, since there has presumably not been any allegation (at least none is required), and the word "denial" is used in the pleading rules only to refer to a response to an allegation. Suggestion: substitute "specific statement setting out [or 'setting forth']" for "specific denial, which must state".

Restyled Rule 9(h)(1). For ease of reading, restore the comma after "Rule 82".

Restyled Rule 10(a). The phrase "that names the parties" in the first sentence of this provision is redundant, since the second sentence makes (and adds to) the point by stating that: "The title of the complaint must name all the parties". Suggestion: delete the phrase in the first sentence. In the second sentence, the phrase "may name the first party on each side" changes the meaning of the rule, which presently *requires* the naming of at least the first party on each side. Suggestion: change "may name the first party on each side and refer generally to other parties" to "must name the first party on each side and may refer generally to other parties".

Restyled Rule 10(c). Restyled Rule 10(c) eliminates use of the word "exhibit(s)". This deletion may cause confusion because documents are frequently enclosed with (or even physically attached to) a pleading as filed that are not intended to be incorporated as part of the pleading – for example, a transmittal letter, a case information form, a request for a summons, and a filing fee check. Labeling a document as an exhibit clarifies the pleader's intention. Suggestion: restore the prior heading, "Adoption by Reference; Exhibits", and insert the words "as an exhibit" after "attached" in the second sentence.

Restyled Rule 11(b)(1). This provision raises an issue that recurs in the restyled rules (*see also* Restyled Rule 26(g)(1)(B)(ii)). The existing phrase "cost of litigation" is changed to "litigation costs" in Restyled Rule 11(b)(1). "Cost of litigation" and "litigation costs" often do not mean the same thing. "Cost of litigation" is inclusive of attorney's fees, but the phrase "litigation costs" is a technical phrase that many times does not. "Litigation costs" is sometimes used in statutes as distinct from attorneys' fees (*e.g.*, False Claims Act, 31 U.S.C. § 3730(h)("litigation costs and reasonable attorneys' fees") — even Restyled Rule 68 uses the lone word "costs" in this sense to mean statutory costs, as in 28 U.S.C. § 1912. This, then, is potentially a substantive change. If intended, it should be included in the style/substance track; if change is not intended, the existing language should be retained.

Restyled Rule 11(c)(2). This provision also raises an issue that recurs in the restyled rules (*see also* Restyled Rules 37(b)(2)(A)(i) and 50(e)). Introduction of the phrase "the

prevailing party" is confusing. That phrase usually refers to the winner of the case, as it does in both existing and Restyled Rule 54(d)(1). What Restyled Rule 11(c)(2) is referring to is the party prevailing on the motion. Suggestion: substitute the former phrase, "the party prevailing on the motion", for "the prevailing party."

Restyled Rule 11(c)(3). The word "initiative" has been retained in the heading of the restyled rule but deleted in the text. "On its own initiative" in this context is a widely used term of art (equivalent to "sua sponte"), and its deletion from the text may cause confusion. In a sense, even when a motion is made, a court issues or refuses to issue an order "on its own". Suggestion: insert "initiative" after "on its own".

Restyled Rule 11(c)(5). For the reasons stated in connection with Restyled Rule 11(c)(3), the word "initiative" should be inserted after "on its own".

Restyled Heading to Rule 12. For reasons stated below (see comments on Restyled Rule 12(g)), the phrase "Consolidating and Waiving Defenses" (added to the heading of the existing rule) is incomplete. Suggestion: change "Consolidating and Waiving Defenses" to "Consolidation and Waiver".

Restyled Rule 12(a)(1)(A). Although the use of more than three lettered or numbered sets of subdivisions in a single rule (going down to (i), (ii), (iii), etc.) may occasionally be warranted by the complexity of a rule, we believe it is usually not required for clarity and should be used sparingly if at all. To simplify citation and to avoid confusion, we therefore propose that use of more than three subdivisions should generally be avoided. Two methods of avoidance are (1) the use of bullets (as in Restyled Rule 8(c)(1)), and (2) combination of the subdivisions. Suggestion: substitute bullets for (i) and (ii), or combine the two subdivisions into one, turning Rule 12(a)(1)(A) into a single sentence. For practical reasons, our preference is the latter (How does one deal with bullet points in quoting a rule in a sentence? Are ellipses required? Must the bullet point appear?).

Restyled Rule 12(f)(1). Suggestion: for reasons stated in the discussion of Restyled Rule 11(c)(3), insert "initiative" after "on its own".

Restyled Rule 12(g). The heading "Consolidating Defenses" seems inapt, since 12(e) and 12(f) motions don't necessarily involve defenses. Suggestion: change the heading of Rule 12(g) to "Consolidating Defenses and Objections" (and correspondingly, change the heading of (g)(1) to "Consolidation").

Restyled Rule 12(h)(1)(B). For reasons given above (see discussion of Restyled Rule 12(A)(1)(a)), use of subdivisions (i) and (ii) seems unnecessary. Moreover, the reference to Rule 15(a) would be clearer if it were changed to a reference to Rule 15(a)(1). Suggestion: change Restyled Rule 12(h)(1)(B) to read: "failing to make it by motion under this rule or to include it in a responsive pleading or an amendment allowed by Rule 15(a)(1) as a matter of course".

Restyled Rule 12(h)(2). Given the reference to "Rule 19" in Restyled Rule 12(b)(7), the reference to Rule 19(b) in this provision leaves a gap with respect to 12(b)(7) motions based on Rule 19(a). We assume this gap is not intended. Suggestion: change "Rule 19(b)" to "Rule 19".

Restyled Rule 12(h)(3). The restyled rule preserves the wording of the prior rule (requiring dismissal), and in doing so may cause difficulty under existing law. The problem is that under present law, defects of subject matter jurisdiction may require not dismissal but remand in removed cases, and may be correctable (for example by dismissal of a party or claim) in original or removed cases. This matter may call for consideration in the substance/style track. Alternatively or in addition, the words "and if the case is not remanded and the defect cannot be cured", could be added after "jurisdiction,".

Restyled Rule 13(b). As presently worded, the restyled rule includes all counterclaims as "permissive", even those defined as "compulsory" under Rule 13(a). Whether or not this will cause difficulty, and it might, it makes little sense and is easily corrected. Suggestion: change Restyled Rule 13(b) to read: "A pleading may also state as a counterclaim against an opposing party any claim that is not a compulsory counterclaim under Rule 13(a)".

Restyled Rule 14(a)(6). In contrast to the existing rule, the first sentence of the restyled rule implies that in rem jurisdiction is automatically available if the third party complaint is admiralty or maritime. If the qualifications in the existing rule are inherent in an in rem action in admiralty, this is perhaps not problematic. If not, the implication could be removed by making the sentence conditional.

Restyled Rule 15(b). The heading for 15(b)(2) ("After Trial") seems inapt, since (b)(2) applies to amendments that can be made at any time, including during trial. Moreover, the principal difference between (b)(1) and (b)(2) is not between amendments made during and after trial. Instead, the distinction is between (1) amendments based on trial evidence that was met with an objection that the evidence was not within issues raised in the pleadings and (2) amendments based on new issues that were tried by consent. Suggestion: change the headings of 15(b)(1) and (b)(2) to "Evidence Objected to at Trial" and "Issues Tried by Consent", respectively.

Restyled Rule 15(c)(1). The word "May" in the new heading of this provision is incorrect, since the amendment *must* relate back if the conditions of the provision are met. Suggestion: change the heading to read: "When an Amendment Relates Back".

Restyled Rule 15(c)(1)(C). For the reasons stated in connection with Restyled Rule 12(a)(1)(A), substitute bullets for, or combine, (i) and (ii) in this provision (and correspondingly, change the reference in Restyled Rule 15(c)(2) from "Rule 15(c)(1)(C)(i) and (ii)" to "Rule 15(c)(1)(C)").

Restyled Rule 15(c)(1)(C). The restyled provision preserves what is generally recognized as an error in the existing rule. When the earlier rule was revised to change the result in *Schiavone v. Fortune*, 477 U.S. 21 (1986), the revision (inadvertently?) provided that relation back was precluded when the party to be brought in by the amendment has received notice after the time for service under Rule 4(m) but within the limitations period. This problem could readily be resolved by inserting, after "the period provided by Rule 4(m) for serving the summons and complaint", the phrase "or the period of the applicable statute of limitations, whichever is longer,". This issue might be referred for consideration in the style/substance track.

Restyled Rule 16(b)(3)(B). The first three items in the existing Rule 16(b) have been condensed into a single sentence in Restyled Rule 16(b)(3)(A), but the next three, in (B), have not. For reasons stated in connection with Restyled Rule 12(a)(1)(A), we suggest that they should be, or that bullets should be used instead.

Restyled Rule 16(c)(1). Since the word "may" in the second sentence confers discretion, it is not clear whether the words "If appropriate," at the beginning of the sentence, are redundant or are intended to add to or qualify this discretion. We assume the words are redundant. Suggestion: delete "If appropriate,".

Existing and Restyled Rules 16(d) and (e). The order of these provisions has been reversed in the restyled rules. Although this makes sense as a matter of logic, the change may cause confusion for purposes of citation and research. Suggestion: consider returning to the existing order.

Restyled Rule 16(e). The words "an order issued after a final pretrial conference" could be read to refer to *any* order issue after the final conference, whether or not it is the order that is issued to embody the results of the conference (especially since the word "order" is not previously used in the text of the provision). Suggestion: change the last sentence to read: "The court may modify an order reciting any action taken at the final pretrial conference only to prevent manifest injustice".

Restyled Rule 16(f)(1). For reasons stated in connection with restyled Rule 11(c)(3), insert the word "initiative" after "on its own".

Restyled Rule 17: Title. We recommend against changing the title of Rule 17. The change to "the plaintiff and defendant" eliminates a clear statement that the rule applies to all parties, not just the original plaintiff(s) and defendant(s), and suggests a two-party model of litigation.

Restyled Rule 17(a),(c). Subdividing these sections adds words, numbers and subtitles without increasing clarity. The first sentence in existing Rule 17(a) is more understandable than when it is broken down into two paragraphs, one with seven subparagraphs. The added formalism makes the list in Rule 17(c) seem exclusive rather than, as the present wording seems clearly to imply, flexible and inclusive. We recommend against these changes.

Restyled Rule 18(a). The change from "an original claim" to "a claim" is inconsistent with Restyled Rule 8(a) and may be read to imply that a "claim" is different from a "counterclaim", a "crossclaim", or a "third-party claim", an interpretation that could have numerous unfortunate consequences. Suggestion: change "a claim" to "an original claim".

Restyled Rule 19(b)(2). We recommend against breaking Rule 19(b)(2) into subparts. The sentence is clear and easily understood without them, and the subparts imply rigidity rather than flexibility and discretion.

Restyled Rule 21. We note a possible ambiguity: Might the change from "at any stage of the action" to "at any time" imply that Rule 21 can be used after judgment? Further, the word "initiative" has been deleted from the phrase: "on its own initiative". As noted in connection with other restyled rules, the phrase "on its own initiative" is a widely used term of art

(equivalent to "sua sponte"), and the deletion of the word "initiative" may cause confusion. In a sense, even when a motion is made, a court issues or refuses to issue an order "on its own". Suggestion: insert "initiative" after "on its own".

Restyled Rule 23(a). We recommend against the proposed change to "class claims and defenses" in (a)(3). One could read the proposed language to direct the court to match the putative class representatives' claims only against the common questions, and not against all of the questions, both common and individual, involved in the class members' claims.

Restyled Rule 23(b)(1). We recommend against the change from "individual members of the class" to "individual class members". There is a subtle difference in meaning; the proposed language could be confusing by juxtaposing "individual" and "class", and the existing language is familiar and incorporated in much case law.

Restyled Rule 23(b)(1)(B). We recommend retaining "would, as a practical matter, be dispositive" because it is more clear, idiomatic, and accurate than the proposed rewording, and saves adding a "would" later in the sentence. We suggest that adding "or" at the end of (b)(1)(B) might help to keep the alternative nature of the categories clear.

Restyled Rule 23(b)(3). We recommend retaining "common to members of the class". This wording emphasizes the individuality of the members of the putative class, while the proposed wording emphasizes that they are part of a class. The risk of changing the meaning of an important rule outweighs the stylistic benefit of replacing "of" with a possessive. Similarly, we recommend against changing "the interests of members of the class" in (b)(3)(A) to "the class members' interests," "litigation . . . by or against members of the class" in (b)(3)(B) to "litigation . . . by or against class members," and "members of the class" to "class members" in (c)(3)(B).

Restyled Rule 23(c). For reasons given elsewhere we recommend against the extent of subdivision in Restyled Rule 23(c)(2)(B). We also recommend changing the placement of the commas in Restyled Rule 23(c)(3)(B) to "to whom the . . . notice was directed and who have not requested exclusion, [added comma] and whom the court finds." The group that is eligible to be bound by the judgment is the group to whom notice was directed *and* who didn't request exclusion. Not requesting exclusion is not just part of a list. And the group that the court declares is bound by the judgment is that group. We also note a possible ambiguity in Restyled Rule 23(c)(4): Eliminating "brought or" in "brought or maintained " might imply that one must bring a class action as a "whole" and then have the court determine that it can be "maintained" only "with respect to particular issues". *Cf.* debates about the propriety of seeking (only) partial summary judgment under existing Rule 56. Suggestion: restore "brought or".

Restyled Rule 23(d). For reasons given elsewhere we recommend against the extent of subdivision in Restyled Rule 23(d)(1)(B).

Restyled Rule 25(a)(1). Replacing "the action shall be dismissed" with "the action . . . may be dismissed" appears to be a substantive change. Suggestion: unless there is unanimous agreement in the case law that the existing language confers discretion — in which event the matter should be discussed in the Committee Note — transfer this change to the style/substance track.

Restyled Rule 26(a)(1)(A)(iv). The deletion of the phrase "which may be entered in the action" arguably mandates disclosure of insurance agreements that are irrelevant to the pending action. Suggestion: insert "in the action" following the phrase "all or part of a possible judgment."

Proposed Deletion of Rule 26(a)(5). Elimination of redundancy is a commendable goal, but existing Rule 26(a)(5) actually settles some disputes. It dispels the argument, for example, that requests for admission are not discovery devices. *Joseph L. v. Conn. Dep't of Children & Families*, 225 F.R.D. 400, 402, 403 (D. Conn. 2005). Or that a Rule 45 subpoena duces tecum is not a discovery device. *Parker v. Learn the Skills Corp.*, 2004 U.S. Dist. LEXIS 21498, at *8 n.4 (E.D.Pa. 2004). In the real world, these issues come up with some frequency as parties try to elude discovery cutoff dates. A quick LEXIS search found more than a dozen cases using 26(a)(5) to deal with such arguments over the past 5 years. Deletion of this provision is, therefore, undesirable. Suggestion: retain (and restyle) existing Rule 26(a)(5).

Restyled Rule 26(a)(2)(B)(vi). Restyled Rule 26(a)(2)(B)(vi) is problematic because it omits information that is currently required to be disclosed. Existing Rule 26(a)(2)(B) requires each retained expert's report to disclose "the compensation to be paid for *the* study and testimony...." Restyled Rule 26(a)(2)(B)(vi) limits the disclosure to "a statement of *the witness's* compensation for study and testimony in the case". The problem is that "*the witness's* compensation for study and testimony" may be far less than "the compensation to be paid for *the* study and testimony". An economic expert, for example, is frequently an academic. The mass of data is crunched by a separate, non-testifying consulting firm (*e.g.*, Cornerstone, Analysis Group, FTI). The witness's "study" includes supervising, working with, and analyzing the work product of, the consulting firm, but the consulting firm is doing a great deal on its own. The current disclosure requirement captures everything done by the expert as well as the back-up firm because disclosure is not limited to the expert's individual compensation — it applies to "the compensation to be paid for *the* study and testimony", as opposed to limiting the disclosure to "*the witness's* compensation for study and testimony". (A similar problem arises when a PricewaterhouseCoopers (or other Big Four) partner is the retained expert and his/her firm does the backup work — disclosure should not turn on the question whether the testifying expert retention agreement is with the firm, rather than the individual.) Suggestion: retain the existing language.

Restyled Rule 26(b)(1). The restyling highlights, but does not cure, inconsistent terminology in the existing version of Rule 26. Thus, Restyled Rule 26(b)(1) encompasses "documents or other tangible things" while Restyled Rule 26 (b)(5) encompasses "documents, communications, or things", even though the items as to which privilege is claimed under 26(b)(5) must be producible under Rule 26(b)(1). The restyling should rectify this inconsistency, which extends to other rules as well. *See, e.g.*, Restyled Rules 34(a) ("documents" and "tangible things"); 34(c) (same); 45(a)(1)(A)(iii), (b)(1) and (c)(2)(A) (same); 45(c)(2)(B) ("designated materials"); 45(d)(2) (which appears to be misnumbered as the second 45(c)(2)) ("documents, communications, or things").

Restyled Rule 26(e). Deleting the phrase "to include information thereafter acquired" is problematic. According to the Note, the change was made because "[t]his apparent limit is not reflected in practice; parties recognize the duty to supplement or correct by providing information that was not originally provided although it was available at the time of the initial

disclosure or response. These words are deleted to reflect the actual meaning of the present rule". This analysis confuses the duty to supplement with the duty to correct. The words "or corrective" in the existing rule are confined to changing an answer based on information acquired after the original response was made. They are not a license to withhold information and provide it later through Rule 26(e). Currently, there is no limitation on the right to amend a prior discovery response. When parties amend discovery responses to correct an erroneous response based on information that they had at the time the original response was made, the correction is not based on Rule 26(e) but on their duty to the court to correct a false certification — the same duty that gives rise to the duty (and right) to correct in Rule 11(c)(1)(A). Compare amending and supplementing pleadings under Rule 15(a) vs. Rule 15(d). Suggestion: retain the existing language.

Restyled Rule 26(g)(1)(B)(ii). This provision raises an issue that recurs in the restyled rules (*see also* Restyled Rule 11(b)(i)). The existing phrase "cost of litigation" in Rule 26(g)(2)(B) is changed to "litigation costs" in Restyled Rule 26(g)(1)(B)(ii). "Cost of litigation" and "litigation costs" often do not mean the same thing. "Cost of litigation" is inclusive of attorney's fees, but the phrase "litigation costs" is a technical phrase that many times does not. "Litigation costs" is sometimes used in statutes as distinct from attorneys' fees (*e.g.*, False Claims Act, 31 U.S.C. § 3730(h)("litigation costs and reasonable attorneys' fees") — even Restyled Rule 68 uses the lone word "costs" in this sense to mean statutory costs, as in 28 U.S.C. § 1912. This, then, is potentially a substantive change. If intended, it should be included in the style/substance track; if change is not intended, the existing language should be retained.

Restyled Rule 26(g)(2). The last paragraph of existing Rule 26(g)(2) provides that, "[i] f a request, response, or objection is not signed, ... a party shall not be obligated to *take any action* with respect to it until it is signed". The restyled rule provides that, "[u]ntil the signature is provided, the other party has *no duty to respond*". If the unsigned item is an objection, no response is due. If the concept is that the unsigned paper is inoperative, the verb "respond" does not capture all scenarios covered by the rule. Suggestion: change "to respond" to "to take any action with respect to it".

Restyled Rule 29(b). The existing rule requires a written stipulation. Because a stipulation can be oral, this restyling is more than mere simplification or clarification of the existing text. The same omission appears in several other restyled rules (30(a)(2)(A), 30(b)(4), 31(a)(2)(A), 33(a)(1), 33(b)(2), 36(a)(3), 59(c)).

Restyled Rules 30(a)(2)(A) and (b)(4). The existing rules (30(a)(2) and 30(b)(7)) require a written stipulation. Because a stipulation can be oral, this restyling is more than mere simplification or clarification of the existing text. The same omission appears in several other restyled rules (29(b), 31(a)(2)(A), 33(a)(1), 33(b)(2), 36(a)(3), 59(c)).

Restyled Rule 30(b). This provision is inconsistent in substituting "audio" for "sound" in Restyled Rule 30(b)(3)(A) (vs. existing Rule 30(b)(2)) but then using "sound" again in Restyled Rule 30(b)(5)(B). There is no apparent reason for the inconsistency.

Restyled Rule 30(f)(1). There is a discrepancy between Restyled Rule 30(f)(1) and Restyled Rule 31(b)(3), both governing the reporter's delivery of transcripts. This discrepancy exists in the existing rules and is not corrected. Rule 30(f)(1) requires that the

transcript/recording be delivered to "the attorney who arranged for the transcript or recording", while Rule 31(b)(3) requires that it be delivered to "the party". It is suggested that they be identical and, perhaps, that they be drafted in terms of parties, rather than lawyers, to deal with *pro se* litigants. Further, the "notice of filing" subsection of this rule (Rule 30(f)(4)) and of Rule 31 (Rule 31(c)), should be deleted. Parties no longer file deposition transcripts with the clerk of court in the ordinary course — indeed, Rule 5(d) bars this practice. If transcripts are filed in connection with motion practice or similar events, other provisions of the rules cover the notice requirements. Suggestion: Refer these issues to the style/substance track.

Restyled Rule 31(a)(2)(A). The existing rule requires a written stipulation. Because a stipulation can be oral, this restyling is more than mere simplification or clarification of the existing text. The same omission appears in several other restyled rules (29(b), 30(a)(2)(A), 30(b)(4), 33(a)(1), 33(b)(2), 36(a)(3), 59(c)).

Restyled Rule 31(b)(3). As noted in connection with Rule 30(f)(1), there is a discrepancy between Restyled Rule 31(b)(3) and Restyled Rule 30(f)(1), both governing the reporter's delivery of transcripts. This discrepancy exists in the existing rules and is not corrected. Rule 30(f)(1) requires that the transcript/recording be delivered to "the attorney who arranged for the transcript or recording", while Rule 31(b)(3) requires that it be delivered to "the party". It is suggested that they be identical and, perhaps, that they be drafted in terms of parties, rather than lawyers, to deal with *pro se* litigants. Further, the "notice of filing" subsection of this rule (31(c)), like the notice provision of Rule 30 (Rule 30(f)(4)), should be deleted. Parties no longer file deposition transcripts with the clerk of court in the ordinary course — indeed, Rule 5(d) bars this practice. If transcripts are filed in connection with motion practice or similar events, other provisions of the rules cover the notice requirements. Suggestion: Refer these issues to the style/substance track.

Restyled Rule 31(c). In light of the 2000 amendment to Rule 5(d), the duty to file arises only when discovery is used in the proceeding or the court orders it filed, but in those circumstances there should be no need for separate notice. Suggestion: delete this provision, explaining why in the Note.

Restyled Rules 33(a)(1) and (b)(2). The existing rules (33(a) and (b)(3)) require a written stipulation. Because a stipulation can be oral, this restyling is more than mere simplification or clarification of the existing text. The same omission appears in several other restyled rules (29(b), 30(a)(2)(A), 30(b)(4), 31(a)(2)(A), 36(a)(3), 59(c)).

Restyled Rule 33(a)(2). Pace Professor Cooper, the removal of "necessarily" from the phrase "not necessarily objectionable" is a substantive change. There are times when a request for an opinion or contention may be objectionable — *e.g.*, an interrogatory addressed to a non-expert that seeks an opinion "based on scientific, technical, or other specialized knowledge". Counsel should not have to quarrel about whether this is really a relevance objection or whether it is precluded by the elimination of the right to object to opinion or contention requests on that basis. Suggestion: retain "necessarily".

***See* the Restyling Project Comment regarding Rule 26(b)(1)** and inconsistent terminology in various rules — "documents and tangible things", "designated materials", and "documents, communications, or things".

Restyled Rule 36(a)(3). The existing rule requires a written stipulation. Because a stipulation can be oral, this restyling is more than mere simplification or clarification of the existing text. The same omission appears in several other restyled rules (29(b), 30(a)(2)(A), 30(b)(4), 31(a)(2)(A), 33(a)(1), 33(b)(2), 59(c)).

Restyled Rules 36(a)(5)-(6). There is no apparent need to separate Restyled Rules 36(a)(5) and (6), both of which deal with objections. Fewer subdivisions would be desirable.

Restyled Rule 37(b)(2)(A)(i). This raises an issue that recurs in the restyled rules (*see also* Restyled Rules 11(c)(2) and 50(e)). Introduction of the phrase "the prevailing party" is confusing. That phrase usually refers to the winner of the case, as it does in both existing and Restyled Rule 54(d)(1). What Restyled Rule 37(b)(2)(A)(i) is referring to is the party prevailing on the motion. Suggestion: substitute "the party obtaining the order" for "the prevailing party".

Restyled Rule 37(c)(1). The restyling fails to address the principal drafting flaw in the existing text — namely, that the word "disclose" in the first dependent clause refers to mandatory disclosure, while the word "disclosed" later in the same sentence means revealed via disclosure or discovery. See Restyled Rule 26(e)(1)(A). The ambiguity should be clarified.

Restyled Rule 38(e). Existing Rule 38(e) refers to "an admiralty or maritime claim within the meaning of Rule 9(h)". Restyled Rule 38(e) refers to "a claim designated as an admiralty or maritime claim under Rule 9(h)". The latter description seems open to a narrower interpretation than the language in the existing rule: "Designated" claims could be taken to refer only to claims—in the language of existing Rule 9(h)—that "[a] pleading or count ... identif[ies] ... as an admiralty or maritime claim", and not to claims that, though not so identified, are considered admiralty claims because they are "cognizable only in admiralty". Indeed, Restyled Rule 9(h)(1) contrasts claims "designated" as admiralty or maritime claims with "claims cognizable only in the admiralty or maritime jurisdiction ... whether or not so designated". Suggestion: retain the existing language, "an admiralty or maritime claim within the meaning of Rule 9(h)".

Restyled Rule 39(a)(1). Existing Rule 39(a) refers to "an oral stipulation made in open court and entered in the record". It is not clear that Restyled Rule 39(a)(1)'s omission of the reference to "open court" is merely a stylistic change. *See, e.g., Tray-Wrap, Inc. v. Six L's Packing Co., Inc.*, 984 F.2d 65, 68 (2d Cir. 1993) (noting, but avoiding, "the question whether a conference call (made without a court reporter present) can fairly be regarded as 'open court'"); *compare* BLACK'S LAW DICTIONARY (8th ed. 2004) (giving, as first entry for "open court": "A court that is in session, presided over by a judge, attended by the parties and their attorneys, and engaged in judicial business. *Open court* usu. refers to a proceeding in which formal entries are made on the record. The term is distinguished from a court that is hearing evidence in camera ...."). Although the issue may be of less practical significance due to the rule in at least some circuits that a party can waive a prior jury demand through its conduct, *see, e.g., Middle Tennessee News Co., Inc. v. Charnel of Cincinnati, Inc.*, 250 F.3d 1077, 1083 (7th Cir. 2000), the restyling arguably changes meaning. Suggestion: add the words "in open court" after "so stipulate on the record".

Restyled Rule 41(c)(2). Existing Rule 41(c) provides that if no responsive pleading is served to a counterclaim, cross-claim or third-party claim, the claimant's voluntary dismissal

pursuant to Rule 41(a)(1) "shall be made ... before the introduction of evidence at the trial or hearing". Restyled Rule 41(c)(2) changes "the" to "a" thus: "before evidence is introduced at a hearing or trial". The restyled version could be interpreted to refer to a pretrial hearing at which evidence is introduced. The existing version, by using "the", appears to denote the ultimate trial on the merits. (Although existing Rule 41(c) refers to "the trial *or hearing*", "hearing" may have been used to denote trials on equitable claims.) Changing "the" to "a" may, in this context, effect more than a stylistic change.

Restyled Rule 43(a). Although existing Rule 43(a) requires both "good cause shown" and "compelling circumstances", the restyled rule omits the "good cause" requirement. The latter might seem redundant, since compelling circumstances would seem to provide good cause. However, the phrase "good cause *shown*" appears to contemplate that a party has made the relevant showing (as distinct from a situation in which the court on its own reaches the conclusion that good cause exists). Moreover, the Advisory Committee Note to the 1996 Amendments repeatedly refers to both "good cause" and "compelling circumstances", suggesting that the inclusion of both phrases was hardly inadvertent; rather, the repetition of both phrases suggests an intention to emphasize the stringent nature of the test. "Good cause" might also place particular emphasis on whether the requesting party is guilty of an oversight that led to the need for the request. *See* 1996 Advisory Committee Note ("A party who could reasonably foresee the circumstances offered to justify transmission of testimony will have special difficulty in showing good cause and the compelling nature of the circumstances.").Suggestion: add "For good cause shown" before "[i]n compelling circumstances".

Restyled Rule 45(a)(3). Replacing "on behalf of" with "from" suggests that the attorney must obtain the subpoena from the identified courts. The entire point of this provision is just the opposite. Suggestion: retain the existing language.

Restyled Rule 45(b)(1). Eliminating the reference to Rule 5 at the end of the provision is not helpful. Because a subpoena is process, the reference to Rule 5 eliminates any confusion that service need be effected on a party pursuant to Rule 4. Suggestion: retain the reference to Rule 5.

Restyled Rule 45(c)(2)(B)(ii). Adding the new phrase "Inspection and copying may be done only as directed in the order" arguably precludes the parties from agreeing to production after an objection has been lodged. The existing rule provides that, once an objection has been made, a party "shall not be entitled ...except pursuant to an order". The lack of entitlement does not foreclose agreement between the parties. The proposed restyling seems to foreclose consensual resolution of the objection. Suggestion: replace "Inspection and copying may be done only as directed in the order" with "The serving party shall not be entitled to inspect or copy except as directed in the order". *See also* the Restyling Project Comment regarding Restyled Rule 26(b)(1) and inconsistent terminology in various rules, including "documents and tangible things" (Restyled Rule 45(a)(1)(A)(iii), (b)(1) and (c)(2)(A)), "designated materials" (45(c)(2)(B)); and "documents, communications, or things" (45(d)(2), which appears to be misnumbered as the second 45(c)(2)).

Restyled Rule 48. The assertion that "[a] jury must have no fewer than 6" members is not strictly true. Although the jury must start out with at least six members, Rule 48 goes on to note that a verdict may be taken from a jury that has been reduced in size to fewer than six if the

parties so stipulate. The phrasing of the existing rule is more accurate. Suggestion: begin the restyled rule "The court must seat a jury of no fewer than 6 ...."

Restyled Rule 49(a)(2). The restyling sacrifices clarity for brevity (What does "it" refer to? Is the jury supposed to enable or to be enabled?). In addition, the restyled version omits the existing reference to "explanation". "Explanation and instruction" may convey a broader range of acts than "instruct" (the word employed in the proposed restyling). For example, "explanation" would appear to include explanations given by the court in response to jurors' questions concerning the instructions or the special verdict form. Suggestion: substitute for the language in Restyled Rule 49(a)(2) "The court must give the instructions and explanations that are necessary to enable the jury to make findings on each submitted issue"

Restyled Rule 49(a)(3). A party waives its jury trial right on any issue not submitted to the jury unless, before the jury retires, the party demands submission of that issue. It is not necessarily true, however, that, as the restyled rule states, "[i]f *the* party does not demand submission, the court may make a finding on the issue". If another party has properly demanded submission of the issue, then the court may not make such a finding. Suggestion: substitute for the third sentence of Restyled Rule 49(a)(3) "If no party demands submission, the court may make a finding on the issue".

Restyled Rule 49(b)(1). The second sentence seems problematic for reasons similar to those discussed above with respect to Restyled Rule 49(a)(2). Suggestion : substitute for the second sentence of Restyled Rule 49(b)(1) "The court must direct the jury to answer the questions in writing and to render a general verdict, and must give the instructions and explanations that are necessary for it to do so".

Restyled Rule 51(c)(1). Although existing Rule 51(c)(1) refers to objections "to an instruction", Restyled Rule 51(c)(1) refers to objections "to a proposed instruction". The latter is too narrow, because it does not encompass situations in which a party first learns of the offending instruction at the time that it is given by the judge. Suggestion: change "a proposed instruction" to "an instruction".

Title of Restyled Rule 52. The restyled rule's title refers to "Findings and Conclusions in a Nonjury Proceeding." This seems too narrow, since Rule 52 also covers actions tried with an advisory jury. Suggestion; change "Findings and Conclusions in a Nonjury Proceeding" to "Findings and Conclusions by the Court."

Restyled Rule 54(a). "Must" makes no sense here. "Should" better captures the sense and understanding of the existing "shall". This sentence is advice to the court. There is no sanction for its violation, nor should there be. If a judgment includes extraneous matter, the judgment should still be given effect, according to Wright, Miller & Kane § 2652, at 17. Suggestion: change "must not include" to "should not include" in the second sentence.

Restyled Rule 54(b). The locutions "direct the entry of" (instead of "enter") and "entry of" (instead of "court enters"), which are preserved in Restyled Rules 59(a)(2) and 54(d)(2)(B)(i), respectively, more accurately reflect that it is the clerk who actually enters judgment under Rule 58(b). Suggestions: change "the court may enter" to "the court may direct the entry of" in the first sentence and "the court enters" to "entry of " in the second sentence.

Restyled Rule 54(d)(1). The existing rule requires an express statute or rule. The case law indicates that this requirement is not surplusage, ensuring that the conflicting provision specifically treats costs in a contrary manner. *See United States ex rel. Lindenthal v. General Dynamics Corp.*, 61 F.3d 1402, 1413 (9th Cir. 1995) ("On its face, this subsection does not constitute an 'express provision' regarding 'costs'; the word 'costs' is simply absent from this provision."). In addition, changing "unless the court otherwise directs" in the existing rule to "unless ... a court order provides otherwise" in the restyled rule may be read to widen the exception to include a court's standing order in the nature of a local rule. Even if "direct" and "order" are synonyms, the verb "direct" is more likely to be read as referring to a case-specific direction rather than a standing order. Suggestion: change the clause to read: "Unless a federal statute or these rules expressly provide otherwise or the court directs otherwise". Finally, given the exception for a court order or direction, the existing rule's "shall" should as a matter of logic be translated as "must," not "should". The restyled rule's deletion of "as of course" also calls for the use of "must", because that phrase was meant to create a mandatory presumption in favor of allowing costs in the absence of the court's specific explanation to the contrary, according to 10 Moore § 54.101[1][a]. Suggestion: change "should be allowed" to "must be allowed".

Restyled Rule 54(d)(2). Suggestion: add "or a magistrate judge" in the heading of Restyled Rule 54(d)(2)(D).

Restyled Rule 55(b)(2). The omission of "to the court" after the word "apply" creates an ambiguity. A clerk or the court can enter or direct entry of a default judgment. To whom should the party apply? The rest of the subrule is passive or permissive. The heading clarifies, but headings are not supposed to carry weight. Suggestion: reinsert "to the court" after "must apply".

A hearing on the motion is required, as indicated by the reference in the existing rule and in the restyled rule's third sentence to "the hearing". An evidentiary hearing is not required, but an opportunity to appear before the judge is mandatory. The restyled rule's fourth sentence has lost this sense and might be read to mean that, in ordinary cases, no hearing at all is necessary. Suggestion: insert the word "evidentiary" before "hearings".

Restyled Rule 56(a). The existing rule says "after the expiration of 20 days". This creates a dead zone of twenty days, a period of inaction that does not include either the day of commencement or the day of the motion. Without that phrase, the generally applicable Rule 6(a) on computation of time would create an ambiguity by including the last day of a counting period, so that an action could be taken on that day. With that phrase, however, existing Rule 56(a) clearly means that the claimant cannot move until Day 21. The restyled rule's language is not as clear in prohibiting a motion on Day 20. Suggestion: insert "have passed" after "20 days" in Restyled Rule 56(a)(1) See Restyled Rule 62(a), another rule that establishes a dead zone of inaction, rather than the more commonly provided period within which an action must be taken.

Restyled Rule 56(d)(1). Federal courts claim power to enter summary judgment *sua sponte*. See Wright, Miller & Kane § 2720. But Rule 56 has never addressed it. Indeed, existing Rule 56(d) expressly limits this subrule to court action upon motion, as the other subdivisions in the existing and Restyled Rule 56 do. Notwithstanding the heading, the restyling of Rule 56(d) arguably creates a power of *sua sponte* partial summary adjudication. Suggestion: reinsert "on motion" after "If" in Restyled Rule 56(d)(1).

Restyled Rule 57. The replacement of "under the circumstances and in the manner provided in Rules 38 and 39" with "under Rules 38 and 39" may lead some litigants to argue that the restyled rule creates (or purports to create) a jury trial right in any declaratory-judgment action. Suggestion: restore the existing language.

Restyled Rule 59(a). The existing rule clearly conveys the sense of limiting the grounds to proper reasons for granting a new trial. The restyled rule suggests that any reason for a new trial that formerly survived in a single case authorizes a new trial today. Suggestion: replace "has" with "could have" before "heretofore", or insert "properly" before "granted", in Restyled Rule 59(a)(1)(A)&(B).

In addition, the existing rule's convoluted sentence structure implies an "or" between (1)(A) and (1)(B). The clear restyling makes the use of "and" more obviously illogical. Note that Restyled Rule 58(c) uses "or" in this circumstance. Suggestion: change "and" to "or" at the end of Restyled Rule 59(a)(1)(A).

Restyled Rule 59(c). The existing rule requires a written stipulation. Because a stipulation can be oral, this restyling is more than mere simplification or clarification of the existing text. The same omission appears in several other restyled rules (29(b), 30(a)(2)(A), 30(f)(3), 31(a)(2)(A), 33(a)(1), 33(b)(2), 36(a)(3)).

Restyled Rule 60(a). The restyled heading is unfortunately phrased and misleading. Suggestion: change the heading to "Correction of Clerical Mistakes and of Oversights and Omissions".

Restyled Rule 60(b). The restyled heading omits something covered by the rule's text, namely, a "final ... proceeding". If it is surplusage it should be omitted from the rule's text as well as its heading. In fact, the word "final" was added in 1948, when the Advisory Committee explained that this word "emphasizes the character of the judgments, orders or proceedings from which Rule 60(b) affords relief". So it seems that the Committee meant to include "final proceedings" in the list, whatever they might be. Suggestion: add "or Proceeding" at the end of the heading.

Restyled Rule 60(d)(2). The use of the present tense is jarring and perhaps mischievous. Suggestion: change "is" to "was".

Restyled Rule 60(e). The restyled heading is incomplete. Suggestion: insert "Bills and" before "Writs".

Restyled Rule 61. The restyling here may affect meaning. The problem arises because existing Rule 61 addresses a matter of evidence law that is also addressed in Fed.R.Evid. 103 (and, for appellate purposes, 28 U.S.C. § 2111). Chief Justice Rehnquist made it clear that the Evidence Rules are not to be restyled because they are substantive, and this proposal reflects why. Existing Rule 61 and Fed.R.Evid. 103(a) and (d) consistently use the modifier "substantial", while the restyled rule deletes it from the first sentence ("justice", not "substantial justice") but retains it in the second ("substantial rights"). Any change may be interpreted as substantive. Moreover, Rule 61 is not entirely consistent with Rule 103. We urge that the Committee not restyle Rule 61 but rewrite it to incorporate the standards of Fed.R.Evid. 103 and place it on the style/substance track.

Restyled Rule 62(a). The court cannot order that a judgment be automatically stayed. Suggestion: delete "automatically".

Restyled Rule 62(b). We note an inconsistency between the description of the nature of the Rule 52(b) motion in Restyled Rule 62(b)(2) ("findings") and in Restyled Rule 58(a)(2) ("findings of fact"). *See also* Restyled Rule 59(a)(2).

Restyled Rule 62(c). Adding the word "order" is unnecessary in light of the definition of judgment in Rule 54(a) and might indeed cause confusion. Moreover, its addition does not conform to the phrasing used in Restyled Rule 62(a)(1). Suggestion: delete "order" after "interlocutory".

The text of the restyled rule fails to limit the authority of the court to the period while the appeal is pending and does not make clear that the authorized injunction should last only as long as the appeal is pending. Suggestion: reinsert "during the pendency of the appeal" or, alternatively, insert "while the appeal is pending", after "grant an injunction".

Existing Rule 62(c) expresses the idea of proper security. The restylers express this same idea with "appropriate" in Restyled Rule 62(b), and they should do the same here. Suggestion: insert "appropriately" before "secure", or change "on terms for bond or other terms that secure the opposing party's rights" to "on appropriate terms for the opposing party's security" (the formulation in Restyled Rule 62(b)).

Restyled Rule 62(d). The reference to the actions described in Rule 62(a)(1) or (2) rather than to the whole of Rule 62(a) may cause some to think that a stay is unavailable in those actions (rather than available only pursuant to a special court order). *See* Wright, Miller & Kane § 2905, at 519. Suggestion: change "except in an action described in Rule 62(a)(1) or (2)" to "subject to the exceptions contained in Rule 62(a)".

Restyled Rule 62(f). The antecedent of "where the court sits" is ambiguous. This would leave "under state law" as possibly meaning any state's law. Suggestion: change "under state law" to "under the law of the state".

Restyled Rule 62(g). Under the existing rule, the qualifier of a pending appeal does not apply to the actions now included in clause (3) of the restyled rule. This is significant because of the appellate court's powers under the All Writs Act to reach down into the district court before an appeal is actually taken. Moreover, the introductory qualifier of the restyled rule sounds a bit silly: the rule does not limit the appellate court's powers, but only while an appeal is pending? In fact, the time-period qualifier should modify the appellate court's order, not the rule's effect. Suggestion: retain "during the pendency of an appeal", or insert "while an appeal is pending", in (1) and (2).

Restyled Rule 63. The restyling has inadvertently elided the situation of a presiding judge — who happened not to have commenced the hearing or trial but conducted part of it — being unable to proceed. Suggestion: replace "commenced" with "conducted" in the first sentence.

Restyled Rule 64(a). By omitting the specific limitations, "under the circumstances and in the manner provided" by state law, the restyled rule arguably allows a federal court to employ

the provisional remedies that are available in state practice without importing the accompanying state law limitations on those remedies. Suggestion: change the second part of the first sentence to read: "every remedy that provides for seizing a person or property to satisfy the potential judgment is available under the circumstances and in the manner provided by the law of the state where the court is located".

Restyled Rule 64(b). We note that the use of bullet points raises irksome practical problems. When a lawyer quotes the text of a rule in a sentence, what does he or she do with a bullet? Are ellipses required? Must the bullet point appear?

Restyled Rule 65(a). The reference in the existing rule to "the hearing" is sometimes thought to imply that a hearing on an application for a preliminary injunction is required. *See* 11A Wright & Miller § 2947, at 126 ("Some type of hearing also implicitly is required by subdivision (a)(2)"); *see id.* § 2951, at 253 (noting that a TRO "is designed to preserve the status quo until there is an opportunity to hold a hearing on the application for a preliminary injunction"); cf. id. § 2949, at 225-31 (discussing the views of various courts as to when hearings are required). The proposed change from "the hearing" to "a hearing" makes the inference that a hearing is required somewhat less likely.

The need for a hearing, however, has also been inferred from the requirement of notice, which is retained in the proposed revision. *See* 11A Wright & Miller § 2949, at 229; *Sims v. Greene*, 161 F.2d 87, 88 (3d Cir. 1947) ("Notice implies an opportunity to be heard"); 13 Moore's § 65.21 (stating that the notice requirement "necessarily implies the holding of a hearing", but that no hearing is necessary when it would be a futile exercise).

We believe that some of the uncertainty evinced by courts and commentators reflects the common failure to distinguish between an opportunity to be heard, which need not include oral argument, let alone the submission of evidence, and a "hearing" before a judge. To the extent, however, that some courts have read the existing rule to require a "hearing" before a judge, the restyled rule may be thought to represent a change in meaning. Suggestion: include this proposed change in the style/substance track.

Restyled Rule 65(b)(1). The 1966 amendment was designed to "make it plain that informal notice, which may be communicated to the attorney rather than the adverse party, is to be preferred to no notice at all". 1966 Advisory Committee Note. *See* 11A Wright & Miller § 2941, at 36-37. By changing "without written or oral notice" to "without notice", and deleting the reference the "party's attorney" being heard in opposition, this point may be obscured. In particular, some might contend that the notice referred to in the restyled rule contemplates service rather than a telephone call to the attorney, who might be far more readily available than the party. Suggestion: add "written or oral" before "notice".

Restyled Rule 65(c): security. Although the existing rule can be read as mandating that security be given whenever a restraining order or preliminary injunction is issued, courts have frequently concluded that they have discretion to waive the posting of security. *See* 11A Wright & Miller § 2954, at 292-93 (stating that "it has been held that the court may dispense with security altogether if the grant of an injunction carries no risk of monetary loss to the defendant").

Waiver of the bond requirement is common in public interest litigation and cases brought by indigents. The leading case states bluntly, "it is clear to us that indigents, suing individually or as class plaintiffs, ordinarily should not be required to post a bond under Rule 65(c)." *Bass v. Richardson*, 338 F. Supp. 478, 490 (S.D.N.Y. 1971). *See* 11A Wright & Miller § 2954 at 298 (describing *Bass* as "correct" and "followed by other courts"); *id.* at 300-03 (discussing approvingly cases that relax the bond requirement in public interest litigation); *see also* 13 Moore's at § 65.52 (noting circumstances in which court "may waive security").

The change from "[n]o restraining order or preliminary injunction shall issue except upon the giving of security". to "the court must require the movant to give security" would appear to remove the discretion that, correctly or incorrectly, courts have claimed under the existing rule. Such a change would be significant in cases where the movant lacks the resources to post security. Suggestion: if intended, this change should be included in the style/substance track; indeed, we recommend treatment there in any event, with language that better reflects existing practice.

Supersession. Some courts that have permitted injunctions without security have done so in reliance on the particular statute being enforced. *See Bass*, 338 F. Supp. at 491 ("If any difference exists between the language of Rule 65(c) and Congressional intent clearly embodied in the remedial statutes at issue, the federal statutes control."); 11A Wright & Miller § 2954, at 302 (using this quotation from the *Bass* case to summarize the "thrust of the argument for a court exercising its discretion under Rule 65(c) in a permissive fashion"); *Van de Kamp*, 766 F.2d at 1325-26 (discretion to dispense with the security requirement when plaintiff cannot afford bond, particularly where Congress has provided for private enforcement of a statute); *see also* 11A Wright & Miller § 2954, at 300 (noting that waiving the security requirement for the indigent "is consistent with the purposes of actions permitted in forma pauperis")

Valid rules supersede previously enacted statutes with which they are in conflict. The promulgation of the restyled rule thus might not only eliminate the discretion to waive a security bond that is frequently found under the existing rule. It might also eliminate the discretion to waive a security bond that is now based on federal statutes.

Restyled Rule 65(d)(2)(C): binding nonparties. The antecedent of the word "them" in the existing rule is ambiguous. It is not clear whether it refers to the parties to the action – binding those in concert with the parties – or refers to the entire preceding list – binding those in concert with the officers, agents, employees, and attorneys of the parties as well. *Compare* 11A Wright & Miller § 2947, at 126 (binds those "acting in concert with defendant") *with id.* § 2956, at 337 (binds those "acting in concert with a named defendant or his privy") and *id.* at 345 (binds a person who "acts in concert with a person who has been enjoined"). *Compare New York v. Operation Rescue*, 80 F. 3d 64, 70-71 (2d Cir. 1996) (upholding contempt citation of nonparty on basis of finding that he acted in concert with an agent of the defendant; respondent apparently challenged whether the person with whom he was in concert was an agent of the defendant, not whether acting in concert with an agent was sufficient) *with Paramount Pictures Corp. v. Carol Publishing*, 25 F. Supp. 2d 372, 374 (S.D.N.Y. 1998) ("Because a court's power to enjoin is limited to the conduct of a party, it is the relationship between the party enjoined and the nonparty that determines the permissible scope of an injunction"). *See also Alemit Mfg. v. Staff*, 42 F. 2d 832, 833 (2d Cir. 1930) (Learned Hand, J.) (stating, in a pre-Rules decision, that a

nonparty "must either abet the defendant, or must be legally identified with him," in order to be held in contempt).

The restyled rule would eliminate the ambiguity in favor of broader liability. Moreover, to the extent that the restyled rule broadened the power of a court of equity to bind nonparties, it might run afoul of the substantive rights limitation of the Rules Enabling Act. Suggestion: delete "or (B)" from Restyled Rule 65(d)(2)(C), or include this proposal in the style/substance track.

Restyled Rule 65(d)(2): notice. The text of the existing rule is also ambiguous regarding whether the notice requirement applies to the entire list of persons who might be bound by an injunction or restraining order or modifies only "those persons in active concert or participation". Most commentators sensibly conclude that the notice requirement applies to all, so that even a party is not bound by an injunction or restraining order until he receives notice. *See* 13 Moore's § 65.61[3] ("A party . . . or nonparty . . . who has not received 'actual notice' of an injunction or restraining order will not be bound by its terms."); 11A Wright & Miller § 2956, at 337 ("Another prerequisite for binding a person to an injunction is that the person must have notice of the order."); id. at 351-52 ("Of course . . . an officer ... must have notice of the injunction to be held in contempt for acting in concert with the corporation."); *id.* § 2960, at 381 (stating that contempt requires finding that "party to be charged had notice of the order"); *but see Dole Fresh Fruit Co. v. United Banana Co.*, 821 F. 2d 106, 109 (2d Cir. 1987) (noting the ambiguity and concluding that officers and agents, servants, employees and attorneys need not receive actual notice of the injunction, but vacating the contempt order on other grounds).

The restyled rule, however, places the notice requirement in subsection (2)(C), thereby limiting its application to those described in subsection (2)(C). By its terms, then, the restyled rule would hold parties, officers, agents, servants, employees, and attorneys bound by an injunction or restraining order – and subject to punishment for contempt – even when they lacked notice of the injunction or restraining order. Suggestion: insert "who receive actual notice of the order by personal service or otherwise" after "the following" (deleting it in Restyled Rule 65(d)(2)(C)). Alternatively, this proposal should be included in the style/substance track.

Restyled Rule 66: court of appointment. The existing rule governs actions involving receivers appointed by federal courts. As the Advisory Committee explained, the title was expanded to "make clear the subject of the rule, i.e., federal equity receivers", while the "[c]apacity of a state court receiver to sue or be sued in Federal court is governed by Rule 17(b)". 1946 Advisory Committee Note; *see also* 13 Moore's § 66.08 ("A federal equity receiver's capacity to sue in any district court contrasts with the capacity of state-appointed receivers."). Moreover, the second sentence of the existing rule "deals with suits by or against a federal equity receiver". 1946 Advisory Committee Note. *See also* 12 Wright & Miller § 2982, at 15-16 ("Rule 66 applies exclusively to equity receivers, and only to those that are appointed by federal courts"). As Judge Learned Hand once explained:

> the phrase "appointed by the court", is not at all appropriate to an appointment by a state court . . . ; the natural reading is that the practice of the federal court which appoints the receiver shall govern his administration under its supervision. Had the intent been to make the rule apply to all receivers, we should expect the indefinite participle: "appointed by a court."

Bicknell v. Lloyd-Smith, 109 F.2d 527, 528-29 (2d Cir. 1940).

By deleting "appointed by federal courts" from the title, and changing "appointed by the court" to "court-appointed", the restyled rule would appear to govern actions brought by or against receivers appointed by state courts. Indeed, the proposed language is quite similar to the phrasing that Judge Learned Hand stated would have been used if a broader meaning were intended. Suggestion: restore the deleted language in the title and change "court-appointed" to "appointed by the court" in the second sentence (moving it after "officer").

Restyled Rule 66: practice and administration. The "practice" referred to by the existing rule has been understood to refer to the procedures by which a receiver obtains authority to act as an owner would, with "administration" understood to refer to the receiver's dealings with the property. *See* 12 Wright & Miller § 2982, at 17; *Phelan v. Middle States Oil*, 210 F.2d 360, 363 (2d Cir. 1954). This "practice" has generally been thought to include the appointment of a federal receiver in the first place. *See* 12 Wright & Miller, § 2982, at 18 (noting the absence of clear authority on the point); *id.* § 2983, at 33-35 (explaining why it is "sound" to treat the question of whether to appoint a receiver in a diversity action as a matter of federal law); 13 Moore's § 66.09 ("Federal law and federal practice govern the appointment of a federal equity receiver.")

By requiring a receiver to "administer an estate according to the historical practice in federal courts", the restyled rule obscures both of these points. Unlike the existing rule – in which "practice" describes the procedure by which the receiver gets various powers – the restyled rule appears to use the term "practice" to describe how the receiver is to administer the estate. As a result, the restyled rule undermines the use of traditional federal practice to govern the procedure by which the receiver gets various powers. In particular, it undermines the basis for using traditional federal practice to govern the appointment of receivers. Suggestion: restore the existing second sentence, changing "rules promulgated by the district courts" to "a local rule".

Restyled Rule 67(b). The change from "or any like statute" to "and any like statute" could be argued to require that money be handled in accordance with all such statutes, not simply compliance with one or the other. Suggestion: change "and" to "or".

Restyled Rule 68(a) and (c): timing. The existing rule requires the offer to be made more than 10 days before trial; the restyled rule requires the offer to be made at least 10 days before trial. The restyled rule, unlike the current rule, permits an offer to be made exactly 10 days before trial. In short, $x > 10$ is not the same as $x \geq 10$. If intended, this change should be included in the style/substance track; if change is not intended, the existing language should be retained.

The existing rule measures the 10 days explicitly from the day the trial "begins", or, in the case of an offer after the determination of liability, from the "commencement" of the hearing. By deleting these terms, the restyled rule may increase ambiguity. *See Greenwood v. Stevenson*, 88 F.R.D. 225, 228-29 (D.R.I. 1980) (concluding that a trial begins for the purpose of Rule 68 "when the trial judge calls the proceedings to order and actually commences to hear the case," not with jury selection). Suggestion: restore the deleted language.

Restyled Rule 68(a): conditional offers. It is unclear under the existing rule whether an offer can be conditioned on acceptance by all plaintiffs. *See* 13 Moore's § 68.04[9] (describing this as the "most problematic multi-party situation"); *Amati v. City of Woodstock*, 176 F.3d 952, 958 (2d Cir. 1999) (finding it permissible for a defendant to impose such a condition, but leaving open question whether it is effectual to shift costs to plaintiffs who did accept). The proposed change from "judgment . . . for the money or property or to the effect specified in the offer" to "judgment on specified terms" would make it more difficult to contend that an offer cannot be conditioned on acceptance by all plaintiffs.

Restyled Rule 68(a): equitable relief, class actions, and judicial discretion. There is some question whether the existing rule applies to actions for equitable relief. *See* 12 Wright & Miller § 3001.1, at 79 (noting suggestions that the rule does not apply in actions for equitable relief but rejecting those suggestions); *Chathas v. Local 134 IBEW*, 233 F.3d 508, 511 (7th Cir. 2000) ("Rule 68 offers are much more common in money cases than in equity cases, but nothing in the rule forbids its use in the latter type of case.") The proposed change from "judgment . . . for the money or property or to the effect specified in the offer" to "judgment on specified terms" would make it more difficult to contend that the rule does not apply to offers to accept a particular equitable decree.

There is also dispute whether the existing rule applies to class actions. *See* 13 Moore's § 68.03[3] (noting "conflict in the few decisions addressing whether Rule 68 should apply to class actions" and stating that it is "questionable whether the offer of judgment rule should apply to cases such as class or derivative actions that require judicial approval of a settlement"); Preliminary Draft of Proposed Amendments, 98 F.R.D. 337, 363, 367 (1983) (proposed amendment to make clear that the rule does not apply to class or derivative actions); *Weiss v. Regal Collections*, 385 F.3d 337, 344 n.12 (3d Cir. 2004) (Scirica, C.J.) ("Courts have wrestled with the application of Rule 68 in the class action context, noting Rule 68 offers to individual named plaintiffs undercut close court supervision of class action settlement, create conflicts of interests for named plaintiffs, and encourage premature class certification motions"); *Schaake v. Risk Management Alternatives, Inc.*, 203 F.R.D. 108, 111 (S.D.N.Y. 2001) ("it has long been recognized that Rule 68 Offers of Judgment have no applicability to matters legitimately brought as class actions pursuant to Rule 23").

If Rule 68 applies to equitable relief and class actions, the court under the existing rule retains authority to reject an accepted offer. *See* 12 Wright & Miller § 3005, at 109-10 (asserting that while Rule 68 offers "may include provision for a specified injunctive regime", the "court cannot be compelled to enter the agreed judgment even though it emerged from a Rule 68 offer and acceptance" and that "Rule 68 cannot remove th[e] authority and duty" of a court to determine whether the settlement of a class action is acceptable). *See also Acceptance Indemnity Insurance v. Southeastern Forge*, 209 F.R.D. 697, 698-99 n.2 (M.D. Ga. 2002) (concluding that, in light of Rule 54, an accepted Rule 68 offer of judgment that does not include all claims and all parties does not result in a final judgment).

These concerns are related: one way in which the existing rule can be accommodated to equitable relief and class actions is through the availability of discretion to decline to enter an agreed judgment or decree. The proposed rule, on the one hand, strengthens arguments that it applies to equitable relief, while weakening arguments for discretion to decline to enter agreed judgments. Suggestion: change the last sentence of Restyled Rule 68(a) to: "Except in cases

where court approval of the judgment is required, the clerk must then enter judgment".

Restyled Rule 68(a): mootness and supersession. There are conflicting decisions whether a Rule 68 offer to provide a plaintiff with the maximum he could recover individually moots a proposed class action. 12 Wright & Miller § 3001.1, at supp. 3; 3 Moore's § 68.03[3]. *See Schaake*, 203 F.R.D. at 112 (noting that to permit such a tactic would "allow defendants to essentially opt-out of Rule 23"); *Weiss*, 385 F.3d at 348 ("Absent undue delay in filing a motion for class certification . . . where a defendant makes a Rule 68 offer to an individual claim that has the effect of mooting possible class relief asserted in the complaint, the appropriate course is to relate the certification motion back to the filing of the class complaint.")

One basis for concluding that such an offer does not moot the class action has been that the statute being enforced contemplated class actions. *Id.* at 345 (stating that a "significant consideration" is that "Congress explicitly provided for class damages" and intended that the statute be enforced "by private attorneys general" and concluding that "[r]epresentative actions . . . appear to be fundamental to the statutory structure"). The promulgation of the restyled rule might make it more difficult to rely on such statutes, for reasons discussed in connection with Rule 65(c).

Restyled Rule 68(d): supersession. The existing rule's mandatory requirement that "the offeree must pay the costs" has been viewed as "overridden by a contrary statutory provision". 13 Moore's § 68.08[1]; *see R.N. v. Suffield Bd. of Ed.*, 194 F.R.D. 49, 52 (D. Conn. 2000) (relying on a statute that invokes Rule 68, but includes an exception). The promulgation of the restyled rule might be viewed as superseding such statutory provisions, for reasons discussed in connection with Rule 65(c).

Restyled Rule 69(a)(1). The existing rule's provision that proceedings "shall be in accordance with" state practice has been interpreted to require only substantial compliance rather than impose a "straitjacket". 13 Moore's § 69.03[3] ("common-sense should be applied to trump obviously technical state procedural requirements that would prevent enforcement of the judgment"). The restyled rule, by changing "shall be in accordance with" state procedure to "must follow" state procedure, threatens to eliminate some of that play and impose more of a straitjacket. There is no obvious solution to this problem, which implicates important issues of federalism and the limitations in the Rules Enabling Act. One possibility is to change the final clause to read "but the court need not follow state procedure that would prevent enforcement of the judgment, and a federal statute governs to the extent it applies".

Restyled Rule 71. The existing rule authorizes enforcement of orders in favor of nonparties in a wide variety of situations, such as an order to deliver property to the purchaser at a judicial sale, or to pay fees to a witness or to pay costs to a special master. *See* 12 Wright & Miller § 3032, at 174; 13 Moore's § 71.03. *See also In Re Employment Discrimination Litigation against Alabama*, 213 F.R.D. 592 (M.D. Ala. 2003) (declining to read "in favor of" to broadly reach incidental beneficiaries). The restyled rule changes "order . . . made in favor of" a nonparty to "an order [that] grants relief for a nonparty". It is not obvious, however, that orders in favor of purchasers, witnesses, and masters constitute "relief", as least as that term is used in Rule 8 (describing requirements of a "pleading which sets forth a claim for relief"). Suggestion: change "grants relief for" to "is made in favor of".

Restyled Rule 71.1(c)(4). The restyled rule refers to "the deposit", while the existing rule refers to "a deposit". Since a deposit may not be required pursuant to Restyled Rule 71.1 (j), the change could cause confusion. Suggestion: change "the deposit" to "a deposit".

Restyled Rule 72(a). Rule 72 was intended to track the Magistrate Judges' Act (28 U.S.C. § 631 *et seq.*) (the "Act"), which uses "hear and determine" instead of "hear and decide", the language in the restyled rule. Likewise, the restyled rule uses the word "decision" rather than the Act's "disposition". Given the history of this rule, we do not believe it is appropriate to change the statutory terms. Suggestion: change "decide" to "determine" and "decision" to "disposition".

Restyled Rule 72(b)(1). The restyling changes the language of the Act and the existing rule, "recommendation for disposition", to "recommended disposition". Although the second paragraph of the existing rule does use "recommended disposition", it does so only after having provided in the first paragraph that the "magistrate judge shall enter into the record a recommendation for disposition of the matter". As with the previous section, we suggest that the Act's language should be retained.

Restyled Rule 72(b)(3). The Act and the existing rule do not contemplate that the magistrate judge will make a "disposition", but merely a recommendation for disposition. Suggestion: change "disposition" to "recommendation for disposition".

Restyled Rule 73(a). The deletion of the phrase "any or all", the language used in the Magistrate Judges' Act (28 U.S.C. § 631 *et seq.*) and existing rule, could be interpreted to alter meaning. Suggestion: change "the proceedings" to "any or all proceedings".

Restyled Rule 77(c)(2). Existing Rule 77(c) specifies that certain motions and applications are "grantable of course" by the clerk. This usage implies (1) that the clerk's duty is ministerial, requiring that the motion or application be granted when properly presented, and (2) that the clerk may only take action in response to such an application or motion. Restyled Rule 77(c)(2) indicates that the clerk "may" perform the specified duty, with no mention made of a motion or application. This usage implies a degree of discretion on the part of the clerk, not present in the existing rule, in the decision whether to take the requested action. It also implies that the clerk could act *sua sponte*. Suggestion: change "the clerk may" to "the clerk shall as of course grant motions and applications to".

Restyled Rule 78(a). Existing Rule 78 requires the district court to establish regular times for hearing motions, qualifying that duty only in the event that "local conditions make it impracticable". The proposed restyling would convert an obligation that is subject to an express qualification into a matter entirely within the district court's discretion. Suggestion: include this proposal in the style/substance track.

Restyled Rule 80. We recommend against the restyling for substantive and practical reasons. *First*, existing Rule 80(c) is an evidentiary provision that stands intact from the original, 1938 Federal Rules of Civil Procedure. The original rulemakers, aware of doubts about the propriety of treating evidence under the Rules Enabling Act of 1934, did so "lightly". As noted elsewhere, Chief Justice Rehnquist opposed any restyling of the evidence rules; any change may be deemed to be more than stylistic; and there is a looming supersession issue — will any change

supersede relevant provisions in the Federal Rules of Evidence, most of which remain statutory? *Second*, the restyled rule doesn't work. The person who will have "recorded" a videotaped deposition — the video technician — is not a court reporter and is not qualified to certify any kind of writing. Compounding this problem, the technician is often, by stipulation, someone affiliated with one side's counsel. *Third*, under Fed.R.Civ.P. 26(a)(3)(b), the party offering a video- or audiotaped deposition already must provide a transcript of it to the court in advance of trial — so a transcript exists. *Fourth*, for practical reasons, videotaped testimony is often transcribed by the court reporter at trial (for financial reasons — more pages of transcript to sell). *Fifth*, it is common that videotaped testimony is simultaneously recorded stenographically, further rendering this a non-issue. Suggestion: refer the matter to the Evidence Rules Committee.

Restyled Rule 81(a)(6) Restyled Rule 81(a)(6) specifies that the rules "govern proceedings under the following laws, except as these laws provide other procedures". Rule 81(a)(6)(B) then identifies "9 U.S.C., relating to arbitration". Title 9 of the U.S. Code is not a law. Suggestion: substitute "All laws codified in 9 U.S.C. relating to arbitration".

Restyled Rule 81(d)(1). The proposed alteration of existing Rule 81(e) to reflect the Supreme Court's decision in *Erie R.R. v. Tompkins* is problematic. "[I]ncludes" does not necessarily mean "includes only", and the Committee Note implies that the change reflects actual practice. But the revised definition does not include court rules, which are mentioned in the Committee Note, and, more important, it does not include state constitutional provisions. Suggestion: abrogate this part of Rule 81 as unnecessary (and/or, unless further revised, potentially misleading).

Ad Hoc Committee of Academics and Practitioners

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Professor Kevin Clermont
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I. SCOPE OF RULES — ONE FORM OF ACTION*	*TITLE I. SCOPE OF RULES; 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 determination of every action and proceeding.

COMMITTEE NOTE

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

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

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

Restyling Project Comments

Restyled Rule 1. Introduction of "and proceedings" may support an argument for expansion of the rules' applicability. To be sure, the Committee disclaims such a purpose. But the decision in *SEC v. McCarthy*, 322 F.3d 650 (9th Cir. 2003), to which the Note refers, placed some emphasis on the statutory distinction between "actions" on the one hand and "applications" and summary proceedings on the other. Including "proceedings" in the definition of the scope of the civil rules may suggest a different answer in a future case. That would not necessarily be a

* Rules in effect on December 1, 2004.

bad thing, but it may go beyond restyling.

To be sure, the word "proceedings" appears in various jurisdictional statutes, nicely summarized in Professor Cooper's article (79 NOTRE DAME L. REV. 1761). It also appears in many of the provisions of existing and Restyled Rule 81. But then Rule 2's proclamation ("There is one form of action – the civil action") may leave the reader wondering what Rule 1 means by "proceedings". As the forms of action recede into history, Rule 2 may take on greater significance for the interpretation of Rule 1's reference to "civil actions". Perhaps Restyled Rule 2 should face that likelihood squarely, and declare that all civil actions and proceedings within the scope of the rules will be referred to generally as civil 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.

COMMITTEE NOTE

The language of Rule 2 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Restyling Project Comments

Restyled Rule 2. See our comment above about Rule 2's relevance to Rule 1.

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

COMMITTEE NOTE

The caption of Rule 3 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 4. Summons	**Rule 4. Summons**
(a) Form. The summons shall be signed by the clerk, bear the seal of the court, identify the court and the parties, be directed to the defendant, and state the name and address of the plaintiff's attorney or, if unrepresented, of the plaintiff. It shall also state the time within which the defendant must appear and defend, and notify the defendant that failure to do so will result in a judgment by default against the defendant for the relief demanded in the complaint. The court may allow a summons to be amended.	**(a) Contents; Amendments.** **(1)** ***Contents.*** The summons must: **(A)** name the court and the parties; **(B)** be directed to the defendant; **(C)** state the name and address of the plaintiff's attorney or — if unrepresented — of the plaintiff; **(D)** state the time within which the defendant must appear and defend; **(E)** notify the defendant that a failure to appear and defend will result in a default judgment against the defendant for the relief demanded in the complaint; **(F)** be signed by the clerk; and **(G)** bear the court's seal. **(2)** ***Amendments.*** The court may permit a summons to be amended.
(b) Issuance. Upon or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is in proper form, the clerk shall sign, seal, and issue it to the plaintiff for service on the defendant. A summons, or a copy of the summons if addressed to multiple defendants, shall be issued for each defendant to be served.	**(b) Issuance.** On or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is properly completed, the clerk must sign, seal, and issue it to the plaintiff for service on the defendant. A summons — or a copy of a summons that is addressed to multiple defendants — must be issued for each defendant to be served.
(c) Service with Complaint; by Whom Made. **(1)** A summons shall be served together with a copy of the complaint. The plaintiff is responsible for service of a summons and complaint within the time allowed under subdivision (m) and shall furnish the person effecting service with the necessary copies of the summons and complaint. **(2)** Service may be effected by any person who is not a party and who is at least 18 years of age. At the request of the plaintiff, however, the court may direct that service be effected by a United States marshal, deputy United States marshal, or other person or officer specially appointed by the court for that purpose. Such an appointment must be made when the plaintiff is authorized to proceed in forma pauperis pursuant to 28 U.S.C. § 1915 or is authorized to proceed as a seaman under 28 U.S.C. § 1916.	**(c) Service.** **(1)** ***In General.*** A summons must be served with a copy of the complaint. The plaintiff is responsible for having the summons and complaint served within the time allowed by Rule 4(m) and must furnish the necessary copies to the person who makes service. **(2)** ***By Whom.*** Any person who is at least 18 years old and not a party may serve a summons and complaint. **(3)** ***By a Marshal or Someone Specially Appointed.*** At the plaintiff's request, the court may order that service be made by a United States marshal or deputy marshal or by a person specially appointed by the court. The court must so order if the plaintiff is authorized to proceed in forma pauperis under 28 U.S.C. §1915 or as a seaman under 28 U.S.C. § 1916.

(d) Waiver of Service; Duty to Save Costs of Service; Request to Waive. **(1)** A defendant who waives service of a summons does not thereby waive any objection to the venue or to the jurisdiction of the court over the person of the defendant. **(2)** An individual, corporation, or association that is subject to service under subdivision (e), (f), or (h) and that receives notice of an action in the manner provided in this paragraph has a duty to avoid unnecessary costs of serving the summons. To avoid costs, the plaintiff may notify such a defendant of the commencement of the action and request that the defendant waive service of a summons. The notice and request **(A)** shall be in writing and shall be addressed directly to the defendant, if an individual, or else to an officer or managing or general agent (or other agent authorized by appointment or law to receive service of process) of a defendant subject to service under subdivision (h); **(B)** shall be dispatched through first-class mail or other reliable means; **(C)** shall be accompanied by a copy of the complaint and shall identify the court in which it has been filed; **(D)** shall inform the defendant, by means of a text prescribed in an official form promulgated pursuant to Rule 84, of the consequences of compliance and of a failure to comply with the request; **(E)** shall set forth the date on which the request is sent; **(F)** shall allow the defendant a reasonable time to return the waiver, which shall be at least 30 days from the date on which the request is sent, or 60 days from that date if the defendant is addressed outside any judicial district of the United States; and **(G)** shall provide the defendant with an extra copy of the notice and request, as well as a prepaid means of compliance in writing. If a defendant located within the United States fails to comply with a request for waiver made by a plaintiff located within the United States, the court shall impose the costs subsequently incurred in effecting service on the defendant unless good cause for the failure be shown.	**(d) Waiving Service.** **(1)** ***Requesting a Waiver.*** An individual, corporation, or association that is subject to service under Rule 4(e), (f), or (h) has a duty to avoid unnecessary expenses of serving the summons. The plaintiff may notify such a defendant that an action has been commenced and request that the defendant waive service of a summons. The notice and request must: **(A)** be in writing and be addressed: **(i)** to the individual defendant; or **(ii)** for a defendant subject to service under Rule 4(h), to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process; **(B)** name the court where the complaint has been filed; **(C)** be accompanied by a copy of the complaint, two copies of a waiver form, and a prepaid means for returning the form; **(D)** inform the defendant, using text prescribed in Official Form 1A, of the consequences of waiving and not waiving service; **(E)** state the date when the request is sent; **(F)** give the defendant a reasonable time of at least 30 days after the request was sent — or at least 60 days if sent to the defendant outside any judicial district of the United States — to return the waiver; and **(G)** be sent by first-class mail or other reliable means. **(2)** ***Failure to Waive.*** If a defendant located within the United States fails, without good cause, to sign and return a waiver requested by a plaintiff located within the United States, the court must impose on the defendant: **(A)** the expenses later incurred in making service; and **(B)** the reasonable expenses, including attorney's fees, of any motion required to collect those service expenses.

(3) A defendant that, before being served with process, timely returns a waiver so requested is not required to serve an answer to the complaint until 60 days after the date on which the request for waiver of service was sent, or 90 days after that date if the defendant was addressed outside any judicial district of the United States. (4) When the plaintiff files a waiver of service with the court, the action shall proceed, except as provided in paragraph (3), as if a summons and complaint had been served at the time of filing the waiver, and no proof of service shall be required. (5) The costs to be imposed on a defendant under paragraph (2) for failure to comply with a request to waive service of a summons shall include the costs subsequently incurred in effecting service under subdivision (e), (f), or (h), together with the costs, including a reasonable attorney's fee, of any motion required to collect the costs of service.	(3) ***Time to Answer After a Waiver.*** A defendant who, before being served with process, timely returns a waiver need not serve an answer to the complaint until 60 days after the request was sent — or until 90 days after it was sent to the defendant outside any judicial district of the United States. (4) ***Results of Filing a Waiver.*** When the plaintiff files a waiver, proof of service is not required and these rules apply as if a summons and complaint had been served at the time of filing the waiver. (5) ***Jurisdiction and Venue Not Waived.*** Waiving service of a summons does not waive any objection to personal jurisdiction or to venue.
(e) Service Upon Individuals Within a Judicial District of the United States. Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in any judicial district of the United States: (1) pursuant to the law of the state in which the district court is located, or in which service is effected, for the service of a summons upon the defendant in an action brought in the courts of general jurisdiction of the State; or (2) by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.	**(e) Serving an Individual Within a Judicial District of the United States.** Unless federal law provides otherwise, an individual — other than a minor, an incompetent person, or a person whose waiver has been filed — may be served in a judicial district of the United States by: (1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or (2) doing any of the following: (A) delivering a copy of the summons and of the complaint to the individual personally; (B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or (C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

(f) Service Upon Individuals in a Foreign Country. Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in a place not within any judicial district of the United States: **(1)** by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents; or **(2)** if there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice **(A)** in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or **(B)** as directed by the foreign authority in response to a letter rogatory or letter of request; or **(C)** unless prohibited by the law of the foreign country, by **(i)** delivery to the individual personally of a copy of the summons and the complaint; or **(ii)** any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or **(3)** by other means not prohibited by international agreement as may be directed by the court.	**(f) Serving an Individual in a Foreign Country.** Unless federal law provides otherwise, an individual — other than a minor, an incompetent person, or a person whose waiver has been filed — may be served at a place not within any judicial district of the United States: **(1)** by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents; **(2)** if there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice: **(A)** as prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction; **(B)** as the foreign authority directs in response to a letter rogatory or letter of request; or **(C)** unless prohibited by the foreign country's law, by: **(i)** delivering a copy of the summons and of the complaint to the individual personally; or **(ii)** using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt; or **(3)** by other means not prohibited by international agreement, as the court orders.
(g) Service Upon Infants and Incompetent Persons. Service upon an infant or an incompetent person in a judicial district of the United States shall be effected in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state. Service upon an infant or an incompetent person in a place not within any judicial district of the United States shall be effected in the manner prescribed by paragraph (2)(A) or (2)(B) of subdivision (f) or by such means as the court may direct.	**(g) Serving a Minor or an Incompetent Person.** A minor or an incompetent person in a judicial district of the United States must be served by following state law for serving a summons or like process on such a defendant in an action brought in the courts of general jurisdiction of the state where service is made. A minor or an incompetent person who is not within any judicial district of the United States must be served in the manner prescribed by Rule 4(f)(2)(A), (f)(2)(B), or (f)(3).

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

Rule 4(i)

(i) Serving the United States and Its Agencies, Corporations, Officers, or Employees. **(1)** Service upon the United States shall be effected **(A)** by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court or by sending a copy of the summons and of the complaint by registered or certified mail addressed to the civil process clerk at the office of the United States attorney and **(B)** by also sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia, and **(C)** in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered or certified mail to the officer or agency. **(2) (A)** Service on an agency or corporation of the United States, or an officer or employee of the United States sued only in an official capacity, is effected by serving the United States in the manner prescribed by Rule 4(i)(1) and by also sending a copy of the summons and complaint by registered or certified mail to the officer, employee, agency, or corporation. **(B)** Service on an officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States — whether or not the officer or employee is sued also in an official capacity — is effected by serving the United States in the manner prescribed by Rule 4(i)(1) and by serving the officer or employee in the manner prescribed by Rule 4(e), (f), or (g). **(3)** The court shall allow a reasonable time to serve process under Rule 4(i) for the purpose of curing the failure to serve: **(A)** all persons required to be served in an action governed by Rule 4(i)(2)(A), if the plaintiff has served either the United States attorney or the Attorney General of the United States, or **(B)** the United States in an action governed by Rule 4(i)(2)(B), if the plaintiff has served an officer or employee of the United States sued in an individual capacity.	**(i) Serving the United States and Its Agencies, Corporations, Officers, or Employees.** **(1)** ***United States.*** To serve the United States, a party must: **(A) (i)** deliver a copy of the summons and of the complaint to the United States attorney for the district where the action is brought — or to an assistant United States attorney or clerical employee whom the United States attorney designates in a writing filed with the court clerk — or **(ii)** send a copy of each by registered or certified mail to the civil-process clerk at the United States attorney's office; **(B)** send a copy of each by registered or certified mail to the Attorney General of the United States at Washington, D.C.; and **(C)** if the action challenges an order of a nonparty agency or officer of the United States, send a copy of each by registered or certified mail to the agency or officer. **(2)** ***Agency; Corporation; Officer or Employee Sued in an Official Capacity.*** To serve a United States agency or corporation, or a United States officer or employee sued only in an official capacity, a party must serve the United States and also send a copy of the summons and of the complaint by registered or certified mail to the agency, corporation, officer, or employee. **(3)** ***Officer or Employee Sued Individually.*** To serve a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf (whether or not the officer or employee is also sued in an official capacity), a party must serve the United States and also serve the officer or employee under Rule 4(e), (f), or (g). **(4)** ***Extending Time.*** The court must allow a party a reasonable time to cure its failure to: **(A)** serve a person required to be served under Rule 4(i)(2), if the party has served either the United States attorney or the Attorney General of the United States; or **(B)** serve the United States under Rule 4(i)(3), if the party has served the United States officer or employee.

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

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

COMMITTEE NOTE

The language of Rule 4 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 4(d)(1)(C) corrects an inadvertent error in former Rule 4(d)(2)(G). The defendant

needs two copies of the waiver form, not an extra copy of the notice and request.

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

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

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

Restyling Project Comments

Restyled Rule 4(e). It may make sense to drop the old formulation "dwelling house" in favor of "dwelling". But Restyled Rule 4(e)(2)(B) may introduce a new uncertainty. It retains alternative references to "dwelling" and "usual place of abode". In the existing rule, "usual place of abode" serves as an alternative to "house", in recognition that some may abide in an apartment or other structure that would not qualify as a "dwelling house". Dropping "house" from the restyled rule means that "usual place of abode" will now operate as an alternative to "dwelling". Of course, some readers may regard these terms as defining one another. Others may contend that the restyled rule contemplates two alternative places where substituted service might be permissible. Current law provides some support for an alternative reading already, and a leading treatise endorses that view. See 4A Wright & Miller, Federal Practice and Procedure § 1096, at 530-31 (2002). Restyled Rule 4(e)(2)(B) may encourage this alternative reading.

Restyled Rule 4(m). The word "initiative" has been deleted from the phrase "on its own initiative". In this context "on its own initiative" is a widely used term of art (equivalent to "sua sponte"), and its deletion from the text may cause confusion, as we note elsewhere as well (*e.g.*, Rule 11(c)(3)). In a sense, even when a motion is made, a court issues or refuses to issue an order "on its own". Suggestion: insert "initiative" after "on its own".

Rule 4.1. Service of Other Process	**Rule 4.1. Serving Other Process**
(a) Generally. Process other than a summons as provided in Rule 4 or subpoena as provided in Rule 45 shall be served by a United States marshal, a deputy United States marshal, or a person specially appointed for that purpose, who shall make proof of service as provided in Rule 4(l). The process may be served anywhere within the territorial limits of the state in which the district court is located, and, when authorized by a statute of the United States, beyond the territorial limits of that state.	**(a) In General.** Process — other than a summons under Rule 4 or a subpoena under Rule 45 — must be served by a United States marshal or deputy marshal or by a person specially appointed for that purpose. It may be served anywhere within the territorial limits of the state where the district court is located and, if authorized by a federal statute, beyond those limits. Proof of service must be made under Rule 4(l).
(b) Enforcement of Orders: Commitment for Civil Contempt. An order of civil commitment of a person held to be in contempt of a decree or injunction issued to enforce the laws of the United States may be served and enforced in any district. Other orders in civil contempt proceedings shall be served in the state in which the court issuing the order to be enforced is located or elsewhere within the United States if not more than 100 miles from the place at which the order to be enforced was issued.	**(b) Enforcing Orders: Committing for Civil Contempt.** An order committing a person for civil contempt of a decree or injunction issued to enforce federal law may be served and enforced in any district. Any other order in a civil-contempt proceeding may be served only in the state where the issuing court is located or elsewhere in the United States within 100 miles from where the order was issued.

COMMITTEE NOTE

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

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

(b) Making Service. **(1)** Service under Rules 5(a) and 77(d) on a party represented by an attorney is made on the attorney unless the court orders service on the party. **(2)** Service under Rule 5(a) is made by: **(A)** Delivering a copy to the person served by: **(i)** handing it to the person; **(ii)** leaving it at the person's office with a clerk or other person in charge, or if no one is in charge leaving it in a conspicuous place in the office; or **(iii)** if the person has no office or the office is closed, leaving it at the person's dwelling house or usual place of abode with someone of suitable age and discretion residing there. **(B)** Mailing a copy to the last known address of the person served. Service by mail is complete on mailing. **(C)** If the person served has no known address, leaving a copy with the clerk of the court. **(D)** Delivering a copy by any other means, including electronic means, consented to in writing by the person served. Service by electronic means is complete on transmission; service by other consented means is complete when the person making service delivers the copy to the agency designated to make delivery. If authorized by local rule, a party may make service under this subparagraph (D) through the court's transmission facilities. **(3)** Service by electronic means under Rule 5(b)(2)(D) is not effective if the party making service learns that the attempted service did not reach the person to be served.	**(b) Service: How Made.** **(1)** ***Serving an Attorney.*** If a party is represented by an attorney, service under this rule must be made on the attorney unless the court orders service on the party. **(2)** ***Service in General.*** A paper is served under this rule by: **(A)** handing it to the person; **(B)** leaving it: **(i)** at the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or **(ii)** if the person has no office or the office is closed, at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there; **(C)** mailing it to the person's last known address — in which event service is complete upon mailing; **(D)** leaving it with the court clerk if the person's address is unknown; **(E)** sending it by electronic means if the person consented in writing — in which event service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served; or **(F)** delivering it by any other means that the person consented to in writing — in which event service is complete when the person making service delivers it to the agency designated to make delivery. **(3)** ***Using Court Facilities.*** If a local rule so authorizes, a party may use the court's transmission facilities to make service under Rule 5(b)(2)(E).
(c) Same: Numerous Defendants. In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.	**(c) Serving Numerous Defendants.** **(1)** ***In General.*** If an action involves an unusually large number of defendants, the court may, on motion or on its own, order that: **(A)** defendants' pleadings and replies to them need not be served on other defendants; **(B)** any crossclaim, counterclaim, avoidance, or affirmative defense in those pleadings and replies to them will be treated as denied or avoided by all other parties; and **(C)** filing any such pleading and serving it on the plaintiff constitutes notice of the pleading to all parties. **(2)** ***Notifying Parties.*** A copy of every such order must be served on the parties as the court directs.

(d) Filing; Certificate of Service. All papers after the complaint required to be served upon a party, together with a certificate of service, must be filed with the court within a reasonable time after service, but disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: (i) depositions, (ii) interrogatories, (iii) requests for documents or to permit entry upon land, and (iv) requests for admission. **(e) Filing With the Court Defined.** The filing of papers with the court as required by these rules shall be made by filing them with the clerk of court, except that the judge may permit the papers to be filed with the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. A court may by local rule permit papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules. The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices.	**(d) Filing.** **(1)** ***Required Filings; Certificate of Service.*** Any paper after the complaint that is required to be served — together with a certificate of service — must be filed within a reasonable time after service. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: depositions, interrogatories, requests for documents or to permit entry onto land, and requests for admission. **(2)** ***How Filing Is Made — In General.*** A paper is filed by delivering it: **(A)** to the clerk; or **(B)** to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk. **(3)** ***Electronic Filing, Signing, or Verification.*** A court may, by local rule, allow papers to be filed, signed, or verified by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. A paper filed by electronic means in compliance with a local rule is a written paper for purposes of these rules. **(4)** ***Acceptance by the Clerk.*** The clerk must not refuse to file a paper solely because it is not in the form prescribed by these rules or by a local rule or practice.

COMMITTEE NOTE

The language of Rule 5 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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

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

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

Restyling Project Comments

Restyled Rule 5(b)(2)(B)(ii). See comment on "dwelling" instead of "dwelling house" in response to Restyled Rule 4(e)(2)(B).

Restyled Rule 5(b)(2)(D). The change from "the person ... has no known address" to "the person's address is unknown" may suggest a lower burden on the party. Suggestion : restore "if the person has no known address".

Note: The Restyling Project submits these comments on Proposed Style Forms 5 and 6 at the suggestion of one of the Committee's consultants. We have not examined the other proposed style forms.

Proposed Style Form 5 substitutes for existing Form 1A. The drafters should change Restyled Rule 4, which continues to refer to Form 1A. The second paragraph speaks of a duty to avoid "costs", which reflects the language of the existing rule but not the references to "expenses" in Restyled Rule 4(d) . "Expenses" may in any event better communicate the risk to a lay person. The third paragraph declares that the "action will then proceed", in keeping with the existing rule, instead of stating, as does Restyled Rule 4(d)(4), that the rules will apply. The fourth paragraph refers to formal service, a reference possibly lost on a lay person. This paragraph also refers to "costs" instead of "expenses". Suggestion: substitute "I will arrange to have the summons and complaint served on you and ask the court to require you, or the entity you represent, to pay the expenses of making service". The fifth paragraph requests that the party read the enclosed statement. Its phrasing should more closely track Restyled Rule 4(d) and the heading of the attachment to Proposed Style Form 6 (where, however, "costs" should be "expenses"). Suggestion: substitute "duty to avoid unnecessary expenses" for "duty to waive service".

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)** ***Exclusions from Brief Periods.*** Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days. **(3)** ***Last Day.*** Include the last day of the period unless it is a Saturday, Sunday, legal holiday, or — if the act to be done is filing a paper in court — a day on which weather or other conditions make the clerk's office inaccessible. When the last day is excluded, the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible. **(4)** ***"Legal Holiday" Defined.*** As used in these rules, "legal holiday" means: **(A)** the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day; and **(B)** any other day declared a holiday by the President, Congress, or the state where the district court is located.
(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), and 60(b), except to the extent and under the conditions stated in them.	**(b) Extending Time.** **(1)** ***In General.*** When an act may or must be done within a specified time, the court may, for good cause, extend the time: **(A)** with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or **(B)** on motion made after the time has expired if the party failed to act because of excusable neglect. **(2)** ***Exceptions.*** A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b), except as those rules allow.

(c) [Rescinded].	
(d) For Motions—Affidavits. A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time.	**(c) Motions, Notices of Hearing, and Affidavits.** **(1)** ***In General.*** A written motion and notice of the hearing must be served at least 5 days before the time specified for the hearing, with the following exceptions: **(A)** when the motion may be heard ex parte; **(B)** when these rules set a different period; or **(C)** when a court order — which a party may, for good cause, apply for ex parte — sets a different period. **(2)** ***Supporting Affidavit.*** Any affidavit supporting a motion must be served with the motion. Except as Rule 59(c) provides otherwise, any opposing affidavit must be served at least 1 day before the hearing, unless the court permits service at another time.
(e) Additional Time After Service Under Rule 5(b)(2)(B), (C), or (D). Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party under Rule 5(b)(2)(B), (C), or (D), 3 days shall be added to the prescribed period.	**(d) Additional Time After Certain Kinds of Service.** When a party must or may act within a specified time after service and service is made under Rule 5(b)(2)(C), (D), (E), or (F), 3 days are added to the period

COMMITTEE NOTE

The language of Rule 6 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

III. PLEADINGS AND MOTIONS **Rule 7. Pleadings Allowed; Form of Motions**	**TITLE III. PLEADINGS AND MOTIONS** **Rule 7. Pleadings Allowed; Form of Motions and Other Papers**
(a) Pleadings. There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.	**(a) Pleadings.** Only these pleadings are allowed: **(1)** a complaint; **(2)** an answer to a complaint; **(3)** an answer to a counterclaim designated as a counterclaim; **(4)** an answer to a crossclaim; **(5)** a third-party complaint; **(6)** an answer to a third-party complaint; and **(7)** if the court orders one, a reply to an answer or a third-party answer.
(b) Motions and Other Papers. **(1)** An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion. **(2)** The rules applicable to captions and other matters of form of pleadings apply to all motions and other papers provided for by these rules. **(3)** All motions shall be signed in accordance with Rule 11.	**(b) Motions and Other Papers.** **(1)** ***In General.*** A request for a court order must be made by motion. The motion must: **(A)** be in writing unless made during a hearing or trial; **(B)** state with particularity the grounds for seeking the order; and **(C)** state the relief sought. **(2)** ***Form.*** The rules governing captions and other matters of form in pleadings apply to motions and other papers.
(c) Demurrers, Pleas, Etc., Abolished. Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used.	[Current Rule 7(c) is deleted.]

COMMITTEE NOTE

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

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

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

Former Rule 7(b)(1) stated that the writing requirement is fulfilled if the motion is stated in a written notice of hearing. This statement was deleted as redundant because a single written document can satisfy the writing requirements both for a motion and for a Rule 6(c)(1) notice.

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

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

Restyling Project Comments

Restyled Rule 7(a)(7). Given the wording of restyled Rule 7(a)(6), specifically including "an answer to a third party complaint", and in light of the intent expressed in the Committee Note, the phrase "or a third party answer" in Rule 7(a)(7) is redundant and raises the question of why other answers (e.g., to a counterclaim or crossclaim) are not also specifically referred to. Suggestion: delete the phrase "or a third party answer". In any event, we do not understand how this proposed change can be thought not to change the meaning of Rule 7 and therefore suggest that it be included in the style/substance track

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.	(1)**Who Must File.** A nongovernmental corporate party must file two copies of a disclosure statement that: (2)identifies any parent corporation and any publicly held corporation owning 10% or more of its stock; or **(2)** states that there is no such corporation.
(b) Time for Filing; Supplemental Filing. A party must: **(1)** file the Rule 7.1(a) statement with its first appearance, pleading, petition, motion, response, or other request addressed to the court, and **(2)** promptly file a supplemental statement upon any change in the information that the statement requires.	**(b) Time to File; Supplemental Filing.** A party must: **(1)** file the disclosure statement with its first appearance, pleading, petition, motion, response, or other request addressed to the court; and **(2)** promptly file a supplemental statement if any required information changes.

COMMITTEE NOTE

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

Restyling Project Comments

Restyled Rule 7.1(a). The heading of this provision, like that of the existing provision, is incomplete. Suggestion: change the heading to read: "Who Must File; Contents".

Rule 8. General Rules of Pleading	*Rule 8. General Rules of Pleading*
(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.	(3)**Claim for Relief.** A pleading that states a claim for relief — whether an original claim, a counterclaim, a crossclaim, or a third-party claim — must contain: **(1)** a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support; **(2)** a short and plain statement of the claim showing that the pleader is entitled to relief; and **(3)** a demand for the relief sought, which may include relief in the alternative or different types of relief.
(b) Defenses; Form of Denials. A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, the pleader may make denials as specific denials of designated averments or paragraphs or may generally deny all the averments except such designated averments or paragraphs as the pleader expressly admits; but, when the pleader does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, the pleader may do so by general denial subject to the obligations set forth in Rule 11.	(4)**Defenses and Denials.** (5)***In General.*** In responding to a pleading, a party must: **(A)** state in short and plain terms its defenses to each claim asserted against it; and **(B)** admit or deny the allegations asserted against it by an opposing party. (6)***Denials — Responding to the Substance.*** A denial must fairly respond to the substance of the allegation. (7)***General and Specific Denials.*** A party that intends in good faith to deny all the allegations of a pleading — including the jurisdictional grounds — may do so by a general denial. A party that does not intend to deny all the allegations must either specifically deny designated allegations or generally deny all except those specifically admitted. (8)***Denying Part of an Allegation.*** A party that intends in good faith to deny only part of an allegation must admit the part that is true and deny the rest. (9)***Lacking Knowledge or Information.*** A party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, and the statement has the effect of a denial. (10)***Effect of Failing to Deny.*** An allegation — other than one relating to the amount of damages — is admitted if a responsive pleading is required and the allegation is not denied. If a responsive pleading is not required, an allegation is considered denied or avoided.

(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.	**(c) Affirmative Defenses.** (1) ***In General.*** In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including: • accord and satisfaction; • arbitration and award; • assumption of risk; • contributory negligence; • discharge in bankruptcy; • duress; • estoppel; • failure of consideration; • fraud; • illegality; • injury by fellow servant; • laches; • license; • payment; • release; • res judicata; • statute of frauds; • statute of limitations; and • waiver. (2) ***Mistaken Designation***. If a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so.
(d) Effect of Failure to Deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.	[Current Rule 8(d) has become restyled Rule 8(b)(6).]

(e) Pleading to Be Concise and Direct; Consistency. **(1)** Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required. **(2)** A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.	**(d) Pleading to Be Concise and Direct; Alternative Statements; Inconsistency.** **(1)** ***In General.*** Each allegation must be simple, concise, and direct. No technical form is required. **(2)** ***Alternative Statements of a Claim or Defense.*** A party may set out two or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient. **(3)** ***Inconsistent Claims or Defenses.*** A party may state as many separate claims or defenses as it has, regardless of consistency.
(f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice.	**(e) Construing Pleadings.** Pleadings must be construed so as to do justice.

COMMITTEE NOTE

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

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

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

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

Restyling Project Comments

Restyled Rule 8(a)(3). The restyled provision deletes the words "judgment for". The present forms appended to the rules use the word "judgment" in complaints for money damages but not for equitable relief, but given the provisions of Rules 58-60, as well as the nature of adjudication, the existence of a judgment is surely an integral part of the relief sought in any action. Suggestion: insert "judgment for" after "a demand for".

Restyled Rule 8(b). The heading of this provision, both in the existing and in the restyled rule, is incomplete, since the provision refers to admissions as well as to defenses and denials. Suggestion: change the heading to read: "Responding to a Pleading".

Restyled Rule 8(d)(3). The deletion of the reference to Rule 11 here may cause difficulty for courts and practitioners because, despite the disclaimer in the Committee Note, the specific authorization of inconsistent claims or defenses may be read (especially in view of the deletion) as overriding the general limitations imposed by Rule 11. Suggestion: begin this provision with the phrase "Subject to the obligations set forth in Rule 11", and explain in the Note the special reason for retaining the Rule 11 reference at this point.

Rule 9. Pleading Special Matters	*Rule 9. Pleading Special Matters*
(a) Capacity. It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party, except to the extent required to show the jurisdiction of the court. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, the party desiring to raise the issue shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.	**(a) Capacity or Authority to Sue; Legal Existence.** **(1)** ***In General.*** Except when required to show that the court has jurisdiction, a pleading need not allege: **(A)** a party's capacity to sue or be sued; **(B)** a party's authority to sue or be sued in a representative capacity; or **(C)** the legal existence of an organized association of persons that is made a party. **(2)** ***Raising Those Issues.*** To raise any of those issues, a party must do so by a specific denial, which must state any supporting facts that are peculiarly within the party's knowledge.
(b) Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.	**(b) Fraud or Mistake; Conditions of Mind.** In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.
(c) Conditions Precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.	**(c) Conditions Precedent.** In pleading conditions precedent, it suffices to allege generally that all conditions precedent have occurred or been performed. But when denying that a condition precedent has occurred or been performed, a party must do so with particularity.
(d) Official Document or Act. In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law.	**(d) Official Document or Act.** In pleading an official document or official act, it suffices to allege that the document was legally issued or the act legally done.
(e) Judgment. In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.	**(e) Judgment.** In pleading a judgment or decision of a domestic or foreign court, a judicial or quasi-judicial tribunal, or a board or officer, it suffices to plead the judgment or decision without showing jurisdiction to render it.
(f) Time and Place. For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.	**(f) Time and Place.** An allegation of time or place is material when testing the sufficiency of a pleading.
(g) Special Damage. When items of special damage are claimed, they shall be specifically stated.	**(g) Special Damages.** If an item of special damage is claimed, it must be specifically stated

(h) Admiralty and Maritime Claims. A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims. If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not. The amendment of a pleading to add or withdraw an identifying statement is governed by the principles of Rule 15. A case that includes an admiralty or maritime claim within this subdivision is an admiralty case within 28 U.S.C. § 1292(a)(3).	**(h) Admiralty or Maritime Claim.** **(1)** ***How Designated.*** If a claim for relief is within the admiralty or maritime jurisdiction and also within the court's subject-matter jurisdiction on some other ground, the pleading may designate the claim as an admiralty or maritime claim for purposes of Rules 14(c), 38(e), and 82 and the Supplemental Rules for 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.*** Rule 15 governs amending a pleading to add or withdraw a designation. **(3)** ***Designation for Appeal.*** A case that includes an admiralty or maritime claim within this subdivision (h) is an admiralty case within 28 U.S.C. § 1292(a)(3).

COMMITTEE NOTE

The language of Rule 9 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Restyling Project Comments

Restyled Rule 9(a)(2). The word "denial", which does not appear in the existing provision, seems inappropriate, since there has presumably not been any allegation (at least none is required), and the word "denial" is used in the pleading rules only to refer to a response to an allegation. Suggestion: substitute "specific statement setting out [or 'setting forth']" for "specific denial, which must state".

Restyled Rule 9(h)(1). For ease of reading, restore the comma after "Rule 82".

Rule 10. Form of Pleadings	**Rule 10. Form of Pleadings**
(a) Caption; Names of Parties. Every pleading shall contain a caption setting forth the name of the court, the title of the action, the file number, and a designation as in Rule 7(a). In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.	**(a) Caption; Names of Parties.** Every pleading must have a caption with the court's name, a title that names the parties, a file number, and a Rule 7(a) designation. The title of the complaint must name all the parties; the title of other pleadings may name the first party on each side and refer generally to other parties.
(b) Paragraphs; Separate Statements. All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.	**(b) Paragraphs; Separate Statements.** A party must state its claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances. A later pleading may refer by number to a paragraph in an earlier pleading. If doing so would promote clarity, each claim founded on a separate transaction or occurrence — and each defense other than a denial — must be stated in a separate count or defense.
(c) Adoption by Reference; Exhibits. Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.	**(c) Adoption by Reference; Attached Instrument.** A statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion. A copy of a written instrument attached to a pleading is a part of the pleading for all purposes.

COMMITTEE NOTE

The language of Rule 10 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Restyling Project Comments

Restyled Rule 10(a). The phrase "that names the parties" in the first sentence of this provision is redundant, since the second sentence makes (and adds to) the point by stating that: "The title of the complaint must name all the parties". Suggestion: delete the phrase in the first sentence. In the second sentence, the phrase "may name the first party on each side" changes the meaning of the rule, which presently *requires* the naming of at least the first party on each side. Suggestion: change "may name the first party on each side and refer generally to other parties" to "must name the first party on each side and may refer generally to other parties".

Restyled Rule 10(c). Restyled Rule 10(c) eliminates use of the word "exhibit(s)". This deletion may cause confusion because documents are frequently enclosed with (or even physically attached to) a pleading as filed that are not intended to be incorporated as part of the pleading – for example, a transmittal letter, a case information form, a request for a summons, and a filing fee check. Labeling a document as an exhibit clarifies the pleader's intention. Suggestion: restore the prior heading, "Adoption by Reference; Exhibits", and insert the words "as an exhibit" after "attached" in the second sentence.

Rule 11. Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions	Rule 11. Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions
(a) Signature. Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.	**(a) Signature.** Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name — or by a party personally if the party is not represented by an attorney. The paper must state the signer's address and telephone number, if any. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.
(b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, — **(1)** it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; **(2)** the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; **(3)** the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and **(4)** the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.	**(b) Representations to the Court.** By presenting to the court a pleading, written motion, or other paper — whether by signing, filing, submitting, or later advocating it — an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: **(1)** it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the litigation costs; **(2)** the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law; **(3)** the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and **(4)** the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

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

(1) How Initiated.

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

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

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

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

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

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

(c) Sanctions.

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

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

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

(4) ***Nature of a Sanction.*** A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.

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

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

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

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

(d) Inapplicability to Discovery. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.	**(d) Inapplicability to Discovery.** This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.

COMMITTEE NOTE

The language of Rule 11 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Restyling Project Comments

Restyled Rule 11(b)(1). This provision raises an issue that recurs in the restyled rules (*see also* Restyled Rule 26(g)(1)(B)(ii)). The existing phrase "cost of litigation" is changed to "litigation costs" in Restyled Rule 11(b)(1). "Cost of litigation" and "litigation costs" often do not mean the same thing. "Cost of litigation" is inclusive of attorney's fees, but the phrase "litigation costs" is a technical phrase that many times does not. "Litigation costs" is sometimes used in statutes as distinct from attorneys' fees (*e.g.*, False Claims Act, 31 U.S.C. § 3730(h)("litigation costs and reasonable attorneys' fees") — even Restyled Rule 68 uses the lone word "costs" in this sense to mean statutory costs, as in 28 U.S.C. § 1912. This, then, is potentially a substantive change. If intended, it should be included in the style/substance track; if change is not intended, the existing language should be retained.

Restyled Rule 11(c)(2). This provision also raises an issue that recurs in the restyled rules (*see also* Restyled Rules 37(b)(2)(A)(i) and 50(e)). Introduction of the phrase "the prevailing party" is confusing. That phrase usually refers to the winner of the case, as it does in both existing and Restyled Rule 54(d)(1). What Restyled Rule 11(c)(2) is referring to is the party prevailing on the motion. Suggestion: substitute the former phrase, "the party prevailing on the motion", for "the prevailing party."

Restyled Rule 11(c)(3). The word "initiative" has been retained in the heading of the restyled rule but deleted in the text. "On its own initiative" in this context is a widely used term of art (equivalent to "sua sponte"), and its deletion from the text may cause confusion. In a sense, even when a motion is made, a court issues or refuses to issue an order "on its own". Suggestion: insert "initiative" after "on its own".

Restyled Rule 11(c)(5). For the reasons stated in connection with Restyled Rule 11(c)(3), the word "initiative" should be inserted after "on its own".

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; Motion for Judgment on the Pleadings; Consolidating and Waiving Defenses; Pretrial Hearing
(a) When Presented. (1) Unless a different time is prescribed in a statute of the United States, a defendant shall serve an answer (A) within 20 days after being served with the summons and complaint, or (B) if service of the summons has been timely waived on request under Rule 4(d), within 60 days after the date when the request for waiver was sent, or within 90 days after that date if the defendant was addressed outside any judicial district of the United States. (2) A party served with a pleading stating a cross-claim against that party shall serve an answer thereto within 20 days after being served. The plaintiff shall serve a reply to a counterclaim in the answer within 20 days after service of the answer, or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs. (3) (A) The United States, an agency of the United States, or an officer or employee of the United States sued in an official capacity, shall serve an answer to the complaint or cross-claim — or a reply to a counterclaim — within 60 days after the United States attorney is served with the pleading asserting the claim. (B) An officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States shall serve an answer to the complaint or cross-claim — or a reply to a counterclaim — within 60 days after service on the officer or employee, or service on the United States attorney, whichever is later.	**(a) Time to Serve a Responsive Pleading.** (1) ***In General.*** Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows: (A) A defendant must serve an answer: (i) within 20 days after being served with the summons and complaint; or (ii) if it has timely waived service under Rule 4(d), within 60 days after the request for a waiver was sent, or within 90 days after it was sent to the defendant outside any judicial district of the United States. (B) A party must serve an answer to a counterclaim or crossclaim within 20 days after being served with the pleading that states the counterclaim or crossclaim. (C) A party must serve a reply to an answer within 20 days after being served with an order to reply, unless the order specifies a different time. (2) ***United States and Its Agencies, Officers, or Employees Sued in an Official Capacity.*** The United States, a United States agency, or a United States officer or employee sued only in an official capacity must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the United States attorney. (3) ***United States Officers or Employees Sued in an Individual Capacity.*** A United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the officer or employee or service on the United States attorney, whichever is later.
(4) Unless a different time is fixed by court order, the service of a motion permitted under this rule alters these periods of time as follows: (A) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; or (B) if the court grants a motion for a more definite statement, the responsive pleading shall be served within 10 days after the service of the more definite statement.	(4) ***Effect of a Motion.*** Unless the court sets a different time, serving a motion under this rule alters these periods as follows: (A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 10 days after notice of the court's action; or (B) if the court grants a motion for a more definite statement, the responsive pleading must be served within 10 days after the more definite statement is served.

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

(d) Preliminary Hearings. The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.	[Current Rule 12(d) has become restyled Rule 12(i).]
(e) Motion for More Definite Statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.	**(e) Motion for a More Definite Statement.** A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 10 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other 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 act: **(1)** on its own; or **(2)** on motion made by a party either before responding to the pleading or, if a response is not allowed, within 20 days after being served with the pleading.
(g) Consolidation of Defenses in Motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.	**(g) Consolidating Defenses in a Motion.** **(1)** ***Consolidating Defenses.*** A motion under this rule may be joined with any other motion allowed by this rule. **(2)** ***Limitation on Further Motions.*** Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

(h) Waiver or Preservation of Certain Defenses. **(1)** A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course. **(2)** A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits. **(3)** Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.	**(h) Waiving and Preserving Certain Defenses.** **(1)** ***When Some Are Waived.*** A party waives any defense listed in Rule 12(b)(2)-(5) by: **(A)** omitting it from a motion in the circumstances described in Rule 12(g)(2); or **(B)** failing to either: **(i)** make it by motion under this rule; or **(ii)** include it in a responsive pleading or in an amendment allowed by Rule 15(a) as a matter of course. **(2)** ***When to Raise Others.*** Failure to state a claim upon which relief can be granted, to join a person required by Rule 19(b), or to state a legal defense to a claim may be raised: **(A)** in any pleading allowed or ordered under Rule 7(a); **(B)** by a motion under Rule 12(c); or **(C)** at trial. **(3)** ***Lack of Subject-Matter Jurisdiction.*** If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.
	(i) Hearing Before Trial. If a party so moves, any defense listed in Rule 12(b)(1)-(7) — whether made in a pleading or by motion — and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial.

COMMITTEE NOTE

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

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

Restyling Project Comments

Restyled Heading to Rule 12. For reasons stated below (see comments on Restyled Rule 12(g)), the phrase "Consolidating and Waiving Defenses" (added to the heading of the

existing rule) is incomplete. Suggestion: change "Consolidating and Waiving Defenses" to "Consolidation and Waiver".

Restyled Rule 12(a)(1)(A). Although the use of more than three lettered or numbered sets of subdivisions in a single rule (going down to (i), (ii), (iii), etc.) may occasionally be warranted by the complexity of a rule, we believe it is usually not required for clarity and should be used sparingly if at all. To simplify citation and to avoid confusion, we therefore propose that use of more than three subdivisions should generally be avoided. Two methods of avoidance are (1) the use of bullets (as in Restyled Rule 8(c)(1)), and (2) combination of the subdivisions. Suggestion: substitute bullets for (i) and (ii), or combine the two subdivisions into one, turning Rule 12(a)(1)(A) into a single sentence. For practical reasons, our preference is the latter (How does one deal with bullet points in quoting a rule in a sentence? Are ellipses required? Must the bullet point appear?).

Restyled Rule 12(f)(1). Suggestion: for reasons stated in the discussion of Restyled Rule 11(c)(3), insert "initiative" after "on its own".

Restyled Rule 12(g). The heading "Consolidating Defenses" seems inapt, since 12(e) and 12(f) motions don't necessarily involve defenses. Suggestion: change the heading of Rule 12(g) to "Consolidating Defenses and Objections" (and correspondingly, change the heading of (g)(1) to "Consolidation").

Restyled Rule 12(h)(1)(B). For reasons given above (see discussion of Restyled Rule 12(A)(1)(a)), use of subdivisions (i) and (ii) seems unnecessary. Moreover, the reference to Rule 15(a) would be clearer if it were changed to a reference to Rule 15(a)(1). Suggestion: change Restyled Rule 12(h)(1)(B) to read: "failing to make it by motion under this rule or to include it in a responsive pleading or an amendment allowed by Rule 15(a)(1) as a matter of course".

Restyled Rule 12(h)(2). Given the reference to "Rule 19" in Restyled Rule 12(b)(7), the reference to Rule 19(b) in this provision leaves a gap with respect to 12(b)(7) motions based on Rule 19(a). We assume this gap is not intended. Suggestion: change "Rule 19(b)" to "Rule 19".

Restyled Rule 12(h)(3). The restyled rule preserves the wording of the prior rule (requiring dismissal), and in doing so may cause difficulty under existing law. The problem is that under present law, defects of subject matter jurisdiction may require not dismissal but remand in removed cases, and may be correctable (for example by dismissal of a party or claim) in original or removed cases. This matter may call for consideration in the substance/style track. Alternatively or in addition, the words "and if the case is not remanded and the defect cannot be cured", could be added after "jurisdiction,".

Rule 13. Counterclaim and Cross-Claim	Rule 13. Counterclaim and Crossclaim
(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon the claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.	**(a) Compulsory Counterclaim.** (1) ***In General.*** A pleading must state as a counterclaim any claim that — at the time of its service — the pleader has against an opposing party if the claim: **(A)** arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and **(B)** does not require adding another party over whom the court cannot acquire jurisdiction. (2) ***Exceptions***. The pleader need not state the claim if: **(A)** when the action was commenced, the claim was the subject of another pending action; or **(B)** the opposing party sued on its claim by attachment or other process by which the court did not acquire personal jurisdiction over the pleader on that claim, and the pleader does not assert any counterclaim under this rule.
(b) Permissive Counterclaims. A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.	**(b) Permissive Counterclaim.** A pleading may state as a counterclaim any claim against an opposing party.
(c) Counterclaim Exceeding Opposing Claim. A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.	**(c) Relief Sought in a Counterclaim.** A counterclaim need not diminish or defeat the recovery sought by the opposing party. It may request relief that exceeds in amount or differs in kind from the relief sought by the opposing party.
(d) Counterclaim Against the United States. These rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the United States or an officer or agency thereof.	**(d) Counterclaim Against the United States.** These rules do not expand the right to assert a counterclaim — or to claim a credit — against the United States or a United States officer or agency.
(e) Counterclaim Maturing or Acquired After Pleading. A claim which either matured or was acquired by the pleader after serving a pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.	**(e) Counterclaim Maturing or Acquired After Pleading.** The court may permit a party to file a supplemental pleading asserting a counterclaim that matured or was acquired by the party after serving an earlier pleading.
(f) Omitted Counterclaim. When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, the pleader may by leave of court set up the counterclaim by amendment.	**(f) Omitted Counterclaim.** The court may permit a party to amend a pleading to add a counterclaim if it was omitted through oversight, inadvertence, or excusable neglect or if justice so requires.

(g) **Cross-Claim Against Co-party.** A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.	(g) **Crossclaim Against a Coparty.** A pleading may state as a crossclaim any claim by one party against a coparty if the claim arises out of the transaction or occurrence that is the subject matter of the original action or of a counterclaim, or if the claim relates to any property that is the subject matter of the original action. The crossclaim may include a claim that the coparty is or may be liable to the crossclaimant for all or part of a claim asserted in the action against the crossclaimant.
(h) **Joinder of Additional Parties.** Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rules 19 and 20.	(h) **Joining Additional Parties.** Rules 19 and 20 govern the addition of a person as a party to a counterclaim or crossclaim.
(i) **Separate Trials; Separate Judgments.** If the court orders separate trials as provided in Rule 42(b), judgment on a counterclaim or cross-claim may be rendered in accordance with the terms of Rule 54(b) when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of.	(i) **Separate Trials; Separate Judgments.** If the court orders separate trials under Rule 42(b), it may enter judgment on a counterclaim or crossclaim under Rule 54(b) when it has jurisdiction to do so, even if the opposing party's claims have been dismissed or otherwise resolved.

COMMITTEE NOTE

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

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

Restyling Project Comments

Restyled Rule 13(b). As presently worded, the restyled rule includes all counterclaims as "permissive", even those defined as "compulsory" under Rule 13(a). Whether or not this will cause difficulty, and it might, it makes little sense and is easily corrected. Suggestion: change Restyled Rule 13(b) to read: "A pleading may also state as a counterclaim against an opposing party any claim that is not a compulsory counterclaim under Rule 13(a)".

Rule 14. Third–Party Practice	Rule 14. Third-Party Practice
(a) When Defendant May Bring in Third Party. At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff. The third-party plaintiff need not obtain leave to make the service if the third-party plaintiff files the third-party complaint not later than 10 days after serving the original answer. Otherwise the third-party plaintiff must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make any defenses to the third-party plaintiff's claim as provided in Rule 12 and any counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert any defenses as provided in Rule 12 and any counterclaims and cross-claims as provided in Rule 13. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to the third-party defendant for all or part of the claim made in the action against the third-party defendant. The third-party complaint, if within the admiralty and maritime jurisdiction, may be in rem against a vessel, cargo, or other property subject to admiralty or maritime process in rem, in which case references in this rule to the summons include the warrant of arrest, and references to the third-party plaintiff or defendant include, where appropriate, a person who asserts a right under Supplemental Rule C(6)(b)(i) in the property arrested.	**(a) When a Defending Party May Bring in a Third Party.** **(1)** ***Timing of the Summons and Complaint.*** A defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it. But the third-party plaintiff must, by motion, obtain the court's leave if it files the third-party complaint more than 10 days after serving its original answer. **(2)** ***Third-Party Defendant's Claims and Defenses.*** The person served with the summons and third-party complaint — the "third-party defendant": **(A)** must assert any defense against the third-party plaintiff's claim under Rule 12; **(B)** must assert any counterclaim against the third-party plaintiff under Rule 13(a), and may assert any counterclaim against the third-party plaintiff under Rule 13(b) or any crossclaim against another third-party defendant under Rule 13(g); **(C)** may assert against the plaintiff any defense that the third-party plaintiff has to the plaintiff's claim; and **(D)** may also assert against the plaintiff any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. **(3)** ***Plaintiff's Claims Against a Third-Party Defendant.*** The plaintiff may assert against the third-party defendant any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The third-party defendant must then assert any defense under Rule 12 and any counterclaim under Rule 13(a), and may assert any counterclaim under Rule 13(b) or any crossclaim under Rule 13(g). **(4)** ***Motion to Strike, Sever, or Try Separately.*** Any party may move to strike the third-party claim, to sever it, or to try it separately. **(5)** ***Third-Party Defendant's Claim Against a Nonparty.*** A third-party defendant may proceed under this rule against a nonparty who is or may be liable to the third-party defendant for all or part of any claim against it. **(6)** ***Third-Party Complaint In Rem.*** If it is within the admiralty or maritime jurisdiction, a third-party complaint may be in rem. In that event, a reference in this rule to the "summons" includes the warrant of arrest, and a reference to the defendant or third-party plaintiff includes, when appropriate, a person who asserts a right under Supplemental Rule C(6)(b)(i) in the property arrested.

(b) When Plaintiff May Bring in Third Party. When a counterclaim is asserted against a plaintiff, the plaintiff may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.	**(b) When a Plaintiff May Bring in a Third Party.** When a counterclaim is asserted against a plaintiff, the plaintiff may bring in a third party if this rule would allow a defendant to do so.
(c) Admiralty and Maritime Claims. When a plaintiff asserts an admiralty or maritime claim within the meaning of Rule 9(h), the defendant or person who asserts a right under Supplemental Rule C(6)(b)(i), as a third-party plaintiff, may bring in a third-party defendant who may be wholly or partly liable, either to the plaintiff or to the third-party plaintiff, by way of remedy over, contribution, or otherwise on account of the same transaction, occurrence, or series of transactions or occurrences. In such a case the third-party plaintiff may also demand judgment against the third-party defendant in favor of the plaintiff, in which event the third-party defendant shall make any defenses to the claim of the plaintiff as well as to that of the third-party plaintiff in the manner provided in Rule 12 and the action shall proceed as if the plaintiff had commenced it against the third-party defendant as well as the third-party plaintiff.	**(c) Admiralty or Maritime Claim.** **(1)** ***Scope of Impleader.*** If a plaintiff asserts an admiralty or maritime claim under Rule 9(h), the defendant or a person who asserts a right under Supplemental Rule C(6)(b)(i) may, as a third-party plaintiff, bring in a third-party defendant who may be wholly or partly liable — either to the plaintiff or to the third-party plaintiff — for remedy over, contribution, or otherwise on account of the same transaction, occurrence, or series of transactions or occurrences. **(2)** ***Defending Against a Demand for Judgment for the Plaintiff.*** The third-party plaintiff may demand judgment in the plaintiff's favor against the third-party defendant. In that event, the third-party defendant must defend under Rule 12 against the plaintiff's claim as well as the third-party plaintiff's claim; and the action proceeds as if the plaintiff had sued both the third-party defendant and the third-party plaintiff.

COMMITTEE NOTE

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

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

Restyling Project Comments

Restyled Rule 14(a)(6). In contrast to the existing rule, the first sentence of the restyled rule implies that in rem jurisdiction is automatically available if the third party complaint is admiralty or maritime. If the qualifications in the existing rule are inherent in an in rem action in admiralty, this is perhaps not problematic. If not, the implication could be removed by making the sentence conditional.

Rule 15. Amended and Supplemental Pleadings	Rule 15. Amended and Supplemental Pleadings
(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.	**(a) Amendments Before Trial.** **(1)** ***Amending as a Matter of Course.*** A party may amend its pleading once as a matter of course: **(A)** before being served with a responsive pleading; or **(B)** within 20 days after serving the pleading if a responsive pleading is not allowed and the action is not yet on the trial calendar. **(2)** ***Other Amendments.*** Except as allowed by Rule 15(a)(1), a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires. **(3)** ***Time to Respond.*** Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 10 days after service of the amended pleading, whichever is later.
(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.	**(b) Amendments During and After Trial.** **(1)** ***During Trial.*** If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings to be amended. The court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits. The court may grant a continuance to enable the objecting party to meet the evidence. **(2)** ***After Trial.*** When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move — at any time, even after judgment — to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

(c) **Relation Back of Amendments.** An amendment of a pleading relates back to the date of the original pleading when **(1)** relation back is permitted by the law that provides the statute of limitations applicable to the action, or **(2)** the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or **(3)** the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party. The delivery or mailing of process to the United States Attorney, or United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of subparagraphs (A) and (B) of this paragraph (3) with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.	(c) **Relation Back of Amendments.** **(1)** ***When an Amendment May Relate Back.*** An amendment to a pleading relates back to the date of the original pleading when: **(A)** the law that provides the applicable statute of limitations allows relation back; **(B)** the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out — or attempted to be set out — in the original pleading; or **(C)** the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment: **(i)** received such notice of the action that it will not be prejudiced in defending on the merits; and **(ii)** knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity. **(2)** ***Notice to the United States.*** When the United States or a United States officer or agency is added as a defendant by amendment, the notice requirements of Rule 15(c)(1)(C)(i) and (ii) are satisfied if, during the stated period, process was delivered or mailed to the United States attorney or the United States attorney's designee, to the Attorney General of the United States, or to the officer or agency.
(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.	**(d) Supplemental Pleadings.** On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense. The court may order that the opposing party plead to the supplemental pleading within a specified time.

COMMITTEE NOTE

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

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

Restyling Project Comments

Restyled Rule 15(b). The heading for 15(b)(2) ("After Trial") seems inapt, since (b)(2) applies to amendments that can be made at any time, including during trial. Moreover, the principal difference between (b)(1) and (b)(2) is not between amendments made during and after trial. Instead, the distinction is between (1) amendments based on trial evidence that was met with an objection that the evidence was not within issues raised in the pleadings and (2) amendments based on new issues that were tried by consent. Suggestion: change the headings of 15(b)(1) and (b)(2) to "Evidence Objected to at Trial" and "Issues Tried by Consent", respectively.

Restyled Rule 15(c)(1). The word "May" in the new heading of this provision is incorrect, since the amendment *must* relate back if the conditions of the provision are met. Suggestion: change the heading to read: "When an Amendment Relates Back".

Restyled Rule 15(c)(1)(C). For the reasons stated in connection with Restyled Rule 12(a)(1)(A), substitute bullets for, or combine, (i) and (ii) in this provision (and correspondingly, change the reference in Restyled Rule 15(c)(2) from "Rule 15(c)(1)(C)(i) and (ii)" to "Rule 15(c)(1)(C)").

Restyled Rule 15(c)(1)(C). The restyled provision preserves what is generally recognized as an error in the existing rule. When the earlier rule was revised to change the result in *Schiavone v. Fortune*, 477 U.S. 21 (1986), the revision (inadvertently?) provided that relation back was precluded when the party to be brought in by the amendment has received notice after the time for service under Rule 4(m) but within the limitations period. This problem could readily be resolved by inserting, after "the period provided by Rule 4(m) for serving the summons and complaint", the phrase "or the period of the applicable statute of limitations, whichever is longer,". This issue might be referred for consideration in the style/substance track.

Rule 16. Pretrial Conferences; Scheduling; Management	Rule 16. Pretrial Conferences; Scheduling; Management
(a) Pretrial Conferences; Objectives. In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as **(1)** expediting the disposition of the action; **(2)** establishing early and continuing control so that the case will not be protracted because of lack of management; **(3)** discouraging wasteful pretrial activities; **(4)** improving the quality of the trial through more thorough preparation, and; **(5)** facilitating the settlement of the case.	**(a) Purposes of a Pretrial Conference.** In any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as: **(1)** expediting disposition of the action; **(2)** establishing early and continuing control so that the case will not be protracted because of lack of management; **(3)** discouraging wasteful pretrial activities; **(4)** improving the quality of the trial through more thorough preparation; and **(5)** facilitating settlement.
(b) Scheduling and Planning. Except in categories of actions exempted by district court rule as inappropriate, the district judge, or a magistrate judge when authorized by district court rule, shall, after receiving the report from the parties under Rule 26(f) or after consulting with the attorneys for the parties and any unrepresented parties by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time **(1)** to join other parties and to amend the pleadings; **(2)** to file motions; and **(3)** to complete discovery. The scheduling order also may include **(4)** modifications of the times for disclosures under Rules 26(a) and 26(e)(1) and of the extent of discovery to be permitted; **(5)** the date or dates for conferences before trial, a final pretrial conference, and trial; and **(6)** any other matters appropriate in the circumstances of the case. The order shall issue as soon as practicable but in any event within 90 days after the appearance of a defendant and within 120 days after the complaint has been served on a defendant. A schedule shall not be modified except upon a showing of good cause and by leave of the district judge or, when authorized by local rule, by a magistrate judge.	**(b) Scheduling.** **(1)** ***Scheduling Order.*** Except in categories of actions exempted by local rule, the district judge — or a magistrate judge when authorized by local rule — must issue a scheduling order: **(A)** after receiving the parties' report under Rule 26(f); or **(B)** after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference or by telephone, mail, or other means. **(2)** ***Time to Issue.*** The judge must issue the scheduling order as soon as practicable, but in any event within 120 days after any defendant has been served with the complaint and within 90 days after any defendant has appeared. **(3)** ***Contents of the Order.*** **(A)** *Required Contents.* The scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions. **(B)** *Permitted Contents.* The scheduling order may: **(i)** modify the timing of disclosures under Rules 26(a) and 26(e)(1); **(ii)** modify the extent of discovery; **(iii)** set dates for pretrial conferences and for trial; and **(iv)** include other appropriate matters. **(4)** ***Modifying a Schedule.*** A schedule may be modified only for good cause and with the judge's consent.

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(c) Subjects for Consideration at Pretrial Conferences. At any conference under this rule consideration may be given, and the court may take appropriate action, with respect to **(1)** the formulation and simplification of the issues, including the elimination of frivolous claims or defenses; **(2)** the necessity or desirability of amendments to the pleadings; **(3)** the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence; **(4)** the avoidance of unnecessary proof and of cumulative evidence, and limitations or restrictions on the use of testimony under Rule 702 of the Federal Rules of Evidence; **(5)** the appropriateness and timing of summary adjudication under Rule 56; **(6)** the control and scheduling of discovery, including orders affecting disclosures and discovery pursuant to Rule 26 and Rules 29 through 37;	**(c) Attendance and Matters for Consideration at a Pretrial Conference.** **(1)** ***Attendance.*** A represented party must authorize at least one of its attorneys to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a pretrial conference. If appropriate, the court may require that a party or its representative be present or reasonably available by telephone to consider possible settlement. **(2)** ***Matters for Consideration.*** At any pretrial conference, the court may consider and take appropriate action on the following matters: **(A)** formulating and simplifying the issues, and eliminating frivolous claims or defenses; **(B)** amending the pleadings if necessary or desirable; **(C)** obtaining admissions and stipulations about facts and documents to avoid unnecessary proof, and ruling in advance on the admissibility of evidence; **(D)** avoiding unnecessary proof and cumulative evidence, and limiting the use of testimony under Federal Rule of Evidence 702; **(E)** determining the appropriateness and timing of summary adjudication under Rule 56; **(F)** controlling and scheduling discovery, including orders affecting disclosures and discovery under Rule 26 and Rules 29 through 37;

Rule 16(c)

(7) the identification of witnesses and documents, the need and schedule for filing and exchanging pretrial briefs, and the date or dates for further conferences and for trial; **(8)** the advisability of referring matters to a magistrate judge or master; **(9)** settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule; **(10)** the form and substance of the pretrial order; **(11)** the disposition of pending motions; **(12)** the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems; **(13)** an order for a separate trial pursuant to Rule 42(b) with respect to a claim, counterclaim, cross-claim, or third-party claim, or with respect to any particular issue in the case; **(14)** an order directing a party or parties to present evidence early in the trial with respect to a manageable issue that could, on the evidence, be the basis for a judgment as a matter of law under Rule 50(a) or a judgment on partial findings under Rule 52(c); **(15)** an order establishing a reasonable limit on the time allowed for presenting evidence; and **(16)** such other matters as may facilitate the just, speedy, and inexpensive disposition of the action. At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed. If appropriate, the court may require that a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute.	**(G)** identifying witnesses and documents, scheduling the filing and exchange of any pretrial briefs, and setting dates for further conferences and for trial; **(H)** referring matters to a magistrate judge or master; **(I)** settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule; **(J)** determining the form and content of the pretrial order; **(K)** disposing of pending motions; **(L)** adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems; **(M)** ordering a separate trial under Rule 42(b) of a claim, counterclaim, crossclaim, third-party claim, or particular issue; **(N)** ordering the presentation of evidence early in the trial on a manageable issue that might, on the evidence, be the basis for a judgment as a matter of law under Rule 50(a) or a judgment on partial findings under Rule 52(c); **(O)** establishing a reasonable limit on the time allowed to present evidence; and **(P)** facilitating in other ways the just, speedy, and inexpensive disposition of the action.
(d) Final Pretrial Conference. Any final pretrial conference shall be held as close to the time of trial as reasonable under the circumstances. The participants at any such conference shall formulate a plan for trial, including a program for facilitating the admission of evidence. The conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties.	**(d) Pretrial Orders.** After any conference under this rule, the court should issue an order reciting the action taken. This order controls the course of the action unless the court modifies it.

(e) **Pretrial Orders.** After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.	(e) **Final Pretrial Conference and Orders.** The court may hold a final pretrial conference to formulate a trial plan, including a plan to facilitate the admission of evidence. The conference must be held as close to the start of trial as is reasonable, and must be attended by at least one attorney who will conduct the trial for each party and by any unrepresented party. The court may modify an order issued after a final pretrial conference only to prevent manifest injustice.
(f) **Sanctions.** If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.	(f) **Sanctions.** (1) ***In General.*** On motion or on its own, the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)-(vii), if a party or its attorney: **(A)** fails to appear at a scheduling or other pretrial conference; **(B)** is substantially unprepared to participate — or does not participate in good faith — in the conference; or **(C)** fails to obey a scheduling or other pretrial order. (2) ***Imposing Fees and Costs.*** Instead of or in addition to any other sanction, the court must order the party, its attorney, or both to pay the reasonable expenses — including attorney's fees — incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust.

COMMITTEE NOTE

The language of Rule 16 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Restyling Project Comments

Restyled Rule 16(b)(3)(B). The first three items in the existing Rule 16(b) have been condensed into a single sentence in Restyled Rule 16(b)(3)(A), but the next three, in (B), have not. For reasons stated in connection with Restyled Rule 12(a)(1)(A), we suggest that they should be, or that bullets should be used instead.

Restyled Rule 16(c)(1). Since the word "may" in the second sentence confers discretion, it is not clear whether the words "If appropriate," at the beginning of the sentence, are redundant or are intended to add to or qualify this discretion. We assume the words are redundant. Suggestion: delete "If appropriate,".

Existing and Restyled Rules 16(d) and (e). The order of these provisions has been reversed in the restyled rules. Although this makes sense as a matter of logic, the change may cause confusion for purposes of citation and research. Suggestion: consider returning to the existing order.

Restyled Rule 16(e). The words "an order issued after a final pretrial conference" could be read to refer to *any* order issue after the final conference, whether or not it is the order that is issued to embody the results of the conference (especially since the word "order" is not previously used in the text of the provision). Suggestion: change the last sentence to read: "The court may modify an order reciting any action taken at the final pretrial conference only to prevent manifest injustice".

Restyled Rule 16(f)(1). For reasons stated in connection with restyled Rule 11(c)(3), insert the word "initiative" after "on its own".

IV. PARTIES **Rule 17. Parties Plaintiff and Defendant; Capacity**	TITLE IV. PARTIES **Rule 17. The Plaintiff and Defendant; Capacity; Public Officers**
(a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.	**(a) Real Party in Interest.** **(1)** ***Designation in General.*** An action must be prosecuted in the name of the real party in interest. The following may sue in their own names without joining the person for whose benefit the action is brought: **(A)** an executor; **(B)** an administrator; **(C)** a guardian; **(D)** a bailee; **(E)** a trustee of an express trust; **(F)** a party with whom or in whose name a contract has been made for another's benefit; and **(G)** a party authorized by statute. **(2)** ***Action in the Name of the United States for Another's Use or Benefit.*** When a federal statute so provides, an action for another's use or benefit must be brought in the name of the United States. **(3)** ***Joinder of the Real Party in Interest.*** The court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action. After ratification, joinder, or substitution, the action proceeds as if it had been originally commenced by the real party in interest.

(b) Capacity to Sue or Be Sued. The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of the individual's domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Title 28, U.S.C., Sections 754 and 959(a).	**(b) Capacity to Sue or Be Sued.** Capacity to sue or be sued is determined as follows: **(1)** for an individual who is not acting in a representative capacity, by the law of the individual's domicile; **(2)** for a corporation, by the law under which it was organized; and **(3)** for all other parties, by the law of the state where the court is located, except that: **(A)** a partnership or other unincorporated association with no such capacity under that state's law may sue or be sued in its common name to enforce a substantive right existing under the United States Constitution or laws; and **(B)** 28 U.S.C. §§ 754 and 959(a) govern the capacity of a receiver appointed by a United States court to sue or be sued in a United States court.
(c) Infants or Incompetent Persons. Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.	**(c) Minor or Incompetent Person.** **(1)** ***With a Representative.*** The following representatives may sue or defend on behalf of a minor or an incompetent person: **(A)** a general guardian; **(B)** a committee; **(C)** a conservator; or **(D)** a like fiduciary. **(2)** ***Without a Representative.*** A minor or an incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court must appoint a guardian ad litem — or issue another appropriate order — to protect a minor or incompetent person who is unrepresented in an action.
	(d) Public Officer's Title and Name. A public officer who sues or is sued in an official capacity may be designated by official title rather than by name, but the court may order that the officer's name be added.

COMMITTEE NOTE

The language of Rule 17 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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

Restyling Project Comments

Restyled Rule 17: Title. We recommend against changing the title of Rule 17. The change to "the plaintiff and defendant" eliminates a clear statement that the rule applies to all

parties, not just the original plaintiff(s) and defendant(s), and suggests a two-party model of litigation.

Restyled Rule 17(a),(c). Subdividing these sections adds words, numbers and subtitles without increasing clarity. The first sentence in existing Rule 17(a) is more understandable than when it is broken down into two paragraphs, one with seven subparagraphs. The added formalism makes the list in Rule 17(c) seem exclusive rather than, as the present wording seems clearly to imply, flexible and inclusive. We recommend against these changes.

Rule 18. Joinder of Claims and Remedies	Rule 18. Joinder of Claims
(a) **Joinder of Claims.** A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as the party has against an opposing party.	(a) **In General.** A party asserting a claim, counterclaim, crossclaim, or third-party claim may join, as independent or alternative claims, as many claims as it has against an opposing party.
(b) **Joinder of Remedies; Fraudulent Conveyances.** Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to that plaintiff, without first having obtained a judgment establishing the claim for money.	(b) **Joinder of Contingent Claims.** A party may join two claims even though one of them is contingent on the disposition of the other; but the court may grant relief only in accordance with the parties' relative substantive rights. In particular, a plaintiff may state a claim for money and a claim to set aside a conveyance that is fraudulent as to that plaintiff, without first obtaining a judgment for the money.

COMMITTEE NOTE

The language of Rule 18 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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

Restyling Project Comments

Restyled Rule 18(a). The change from "an original claim" to "a claim" is inconsistent with Restyled Rule 8(a) and may be read to imply that a "claim" is different from a "counterclaim", a "crossclaim", or a "third-party claim", an interpretation that could have numerous unfortunate consequences. Suggestion: change "a claim" to "an original claim".

Rule 19. Joinder of Persons Needed for Just Adjudication	Rule 19. Required Joinder of Parties
(a) Persons to Be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.	**(a) Persons Required to Be Joined if Feasible.** **(1)** ***Required Party.*** A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if: **(A)** in that person's absence, the court cannot accord complete relief among existing parties; or **(B)** that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: **(i)** as a practical matter impair or impede the person's ability to protect the interest; or **(ii)** leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest. **(2)** ***Joinder by Court Order.*** If a person has not been joined as required, the court must order that the person be made a party. A person who refuses to join as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff. **(3)** ***Venue.*** If a joined party objects to venue and the joinder would make venue improper, the court must dismiss that party.
(b) Determination by Court Whenever Joinder Not Feasible. If a person as described in subdivision (a)(1)–(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.	**(b) When Joinder Is Not Feasible.** If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include: **(1)** the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties; **(2)** the extent to which any prejudice could be lessened or avoided by: **(A)** protective provisions in the judgment; **(B)** shaping the relief; or **(C)** other measures; **(3)** whether a judgment rendered in the person's absence would be adequate; and **(4)** whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)–(2) hereof who are not joined, and the reasons why they are not joined.	**(c) Pleading the Reasons for Nonjoinder.** When asserting a claim for relief, a party must state: **(1)** the name, if known, of any person who is required to be joined if feasible but is not joined; and **(2)** the reasons for not joining that person.
(d) Exception of Class Actions. This rule is subject to the provisions of Rule 23.	**(d) Exception for Class Actions.** This rule is subject to Rule 23.

COMMITTEE NOTE

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

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

Restyling Project Comments

Restyled Rule 19(b)(2). We recommend against breaking Rule 19(b)(2) into subparts. The sentence is clear and easily understood without them, and the subparts imply rigidity rather than flexibility and discretion.

Rule 20. Permissive Joinder of Parties	Rule 20. Permissive Joinder of Parties
(a) Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons (and any vessel, cargo or other property subject to admiralty process in rem) may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.	**(a) Persons Who May Join or Be Joined.** **(1)** ***Plaintiffs.*** Persons may join in one action as plaintiffs if: **(A)** they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and **(B)** any question of law or fact common to all plaintiffs will arise in the action. **(2)** ***Defendants.*** Persons — as well as a vessel, cargo, or other property subject to admiralty process in rem — may be joined in one action as defendants if: **(A)** any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and **(B)** any question of law or fact common to all defendants will arise in the action. **(3)** ***Extent of Relief.*** Neither a plaintiff nor a defendant need be interested in obtaining or defending against all the relief demanded. The court may grant judgment to one or more plaintiffs according to their rights, and against one or more defendants according to their liabilities.
(b) Separate Trials. The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom the party asserts no claim and who asserts no claim against the party, and may order separate trials or make other orders to prevent delay or prejudice.	**(b) Protective Measures.** The court may issue orders — including an order for separate trials — to protect a party against embarrassment, delay, expense, or other prejudice that arises from including a person against whom the party asserts no claim and who asserts no claim against the party.

COMMITTEE NOTE

The language of Rule 20 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 21. Misjoinder and Non-Joinder of Parties	Rule 21. Misjoinder and Nonjoinder of Parties
Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.	Misjoinder of parties is not a ground for dismissing an action. On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party.

COMMITTEE NOTE

The language of Rule 21 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Restyling Project Comments

Restyled Rule 21. We note a possible ambiguity: Might the change from "at any stage of the action" to "at any time" imply that Rule 21 can be used after judgment? Further, the word "initiative" has been deleted from the phrase: "on its own initiative". As noted in connection with other restyled rules, the phrase "on its own initiative" is a widely used term of art (equivalent to "sua sponte"), and the deletion of the word "initiative" may cause confusion. In a sense, even when a motion is made, a court issues or refuses to issue an order "on its own". Suggestion: insert "initiative" after "on its own".

Rule 22. Interpleader	Rule 22. Interpleader
(1) Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that the plaintiff is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20. (2) The remedy herein provided is in addition to and in no way supersedes or limits the remedy provided by Title 28, U.S.C., §§ 1335, 1397, and 2361. Actions under those provisions shall be conducted in accordance with these rules.	**(a) Grounds.** **(1)** ***By a Plaintiff.*** Persons with claims that may expose a plaintiff to double or multiple liability may be joined as defendants and required to interplead. Joinder for interpleader is proper even though: **(A)** the claims of the several claimants, or the titles on which their claims depend, lack a common origin or are adverse and independent rather than identical; or **(B)** the plaintiff denies liability in whole or in part to any or all of the claimants. **(2)** ***By a Defendant.*** A defendant exposed to similar liability may seek interpleader through a crossclaim or counterclaim. **(b) Relation to Other Rules and Statutes.** This rule supplements — and does not limit — the joinder of parties allowed by Rule 20. The remedy it provides is in addition to — and does not supersede or limit — the remedy provided by 28 U.S.C. §§ 1335, 1397, and 2361. An action under those statutes must be conducted under these rules.

COMMITTEE NOTE

The language of Rule 22 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 23(a)-(b)

Rule 23. Class Actions	Rule 23. Class Actions
(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.	**(a) Prerequisites.** One or more members of a class may sue or be sued as representative parties on behalf of all members only if: **(1)** the class is so numerous that joinder of all members is impracticable; **(2)** questions of law or fact are common to the class; **(3)** the representative parties' claims or defenses are typical of the class claims or defenses; and **(4)** the representative parties will fairly and adequately protect the interests of the class.
(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: **(1)** the prosecution of separate actions by or against individual members of the class would create a risk of **(A)** inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or **(B)** adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or **(2)** the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or **(3)** the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.	**(b) Types of Class Actions.** A class action may be maintained if Rule 23(a) is satisfied and if: **(1)** prosecuting separate actions by or against individual class members would create a risk of: **(A)** inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or **(B)** adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests; **(2)** the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or **(3)** the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include: **(A)** the class members' interests in individually controlling the prosecution or defense of separate actions; **(B)** the extent and nature of any litigation concerning the controversy already begun by or against class members; **(C)** the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and **(D)** the likely difficulties in managing a class action.

(c) Determining by Order Whether to Certify a Class Action; Appointing Class Counsel; Notice and Membership in Class; Judgment; Multiple Classes and Subclasses. **(1) (A)** When a person sues or is sued as a representative of a class, the court must — at an early practicable time — determine by order whether to certify the action as a class action. **(B)** An order certifying a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g). **(C)** An order under Rule 23(c)(1) may be altered or amended before final judgment. **(2) (A)** For any class certified under Rule 23(b)(1) or (2), the court may direct appropriate notice to the class. **(B)** For any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language: • the nature of the action, • the definition of the class certified, • the class claims, issues, or defenses, • that a class member may enter an appearance through counsel if the member so desires, • that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and • the binding effect of a class judgment on class members under Rule 23(c)(3).	**(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.** **(1)** ***Certification Order.*** **(A)** *Time to Issue.* At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action. **(B)** *Defining the Class; Appointing Class Counsel* An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g). **(C)** *Altering or Amending the Order.* An order that grants or denies class certification may be altered or amended before final judgment. **(2)** ***Notice.*** **(A)** *For (b)(1) or (b)(2) Classes* For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class. **(B)** *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language: **(i)** the nature of the action; **(ii)** the definition of the class certified; **(iii)** the class claims, issues, or defenses; **(iv)** that a class member may enter an appearance through an attorney if the member so desires; **(v)** that the court will exclude from the class any member who requests exclusion; **(vi)** the time and manner for requesting exclusion; and **(vii)** the binding effect of a class judgment on members under Rule 23(c)(3).

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

(e) Settlement, Voluntary Dismissal, or Compromise. **(1)** **(A)** The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class. **(B)** The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise. **(C)** The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate. **(2)** The parties seeking approval of a settlement, voluntary dismissal, or compromise under Rule 23(e)(1) must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise. **(3)** In an action previously certified as a class action under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so. **(4)** **(A)** Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval under Rule 23(e)(1)(A). **(B)** An objection made under Rule 23(e)(4)(A) may be withdrawn only with the court's approval.	(e) **Settlement, Voluntary Dismissal, or Compromise.** The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply: **(1)** The court must direct notice in a reasonable manner to all class members who would be bound by the proposed settlement, voluntary dismissal, or compromise. **(2)** The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that it is fair, reasonable, and adequate. **(3)** The parties seeking approval must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise. **(4)** If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so. **(5)** Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

(f) Appeals. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.	**(f) Appeals.** A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 10 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.
(g) Class Counsel. **(1) Appointing Class Counsel.** **(A)** Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. **(B)** An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class. **(C)** In appointing class counsel, the court **(i)** must consider: • the work counsel has done in identifying or investigating potential claims in the action, • counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action, • counsel's knowledge of the applicable law, and • the resources counsel will commit to representing the class; **(ii)** may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class; **(iii)** may direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs, and **(iv)** may make further orders in connection with the appointment.	**(g) Class Counsel.** **(1)** ***Appointing Class Counsel.*** Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court: **(A)** must consider: **(i)** the work counsel has done in identifying or investigating potential claims in the action; **(ii)** counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; **(iii)** counsel's knowledge of the applicable law; and **(iv)** the resources that counsel will commit to representing the class; **(B)** may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class; **(C)** may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs; **(D)** may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and **(E)** may make further orders in connection with the appointment.
(2) Appointment Procedure. **(A)** The court may designate interim counsel to act on behalf of the putative class before determining whether to certify the action as a class action. **(B)** When there is one applicant for appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1)(B) and (C). If more than one adequate applicant seeks appointment as class counsel, the court must appoint the applicant best able to represent the interests of the class. **(C)** The order appointing class counsel may include provisions about the award of attorney fees or nontaxable costs under Rule 23(h).	**(2)** ***Standard for Appointing Class Counsel.*** When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class. **(3)** ***Interim Counsel.*** The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action. **(4)** ***Duty of Class Counsel.*** Class counsel must fairly and adequately represent the interests of the class.

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

COMMITTEE NOTE

The language of Rule 23 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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

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

Restyling Project Comments

Restyled Rule 23(a). We recommend against the proposed change to "class claims and defenses" in (a)(3). One could read the proposed language to direct the court to match the putative class representatives' claims only against the common questions, and not against all of the questions, both common and individual, involved in the class members' claims.

Restyled Rule 23(b)(1). We recommend against the change from "individual members of the class" to "individual class members". There is a subtle difference in meaning; the proposed language could be confusing by juxtaposing "individual" and "class", and the existing language is familiar and incorporated in much case law.

Restyled Rule 23(b)(1)(B). We recommend retaining "would, as a practical matter, be dispositive" because it is more clear, idiomatic, and accurate than the proposed rewording, and

saves adding a "would" later in the sentence. We suggest that adding "or" at the end of (b)(1)(B) might help to keep the alternative nature of the categories clear.

Restyled Rule 23(b)(3). We recommend retaining "common to members of the class". This wording emphasizes the individuality of the members of the putative class, while the proposed wording emphasizes that they are part of a class. The risk of changing the meaning of an important rule outweighs the stylistic benefit of replacing "of" with a possessive. Similarly, we recommend against changing "the interests of members of the class" in (b)(3)(A) to "the class members' interests," "litigation . . . by or against members of the class" in (b)(3)(B) to "litigation . . . by or against class members," and "members of the class" to "class members" in (c)(3)(B).

Restyled Rule 23(c). For reasons given elsewhere we recommend against the extent of subdivision in Restyled Rule 23(c)(2)(B). We also recommend changing the placement of the commas in Restyled Rule 23(c)(3)(B) to "to whom the . . . notice was directed and who have not requested exclusion, [added comma] and whom the court finds." The group that is eligible to be bound by the judgment is the group to whom notice was directed *and* who didn't request exclusion. Not requesting exclusion is not just part of a list. And the group that the court declares is bound by the judgment is that group. We also note a possible ambiguity in Restyled Rule 23(c)(4): Eliminating "brought or" in "brought or maintained " might imply that one must bring a class action as a "whole" and then have the court determine that it can be "maintained" only "with respect to particular issues". *Cf.* debates about the propriety of seeking (only) partial summary judgment under existing Rule 56. Suggestion: restore "brought or".

Restyled Rule 23(d). For reasons given elsewhere we recommend against the extent of subdivision in Restyled Rule 23(d)(1)(B).

Rule 23.1. Derivative Actions by Shareholders	Rule 23.1. Derivative Actions
In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which the plaintiff complains or that the plaintiff's share or membership thereafter devolved on the plaintiff by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for the plaintiff's failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.	(a) **Prerequisites.** This rule applies when one or more shareholders or members of a corporation or an unincorporated association bring a derivative action to enforce a right that the corporation or association may properly assert but has failed to enforce. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of shareholders or members who are similarly situated in enforcing the right of the corporation or association. (b) **Pleading Requirements.** The complaint must be verified and must: (1) allege that the plaintiff was a shareholder or member at the time of the transaction complained of, or that the plaintiff's share or membership later devolved on it by operation of law; (2) allege that the action is not a collusive one to confer jurisdiction that the court would otherwise lack; and (3) state with particularity: (A) any effort by the plaintiff to obtain the desired action from the directors or comparable authority and, if necessary, from the shareholders or members; and (B) the reasons for not obtaining the action or not making the effort. (c) **Settlement, Dismissal, and Compromise.** A derivative action may be settled, voluntarily dismissed, or compromised only with the court's approval. Notice of a proposed settlement, voluntary dismissal, or compromise must be given to shareholders or members in the manner that the court orders.

COMMITTEE NOTE

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

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

COMMITTEE NOTE

The language of Rule 23.2 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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

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

COMMITTEE NOTE

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

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

Rule 25. Substitution of Parties	Rule 25. Substitution of Parties
(a) Death. (1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons, and may be served in any judicial district. Unless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party. (2) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.	**(a) Death.** (1) ***Substitution if the Claim Is Not Extinguished.*** If a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representative. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent may be dismissed. (2) ***Continuation Among the Remaining Parties.*** After a party's death, if the right sought to be enforced survives only to or against the remaining parties, the action does not abate, but proceeds in favor of or against the remaining parties. The death should be noted on the record. (3) ***Service.*** A motion to substitute, together with a notice of hearing, must be served on the parties as provided in Rule 5 and on nonparties as provided in Rule 4. A statement noting death must be served in the same manner. Service may be made in any judicial district.
(b) Incompetency. If a party becomes incompetent, the court upon motion served as provided in subdivision (a) of this rule may allow the action to be continued by or against the party's representative.	**(b) Incompetency.** If a party becomes incompetent, the court may, on motion, permit the action to be continued by or against the party's representative. The motion must be served as provided in Rule 25(a)(3).
(c) Transfer of Interest. In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule.	**(c) Transfer of Interest.** If an interest is transferred, the action may be continued by or against the original party unless the court, on motion, orders the transferee to be substituted in the action or joined with the original party. The motion must be served as provided in Rule 25(a)(3).

(d) Public Officers; Death or Separation From Office. (1) When a public officer is a party to an action in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and the officer's successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution. (2) A public officer who sues or is sued in an official capacity may be described as a party by the officer's official title rather than by name; but the court may require the officer's name to be added.	**(d) Public Officers; Death or Separation from Office.** An action does not abate when a public officer who is a party in an official capacity dies, resigns, or otherwise ceases to hold office while the action is pending. The officer's successor is automatically substituted as a party. Later proceedings should be in the substituted party's name, but any misnomer not affecting the parties' substantial rights must be disregarded. The court may order substitution at any time, but the absence of such an order does not affect the substitution. [Current Rule 25(d)(2) has become restyled Rule 17(d).]

COMMITTEE NOTE

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

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

Restyling Project Comments

Restyled Rule 25(a)(1). Replacing "the action shall be dismissed" with "the action . . . may be dismissed" appears to be a substantive change. Suggestion: unless there is unanimous agreement in the case law that the existing language confers discretion — in which event the matter should be discussed in the Committee Note — transfer this change to the style/substance track.

V. DEPOSITIONS AND DISCOVERY **Rule 26. General Provisions Governing Discovery; Duty of Disclosure**	TITLE V. DISCLOSURES AND DISCOVERY **Rule 26. Duty to Disclose; General Provisions Governing Discovery**
(a) Required Disclosures; Methods to Discover Additional Matter. **(1) Initial Disclosures.** Except in categories of proceedings specified in Rule 26(a)(1)(E), or to the extent otherwise stipulated or directed by order, a party must, without awaiting a discovery request, provide to other parties: **(A)** the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment, identifying the subjects of the information; **(B)** a copy of, or a description by category and location of, all documents, data compilations, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment;	**(a) Required Disclosures.** **(1)** ***Initial Disclosure.*** **(A)** *In General.* Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties: **(i)** the name and, if known, the address and telephone number of each individual likely to have discoverable information — along with the subjects of that information — that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment; **(ii)** a copy — or a description by category and location — of all documents, data compilations, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;
(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and **(D)** for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.	**(iii)** a computation of each category of damages claimed by the disclosing party — who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and **(iv)** for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment or to indemnify or reimburse for payments made to satisfy the judgment.

(E) The following categories of proceedings are exempt from initial disclosure under Rule 26(a)(1): (i) an action for review on an administrative record; (ii) a petition for habeas corpus or other proceeding to challenge a criminal conviction or sentence; (iii) an action brought without counsel by a person in custody of the United States, a state, or a state subdivision; (iv) an action to enforce or quash an administrative summons or subpoena; (v) an action by the United States to recover benefit payments; (vi) an action by the United States to collect on a student loan guaranteed by the United States; (vii) a proceeding ancillary to proceedings in other courts; and (viii) an action to enforce an arbitration award.	**(B)** *Proceedings Exempt from Initial Disclosure* The following proceedings are exempt from initial disclosure: **(i)** an action for review on an administrative record; **(ii)** a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence; **(iii)** an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision; **(iv)** an action to enforce or quash an administrative summons or subpoena; **(v)** an action by the United States to recover benefit payments; **(vi)** an action by the United States to collect on a student loan guaranteed by the United States; **(vii)** a proceeding ancillary to a proceeding in another court; and **(viii)** an action to enforce an arbitration award.
These disclosures must be made at or within 14 days after the Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in the circumstances of the action and states the objection in the Rule 26(f) discovery plan. In ruling on the objection, the court must determine what disclosures – if any – are to be made, and set the time for disclosure. Any party first served or otherwise joined after the Rule 26(f) conference must make these disclosures within 30 days after being served or joined unless a different time is set by stipulation or court order. A party must make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures	**(C)** *Time for Initial Disclosures — In General.* A party must make the initial disclosures at or within 14 days after the Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure. **(D)** *Time for Initial Disclosures — For Parties Served or Joined Later.* A party that is first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order. **(E)** *Basis for Initial Disclosure; Unacceptable Excuses.* A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) Disclosure of Expert Testimony. **(A)** In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence. **(B)** Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.	**(2)** ***Disclosure of Expert Testimony.*** **(A)** *In General* In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705. **(B)** *Written Report.* Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report — prepared and signed by the witness — if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain: **(i)** a complete statement of all opinions the witness will express and the basis and reasons for them; **(ii)** the data or other information considered by the witness in forming them; **(iii)** any exhibits that will be used to summarize or support them; **(iv)** the witness's qualifications, including a list of all publications authored in the previous ten years; **(v)** a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and **(vi)** a statement of the witness's compensation for study and testimony in the case.
(C) These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), within 30 days after the disclosure made by the other party. The parties shall supplement these disclosures when required under subdivision (e)(1).	**(C)** *Time to Disclose Expert Testimony* A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made: **(i)** at least 90 days before the date set for trial or for the case to be ready for trial; or **(ii)** if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B), within 30 days after the other party's disclosure. **(D)** *Supplementing the Disclosure.* The parties must supplement these disclosures when required under Rule 26(e).

(3) Pretrial Disclosures. In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to other parties and promptly file with the court the following information regarding the evidence that it may present at trial other than solely for impeachment: **(A)** the name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises; **(B)** the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and **(C)** an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises. Unless otherwise directed by the court, these disclosures must be made at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by the court, a party may serve and promptly file a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(B), and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under Rule 26(a)(3)(C). Objections not so disclosed, other than objections under Rules 402 and 403 of the Federal Rules of Evidence, are waived unless excused by the court for good cause.	**(3)** ***Pretrial Disclosures.*** **(A)** *In General* In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment: **(i)** the name and, if not previously provided, the address and telephone number of each witness — separately identifying those the party expects to present and those it may call if the need arises; **(ii)** the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and **(iii)** an identification of each document or other exhibit, including summaries of other evidence — separately identifying those items the party expects to offer and those it may offer if the need arises. **(B)** *Time for Pretrial Disclosures; Objections*. Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made — except for one under Federal Rule of Evidence 402 or 403 — is waived unless excused by the court for good cause.
(4) Form of Disclosures. Unless the court orders otherwise, all disclosures under Rules 26(a)(1) through (3) must be made in writing, signed, and served. **(5) Methods to Discover Additional Matter.** Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property under Rule 34 or 45(a)(1)(C), for inspection and other purposes; physical and mental examinations; and requests for admission.	**(4)** ***Form of Disclosures.*** Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served. [Current Rule 26(a)(5) is deleted.]

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows: **(1) In General.** Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii).	**(b) Discovery Scope and Limits.** **(1)** ***Scope in General.*** Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense — including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(B).
(2) Limitations. By order, the court may alter the limits in these rules on the number of depositions and interrogatories or the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36. The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Rule 26(c).	**(2)** ***Limitations on Frequency and Extent.*** **(A)** *When Permitted.* By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36. **(B)** *When Required* The court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that: **(i)** the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; **(ii)** the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or **(iii)** the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues. **(C)** *On Motion or the Court's Own Initiative.* The court may act on motion or on its own after reasonable notice.

(3) Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation. A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.	**(3)** ***Trial Preparation: Materials.*** **(A)** *Documents and Tangible Things.* Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if: **(i)** they are otherwise discoverable under Rule 26(b)(1); and **(ii)** the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means. **(B)** *Protection Against Disclosure.* If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation. **(C)** *Previous Statement* Any party or other person may, on request and without the showing required under Rule 26(b)(3)(A), obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either: **(i)** a written statement that the person has signed or otherwise adopted or approved; or **(ii)** a contemporaneous stenographic, mechanical, electrical, or other recording — or a transcription of it — that recites substantially verbatim the person's oral statement.

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

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: **(1)** that the disclosure or discovery not be had; **(2)** that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place; **(3)** that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; **(4)** that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters;	**(c) Protective Orders.** **(1)** ***In General.*** A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending — or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: **(A)** forbidding the disclosure or discovery; **(B)** specifying terms, including time and place, for the disclosure or discovery; **(C)** prescribing a discovery method other than the one selected by the party seeking discovery; **(D)** forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;
(5) that discovery be conducted with no one present except persons designated by the court; **(6)** that a deposition, after being sealed, be opened only by order of the court; **(7)** that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and **(8)** that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court. If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or other person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.	**(E)** designating the persons who may be present while the discovery is conducted; **(F)** requiring that a deposition be sealed and opened only on court order; **(G)** requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and **(H)** requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs. **(2)** ***Ordering Discovery.*** If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery. **(3)** ***Awarding Expenses.*** Rule 37(a)(5) applies to the award of expenses.

(d) Timing and Sequence of Discovery. Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E), or when authorized under these rules or by order or agreement of the parties, a party may not seek discovery from any source before the parties have conferred as required by Rule 26(f). Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, does not operate to delay any other party's discovery.	**(d) Timing and Sequence of Discovery.** **(1)** ***Timing.*** A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order. **(2)** ***Sequence.*** Unless, on motion, the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice: **(A)** methods of discovery may be used in any sequence; and **(B)** discovery by one party does not require any other party to delay its discovery.
(e) Supplementation of Disclosures and Responses. A party who has made a disclosure under subdivision (a) or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if ordered by the court or in the following circumstances: **(1)** A party is under a duty to supplement at appropriate intervals its disclosures under subdivision (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under subdivision (a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert, and any additions or other changes to this information shall be disclosed by the time the party's disclosures under Rule 26(a)(3) are due.	**(e) Supplementing Disclosures and Responses.** **(1)** ***In General.*** A party who has made a disclosure under Rule 26(a) — or who has responded to an interrogatory, request for production, or request for admission — must supplement or correct its disclosure or response: **(A)** in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or **(B)** as ordered by the court.
(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.	**(2)** ***Expert Witness.*** For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

(f) Conference of Parties; Planning for Discovery. Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E) or when otherwise ordered, the parties must, as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), confer to consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by Rule 26(a)(1), and to develop a proposed discovery plan that indicates the parties' views and proposals concerning: **(1)** what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement as to when disclosures under Rule 26(a)(1) were made or will be made; **(2)** the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues; **(3)** what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and **(4)** any other orders that should be entered by the court under Rule 26(c) or under Rule 16(b) and (c). The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. A court may order that the parties or attorneys attend the conference in person. If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule (i) require that the conference between the parties occur fewer than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b), and (ii) require that the written report outlining the discovery plan be filed fewer than 14 days after the conference between the parties, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.	**(f) Conference of the Parties; Planning for Discovery.** **(1)** ***Conference Timing.*** Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable — and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b). **(2)** ***Conference Content; Parties' Responsibilities.*** In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person. **(3)** ***Discovery Plan.*** A discovery plan must state the parties' views and proposals on: **(A)** what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made; **(B)** the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues; **(C)** what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and **(D)** any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c). **(4)** ***Expedited Schedule.*** If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule: **(A)** require the parties' conference to occur less than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b); and **(B)** require the written report outlining the discovery plan to be filed less than 14 days after the parties' conference, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

(g) Signing of Disclosures, Discovery Requests, Responses, and Objections. **(1)** Every disclosure made pursuant to subdivision (a)(1) or subdivision (a)(3) shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the disclosure and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made. **(2)** Every discovery request, response, or objection made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response, or objection is: **(A)** consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; **(B)** not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and **(C)** not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed. **(3)** If without substantial justification a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the disclosure, request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.	**(g) Signing Disclosures and Discovery Requests, Responses, and Objections.** **(1)** ***Signature Required; Effect of Signature.*** Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name — or by the party personally, if unrepresented — and must state the signer's address. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry: **(A)** with respect to a disclosure, it is complete and correct as of the time it is made; and **(B)** with respect to a discovery request, response, or objection, it is: **(i)** consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law; **(ii)** not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the litigation costs; and **(iii)** neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action. **(2)** ***Failure to Sign.*** The court must strike an unsigned disclosure, request, response, or objection unless the omission is promptly corrected after being called to the attorney's or party's attention. Until the signature is provided, the other party has no duty to respond. **(3)** ***Sanction for Improper Certification.*** If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

COMMITTEE NOTE

The language of Rule 26 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 26(a)(5) served only as an index of the discovery methods provided by later rules. It was deleted as redundant.

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

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

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

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

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

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

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

Restyling Project Comments

Restyled Rule 26(a)(1)(A)(iv). The deletion of the phrase "which may be entered in the action" arguably mandates disclosure of insurance agreements that are irrelevant to the pending action. Suggestion: insert "in the action" following the phrase "all or part of a possible judgment."

Proposed Deletion of Rule 26(a)(5). Elimination of redundancy is a commendable goal, but existing Rule 26(a)(5) actually settles some disputes. It dispels the argument, for example, that requests for admission are not discovery devices. *Joseph L. v. Conn. Dep't of Children & Families*, 225 F.R.D. 400, 402, 403 (D. Conn. 2005). Or that a Rule 45 subpoena duces tecum is not a discovery device. *Parker v. Learn the Skills Corp.*, 2004 U.S. Dist. LEXIS 21498, at *8

n.4 (E.D.Pa. 2004). In the real world, these issues come up with some frequency as parties try to elude discovery cutoff dates. A quick LEXIS search found more than a dozen cases using 26(a)(5) to deal with such arguments over the past 5 years. Deletion of this provision is, therefore, undesirable. Suggestion: retain (and restyle) existing Rule 26(a)(5).

Restyled Rule 26(a)(2)(B)(vi). Restyled Rule 26(a)(2)(B)(vi) is problematic because it omits information that is currently required to be disclosed. Existing Rule 26(a)(2)(B) requires each retained expert's report to disclose "the compensation to be paid for *the* study and testimony...." Restyled Rule 26(a)(2)(B)(vi) limits the disclosure to "a statement of *the witness's* compensation for study and testimony in the case". The problem is that "*the witness's* compensation for study and testimony" may be far less than "the compensation to be paid for *the* study and testimony". An economic expert, for example, is frequently an academic. The mass of data is crunched by a separate, non-testifying consulting firm (*e.g.*, Cornerstone, Analysis Group, FTI). The witness's "study" includes supervising, working with, and analyzing the work product of, the consulting firm, but the consulting firm is doing a great deal on its own. The current disclosure requirement captures everything done by the expert as well as the back-up firm because disclosure is not limited to the expert's individual compensation — it applies to "the compensation to be paid for *the* study and testimony", as opposed to limiting the disclosure to "*the witness's* compensation for study and testimony". (A similar problem arises when a PricewaterhouseCoopers (or other Big Four) partner is the retained expert and his/her firm does the backup work — disclosure should not turn on the question whether the testifying expert retention agreement is with the firm, rather than the individual.) Suggestion: retain the existing language.

Restyled Rule 26(b)(1). The restyling highlights, but does not cure, inconsistent terminology in the existing version of Rule 26. Thus, Restyled Rule 26(b)(1) encompasses "documents or other tangible things" while Restyled Rule 26 (b)(5) encompasses "documents, communications, or things", even though the items as to which privilege is claimed under 26(b)(5) must be producible under Rule 26(b)(1). The restyling should rectify this inconsistency, which extends to other rules as well. *See, e.g.*, Restyled Rules 34(a) ("documents" and "tangible things"); 34(c) (same); 45(a)(1)(A)(iii), (b)(1) and (c)(2)(A) (same); 45(c)(2)(B) ("designated materials"); 45(d)(2) (which appears to be misnumbered as the second 45(c)(2)) ("documents, communications, or things").

Restyled Rule 26(e). Deleting the phrase "to include information thereafter acquired" is problematic. According to the Note, the change was made because "[t]his apparent limit is not reflected in practice; parties recognize the duty to supplement or correct by providing information that was not originally provided although it was available at the time of the initial disclosure or response. These words are deleted to reflect the actual meaning of the present rule". This analysis confuses the duty to supplement with the duty to correct. The words "or corrective" in the existing rule are confined to changing an answer based on information acquired after the original response was made. They are not a license to withhold information and provide it later through Rule 26(e). Currently, there is no limitation on the right to amend a prior discovery response. When parties amend discovery responses to correct an erroneous response based on information that they had at the time the original response was made, the correction is not based on Rule 26(e) but on their duty to the court to correct a false certification — the same duty that gives rise to the duty (and right) to correct in Rule 11(c)(1)(A). Compare amending and supplementing pleadings under Rule 15(a) vs. Rule 15(d). Suggestion: retain the existing language.

Restyled Rule 26(g)(1)(B)(ii). This provision raises an issue that recurs in the restyled rules (*see also* Restyled Rule 11(b)(i)). The existing phrase "cost of litigation" in Rule 26(g)(2)(B) is changed to "litigation costs" in Restyled Rule 26(g)(1)(B)(ii). "Cost of litigation" and "litigation costs" often do not mean the same thing. "Cost of litigation" is inclusive of attorney's fees, but the phrase "litigation costs" is a technical phrase that many times does not. "Litigation costs" is sometimes used in statutes as distinct from attorneys' fees (*e.g.*, False Claims Act, 31 U.S.C. § 3730(h)("litigation costs and reasonable attorneys' fees") — even Restyled Rule 68 uses the lone word "costs" in this sense to mean statutory costs, as in 28 U.S.C. § 1912. This, then, is potentially a substantive change. If intended, it should be included in the style/substance track; if change is not intended, the existing language should be retained.

Restyled Rule 26(g)(2). The last paragraph of existing Rule 26(g)(2) provides that, "[i] f a request, response, or objection is not signed, ... a party shall not be obligated to *take any action* with respect to it until it is signed". The restyled rule provides that, "[u]ntil the signature is provided, the other party has *no duty to respond*". If the unsigned item is an objection, no response is due. If the concept is that the unsigned paper is inoperative, the verb "respond" does not capture all scenarios covered by the rule. Suggestion: change "to respond" to "to take any action with respect to it".

Rule 27. Depositions before Action or Pending Appeal	Rule 27. Depositions to Perpetuate Testimony
(a) Before Action. **(1) Petition.** A person who desires to perpetuate testimony regarding any matter that may be cognizable in any court of the United States may file a verified petition in the United States district court in the district of the residence of any expected adverse party. The petition shall be entitled in the name of the petitioner and shall show: 1, that the petitioner expects to be a party to an action cognizable in a court of the United States but is presently unable to bring it or cause it to be brought, 2, the subject matter of the expected action and the petitioner's interest therein, 3, the facts which the petitioner desires to establish by the proposed testimony and the reasons for desiring to perpetuate it, 4, the names or a description of the persons the petitioner expects will be adverse parties and their addresses so far as known, and 5, the names and addresses of the persons to be examined and the substance of the testimony which the petitioner expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.	**(a) Before an Action Is Filed.** **(1)** ***Petition.*** A person who wants to perpetuate testimony about any matter cognizable in a United States court may file a verified petition in the district court for the district where any expected adverse party resides. The petition must ask for an order authorizing the petitioner to depose the named persons in order to perpetuate their testimony. The petition must be titled in the petitioner's name and must show: **(A)** that the petitioner expects to be a party to an action cognizable in a United States court but cannot presently bring it or cause it to be brought; **(B)** the subject matter of the expected action and the petitioner's interest; **(C)** the facts that the petitioner wants to establish by the proposed testimony and the reasons to perpetuate it; **(D)** the names or a description of the persons whom the petitioner expects to be adverse parties and their addresses, so far as known; and **(E)** the name, address, and expected substance of the testimony of each deponent.

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

(b) Pending Appeal. If an appeal has been taken from a judgment of a district court or before the taking of an appeal if the time therefor has not expired, the district court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the district court. In such case the party who desires to perpetuate the testimony may make a motion in the district court for leave to take the depositions, upon the same notice and service thereof as if the action was pending in the district court. The motion shall show (1) the names and addresses of persons to be examined and the substance of the testimony which the party expects to elicit from each; (2) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken and may make orders of the character provided for by Rules 34 and 35, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in the district court.	**(b) Pending Appeal.** **(1)** ***In General.*** The court where a judgment has been rendered may, if an appeal has been taken or may still be taken, permit a party to depose witnesses to perpetuate their testimony for use in the event of further proceedings in that court. **(2)** ***Motion.*** The party who wants to perpetuate testimony may move for leave to take the depositions, on the same notice and service as if the action were pending in the district court. The motion must show: **(A)** the name, address, and expected substance of the testimony of each deponent; and **(B)** the reasons for perpetuating the testimony. **(3)** ***Court Order.*** If the court finds that perpetuating the testimony may prevent a failure or delay of justice, the court may permit the depositions to be taken and may issue orders like those authorized by Rules 34 and 35. The depositions may be taken and used as any other deposition taken in a pending district-court action.
(c) Perpetuation by Action. This rule does not limit the power of a court to entertain an action to perpetuate testimony.	**(c) Perpetuation by an Action.** This rule does not limit a court's power to entertain an action to perpetuate testimony.

COMMITTEE NOTE

The language of Rule 27 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 28. Persons Before Whom Depositions May Be Taken	Rule 28. Persons Before Whom Depositions May Be Taken
(a) Within the United States. Within the United States or within a territory or insular possession subject to the jurisdiction of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, or before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony. The term officer as used in Rules 30, 31 and 32 includes a person appointed by the court or designated by the parties under Rule 29.	**(a) Within the United States.** **(1)** ***In General.*** Within the United States or a territory or insular possession subject to United States jurisdiction, a deposition must be taken before: **(A)** an officer authorized to administer oaths either by federal law or by the law in the place of examination; or **(B)** a person appointed by the court where the action is pending to administer oaths and take testimony. **(2)** ***Definition of "Officer."*** The term "officer" in Rules 30, 31, and 32 includes a person appointed by the court under this rule or designated by the parties under Rule 29(a).
(b) In Foreign Countries. Depositions may be taken in a foreign country (1) pursuant to any applicable treaty or convention, or (2) pursuant to a letter of request (whether or not captioned a letter rogatory), or (3) on notice before a person authorized to administer oaths in the place where the examination is held, either by the law thereof or by the law of the United States, or (4) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of the commission to administer any necessary oath and take testimony. A commission or a letter of request shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter of request that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter of request may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter of request may be addressed "To the Appropriate Authority in [here name the country]." When a letter of request or any other device is used pursuant to any applicable treaty or convention, it shall be captioned in the form prescribed by that treaty or convention. Evidence obtained in response to a letter of request need not be excluded merely because it is not a verbatim transcript, because the testimony was not taken under oath, or because of any similar departure from the requirements for depositions taken within the United States under these rules.	**(b) In a Foreign Country.** **(1)** ***In General.*** A deposition may be taken in a foreign country: **(A)** under an applicable treaty or convention; **(B)** under a letter of request, whether or not captioned a "letter rogatory"; **(C)** on notice, before a person authorized to administer oaths either by federal law or by the law in the place of examination; or **(D)** before a person commissioned by the court to administer any necessary oath and take testimony. **(2)** ***Issuing a Letter of Request or a Commission.*** A letter of request, a commission, or both may be issued: **(A)** on appropriate terms after an application and notice of it; and **(B)** without a showing that taking the deposition in another manner is impracticable or inconvenient. **(3)** ***Form of a Request, Notice, or Commission.*** When a letter of request or any other device is used according to a treaty or convention, it must be captioned in the form prescribed by that treaty or convention. A letter of request may be addressed "To the Appropriate Authority in [name of country]." A deposition notice or a commission must designate by name or descriptive title the person before whom the deposition is to be taken. **(4)** ***Letter of Request — Admitting Evidence.*** Evidence obtained in response to a letter of request need not be excluded merely because it is not a verbatim transcript, because the testimony was not taken under oath, or because of any similar departure from the requirements for depositions taken within the United States.

(c) **Disqualification for Interest.** No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action.	(c) **Disqualification.** A deposition must not be taken before a person who is any party's relative, employee, or attorney; who is related to or employed by any party's attorney; or who is financially interested in the action.

COMMITTEE NOTE

The language of Rule 28 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 29. Stipulations Regarding Discovery Procedure	Rule 29. Stipulations About Discovery Procedure
Unless otherwise directed by the court, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify other procedures governing or limitations placed upon discovery, except that stipulations extending the time provided in Rules 33, 34, and 36 for responses to discovery may, if they would interfere with any time set for completion of discovery, for hearing of a motion, or for trial, be made only with the approval of the court.	Unless the court orders otherwise, the parties may stipulate that: **(a)** a deposition may be taken before any person, at any time or place, on any notice, and in the manner specified — in which event it may be used in the same way as any other deposition; and **(b)** other procedures governing or limiting discovery be modified — but a stipulation extending the time for any form of discovery must have court approval if it would interfere with the time set for completing discovery, for hearing a motion, or for trial.

COMMITTEE NOTE

The language of Rule 29 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Restyling Project Comments

Restyled Rule 29(b). The existing rule requires a written stipulation. Because a stipulation can be oral, this restyling is more than mere simplification or clarification of the existing text. The same omission appears in several other restyled rules (30(a)(2)(A), 30(b)(4), 31(a)(2)(A), 33(a)(1), 33(b)(2), 36(a)(3), 59(c)).

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

(2) The party taking the deposition shall state in the notice the method by which the testimony shall be recorded. Unless the court orders otherwise, it may be recorded by sound, sound-and-visual, or stenographic means, and the party taking the deposition shall bear the cost of the recording. Any party may arrange for a transcription to be made from the recording of a deposition taken by nonstenographic means. **(3)** With prior notice to the deponent and other parties, any party may designate another method to record the deponent's testimony in addition to the method specified by the person taking the deposition. The additional record or transcript shall be made at that party's expense unless the court otherwise orders.	**(3)** ***Method of Recording.*** **(A)** *Method Stated in the Notice* The party who notices the deposition must state in the notice the method for recording the testimony. Unless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The noticing party bears the recording costs. Any party may arrange to transcribe a deposition that was taken nonstenographically. **(B)** *Additional Method.* With prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice. That party bears the expense of the additional record or transcript unless the court orders otherwise. **(4)** ***By Remote Means.*** The parties may stipulate — or the court may on motion order — that a deposition be taken by telephone or other remote means. For the purpose of this rule and Rules 28(a), 37(a)(2), and 37(b)(1), the deposition takes place where the deponent answers the questions.
(4) Unless otherwise agreed by the parties, a deposition shall be conducted before an officer appointed or designated under Rule 28 and shall begin with a statement on the record by the officer that includes (A) the officer's name and business address; (B) the date, time, and place of the deposition; (C) the name of the deponent; (D) the administration of the oath or affirmation to the deponent; and (E) an identification of all persons present. If the deposition is recorded other than stenographically, the officer shall repeat items (A) through (C) at the beginning of each unit of recorded tape or other recording medium. The appearance or demeanor of deponents or attorneys shall not be distorted through camera or sound-recording techniques. At the end of the deponent, the officer shall state on the record that the deposition is complete and shall set forth any stipulations made by counsel concerning the custody of the transcript or recording and the exhibits, or concerning other pertinent matters. **(5)** The notice to a party deponent may be accompanied by a request made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 34 shall apply to the request.	**(5)** ***Officer's Duties.*** **(A)** *Before the Deposition.* Unless the parties stipulate otherwise, a deposition must be conducted before an officer appointed or designated under Rule 28. The officer must begin the deposition with an on-the-record statement that includes: **(i)** the officer's name and business address; **(ii)** the date, time, and place of the deposition; **(iii)** the deponent's name; **(iv)** the officer's administration of the oath or affirmation to the deponent; and **(v)** the identity of all persons present. **(B)** *Conducting the Deposition; Avoiding Distortion.* If the deposition is recorded nonstenographically, the officer must repeat the items in Rule 30(b)(5)(A)(i)-(iii) at the beginning of each unit of the recording medium. The deponent's and attorneys' appearance or demeanor must not be distorted through camera or sound-recording techniques. **(C)** *After the Deposition.* At the end of a deposition, the officer must state on the record that the deposition is complete and must set out any stipulations made by the attorneys about custody of the transcript or recording and of the exhibits, or about any other pertinent matters.

(6) A party may in the party's notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules. (7) The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone or other remote electronic means. For the purposes of this rule and Rules 28(a), 37(a)(1), and 37(b)(1), a deposition taken by such means is taken in the district and at the place where the deponent is to answer questions.	(6) ***Notice or Subpoena Directed to an Organization.*** In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, or a governmental agency and describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.
(c) Examination and Cross-Examination; Record of Examination; Oath; Objections. Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Federal Rules of Evidence except Rules 103 and 615. The officer before whom the deposition is to be taken shall put the witness on oath or affirmation and shall personally, or by someone acting under the officer's direction and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other method authorized by subdivision (b)(2) of this rule. All objections made at the time of the examination to the qualifications of the officer taking the deposition, to the manner of taking it, to the evidence presented, to the conduct of any party, or to any other aspect of the proceedings shall be noted by the officer upon the record of the deposition; but the examination shall proceed, with the testimony being taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and the party taking the deposition shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.	**(c) Examination and Cross-Examination; Record of the Examination; Objections; Written Questions.** (1) ***Examination and Cross-Examination.*** The examination and cross-examination of a deponent proceed as they would at trial under the Federal Rules of Evidence, except Rules 103 and 615. After putting the deponent under oath or affirmation, the officer must record the testimony by the method designated under Rule 30(b)(3)(A). The testimony must be recorded by the officer personally or by a person acting in the presence and under the direction of the officer. (2) ***Objections.*** An objection at the time of the examination — whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition — must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3). (3) ***Participating Through Written Questions.*** Instead of participating in the oral examination, a party may serve written questions in a sealed envelope on the party noticing the deposition, who must deliver them to the officer. The officer must ask the deponent those questions and record the answers verbatim.

(d) Schedule and Duration; Motion to Terminate or Limit Examination. **(1)** Any objection during a deposition must be stated concisely and in a non-argumentative and non-suggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion under Rule 30(d)(4). **(2)** Unless otherwise authorized by the court or stipulated by the parties, a deposition is limited to one day of seven hours. The court must allow additional time consistent with Rule 26(b)(2) if needed for a fair examination of the deponent or if the deponent or another person, or other circumstance, impedes or delays the examination. **(3)** If the court finds that any impediment, delay, or other conduct has frustrated the fair examination of the deponent, it may impose upon the persons responsible an appropriate sanction, including the reasonable costs and attorney's fees incurred by any parties as a result thereof.	**(d) Duration; Sanction; Motion to Terminate or Limit.** **(1)** ***Duration.*** Unless otherwise stipulated or ordered by the court, a deposition is limited to 1 day of 7 hours. The court must allow additional time consistent with Rule 26(b)(2) if needed for a fair examination of the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination. **(2)** ***Sanction.*** The court may impose an appropriate sanction — including the reasonable expenses and attorney's fees incurred by any party — on a person who impedes, delays, or frustrates the fair examination of the deponent.
(4) At any time during a deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it may be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition must be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.	**(3)** ***Motion to Terminate or Limit.*** **(A)** *Grounds.* At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. The motion may be filed in the court where the action is pending or the deposition is being taken. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order. **(B)** *Order.* The court may order that the deposition be terminated or may limit its scope and manner as provided in Rule 26(c). If terminated, the deposition may be resumed only by order of the court where the action is pending. **(C)** *Award of Expenses.* Rule 37(a)(5) applies to the award of expenses.

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

(f) Certification and Delivery by Officer; Exhibits; Copies. **(1)** The officer must certify that the witness was duly sworn by the officer and that the deposition is a true record of the testimony given by the witness. This certificate must be in writing and accompany the record of the deposition. Unless otherwise ordered by the court, the officer must securely seal the deposition in an envelope or package indorsed with the title of the action and marked "Deposition of [here insert name of witness]" and must promptly send it to the attorney who arranged for the transcript or recording, who must store it under conditions that will protect it against loss, destruction, tampering, or deterioration. Documents and things produced for inspection during the examination of the witness, must, upon the request of a party, be marked for identification and annexed to the deposition and may be inspected and copied by any party, except that if the person producing the materials desires to retain them the person may (A) offer copies to be marked for identification and annexed to the deposition and to serve thereafter as originals if the person affords to all parties fair opportunity to verify the copies by comparison with the originals, or (B) offer the originals to be marked for identification, after giving to each party an opportunity to inspect and copy them, in which event the materials may then be used in the same manner as if annexed to the deposition. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.	**(f) Certification and Delivery; Exhibits; Copies of the Transcript or Recording; Filing.** **(1)** ***Certification and Delivery.*** The officer must certify in writing that the witness was duly sworn and that the deposition accurately records the witness's testimony. The certificate must accompany the record of the deposition. Unless the court orders otherwise, the officer must seal the deposition in an envelope or package bearing the title of the action and marked "Deposition of [witness's name]" and must promptly send it to the attorney who arranged for the transcript or recording. The attorney must store it under conditions that will protect it against loss, destruction, tampering, or deterioration. **(2)** ***Documents and Tangible Things.*** **(A)** *Originals and Copies.* Documents and tangible things produced for inspection during a deposition must, on a party's request, be marked for identification and attached to the deposition. Any party may inspect and copy them. But if the person who produced them wants to keep the originals, the person may: **(i)** offer copies to be marked, attached to the deposition, and then used as originals — after giving all parties a fair opportunity to verify the copies by comparing them with the originals; or **(ii)** give all parties a fair opportunity to inspect and copy the originals after they are marked — in which event the originals may be used as if attached to the deposition. **(B)** *Order Regarding the Originals.* Any party may move for an order that the originals be attached to the deposition pending final disposition of the case.
(2) Unless otherwise ordered by the court or agreed by the parties, the officer shall retain stenographic notes of any deposition taken stenographically or a copy of the recording of any deposition taken by another method. Upon payment of reasonable charges therefor, the officer shall furnish a copy of the transcript or other recording of the deposition to any party or to the deponent. **(3)** The party taking the deposition shall give prompt notice of its filing to all other parties.	**(3)** ***Copies of the Transcript or Recording.*** Unless otherwise stipulated or ordered by the court, the officer must retain the stenographic notes of a deposition taken stenographically or a copy of the recording of a deposition taken by another method. When paid reasonable charges, the officer must furnish a copy of the transcript or recording to any party or the deponent. **(4)** ***Notice of Filing.*** A party who files the deposition must promptly notify all other parties of the filing.

(g) Failure to Attend or to Serve Subpoena; Expenses. **(1)** If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by that party and that party's attorney in attending, including reasonable attorney's fees. **(2)** If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon the witness and the witness because of such failure does not attend, and if another party attends in person or by attorney because that party expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by that party and that party's attorney in attending, including reasonable attorney's fees.	**(g) Failure to Attend a Deposition or Serve a Subpoena; Expenses.** A party who, expecting a deposition to be taken, attends in person or by an attorney may recover reasonable expenses for attending, including attorney's fees, if the noticing party failed to: **(1)** attend and proceed with the deposition; or **(2)** serve a subpoena on a nonparty deponent, who consequently did not attend.

COMMITTEE NOTE

The language of Rule 30 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Restyling Project Comments

Restyled Rules 30(a)(2)(A) and (b)(4). The existing rules (30(a)(2) and 30(b)(7)) require a written stipulation. Because a stipulation can be oral, this restyling is more than mere simplification or clarification of the existing text. The same omission appears in several other restyled rules (29(b), 31(a)(2)(A), 33(a)(1), 33(b)(2), 36(a)(3), 59(c)).

Restyled Rule 30(b). This provision is inconsistent in substituting "audio" for "sound" in Restyled Rule 30(b)(3)(A) (vs. existing Rule 30(b)(2)) but then using "sound" again in Restyled Rule 30(b)(5)(B). There is no apparent reason for the inconsistency.

Restyled Rule 30(f)(1). There is a discrepancy between Restyled Rule 30(f)(1) and Restyled Rule 31(b)(3), both governing the reporter's delivery of transcripts. This discrepancy exists in the existing rules and is not corrected. Rule 30(f)(1) requires that the transcript/recording be delivered to "the attorney who arranged for the transcript or recording", while Rule 31(b)(3) requires that it be delivered to "the party". It is suggested that they be identical and, perhaps, that they be drafted in terms of parties, rather than lawyers, to deal with *pro se* litigants. Further, the "notice of filing" subsection of this rule (Rule 30(f)(4)) and of Rule 31 (Rule 31(c)), should be deleted. Parties no longer file deposition transcripts with the clerk of court in the ordinary course — indeed, Rule 5(d) bars this practice. If transcripts are filed in connection with motion practice or similar events, other provisions of the rules cover the notice requirements. Suggestion: Refer these issues to the style/substance track.

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

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

COMMITTEE NOTE

The language of Rule 31 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Restyling Project Comments

Restyled Rule 31(a)(2)(A). The existing rule requires a written stipulation. Because a stipulation can be oral, this restyling is more than mere simplification or clarification of the existing text. The same omission appears in several other restyled rules (29(b), 30(a)(2)(A), 30(b)(4), 33(a)(1), 33(b)(2), 36(a)(3), 59(c)).

Restyled Rule 31(b)(3). As noted in connection with Rule 30(f)(1), there is a discrepancy between Restyled Rule 31(b)(3) and Restyled Rule 30(f)(1), both governing the reporter's delivery of transcripts. This discrepancy exists in the existing rules and is not corrected. Rule 30(f)(1) requires that the transcript/recording be delivered to "the attorney who arranged for the transcript or recording", while Rule 31(b)(3) requires that it be delivered to "the party". It is suggested that they be identical and, perhaps, that they be drafted in terms of parties, rather than lawyers, to deal with *pro se* litigants. Further, the "notice of filing" subsection of this rule (31(c)), like the notice provision of Rule 30 (Rule 30(f)(4)), should be deleted. Parties no longer file deposition transcripts with the clerk of court in the ordinary course — indeed, Rule 5(d) bars this practice. If transcripts are filed in connection with motion practice or similar events, other provisions of the rules cover the notice requirements. Suggestion: Refer these issues to the style/substance track.

Restyled Rule 31(c). In light of the 2000 amendment to Rule 5(d), the duty to file arises only when discovery is used in the proceeding or the court orders it filed, but in those circumstances there should be no need for separate notice. Suggestion: delete this provision, explaining why in the Note.

Rule 32. Use of Depositions in Court Proceedings	Rule 32. Using Depositions in Court Proceedings
(a) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:	**(a) Using Depositions.** **(1)** ***In General.*** At a hearing or trial, all or part of a deposition may be used against a party on these conditions: **(A)** the party was present or represented at the taking of the deposition or had reasonable notice of it; **(B)** it is used to the extent it would be admissible under the Federal Rules of Evidence if the deponent were present and testifying; and **(C)** the use is allowed by Rule 32(a)(2) through (8).
(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness, or for any other purpose permitted by the Federal Rules of Evidence. **(2)** The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.	**(2)** ***Impeachment and Other Uses.*** Any party may use a deposition to contradict or impeach the testimony given by the deponent as a witness, or for any other purpose allowed by the Federal Rules of Evidence. **(3)** ***Deposition of Party, Agent, or Designee.*** An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4).
(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: **(A)** that the witness is dead; or **(B)** that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or **(C)** that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or **(D)** that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or **(E)** upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.	**(4)** ***Unavailable Witness.*** A party may use for any purpose the deposition of a witness, whether or not a party, if the court finds: **(A)** that the witness is dead; **(B)** that the witness is more than 100 miles from the place of hearing or trial or is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition; **(C)** that the witness cannot attend or testify because of age, illness, infirmity, or imprisonment; **(D)** that the party offering the deposition could not procure the witness's attendance by subpoena; or **(E)** on motion and notice, that exceptional circumstances make it desirable — in the interest of justice and with due regard to the importance of live testimony in open court — to permit the deposition to be used.

A deposition taken without leave of court pursuant to a notice under Rule 30(a)(2)(C) shall not be used against a party who demonstrates that, when served with the notice, it was unable through the exercise of diligence to obtain counsel to represent it at the taking of the deposition; nor shall a deposition be used against a party who, having received less than 11 days notice of a deposition, has promptly upon receiving such notice filed a motion for a protective order under Rule 26(c)(2) requesting that the deposition not be held or be held at a different time or place and such motion is pending at the time the deposition is held.	**(5)** ***Limitations on Use.*** **(A)** *Deposition Taken on Short Notice* A deposition must not be used against a party who, having received less than 11 days' notice of the deposition, promptly moved for a protective order under Rule 26(c)(1)(B) requesting that it not be taken or be taken at a different time or place — and this motion was still pending when the deposition was taken. **(B)** *Unavailable Deponent; Party Could Not Obtain an Attorney.* A deposition taken without leave of court under the unavailability provision of Rule 30(a)(2)(A)(iii) must not be used against a party who shows that, when served with the notice, it could not, despite diligent efforts, obtain an attorney to represent it at the deposition.
(4) If only part of a deposition is offered in evidence by a party, an adverse party may require the offeror to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts. Substitution of parties pursuant to Rule 25 does not affect the right to use depositions previously taken; and, when an action has been brought in any court of the United States or of any State and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor. A deposition previously taken may also be used as permitted by the Federal Rules of Evidence.	**(6)** ***Using Part of a Deposition.*** If a party offers in evidence only part of a deposition, an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part introduced, and any party may itself introduce any other parts. **(7)** ***Substituting a Party.*** Substituting a party under Rule 25 does not affect the right to use a deposition previously taken. **(8)** ***Deposition Taken in an Earlier Action.*** A deposition lawfully taken and, if required, filed in any federal- or state-court action may be used in a later action involving the same subject matter between the same parties, or their representatives or successors in interest, to the same extent as if taken in the later action. A deposition previously taken may also be used as allowed by the Federal Rules of Evidence.

(b) Objections to Admissibility. Subject to the provisions of Rule 28(b) and subdivision (d)(3) of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.	**(b) Objections to Admissibility.** Subject to Rules 28(b) and 32(d)(3), an objection may be made at a hearing or trial to the admission of any deposition testimony that would be inadmissible if the witness were present and testifying.
(c) Form of Presentation. Except as otherwise directed by the court, a party offering deposition testimony pursuant to this rule may offer it in stenographic or nonstenographic form, but, if in nonstenographic form, the party shall also provide the court with a transcript of the portions so offered. On request of any party in a case tried before a jury, deposition testimony offered other than for impeachment purposes shall be presented in nonstenographic form, if available, unless the court for good cause orders otherwise.	**(c) Form of Presentation.** Unless the court orders otherwise, a party must provide a transcript of any deposition testimony the party offers, but may provide the court with the testimony in nontranscript form as well. On any party's request, deposition testimony offered in a jury trial for any purpose other than impeachment must be presented in nontranscript form, if available, unless the court for good cause orders otherwise.

(d) Effect of Errors and Irregularities in Depositions. **(1) As to Notice.** All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice. **(2) As to Disqualification of Officer.** Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence. **(3) As to Taking of Deposition.** **(A)** Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time. **(B)** Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.	**(d) Waiver of Objections.** **(1)** ***To the Notice.*** An objection to an error or irregularity in a deposition notice is waived unless promptly served in writing on the party giving the notice. **(2)** ***To the Officer's Qualification.*** An objection based on disqualification of the officer before whom a deposition is to be taken is waived if not made: **(A)** before the deposition begins; or **(B)** promptly after the basis for disqualification becomes known or, with reasonable diligence, could have been known. **(3)** ***To the Taking of the Deposition.*** **(A)** *Objection to Competence, Relevance, or Materiality* An objection to a deponent's competence — or to the competence, relevance, or materiality of testimony — is not waived by a failure to make the objection before or during the deposition, unless the ground for it might have been corrected at that time. **(B)** *Objection to an Error or Irregularity.* An objection to an error or irregularity at an oral examination is waived if: **(i)** it relates to the manner of taking the deposition, the form of a question or answer, the oath or affirmation, a party's conduct, or other matters that might have been corrected at that time; and **(ii)** it is not timely made during the deposition.

(C) Objections to the form of written questions submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within 5 days after service of the last questions authorized. **(4) As to Completion and Return of Deposition.** Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.	(C) *Objection to a Written Question.* An objection to the form of a written question under Rule 31 is waived if not served in writing on the party submitting the question within the time for serving responsive questions or, if the question is a recross-question, within 5 days after being served with it. (4) ***To Completing and Returning the Deposition.*** An objection to how the officer transcribed the testimony — or prepared, signed, certified, sealed, endorsed, sent, or otherwise dealt with the deposition — is waived unless a motion to suppress is made promptly after the defect or irregularity becomes known or, with reasonable diligence, could have been known.

COMMITTEE NOTE

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

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

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

Rule 33. Interrogatories to Parties	Rule 33. Interrogatories to Parties
(a) Availability. Without leave of court or written stipulation, any party may serve upon any other party written interrogatories, not exceeding 25 in number including all discrete subparts, to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Leave to serve additional interrogatories shall be granted to the extent consistent with the principles of Rule 26(b)(2). Without leave of court or written stipulation, interrogatories may not be served before the time specified in Rule 26(d).	**(a) In General.** **(1)** ***Number.*** Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts. Leave to serve additional interrogatories may be granted to the extent consistent with Rule 26(b)(2). **(2)** ***Scope.*** An interrogatory may relate to any matter that may be inquired into under Rule 26(b). An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time.
(b) Answers and Objections. **(1)** Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for objection and shall answer to the extent the interrogatory is not objectionable. **(2)** The answers are to be signed by the person making them, and the objections signed by the attorney making them. **(3)** The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties subject to Rule 29. **(4)** All grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown. **(5)** The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory	**(b) Answers and Objections.** **(1)** ***Responding Party.*** The interrogatories must be answered: **(A)** by the party to whom they are directed; or **(B)** if that party is a public or private corporation, a partnership, an association, or a governmental agency, by any officer or agent, who must furnish the information available to the party. **(2)** ***Time to Respond.*** The responding party must serve its answers and any objections within 30 days after being served with the interrogatories. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court. **(3)** ***Answering Each Interrogatory.*** Each interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath. **(4)** ***Objections.*** The grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure. **(5)** ***Signature.*** The person who makes the answers must sign them, and the attorney who objects must sign any objections.

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

COMMITTEE NOTE

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

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

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

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

Restyling Project Comments

Restyled Rules 33(a)(1) and (b)(2). The existing rules (33(a) and (b)(3)) require a written stipulation. Because a stipulation can be oral, this restyling is more than mere simplification or clarification of the existing text. The same omission appears in several other restyled rules (29(b), 30(a)(2)(A), 30(b)(4), 31(a)(2)(A), 36(a)(3), 59(c)).

Restyled Rule 33(a)(2). Pace Professor Cooper, the removal of "necessarily" from the phrase "not necessarily objectionable" is a substantive change. There are times when a request for an opinion or contention may be objectionable — *e.g.*, an interrogatory addressed to a non-expert that seeks an opinion "based on scientific, technical, or other specialized knowledge". Counsel should not have to quarrel about whether this is really a relevance objection or whether it is precluded by the elimination of the right to object to opinion or contention requests on that basis. Suggestion: retain "necessarily".

Rule 34. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes	Rule 34. Producing Documents and Tangible Things, or Entering onto Land, for Inspection and Other Purposes
(a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).	**(a) In General.** A party may serve on any other party a request within the scope of Rule 26(b): **(1)** to produce and permit the requesting party or its representative to inspect and copy the following items in the responding party's possession, custody, or control: **(A)** any designated documents — including writings, drawings, graphs, charts, photographs, recordings, and other data compilations from which information can be obtained either directly or after the responding party translates them into a reasonably usable form; or **(B)** any tangible things — and to test or sample these things; or **(2)** to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.
(b) Procedure. The request shall set forth, either by individual item or by category, the items to be inspected, and describe each with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. Without leave of court or written stipulation, a request may not be served before the time specified in Rule 26(d). The party upon whom the request is served shall serve a written response within 30 days after the service of the request. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties, subject to Rule 29. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for the objection shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested. A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.	**(b) Procedure.** **(1)** *Contents of the Request.* The request must: **(A)** describe with reasonable particularity each item or category of items to be inspected; and **(B)** specify a reasonable time, place, and manner for the inspection and for performing the related acts. **(2)** ***Responses and Objections.*** **(A)** *Time to Respond.* The party to whom the request is directed must respond in writing within 30 days after being served. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court. **(B)** *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection to the request, including the reasons. **(C)** *Objections.* An objection to part of a request must specify the part and permit inspection of the rest. **(D)** *Producing the Documents.* A party producing documents for inspection must produce them as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request.

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

COMMITTEE NOTE

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

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

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

Restyling Project Comment

See **the Restyling Project Comment regarding Rule 26(b)(1)** and inconsistent terminology in various rules — "documents and tangible things", "designated materials", and "documents, communications, or things".

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

The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if an examiner fails or refuses to make a report the court may exclude the examiner's testimony if offered at trial. **(2)** By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege the party may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine the party in respect of the same mental or physical condition. **(3)** This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examiner or the taking of a deposition of the examiner in accordance with the provisions of any other rule.	**(4)** ***Waiver of Privilege.*** By requesting and obtaining the examiner's report, or by deposing the examiner, the party examined waives any privilege it may have — in that action or any other action involving the same controversy — concerning testimony about all examinations of the same condition. **(5)** ***Failure to Deliver a Report.*** The court on motion may order — on just terms — that a party deliver the report of an examination. If the report is not provided, the court may exclude the examiner's testimony at trial. **(6)** ***Scope.*** This subdivision (b) applies also to an examination made by the parties' stipulation, unless the stipulation states otherwise. This subdivision does not preclude obtaining an examiner's report or deposing an examiner under other rules.

COMMITTEE NOTE

The language of Rule 35 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 36. Requests for Admission	Rule 36. Requests for Admission
(a) Request for Admission. A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b)(1) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Without leave of court or written stipulation, requests for admission may not be served before the time specified in Rule 26(d). Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow or as the parties may agree to in writing, subject to Rule 29, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify an answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that the party has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why the party cannot admit or deny it.	**(a) Scope and Procedure.** **(1)** ***Scope.*** A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(1) relating to: **(A)** facts, the application of law to fact, or opinions about either; and **(B)** the genuineness of any described documents. **(2)** ***Form; Copy of a Document.*** Each matter must be separately stated. A request to admit the genuineness of a document must be accompanied by a copy of the document unless it is, or has been, otherwise furnished or made available for inspection and copying. **(3)** ***Time to Respond; Effect of Not Responding.*** A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney. A shorter or longer time for responding may be stipulated to under Rule 29 or be ordered by the court. **(4)** ***Answer.*** If a matter is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it. A denial must fairly respond to the substance of the matter; and when good faith requires that a party qualify an answer or deny only a part of a matter, the answer must specify the part admitted and qualify or deny the rest. The answering party may assert lack of information or knowledge as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny.
The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pre-trial conference or at a designated time prior to trial. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.	**(5)** ***Objections.*** The grounds for objecting to a request must be stated. **(6)** ***Matter Presenting a Trial Issue.*** A party must not object to a request solely on the ground that it presents a genuine issue for trial. The party may deny the matter or state why it cannot admit or deny. **(7)** ***Motion Regarding the Sufficiency of an Answer or Objection.*** The requesting party may move to determine the sufficiency of an answer or objection. Unless the court finds an objection justified, it must order that an answer be served. On finding that an answer does not comply with this rule, the court may order either that the matter is admitted or that an amended answer be served. The court may defer its final decision until a pretrial conference or a specified time before trial. Rule 37(a)(5) applies to an award of expenses.

(b) Effect of Admission. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provision of Rule 16 governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission for any other purpose nor may it be used against the party in any other proceeding.	**(b) Effect of an Admission; Withdrawing or Amending It.** A matter admitted under this rule is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended. Subject to Rule 16(d) and (e), the court may permit withdrawal or amendment if it would promote the presentation of the merits of the action and if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits. An admission under this rule is not an admission for any other purpose and cannot be used against the party in any other proceeding.

COMMITTEE NOTE

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

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

Restyling Project Comments

Restyled Rule 36(a)(3). The existing rule requires a written stipulation. Because a stipulation can be oral, this restyling is more than mere simplification or clarification of the existing text. The same omission appears in several other restyled rules (29(b), 30(a)(2)(A), 30(b)(4), 31(a)(2)(A), 33(a)(1), 33(b)(2), 59(c)).

Restyled Rules 36(a)(5)-(6). There is no apparent need to separate Restyled Rules 36(a)(5) and (6), both of which deal with objections. Fewer subdivisions would be desirable.

Rule 37. Failure to Make Disclosure or Cooperate in Discovery; Sanctions	**Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions**

(a) Motion For Order Compelling Disclosure or Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling disclosure or discovery as follows: **(1) Appropriate Court.** An application for an order to a party shall be made to the court in which the action is pending. An application for an order to a person who is not a party shall be made to the court in the district where the discovery is being, or is to be, taken. **(2) Motion.** **(A)** If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.	**(a) Motion for an Order Compelling Disclosure or Discovery.** **(1)** ***In General.*** On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action. **(2)** ***Appropriate Court.*** A motion for an order to a party must be made in the court where the action is pending. A motion for an order to a nonparty must be made in the court where the discovery is or will be taken. **(3)** ***Specific Motions.*** **(A)** *To Compel Disclosure.* If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions.
(B) If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order. **(3) Evasive or Incomplete Disclosure, Answer, or Response.** For purposes of this subdivision an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond.	**(B)** *To Compel a Discovery Response.* A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if: **(i)** a deponent fails to answer a question asked under Rule 30 or 31; **(ii)** a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a)(4); **(iii)** a party fails to answer an interrogatory submitted under Rule 33; or **(iv)** a party fails to respond that inspection will be permitted — or fails to permit inspection — as requested under Rule 34. **(C)** *Related to a Deposition* When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order. **(4)** ***Evasive or Incomplete Disclosure, Answer, or Response.*** For purposes of this subdivision (a), an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.

(4) Expenses and Sanctions. **(A)** If the motion is granted or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust. **(B)** If the motion is denied, the court may enter any protective order authorized under Rule 26(c) and shall, after affording an opportunity to be heard, require the moving party or the attorney filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust. **(C)** If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26(c) and may, after affording an opportunity to be heard, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner	**(5)** ***Payment of Expenses; Protective Orders.*** **(A)** *If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing)* If the motion is granted — or if the disclosure or requested discovery is provided after the motion was filed — the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if: **(i)** the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action; **(ii)** the opposing party's nondisclosure, response, or objection was substantially justified; or **(iii)** other circumstances make an award of expenses unjust. **(B)** *If the Motion Is Denied* If the motion is denied, the court may issue any protective order authorized under Rule 26(c) and must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust. **(C)** *If the Motion Is Granted in Part and Denied in Part.* If the motion is granted in part and denied in part, the court may issue any protective order authorized under Rule 26(c) and may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion.

(b) Failure to Comply With Order. **(1) Sanctions by Court in District Where Deposition Is Taken.** If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court. **(2) Sanctions by Court in Which Action Is Pending.** If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following: **(A)** An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order; **(B)** An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence; **(C)** An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party; **(D)** In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;	**(b) Failure to Comply with a Court Order.** **(1)** ***Sanctions in the District Where the Deposition Is Taken.*** If the court where the discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court. **(2)** ***Sanctions in the District Where the Action Is Pending.*** **(A)** *For Not Obeying a Discovery Order.* If a party or a party's officer, director, or managing agent — or a witness designated under Rule 30(b)(6) or 31(a)(4) — fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following: **(i)** directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims; **(ii)** prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence; **(iii)** striking pleadings in whole or in part; **(iv)** staying further proceedings until the order is obeyed; **(v)** dismissing the action or proceeding in whole or in part; **(vi)** rendering a default judgment against the disobedient party; or **(vii)** treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.
(E) Where a party has failed to comply with an order under Rule 35(a) requiring that party to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that that party is unable to produce such person for examination. In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.	**(B)** *For Not Producing a Person for Examination.* If a party fails to comply with an order under Rule 35(a) requiring it to produce another person for examination, the court may issue any of the orders listed in Rule 37(b)(2)(A)(i)-(vi), unless the disobedient party shows that it cannot produce the other person. **(C)** *Payment of Expenses.* Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(c) Failure to Disclose; False or Misleading Disclosure; Refusal to Admit. **(1)** A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under Rule 37(b)(2)(A), (B), and (C) and may include informing the jury of the failure to make the disclosure. **(2)** If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (A) the request was held objectionable pursuant to Rule 36(a), or (B) the admission sought was of no substantial importance, or (C) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or (D) there was other good reason for the failure to admit.	**(c) Failure to Disclose, to Amend an Earlier Response, or to Admit.** **(1)** ***Failure to Disclose or Amend.*** If a party fails to disclose the information required by Rule 26(a) — or to provide the additional or corrective information required by Rule 26(e) — the party is not allowed to use as evidence on a motion, at a hearing, or at a trial any witness or information not so disclosed, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard: **(A)** may order payment of the reasonable expenses, including attorney's fees, caused by the failure; **(B)** may inform the jury of the party's failure; and **(C)** may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi). **(2)** ***Failure to Admit.*** If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. The court must so order unless: **(A)** the request was held objectionable under Rule 36(a); **(B)** the admission sought was of no substantial importance, **(C)** the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or **(D)** there was other good reason for the failure to admit.

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

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

COMMITTEE NOTE

The language of Rule 37 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Restyling Project Comments

Restyled Rule 37(b)(2)(A)(i). This raises an issue that recurs in the restyled rules (*see also* Restyled Rules 11(c)(2) and 50(e)). Introduction of the phrase "the prevailing party" is confusing. That phrase usually refers to the winner of the case, as it does in both existing and Restyled Rule 54(d)(1). What Restyled Rule 37(b)(2)(A)(i) is referring to is the party prevailing on the motion. Suggestion: substitute "the party obtaining the order" for "the prevailing party".

Restyled Rule 37(c)(1). The restyling fails to address the principal drafting flaw in the existing text — namely, that the word "disclose" in the first dependent clause refers to mandatory disclosure, while the word "disclosed" later in the same sentence means revealed via disclosure or discovery. See Restyled Rule 26(e)(1)(A). The ambiguity should be clarified.

VI. TRIALS **Rule 38. Jury Trial of Right**	TITLE VI. TRIALS **Rule 38. Right to a Jury Trial; Demand**
(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.	**(a) Right Preserved.** The right of trial by jury as declared by the Seventh Amendment to the Constitution — or as provided by a federal statute — is preserved to the parties inviolate.
(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by (1) serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue, and (2) filing the demand as required by Rule 5(d). Such demand may be indorsed upon a pleading of the party.	**(b) Demand.** On any issue triable of right by a jury, a party may demand a jury trial by: **(1)** serving the other parties with a written demand — which may be included in a pleading — no later than 10 days after the last pleading directed to the issue is served; and **(2)** filing the demand in accordance with Rule 5(d).

(c) **Same: Specification of Issues.** In the demand a party may specify the issues which the party wishes so tried; otherwise the party shall be deemed to have demanded trial by jury for all the issues so triable. If the party has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.	(c) **Specifying Issues.** In its demand, a party may specify the issues that it wishes to have tried by a jury; otherwise, it is considered to have demanded a jury trial on all the issues so triable. If the party has demanded a jury trial on only some issues, any other party may — within 10 days after being served with the demand or within a shorter time ordered by the court — serve a demand for a jury trial on any other or all factual issues triable by jury.
(d) **Waiver.** The failure of a party to serve and file a demand as required by this rule constitutes a waiver by the party of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.	(d) **Waiver; Withdrawal.** A party waives a jury trial unless its demand is properly served and filed. A proper demand may be withdrawn only if the parties consent.
(e) **Admiralty and Maritime Claims.** These rules shall not be construed to create a right to trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9(h).	(e) **Admiralty and Maritime Claims.** These rules do not create a right to a jury trial on issues in a claim designated as an admiralty or maritime claim under Rule 9(h).

COMMITTEE NOTE

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

Restyling Project Comments

Restyled Rule 38(e). Existing Rule 38(e) refers to "an admiralty or maritime claim within the meaning of Rule 9(h)". Restyled Rule 38(e) refers to "a claim designated as an admiralty or maritime claim under Rule 9(h)". The latter description seems open to a narrower interpretation than the language in the existing rule: "Designated" claims could be taken to refer only to claims—in the language of existing Rule 9(h)—that "[a] pleading or count ... identif[ies] ... as an admiralty or maritime claim", and not to claims that, though not so identified, are considered admiralty claims because they are "cognizable only in admiralty". Indeed, Restyled Rule 9(h)(1) contrasts claims "designated" as admiralty or maritime claims with "claims cognizable only in the admiralty or maritime jurisdiction ... whether or not so designated". Suggestion: retain the existing language, "an admiralty or maritime claim within the meaning of Rule 9(h)".

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

COMMITTEE NOTE

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

Restyling Project Comments

Restyled Rule 39(a)(1). Existing Rule 39(a) refers to "an oral stipulation made in open court and entered in the record". It is not clear that Restyled Rule 39(a)(1)'s omission of the reference to "open court" is merely a stylistic change. *See, e.g., Tray-Wrap, Inc. v. Six L's Packing Co., Inc.*, 984 F.2d 65, 68 (2d Cir. 1993) (noting, but avoiding, "the question whether a conference call (made without a court reporter present) can fairly be regarded as 'open court'"); *compare* BLACK'S LAW DICTIONARY (8th ed. 2004) (giving, as first entry for "open court": "A court that is in session, presided over by a judge, attended by the parties and their attorneys, and engaged in judicial business. *Open court* usu. refers to a proceeding in which formal entries are made on the record. The term is distinguished from a court that is hearing evidence in camera...."). Although the issue may be of less practical significance due to the rule in at least some circuits that a party can waive a prior jury demand through its conduct, *see, e.g., Middle*

Tennessee News Co., Inc. v. Charnel of Cincinnati, Inc., 250 F.3d 1077, 1083 (7th Cir. 2000), the restyling arguably changes meaning. Suggestion: add the words "in open court" after "so stipulate on the record".

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

COMMITTEE NOTE

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

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

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

COMMITTEE NOTE

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

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

Restyling Project Comments

Restyled Rule 41(c)(2). Existing Rule 41(c) provides that if no responsive pleading is served to a counterclaim, cross-claim or third-party claim, the claimant's voluntary dismissal pursuant to Rule 41(a)(1) "shall be made ... before the introduction of evidence at the trial or hearing". Restyled Rule 41(c)(2) changes "the" to "a" thus: "before evidence is introduced at a

hearing or trial". The restyled version could be interpreted to refer to a pretrial hearing at which evidence is introduced. The existing version, by using "the", appears to denote the ultimate trial on the merits. (Although existing Rule 41(c) refers to "the trial *or hearing*", "hearing" may have been used to denote trials on equitable claims.) Changing "the" to "a" may, in this context, effect more than a stylistic change.

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

COMMITTEE NOTE

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

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

COMMITTEE NOTE

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

Restyling Project Comments

Restyled Rule 43(a). Although existing Rule 43(a) requires both "good cause shown" and "compelling circumstances", the restyled rule omits the "good cause" requirement. The latter might seem redundant, since compelling circumstances would seem to provide good cause. However, the phrase "good cause *shown*" appears to contemplate that a party has made the relevant showing (as distinct from a situation in which the court on its own reaches the conclusion that good cause exists). Moreover, the Advisory Committee Note to the 1996 Amendments repeatedly refers to both "good cause" and "compelling circumstances", suggesting that the inclusion of both phrases was hardly inadvertent; rather, the repetition of both phrases suggests an intention to emphasize the stringent nature of the test. "Good cause" might also

place particular emphasis on whether the requesting party is guilty of an oversight that led to the need for the request. *See* 1996 Advisory Committee Note ("A party who could reasonably foresee the circumstances offered to justify transmission of testimony will have special difficulty in showing good cause and the compelling nature of the circumstances.").Suggestion: add "For good cause shown" before "[i]n compelling circumstances".

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

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

COMMITTEE NOTE

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

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

COMMITTEE NOTE

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

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

(3) The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney as officer of the court may also issue and sign a subpoena on behalf of (A) a court in which the attorney is authorized to practice; or (B) a court for a district in which a deposition or production is compelled by the subpoena, if the deposition or production pertains to an action pending in a court in which the attorney is authorized to practice.	(3) ***Issued by Whom.*** The clerk must issue a subpoena, signed but otherwise in blank, to a party who requests it. That party must complete it before service. An attorney, as an officer of the court, also may issue and sign a subpoena from: (A) a court in which the attorney is authorized to practice; or (B) a court for a district where a deposition is to be taken or production is to be made, if the attorney is authorized to practice in the court where the action is pending.
(b) Service. (1) A subpoena may be served by any person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and, if the person's attendance is commanded, by tendering to that person the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered. Prior notice of any commanded production of documents and things or inspection of premises before trial shall be served on each party in the manner prescribed by Rule 5(b).	**(b) Service.** (1) ***By Whom; Tendering Fees; Serving a Copy of Certain Subpoenas.*** Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies. If the subpoena commands the production of documents or tangible things or the inspection of premises before trial, then before it is served, a notice must be served on each party.

(2) Subject to the provisions of clause (ii) of subparagraph (c)(3)(A) of this rule, a subpoena may be served at any place within the district of the court by which it is issued, or at any place without the district that is within 100 miles of the place of the deposition, hearing, trial, production, or inspection specified in the subpoena or at any place within the state where a state statute or rule of court permits service of a subpoena issued by a state court of general jurisdiction sitting in the place of the deposition, hearing, trial, production, or inspection specified in the subpoena. When a statute of the United States provides therefor, the court upon proper application and cause shown may authorize the service of a subpoena at any other place. A subpoena directed to a witness in a foreign country who is a national or resident of the United States shall issue under the circumstances and in the manner and be served as provided in Title 28, U.S.C. § 1783. (3) Proof of service when necessary shall be made by filing with the clerk of the court by which the subpoena is issued a statement of the date and manner of service and of the names of the persons served, certified by the person who made the service.	(2) ***Service in the United States.*** Subject to Rule 45(c)(3)(A)(ii), a subpoena may be served at any place: **(A)** within the district of the issuing court; **(B)** outside that district but within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection; **(C)** within the state of the issuing court if a state statute or court rule allows service at that place of a subpoena issued by a state court of general jurisdiction sitting in the place specified for the deposition, hearing, trial, production, or inspection; or **(D)** that the court authorizes on motion and for good cause, if a federal statute so provides. (3) ***Service in a Foreign Country.*** 28 U.S.C. § 1783 governs issuing and serving a subpoena directed to a United States national or resident who is in a foreign country. (4) ***Proof of Service.*** Proving service, when necessary, requires filing with the issuing court a statement showing the date and manner of service and the names of the persons served. The statement must be certified by the server.
(c) Protection of Persons Subject to Subpoenas. (1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.	**(c) Protecting a Person Subject to a Subpoena.** (1) ***Avoiding Undue Burden or Expense; Sanctions.*** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply.

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

(B) If a subpoena (i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or (ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or (iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.	(B) *When Permitted* To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires: (i) disclosing a trade secret or other confidential research, development, or commercial information; (ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or (iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial. (C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party: (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and (ii) ensures that the subpoenaed person will be reasonably compensated.
(d) Duties in Responding to Subpoena. (1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand. (2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.	**(d) Duties in Responding to a Subpoena.** (1) ***Producing Documents.*** A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand. (2) ***Claiming Privilege or Protection.*** A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must: (A) expressly assert the claim; and (B) describe the nature of the withheld documents, communications, or things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.
(e) **Contempt.** Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued. An adequate cause for failure to obey exists when a subpoena purports to require a non-party to attend or produce at a place not within the limits provided by clause (ii) of subparagraph (c)(3)(A).	(e) **Contempt.** The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

COMMITTEE NOTE

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

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

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

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

Restyling Project Comments

Restyled Rule 45(a)(3). Replacing "on behalf of" with "from" suggests that the attorney must obtain the subpoena from the identified courts. The entire point of this provision is just the opposite. Suggestion: retain the existing language.

Restyled Rule 45(b)(1). Eliminating the reference to Rule 5 at the end of the provision is not helpful. Because a subpoena is process, the reference to Rule 5 eliminates any confusion that service need be effected on a party pursuant to Rule 4. Suggestion: retain the reference to Rule 5.

Restyled Rule 45(c)(2)(B)(ii). Adding the new phrase "Inspection and copying may be done only as directed in the order" arguably precludes the parties from agreeing to production after an objection has been lodged. The existing rule provides that, once an objection has been made, a party "shall not be entitled ...except pursuant to an order". The lack of entitlement does not foreclose agreement between the parties. The proposed restyling seems to foreclose consensual resolution of the objection. Suggestion: replace "Inspection and copying may be done only as directed in the order" with "The serving party shall not be entitled to inspect or copy except as directed in the order". *See also* the Restyling Project Comment regarding Restyled Rule 26(b)(1) and inconsistent terminology in various rules, including "documents and tangible things" (Restyled Rule 45(a)(1)(A)(iii), (b)(1) and (c)(2)(A)), "designated materials" (45(c)(2)(B)); and "documents, communications, or things" (45(d)(2), which appears to be misnumbered as the second 45(c)(2)).

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

COMMITTEE NOTE

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

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

COMMITTEE NOTE

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

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

COMMITTEE NOTE

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

Restyling Project Comments

Restyled Rule 48. The assertion that "[a] jury must have no fewer than 6" members is not strictly true. Although the jury must start out with at least six members, Rule 48 goes on to note that a verdict may be taken from a jury that has been reduced in size to fewer than six if the parties so stipulate. The phrasing of the existing rule is more accurate. Suggestion: begin the restyled rule "The court must seat a jury of no fewer than 6 ...."

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

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

COMMITTEE NOTE

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

Restyling Project Comments

Restyled Rule 49(a)(2). The restyling sacrifices clarity for brevity (What does "it" refer to? Is the jury supposed to enable or to be enabled?). In addition, the restyled version omits the existing reference to "explanation". "Explanation and instruction" may convey a broader range of acts than "instruct" (the word employed in the proposed restyling). For example, "explanation" would appear to include explanations given by the court in response to jurors' questions concerning the instructions or the special verdict form. Suggestion: substitute for the language in Restyled Rule 49(a)(2) "The court must give the instructions and explanations that are necessary to enable the jury to make findings on each submitted issue"

Restyled Rule 49(a)(3). A party waives its jury trial right on any issue not submitted to the jury unless, before the jury retires, the party demands submission of that issue. It is not necessarily true, however, that, as the restyled rule states, "[i]f *the* party does not demand submission, the court may make a finding on the issue". If another party has properly demanded submission of the issue, then the court may not make such a finding. Suggestion: substitute for

the third sentence of Restyled Rule 49(a)(3) "If no party demands submission, the court may make a finding on the issue".

Restyled Rule 49(b)(1). The second sentence seems problematic for reasons similar to those discussed above with respect to Restyled Rule 49(a)(2). Suggestion : substitute for the second sentence of Restyled Rule 49(b)(1) "The court must direct the jury to answer the questions in writing and to render a general verdict, and must give the instructions and explanations that are necessary for it to do so".

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

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

COMMITTEE NOTE

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

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

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

caution.

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

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

COMMITTEE NOTE

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

Restyling Project Comments

Restyled Rule 51(c)(1). Although existing Rule 51(c)(1) refers to objections "to an instruction", Restyled Rule 51(c)(1) refers to objections "to a proposed instruction". The latter is too narrow, because it does not encompass situations in which a party first learns of the offending instruction at the time that it is given by the judge. Suggestion: change "a proposed instruction" to "an instruction".

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

COMMITTEE NOTE

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

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

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

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

Restyling Project Comments

Title of Restyled Rule 52. The restyled rule's title refers to "Findings and Conclusions in a Nonjury Proceeding." This seems too narrow, since Rule 52 also covers actions tried with an advisory jury. Suggestion; change "Findings and Conclusions in a Nonjury Proceeding" to "Findings and Conclusions by the Court."

Rule 53(a)

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

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

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

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

COMMITTEE NOTE

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

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

(d) Costs; Attorneys' Fees. **(1) Costs Other than Attorneys' Fees.** Except when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Such costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court **(2) Attorneys' Fees.** **(A)** Claims for attorneys' fees and related nontaxable expenses shall be made by motion unless the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial. **(B)** Unless otherwise provided by statute or order of the court, the motion must be filed no later than 14 days after entry of judgment; must specify the judgment and the statute, rule, or other grounds entitling the moving party to the award; and must state the amount or provide a fair estimate of the amount sought. If directed by the court, the motion shall also disclose the terms of any agreement with respect to fees to be paid for the services for which claim is made.	**(d) Costs; Attorney's Fees.** **(1)** ***Costs Other Than Attorney's Fees.*** Unless a federal statute, these rules, or a court order provides otherwise, costs — other than attorney's fees — should be allowed to the prevailing party. But costs against the United States, its officers, and its agencies may be imposed only to the extent allowed by law. The clerk may tax costs on 1 day's notice. On motion served within the next 5 days, the court may review the clerk's action. **(2)** ***Attorney's Fees.*** **(A)** *Claim to Be by Motion* A claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages. **(B)** *Timing and Contents of the Motion.* Unless a statute or a court order provides otherwise, the motion must: **(i)** be filed no later than 14 days after the entry of judgment; **(ii)** specify the judgment and the statute, rule, or other grounds entitling the movant to the award; **(iii)** state the amount sought or provide a fair estimate of it; and **(iv)** disclose, if the court so orders, the terms of any agreement about fees for the services for which the claim is made.

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

COMMITTEE NOTE

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

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

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

Restyling Project Comments

Restyled Rule 54(a). "Must" makes no sense here. "Should" better captures the sense and understanding of the existing "shall". This sentence is advice to the court. There is no sanction for its violation, nor should there be. If a judgment includes extraneous matter, the judgment should still be given effect, according to Wright, Miller & Kane § 2652, at 17. Suggestion: change "must not include" to "should not include" in the second sentence.

Restyled Rule 54(b). The locutions "direct the entry of" (instead of "enter") and "entry of" (instead of "court enters"), which are preserved in Restyled Rules 59(a)(2) and 54(d)(2)(B)(i), respectively, more accurately reflect that it is the clerk who actually enters

judgment under Rule 58(b). Suggestions: change "the court may enter" to "the court may direct the entry of" in the first sentence and "the court enters" to "entry of " in the second sentence.

Restyled Rule 54(d)(1). The existing rule requires an express statute or rule. The case law indicates that this requirement is not surplusage, ensuring that the conflicting provision specifically treats costs in a contrary manner. *See United States ex rel. Lindenthal v. General Dynamics Corp.*, 61 F.3d 1402, 1413 (9th Cir. 1995) ("On its face, this subsection does not constitute an 'express provision' regarding 'costs'; the word 'costs' is simply absent from this provision."). In addition, changing "unless the court otherwise directs" in the existing rule to "unless ... a court order provides otherwise" in the restyled rule may be read to widen the exception to include a court's standing order in the nature of a local rule. Even if "direct" and "order" are synonyms, the verb "direct" is more likely to be read as referring to a case-specific direction rather than a standing order. Suggestion: change the clause to read: "Unless a federal statute or these rules expressly provide otherwise or the court directs otherwise". Finally, given the exception for a court order or direction, the existing rule's "shall" should as a matter of logic be translated as "must," not "should". The restyled rule's deletion of "as of course" also calls for the use of "must", because that phrase was meant to create a mandatory presumption in favor of allowing costs in the absence of the court's specific explanation to the contrary, according to 10 Moore § 54.101[1][a]. Suggestion: change "should be allowed" to "must be allowed".

Restyled Rule 54(d)(2). Suggestion: add "or a magistrate judge" in the heading of Restyled Rule 54(d)(2)(D).

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

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

COMMITTEE NOTE

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

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

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

Restyling Project Comments

Restyled Rule 55(b)(2). The omission of "to the court" after the word "apply" creates an ambiguity. A clerk or the court can enter or direct entry of a default judgment. To whom should the party apply? The rest of the subrule is passive or permissive. The heading clarifies, but headings are not supposed to carry weight. Suggestion: reinsert "to the court" after "must apply".

A hearing on the motion is required, as indicated by the reference in the existing rule and in the restyled rule's third sentence to "the hearing". An evidentiary hearing is not required, but an opportunity to appear before the judge is mandatory. The restyled rule's fourth sentence has lost this sense and might be read to mean that, in ordinary cases, no hearing at all is necessary. Suggestion: insert the word "evidentiary" before "hearings".

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

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

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

COMMITTEE NOTE

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

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

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

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

Restyling Project Comments

Restyled Rule 56(a). The existing rule says "after the expiration of 20 days". This creates a dead zone of twenty days, a period of inaction that does not include either the day of commencement or the day of the motion. Without that phrase, the generally applicable Rule 6(a) on computation of time would create an ambiguity by including the last day of a counting period, so that an action could be taken on that day. With that phrase, however, existing Rule 56(a) clearly means that the claimant cannot move until Day 21. The restyled rule's language is not as clear in prohibiting a motion on Day 20. Suggestion: insert "have passed" after "20 days" in Restyled Rule 56(a)(1) See Restyled Rule 62(a), another rule that establishes a dead zone of inaction, rather than the more commonly provided period within which an action must be taken.

Restyled Rule 56(d)(1). Federal courts claim power to enter summary judgment *sua sponte*. See Wright, Miller & Kane § 2720. But Rule 56 has never addressed it. Indeed, existing Rule 56(d) expressly limits this subrule to court action upon motion, as the other subdivisions in the existing and Restyled Rule 56 do. Notwithstanding the heading, the restyling of Rule 56(d) arguably creates a power of *sua sponte* partial summary adjudication. Suggestion: reinsert "on motion" after "If" in Restyled Rule 56(d)(1).

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

COMMITTEE NOTE

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

Restyling Project Comments

Restyled Rule 57. The replacement of "under the circumstances and in the manner provided in Rules 38 and 39" with "under Rules 38 and 39" may lead some litigants to argue that the restyled rule creates (or purports to create) a jury trial right in any declaratory-judgment action. Suggestion: restore the existing language.

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

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

COMMITTEE NOTE

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

Rule 59. New Trials; Amendment of Judgments	Rule 59. New Trial; Amending a Judgment
(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.	**(a) In General.** **(1)** ***Grounds for New Trial.*** The court may, on motion, grant a new trial on all or some of the issues as follows: **(A)** after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court; and **(B)** after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court. **(2)** ***Further Action After a Nonjury Trial.*** After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment.
(b) Time for Motion. Any motion for a new trial shall be filed no later than 10 days after entry of the judgment.	**(b) Time to File a Motion for a New Trial.** A motion for a new trial must be filed no later than 10 days after the entry of judgment.
(c) Time for Serving Affidavits. When a motion for new trial is based on affidavits, they shall be filed with the motion. The opposing party has 10 days after service to file opposing affidavits, but that period may be extended for up to 20 days, either by the court for good cause or by the parties' written stipulation. The court may permit reply affidavits.	**(c) Time to Serve Affidavits.** When a motion for a new trial is based on affidavits, they must be filed with the motion. The opposing party has 10 days after being served to file opposing affidavits; but that period may be extended for up to 20 days, either by the court for good cause or by the parties' stipulation. The court may permit reply affidavits.

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

COMMITTEE NOTE

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

Restyling Project Comments

Restyled Rule 59(a). The existing rule clearly conveys the sense of limiting the grounds to proper reasons for granting a new trial. The restyled rule suggests that any reason for a new trial that formerly survived in a single case authorizes a new trial today. Suggestion: replace "has" with "could have" before "heretofore", or insert "properly" before "granted", in Restyled Rule 59(a)(1)(A)&(B).

In addition, the existing rule's convoluted sentence structure implies an "or" between (1)(A) and (1)(B). The clear restyling makes the use of "and" more obviously illogical. Note that Restyled Rule 58(c) uses "or" in this circumstance. Suggestion: change "and" to "or" at the end of Restyled Rule 59(a)(1)(A).

Restyled Rule 59(c). The existing rule requires a written stipulation. Because a stipulation can be oral, this restyling is more than mere simplification or clarification of the existing text. The same omission appears in several other restyled rules (29(b), 30(a)(2)(A), 30(f)(3), 31(a)(2)(A), 33(a)(1), 33(b)(2), 36(a)(3)).

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

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

COMMITTEE NOTE

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

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

Restyling Project Comments

Restyled Rule 60(a). The restyled heading is unfortunately phrased and misleading. Suggestion: change the heading to "Correction of Clerical Mistakes and of Oversights and Omissions".

Restyled Rule 60(b). The restyled heading omits something covered by the rule's text, namely, a "final ... proceeding". If it is surplusage it should be omitted from the rule's text as well as its heading. In fact, the word "final" was added in 1948, when the Advisory Committee explained that this word "emphasizes the character of the judgments, orders or proceedings from which Rule 60(b) affords relief". So it seems that the Committee meant to include "final proceedings" in the list, whatever they might be. Suggestion: add "or Proceeding" at the end of the heading.

Restyled Rule 60(d)(2). The use of the present tense is jarring and perhaps mischievous. Suggestion: change "is" to "was".

Restyled Rule 60(e). The restyled heading is incomplete. Suggestion: insert "Bills and" before "Writs".

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

COMMITTEE NOTE

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

Restyling Project Comments

Restyled Rule 61. The restyling here may affect meaning. The problem arises because existing Rule 61 addresses a matter of evidence law that is also addressed in Fed.R.Evid. 103 (and, for appellate purposes, 28 U.S.C. § 2111). Chief Justice Rehnquist made it clear that the Evidence Rules are not to be restyled because they are substantive, and this proposal reflects why. Existing Rule 61 and Fed.R.Evid. 103(a) and (d) consistently use the modifier "substantial", while the restyled rule deletes it from the first sentence ("justice", not "substantial justice") but retains it in the second ("substantial rights"). Any change may be interpreted as substantive. Moreover, Rule 61 is not entirely consistent with Rule 103. We urge that the Committee not restyle Rule 61 but rewrite it to incorporate the standards of Fed.R.Evid. 103 and place it on the style/substance track.

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

(e) Stay in Favor of the United States or Agency Thereof. When an appeal is taken by the United States or an officer or agency thereof or by direction of any department of the Government of the United States and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant.	**(e) Stay Without Bond on an Appeal by the United States, Its Officers, or Its Agencies.** The court must not require a bond, obligation, or other security from the appellant when granting a stay on an appeal by the United States, its officers, or its agencies or on an appeal directed by a department of the federal government.
(f) Stay According to State Law. In any state in which a judgment is a lien upon the property of the judgment debtor and in which the judgment debtor is entitled to a stay of execution, a judgment debtor is entitled, in the district court held therein, to such stay as would be accorded the judgment debtor had the action been maintained in the courts of that state.	**(f) Stay in Favor of a Judgment Debtor Under State Law.** If a judgment is a lien on the judgment debtor's property under state law where the court sits, the judgment debtor is entitled to the same stay of execution the state court would give.
(g) Power of Appellate Court Not Limited. The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.	**(g) Appellate Court's Power Not Limited.** While an appeal is pending, this rule does not limit the power of the appellate court or one of its judges or justices to: **(1)** stay proceedings; **(2)** suspend, modify, restore, or grant an injunction; or **(3)** issue an order to preserve the status quo or the effectiveness of the judgment to be entered.
(h) Stay of Judgment as to Multiple Claims or Multiple Parties. When a court has ordered a final judgment under the conditions stated in Rule 54(b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.	**(h) Stay with Multiple Claims or Parties.** A court may stay the enforcement of a final judgment entered under Rule 54(b) until it enters a later judgment or judgments, and may prescribe terms necessary to secure the benefit of the stayed judgment for the party in whose favor it was entered.

COMMITTEE NOTE

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

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

Restyling Project Comments

Restyled Rule 62(a). The court cannot order that a judgment be automatically stayed. Suggestion: delete "automatically".

Restyled Rule 62(b). We note an inconsistency between the description of the nature of the Rule 52(b) motion in Restyled Rule 62(b)(2) ("findings") and in Restyled Rule 58(a)(2) ("findings of fact"). *See also* Restyled Rule 59(a)(2).

Restyled Rule 62(c). Adding the word "order" is unnecessary in light of the definition of judgment in Rule 54(a) and might indeed cause confusion. Moreover, its addition does not conform to the phrasing used in Restyled Rule 62(a)(1). Suggestion: delete "order" after "interlocutory".

The text of the restyled rule fails to limit the authority of the court to the period while the appeal is pending and does not make clear that the authorized injunction should last only as long as the appeal is pending. Suggestion: reinsert "during the pendency of the appeal" or, alternatively, insert "while the appeal is pending", after "grant an injunction".

Existing Rule 62(c) expresses the idea of proper security. The restylers express this same idea with "appropriate" in Restyled Rule 62(b), and they should do the same here. Suggestion: insert "appropriately" before "secure", or change "on terms for bond or other terms that secure the opposing party's rights" to "on appropriate terms for the opposing party's security" (the formulation in Restyled Rule 62(b)).

Restyled Rule 62(d). The reference to the actions described in Rule 62(a)(1) or (2) rather than to the whole of Rule 62(a) may cause some to think that a stay is unavailable in those actions (rather than available only pursuant to a special court order). *See* Wright, Miller & Kane § 2905, at 519. Suggestion: change "except in an action described in Rule 62(a)(1) or (2)" to "subject to the exceptions contained in Rule 62(a)".

Restyled Rule 62(f). The antecedent of "where the court sits" is ambiguous. This would leave "under state law" as possibly meaning any state's law. Suggestion: change "under state law" to "under the law of the state".

Restyled Rule 62(g). Under the existing rule, the qualifier of a pending appeal does not apply to the actions now included in clause (3) of the restyled rule. This is significant because of the appellate court's powers under the All Writs Act to reach down into the district court before an appeal is actually taken. Moreover, the introductory qualifier of the restyled rule sounds a bit silly: the rule does not limit the appellate court's powers, but only while an appeal is pending? In fact, the time-period qualifier should modify the appellate court's order, not the rule's effect. Suggestion: retain "during the pendency of an appeal", or insert "while an appeal is pending", in (1) and (2).

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

COMMITTEE NOTE

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

Restyling Project Comments

Restyled Rule 63. The restyling has inadvertently elided the situation of a presiding judge — who happened not to have commenced the hearing or trial but conducted part of it — being unable to proceed. Suggestion: replace "commenced" with "conducted" in the first sentence.

VIII. PROVISIONAL AND FINAL REMEDIES **Rule 64. Seizure of Person or Property**	TITLE VIII. PROVISIONAL AND FINAL REMEDIES **Rule 64. Seizing a Person or Property**
At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, subject to the following qualifications: (1) any existing statute of the United States governs to the extent to which it is applicable; (2) the action in which any of the foregoing remedies is used shall be commenced and prosecuted or, if removed from a state court, shall be prosecuted after removal, pursuant to these rules.	**(a) Remedies Under State Law — In General.** At the commencement of and throughout an action, every remedy is available that, under the law of the state where the court is located, provides for seizing a person or property to satisfy the potential judgment. But a federal statute governs to the extent it applies.
The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action.	**(b) Specific Kinds of Remedies.** The remedies available under this rule include the following — however designated and regardless of whether state procedure requires an independent action: • arrest; • attachment; • garnishment; • replevin; • sequestration; and • other corresponding or equivalent remedies.

COMMITTEE NOTE

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

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

Restyling Project Comments

Restyled Rule 64(a). By omitting the specific limitations, "under the circumstances and in the manner provided" by state law, the restyled rule arguably allows a federal court to employ the provisional remedies that are available in state practice without importing the accompanying state law limitations on those remedies. Suggestion: change the second part of the first sentence to read: "every remedy that provides for seizing a person or property to satisfy the potential judgment is available under the circumstances and in the manner provided by the law of the state where the court is located".

Restyled Rule 64(b). We note that the use of bullet points raises irksome practical problems. When a lawyer quotes the text of a rule in a sentence, what does he or she do with a bullet? Are ellipses required? Must the bullet point appear?

Rule 65. Injunctions	Rule 65. Injunctions and Restraining Orders
(a) Preliminary Injunction. **(1) Notice.** No preliminary injunction shall be issued without notice to the adverse party. **(2) Consolidation of Hearing With Trial on Merits.** Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.	**(a) Preliminary Injunction.** **(1)** ***Notice.*** The court may issue a preliminary injunction only on notice to the adverse party. **(2)** ***Consolidating the Hearing with the Trial on the Merits.*** Before or after beginning a hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing. Even when consolidation is not ordered, evidence that is received on the motion and that would be admissible at trial becomes part of the trial record and need not be repeated at trial. But the court must preserve any party's right to a jury trial.
(b) Temporary Restraining Order; Notice; Hearing; Duration. A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required.	**(b) Temporary Restraining Order.** **(1)** ***Issuing Without Notice.*** The court may issue a temporary restraining order without notice to the adverse party or its attorney only if: **(A)** specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and **(B)** the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.
Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record.	**(2)** ***Contents; Expiration.*** Every temporary restraining order issued without notice must state the date and hour it was issued; describe the injury and state why it is irreparable; state why the order was issued without notice; and be promptly filed in the clerk's office and entered in the record. The order expires at the time after entry — not to exceed 10 days — that the court sets, unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension. The reasons for an extension must be entered in the record.

In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if the party does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.	(3) *Expediting the Preliminary-Injunction Hearing.* If the order is issued without notice, the motion for a preliminary injunction must be set for hearing at the earliest possible time, taking precedence over all other matters except hearings on older matters of the same character. At the hearing, the party who obtained the order must proceed with the motion; if the party does not, the court must dissolve the order. (4) *Motion to Dissolve.* On 2 days' notice to the party who obtained the order without notice — or on shorter notice set by the court — the adverse party may appear and move to dissolve or modify the order. The court must then hear and decide the motion as promptly as justice requires.
(c) **Security.** No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof. The provisions of Rule 65.1 apply to a surety upon a bond or undertaking under this rule.	(c) **Security.** If the court issues a preliminary injunction or a temporary restraining order, the court must require the movant to give security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. The United States, its officers, and its agencies are not required to give security.
(d) **Form and Scope of Injunction or Restraining Order.** Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.	(d) **Contents and Scope of Every Injunction and Restraining Order.** (1) *Contents.* Every order granting an injunction and every restraining order must: (A) state the reasons why it issued; (B) state its terms specifically; and (C) describe in reasonable detail — and not by referring to the complaint or other document — the act or acts restrained or required. (2) *Persons Bound.* The order binds only the following: (A) the parties; (B) the parties' officers, agents, servants, employees, and attorneys; and (C) other persons who receive actual notice of the order by personal service or otherwise and who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).
(e) **Employer and Employee; Interpleader; Constitutional Cases.** These rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee; or the provisions of Title 28, U.S.C., § 2361, relating to preliminary injunctions in actions of interpleader or in the nature of interpleader; or Title 28, U.S.C., § 2284, relating to actions required by Act of Congress to be heard and determined by a district court of three judges.	(e) **Other Laws Not Modified.** These rules do not modify the following: (1) any federal statute relating to temporary restraining orders or preliminary injunctions in actions affecting employer and employee; (2) 28 U.S.C. § 2361, which relates to preliminary injunctions in actions of interpleader or in the nature of interpleader; or (3) 28 U.S.C. § 2284, which relates to actions that must be heard and decided by a three-judge district court.

(f) **Copyright Impoundment.** This rule applies to copyright impoundment proceedings.	(f) **Copyright Impoundment.** This rule applies to copyright-impoundment proceedings.

COMMITTEE NOTE

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

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

Restyling Project Comments

Restyled Rule 65(a). The reference in the existing rule to "the hearing" is sometimes thought to imply that a hearing on an application for a preliminary injunction is required. *See* 11A Wright & Miller § 2947, at 126 ("Some type of hearing also implicitly is required by subdivision (a)(2)"); *see id.* § 2951, at 253 (noting that a TRO "is designed to preserve the status quo until there is an opportunity to hold a hearing on the application for a preliminary injunction"); cf. id. § 2949, at 225-31 (discussing the views of various courts as to when hearings are required). The proposed change from "the hearing" to "a hearing" makes the inference that a hearing is required somewhat less likely.

The need for a hearing, however, has also been inferred from the requirement of notice, which is retained in the proposed revision. *See* 11A Wright & Miller § 2949, at 229; *Sims v. Greene*, 161 F.2d 87, 88 (3d Cir. 1947) ("Notice implies an opportunity to be heard"); 13 Moore's § 65.21 (stating that the notice requirement "necessarily implies the holding of a hearing", but that no hearing is necessary when it would be a futile exercise).

We believe that some of the uncertainty evinced by courts and commentators reflects the common failure to distinguish between an opportunity to be heard, which need not include oral argument, let alone the submission of evidence, and a "hearing" before a judge. To the extent, however, that some courts have read the existing rule to require a "hearing" before a judge, the restyled rule may be thought to represent a change in meaning. Suggestion: include this proposed change in the style/substance track.

Restyled Rule 65(b)(1). The 1966 amendment was designed to "make it plain that informal notice, which may be communicated to the attorney rather than the adverse party, is to be preferred to no notice at all". 1966 Advisory Committee Note. *See* 11A Wright & Miller § 2941, at 36-37. By changing "without written or oral notice" to "without notice", and deleting the reference the "party's attorney" being heard in opposition, this point may be obscured. In particular, some might contend that the notice referred to in the restyled rule contemplates service rather than a telephone call to the attorney, who might be far more readily available than the party. Suggestion: add "written or oral" before "notice".

Restyled Rule 65(c): security. Although the existing rule can be read as mandating that security be given whenever a restraining order or preliminary injunction is issued, courts have frequently concluded that they have discretion to waive the posting of security. *See* 11A Wright

& Miller § 2954, at 292-93 (stating that "it has been held that the court may dispense with security altogether if the grant of an injunction carries no risk of monetary loss to the defendant").

Waiver of the bond requirement is common in public interest litigation and cases brought by indigents. The leading case states bluntly, "it is clear to us that indigents, suing individually or as class plaintiffs, ordinarily should not be required to post a bond under Rule 65(c)." *Bass v. Richardson*, 338 F. Supp. 478, 490 (S.D.N.Y. 1971). *See* 11A Wright & Miller § 2954 at 298 (describing *Bass* as "correct" and "followed by other courts"); *id.* at 300-03 (discussing approvingly cases that relax the bond requirement in public interest litigation); *see also* 13 Moore's at § 65.52 (noting circumstances in which court "may waive security").

The change from "[n]o restraining order or preliminary injunction shall issue except upon the giving of security". to "the court must require the movant to give security" would appear to remove the discretion that, correctly or incorrectly, courts have claimed under the existing rule. Such a change would be significant in cases where the movant lacks the resources to post security. Suggestion: if intended, this change should be included in the style/substance track; indeed, we recommend treatment there in any event, with language that better reflects existing practice.

Supersession. Some courts that have permitted injunctions without security have done so in reliance on the particular statute being enforced. *See Bass*, 338 F. Supp. at 491 ("If any difference exists between the language of Rule 65(c) and Congressional intent clearly embodied in the remedial statutes at issue, the federal statutes control."); 11A Wright & Miller § 2954, at 302 (using this quotation from the *Bass* case to summarize the "thrust of the argument for a court exercising its discretion under Rule 65(c) in a permissive fashion"); *Van de Kamp*, 766 F.2d at 1325-26 (discretion to dispense with the security requirement when plaintiff cannot afford bond, particularly where Congress has provided for private enforcement of a statute); *see also* 11A Wright & Miller § 2954, at 300 (noting that waiving the security requirement for the indigent "is consistent with the purposes of actions permitted in forma pauperis")

Valid rules supersede previously enacted statutes with which they are in conflict. The promulgation of the restyled rule thus might not only eliminate the discretion to waive a security bond that is frequently found under the existing rule. It might also eliminate the discretion to waive a security bond that is now based on federal statutes.

Restyled Rule 65(d)(2)(C): binding nonparties. The antecedent of the word "them" in the existing rule is ambiguous. It is not clear whether it refers to the parties to the action – binding those in concert with the parties – or refers to the entire preceding list – binding those in concert with the officers, agents, employees, and attorneys of the parties as well. *Compare* 11A Wright & Miller § 2947, at 126 (binds those "acting in concert with defendant") *with id.* § 2956, at 337 (binds those "acting in concert with a named defendant or his privy") and *id.* at 345 (binds a person who "acts in concert with a person who has been enjoined"). *Compare New York v. Operation Rescue*, 80 F. 3d 64, 70-71 (2d Cir. 1996) (upholding contempt citation of nonparty on basis of finding that he acted in concert with an agent of the defendant; respondent apparently challenged whether the person with whom he was in concert was an agent of the defendant, not whether acting in concert with an agent was sufficient) *with Paramount Pictures Corp. v. Carol Publishing*, 25 F. Supp. 2d 372, 374 (S.D.N.Y. 1998) ("Because a court's power to enjoin is limited to the conduct of a party, it is the relationship between the party enjoined and the nonparty that determines the permissible scope of an injunction"). *See also Alemit Mfg. v. Staff*,

42 F. 2d 832, 833 (2d Cir. 1930) (Learned Hand, J.) (stating, in a pre-Rules decision, that a nonparty "must either abet the defendant, or must be legally identified with him," in order to be held in contempt).

The restyled rule would eliminate the ambiguity in favor of broader liability. Moreover, to the extent that the restyled rule broadened the power of a court of equity to bind nonparties, it might run afoul of the substantive rights limitation of the Rules Enabling Act. Suggestion: delete "or (B)" from Restyled Rule 65(d)(2)(C), or include this proposal in the style/substance track.

Restyled Rule 65(d)(2): notice. The text of the existing rule is also ambiguous regarding whether the notice requirement applies to the entire list of persons who might be bound by an injunction or restraining order or modifies only "those persons in active concert or participation". Most commentators sensibly conclude that the notice requirement applies to all, so that even a party is not bound by an injunction or restraining order until he receives notice. *See* 13 Moore's § 65.61[3] ("A party . . . or nonparty . . . who has not received 'actual notice' of an injunction or restraining order will not be bound by its terms."); 11A Wright & Miller § 2956, at 337 ("Another prerequisite for binding a person to an injunction is that the person must have notice of the order."); id. at 351-52 ("Of course . . . an officer ... must have notice of the injunction to be held in contempt for acting in concert with the corporation."); *id.* § 2960, at 381 (stating that contempt requires finding that "party to be charged had notice of the order"); *but see Dole Fresh Fruit Co. v. United Banana Co.*, 821 F. 2d 106, 109 (2d Cir. 1987) (noting the ambiguity and concluding that officers and agents, servants, employees and attorneys need not receive actual notice of the injunction, but vacating the contempt order on other grounds).

The restyled rule, however, places the notice requirement in subsection (2)(C), thereby limiting its application to those described in subsection (2)(C). By its terms, then, the restyled rule would hold parties, officers, agents, servants, employees, and attorneys bound by an injunction or restraining order – and subject to punishment for contempt – even when they lacked notice of the injunction or restraining order. Suggestion: insert "who receive actual notice of the order by personal service or otherwise" after "the following" (deleting it in Restyled Rule 65(d)(2)(C)). Alternatively, this proposal should be included in the style/substance track.

Rule 65.1. Security: Proceedings Against Sureties	Rule 65.1. Proceedings Against a Surety
Whenever these rules, including the Supplemental Rules for Certain Admiralty and Maritime Claims, require or permit the giving of security by a party, and security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as the surety's agent upon whom any papers affecting the surety's liability on the bond or undertaking may be served. The surety's liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the sureties if their addresses are known.	Whenever these rules (including the Supplemental Rules for Certain Admiralty and Maritime Claims) require or allow a party to give security, and security is given through a bond or other undertaking with one or more sureties, each surety submits to the court's jurisdiction and irrevocably appoints the court clerk as its agent for receiving service of any papers that affect its liability on the bond or undertaking. The surety's liability may be enforced on motion without an independent action. The motion and any notice that the court orders may be served on the court clerk, who must promptly mail a copy of each to every surety whose address is known.

COMMITTEE NOTE

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

Rule 66. Receivers Appointed by Federal Courts	Rule 66. Receivers
An action wherein a receiver has been appointed shall not be dismissed except by order of the court. The practice in the administration of estates by receivers or by other similar officers appointed by the court shall be in accordance with the practice heretofore followed in the courts of the United States or as provided in rules promulgated by the district courts. In all other respects the action in which the appointment of a receiver is sought or which is brought by or against a receiver is governed by these rules.	These rules govern an action in which the appointment of a receiver is sought or a receiver sues or is sued. But a receiver or a similar court-appointed officer must administer an estate according to the historical practice in federal courts or as provided in a local rule. An action in which a receiver has been appointed may be dismissed only by court order.

COMMITTEE NOTE

The language of Rule 66 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Restyling Project Comments

Restyled Rule 65(a). The reference in the existing rule to "the hearing" is sometimes thought to imply that a hearing on an application for a preliminary injunction is required. *See* 11A Wright & Miller § 2947, at 126 ("Some type of hearing also implicitly is required by subdivision (a)(2)"); *see id.* § 2951, at 253 (noting that a TRO "is designed to preserve the status quo until there is an opportunity to hold a hearing on the application for a preliminary injunction"); cf. id. § 2949, at 225-31 (discussing the views of various courts as to when hearings are required). The proposed change from "the hearing" to "a hearing" makes the inference that a hearing is required somewhat less likely.

The need for a hearing, however, has also been inferred from the requirement of notice, which is retained in the proposed revision. *See* 11A Wright & Miller § 2949, at 229; *Sims v. Greene*, 161 F.2d 87, 88 (3d Cir. 1947) ("Notice implies an opportunity to be heard"); 13 Moore's § 65.21 (stating that the notice requirement "necessarily implies the holding of a hearing", but that no hearing is necessary when it would be a futile exercise).

We believe that some of the uncertainty evinced by courts and commentators reflects the common failure to distinguish between an opportunity to be heard, which need not include oral argument, let alone the submission of evidence, and a "hearing" before a judge. To the extent, however, that some courts have read the existing rule to require a "hearing" before a judge, the restyled rule may be thought to represent a change in meaning. Suggestion: include this proposed change in the style/substance track.

Restyled Rule 65(b)(1). The 1966 amendment was designed to "make it plain that informal notice, which may be communicated to the attorney rather than the adverse party, is to be preferred to no notice at all". 1966 Advisory Committee Note. *See* 11A Wright & Miller § 2941, at 36-37. By changing "without written or oral notice" to "without notice", and deleting the reference the "party's attorney" being heard in opposition, this point may be obscured. In particular, some might contend that the notice referred to in the restyled rule contemplates

service rather than a telephone call to the attorney, who might be far more readily available than the party. Suggestion: add "written or oral" before "notice".

Restyled Rule 65(c): security. Although the existing rule can be read as mandating that security be given whenever a restraining order or preliminary injunction is issued, courts have frequently concluded that they have discretion to waive the posting of security. *See* 11A Wright & Miller § 2954, at 292-93 (stating that "it has been held that the court may dispense with security altogether if the grant of an injunction carries no risk of monetary loss to the defendant").

Waiver of the bond requirement is common in public interest litigation and cases brought by indigents. The leading case states bluntly, "it is clear to us that indigents, suing individually or as class plaintiffs, ordinarily should not be required to post a bond under Rule 65(c)." *Bass v. Richardson*, 338 F. Supp. 478, 490 (S.D.N.Y. 1971). *See* 11A Wright & Miller § 2954 at 298 (describing *Bass* as "correct" and "followed by other courts"); *id.* at 300-03 (discussing approvingly cases that relax the bond requirement in public interest litigation); *see also* 13 Moore's at § 65.52 (noting circumstances in which court "may waive security").

The change from "[n]o restraining order or preliminary injunction shall issue except upon the giving of security". to "the court must require the movant to give security" would appear to remove the discretion that, correctly or incorrectly, courts have claimed under the existing rule. Such a change would be significant in cases where the movant lacks the resources to post security. Suggestion: if intended, this change should be included in the style/substance track; indeed, we recommend treatment there in any event, with language that better reflects existing practice.

Supersession. Some courts that have permitted injunctions without security have done so in reliance on the particular statute being enforced. *See Bass*, 338 F. Supp. at 491 ("If any difference exists between the language of Rule 65(c) and Congressional intent clearly embodied in the remedial statutes at issue, the federal statutes control."); 11A Wright & Miller § 2954, at 302 (using this quotation from the *Bass* case to summarize the "thrust of the argument for a court exercising its discretion under Rule 65(c) in a permissive fashion"); *Van de Kamp*, 766 F.2d at 1325-26 (discretion to dispense with the security requirement when plaintiff cannot afford bond, particularly where Congress has provided for private enforcement of a statute); *see also* 11A Wright & Miller § 2954, at 300 (noting that waiving the security requirement for the indigent "is consistent with the purposes of actions permitted in forma pauperis")

Valid rules supersede previously enacted statutes with which they are in conflict. The promulgation of the restyled rule thus might not only eliminate the discretion to waive a security bond that is frequently found under the existing rule. It might also eliminate the discretion to waive a security bond that is now based on federal statutes.

Restyled Rule 65(d)(2)(C): binding nonparties. The antecedent of the word "them" in the existing rule is ambiguous. It is not clear whether it refers to the parties to the action – binding those in concert with the parties – or refers to the entire preceding list – binding those in concert with the officers, agents, employees, and attorneys of the parties as well. *Compare* 11A Wright & Miller § 2947, at 126 (binds those "acting in concert with defendant") *with id.* § 2956, at 337 (binds those "acting in concert with a named defendant or his privy") and *id.* at 345 (binds a person who "acts in concert with a person who has been enjoined"). *Compare New York v. Operation Rescue*, 80 F. 3d 64, 70-71 (2d Cir. 1996) (upholding contempt citation of nonparty

on basis of finding that he acted in concert with an agent of the defendant; respondent apparently challenged whether the person with whom he was in concert was an agent of the defendant, not whether acting in concert with an agent was sufficient) *with Paramount Pictures Corp. v. Carol Publishing*, 25 F. Supp. 2d 372, 374 (S.D.N.Y. 1998) ("Because a court's power to enjoin is limited to the conduct of a party, it is the relationship between the party enjoined and the nonparty that determines the permissible scope of an injunction"). *See also Alemit Mfg. v. Staff*, 42 F. 2d 832, 833 (2d Cir. 1930) (Learned Hand, J.) (stating, in a pre-Rules decision, that a nonparty "must either abet the defendant, or must be legally identified with him," in order to be held in contempt).

The restyled rule would eliminate the ambiguity in favor of broader liability. Moreover, to the extent that the restyled rule broadened the power of a court of equity to bind nonparties, it might run afoul of the substantive rights limitation of the Rules Enabling Act. Suggestion: delete "or (B)" from Restyled Rule 65(d)(2)(C), or include this proposal in the style/substance track.

Restyled Rule 65(d)(2): notice. The text of the existing rule is also ambiguous regarding whether the notice requirement applies to the entire list of persons who might be bound by an injunction or restraining order or modifies only "those persons in active concert or participation". Most commentators sensibly conclude that the notice requirement applies to all, so that even a party is not bound by an injunction or restraining order until he receives notice. *See* 13 Moore's § 65.61[3] ("A party . . . or nonparty . . . who has not received 'actual notice' of an injunction or restraining order will not be bound by its terms."); 11A Wright & Miller § 2956, at 337 ("Another prerequisite for binding a person to an injunction is that the person must have notice of the order."); id. at 351-52 ("Of course . . . an officer ... must have notice of the injunction to be held in contempt for acting in concert with the corporation."); *id.* § 2960, at 381 (stating that contempt requires finding that "party to be charged had notice of the order"); *but see Dole Fresh Fruit Co. v. United Banana Co.*, 821 F. 2d 106, 109 (2d Cir. 1987) (noting the ambiguity and concluding that officers and agents, servants, employees and attorneys need not receive actual notice of the injunction, but vacating the contempt order on other grounds).

The restyled rule, however, places the notice requirement in subsection (2)(C), thereby limiting its application to those described in subsection (2)(C). By its terms, then, the restyled rule would hold parties, officers, agents, servants, employees, and attorneys bound by an injunction or restraining order – and subject to punishment for contempt – even when they lacked notice of the injunction or restraining order. Suggestion: insert "who receive actual notice of the order by personal service or otherwise" after "the following" (deleting it in Restyled Rule 65(d)(2)(C)). Alternatively, this proposal should be included in the style/substance track.

Restyled Rule 66: court of appointment. The existing rule governs actions involving receivers appointed by federal courts. As the Advisory Committee explained, the title was expanded to "make clear the subject of the rule, i.e., federal equity receivers", while the "[c]apacity of a state court receiver to sue or be sued in Federal court is governed by Rule 17(b)". 1946 Advisory Committee Note; *see also* 13 Moore's § 66.08 ("A federal equity receiver's capacity to sue in any district court contrasts with the capacity of state-appointed receivers."). Moreover, the second sentence of the existing rule "deals with suits by or against a federal equity receiver". 1946 Advisory Committee Note. *See also* 12 Wright & Miller § 2982, at 15-16 ("Rule 66 applies exclusively to equity receivers, and only to those that are appointed by federal courts"). As Judge Learned Hand once explained:

> the phrase "appointed by the court", is not at all appropriate to an

> appointment by a state court . . . ; the natural reading is that the practice of the federal court which appoints the receiver shall govern his administration under its supervision. Had the intent been to make the rule apply to all receivers, we should expect the indefinite participle: "appointed by a court."

Bicknell v. Lloyd-Smith, 109 F.2d 527, 528-29 (2d Cir. 1940).

By deleting "appointed by federal courts" from the title, and changing "appointed by the court" to "court-appointed", the restyled rule would appear to govern actions brought by or against receivers appointed by state courts. Indeed, the proposed language is quite similar to the phrasing that Judge Learned Hand stated would have been used if a broader meaning were intended. Suggestion: restore the deleted language in the title and change "court-appointed" to "appointed by the court" in the second sentence (moving it after "officer").

Rule 67. Deposit in Court	Rule 67. Deposit into Court
In an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery, a party, upon notice to every other party, and by leave of court, may deposit with the court all or any part of such sum or thing, whether or not that party claims all or any part of the sum or thing. The party making the deposit shall serve the order permitting deposit on the clerk of the court.	(a) **Depositing Property.** If any part of the relief sought is a money judgment or the disposition of a sum of money or some other deliverable thing, a party — on notice to every other party and by leave of court — may deposit with the court all or part of the money or thing, whether or not that party claims any of it. The depositing party must deliver to the clerk a copy of the order permitting deposit.
Money paid into court under this rule shall be deposited and withdrawn in accordance with the provisions of Title 28, U.S.C., §§ 2041, and 2042; the Act of June 26, 1934, c. 756, § 23, as amended (48 Stat. 1236, 58 Stat. 845), U.S.C., Title 31, § 725v; or any like statute. The fund shall be deposited in an interest-bearing account or invested in an interest-bearing instrument approved by the court.	(b) **Investing and Withdrawing Funds.** Money paid into court under this rule must be deposited and withdrawn in accordance with 28 U.S.C. §§ 2041 and 2042 and any like statute. The money must be deposited in an interest-bearing account or invested in a court-approved, interest-bearing instrument.

COMMITTEE NOTE

The language of Rule 67 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Restyling Project Comments

Restyled Rule 67(b). The change from "or any like statute" to "and any like statute" could be argued to require that money be handled in accordance with all such statutes, not simply compliance with one or the other. Suggestion: change "and" to "or".

Rule 68. Offer of Judgment	Rule 68. Offer of Judgment
At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.	(a) **Making an Offer; Judgment on an Accepted Offer.** At least 10 days before the trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 10 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment. (b) **Unaccepted Offer.** An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs. (c) **Offer After Liability Is Determined.** When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be served within a reasonable time — but at least 10 days — before a hearing to determine the extent of liability. (d) **Paying Costs After an Unaccepted Offer.** If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.

COMMITTEE NOTE

The language of Rule 68 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Restyling Project Comments

Restyled Rule 68(a) and (c): timing. The existing rule requires the offer to be made more than 10 days before trial; the restyled rule requires the offer to be made at least 10 days before trial. The restyled rule, unlike the current rule, permits an offer to be made exactly 10 days before trial. In short, $x > 10$ is not the same as $x \geq 10$. If intended, this change should be included in the style/substance track; if change is not intended, the existing language should be retained.

The existing rule measures the 10 days explicitly from the day the trial "begins", or, in the case of an offer after the determination of liability, from the "commencement" of the hearing. By deleting these terms, the restyled rule may increase ambiguity. *See Greenwood v. Stevenson*, 88 F.R.D. 225, 228-29 (D.R.I. 1980) (concluding that a trial begins for the purpose of Rule 68 "when the trial judge calls the proceedings to order and actually commences to hear the case," not with jury selection). Suggestion: restore the deleted language.

Restyled Rule 68(a): conditional offers. It is unclear under the existing rule whether an offer can be conditioned on acceptance by all plaintiffs. *See* 13 Moore's § 68.04[9] (describing this as the "most problematic multi-party situation"); *Amati v. City of Woodstock*, 176 F.3d 952,

958 (2d Cir. 1999) (finding it permissible for a defendant to impose such a condition, but leaving open question whether it is effectual to shift costs to plaintiffs who did accept). The proposed change from "judgment . . . for the money or property or to the effect specified in the offer" to "judgment on specified terms" would make it more difficult to contend that an offer cannot be conditioned on acceptance by all plaintiffs.

Restyled Rule 68(a): equitable relief, class actions, and judicial discretion. There is some question whether the existing rule applies to actions for equitable relief. *See* 12 Wright & Miller § 3001.1, at 79 (noting suggestions that the rule does not apply in actions for equitable relief but rejecting those suggestions); *Chathas v. Local 134 IBEW*, 233 F.3d 508, 511 (7th Cir. 2000) ("Rule 68 offers are much more common in money cases than in equity cases, but nothing in the rule forbids its use in the latter type of case.") The proposed change from "judgment . . . for the money or property or to the effect specified in the offer" to "judgment on specified terms" would make it more difficult to contend that the rule does not apply to offers to accept a particular equitable decree.

There is also dispute whether the existing rule applies to class actions. *See* 13 Moore's § 68.03[3] (noting "conflict in the few decisions addressing whether Rule 68 should apply to class actions" and stating that it is "questionable whether the offer of judgment rule should apply to cases such as class or derivative actions that require judicial approval of a settlement"); Preliminary Draft of Proposed Amendments, 98 F.R.D. 337, 363, 367 (1983) (proposed amendment to make clear that the rule does not apply to class or derivative actions); *Weiss v. Regal Collections*, 385 F.3d 337, 344 n.12 (3d Cir. 2004) (Scirica, C.J.) ("Courts have wrestled with the application of Rule 68 in the class action context, noting Rule 68 offers to individual named plaintiffs undercut close court supervision of class action settlement, create conflicts of interests for named plaintiffs, and encourage premature class certification motions"); *Schaake v. Risk Management Alternatives, Inc.*, 203 F.R.D. 108, 111 (S.D.N.Y. 2001) ("it has long been recognized that Rule 68 Offers of Judgment have no applicability to matters legitimately brought as class actions pursuant to Rule 23").

If Rule 68 applies to equitable relief and class actions, the court under the existing rule retains authority to reject an accepted offer. *See* 12 Wright & Miller § 3005, at 109-10 (asserting that while Rule 68 offers "may include provision for a specified injunctive regime", the "court cannot be compelled to enter the agreed judgment even though it emerged from a Rule 68 offer and acceptance" and that "Rule 68 cannot remove th[e] authority and duty" of a court to determine whether the settlement of a class action is acceptable). *See also Acceptance Indemnity Insurance v. Southeastern Forge*, 209 F.R.D. 697, 698-99 n.2 (M.D. Ga. 2002) (concluding that, in light of Rule 54, an accepted Rule 68 offer of judgment that does not include all claims and all parties does not result in a final judgment).

These concerns are related: one way in which the existing rule can be accommodated to equitable relief and class actions is through the availability of discretion to decline to enter an agreed judgment or decree. The proposed rule, on the one hand, strengthens arguments that it applies to equitable relief, while weakening arguments for discretion to decline to enter agreed judgments. Suggestion: change the last sentence of Restyled Rule 68(a) to: "Except in cases where court approval of the judgment is required, the clerk must then enter judgment".

Restyled Rule 68(a): mootness and supersession. There are conflicting decisions whether a Rule 68 offer to provide a plaintiff with the maximum he could recover individually moots a proposed class action. 12 Wright & Miller § 3001.1, at supp. 3; 3 Moore's § 68.03[3].

See Schaake, 203 F.R.D. at 112 (noting that to permit such a tactic would "allow defendants to essentially opt-out of Rule 23"); *Weiss*, 385 F.3d at 348 ("Absent undue delay in filing a motion for class certification . . . where a defendant makes a Rule 68 offer to an individual claim that has the effect of mooting possible class relief asserted in the complaint, the appropriate course is to relate the certification motion back to the filing of the class complaint.")

One basis for concluding that such an offer does not moot the class action has been that the statute being enforced contemplated class actions. *Id.* at 345 (stating that a "significant consideration" is that "Congress explicitly provided for class damages" and intended that the statute be enforced "by private attorneys general" and concluding that "[r]epresentative actions . . . appear to be fundamental to the statutory structure"). The promulgation of the restyled rule might make it more difficult to rely on such statutes, for reasons discussed in connection with Rule 65(c).

Restyled Rule 68(d): supersession. The existing rule's mandatory requirement that "the offeree must pay the costs" has been viewed as "overridden by a contrary statutory provision". 13 Moore's § 68.08[1]; *see R.N. v. Suffield Bd. of Ed.*, 194 F.R.D. 49, 52 (D. Conn. 2000) (relying on a statute that invokes Rule 68, but includes an exception). The promulgation of the restyled rule might be viewed as superseding such statutory provisions, for reasons discussed in connection with Rule 65(c).

Rule 69. Execution	Rule 69. Execution
(a) In General. Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable. In aid of the judgment or execution, the judgment creditor or a successor in interest when that interest appears of record, may obtain discovery from any person, including the judgment debtor, in the manner provided in these rules or in the manner provided by the practice of the state in which the district court is held.	**(a) In General.** (1) *Money Judgment; Applicable Procedure.* A money judgment is enforced by a writ of execution, unless the court orders otherwise. The procedure on execution — and in proceedings supplementary to and in aid of judgment or execution — must follow the procedure of the state where the court is located, but a federal statute governs to the extent it applies. (2) *Obtaining Discovery.* In aid of the judgment or execution, the judgment creditor or a successor in interest whose interest appears of record may obtain discovery from any person — including the judgment debtor — as provided in these rules or by the procedure of the state where the court is located.
(b) Against Certain Public Officers. When a judgment has been entered against a collector or other officer of revenue under the circumstances stated in Title 28, U.S.C., § 2006, or against an officer of Congress in an action mentioned in the Act of March 3, 1875, ch. 130, § 8 (18 Stat. 401), U.S.C., Title 2, § 118, and when the court has given the certificate of probable cause for the officer's act as provided in those statutes, execution shall not issue against the officer or the officer's property but the final judgment shall be satisfied as provided in such statutes.	**(b) Against Certain Public Officers.** When a judgment has been entered against a revenue officer in the circumstances stated in 28 U.S.C. § 2006, or against an officer of Congress in the circumstances stated in 2 U.S.C. § 118, the judgment must be satisfied as those statutes provide.

COMMITTEE NOTE

The language of Rule 69 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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

Restyling Project Comments

Restyled Rule 69(a)(1). The existing rule's provision that proceedings "shall be in accordance with" state practice has been interpreted to require only substantial compliance rather than impose a "straitjacket". 13 Moore's § 69.03[3] ("common-sense should be applied to trump obviously technical state procedural requirements that would prevent enforcement of the judgment"). The restyled rule, by changing "shall be in accordance with" state procedure to "must follow" state procedure, threatens to eliminate some of that play and impose more of a straitjacket. There is no obvious solution to this problem, which implicates important issues of federalism and the limitations in the Rules Enabling Act. One possibility is to change the final clause to read "but the court need not follow state procedure that would prevent enforcement of the judgment, and a federal statute governs to the extent it applies".

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

COMMITTEE NOTE

The language of Rule 70 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 71. Process in Behalf of and Against Persons Not Parties	Rule 71. Enforcing Relief For or Against a Nonparty
When an order is made in favor of a person who is not a party to the action, that person may enforce obedience to the order by the same process as if a party; and, when obedience to an order may be lawfully enforced against a person who is not a party, that person is liable to the same process for enforcing obedience to the order as if a party.	When an order grants relief for a nonparty or may be enforced against a nonparty, the procedure for enforcing the order is the same as for a party.

COMMITTEE NOTE

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

Restyling Project Comments

Restyled Rule 71. The existing rule authorizes enforcement of orders in favor of nonparties in a wide variety of situations, such as an order to deliver property to the purchaser at a judicial sale, or to pay fees to a witness or to pay costs to a special master. *See* 12 Wright & Miller § 3032, at 174; 13 Moore's § 71.03. *See also In Re Employment Discrimination Litigation against Alabama*, 213 F.R.D. 592 (M.D. Ala. 2003) (declining to read "in favor of" to broadly reach incidental beneficiaries). The restyled rule changes "order . . . made in favor of" a nonparty to "an order [that] grants relief for a nonparty". It is not obvious, however, that orders in favor of purchasers, witnesses, and masters constitute "relief", as least as that term is used in Rule 8 (describing requirements of a "pleading which sets forth a claim for relief"). Suggestion: change "grants relief for" to "is made in favor of".

IX. SPECIAL PROCEEDINGS Rule 71A. Condemnation of Property	TITLE IX. SPECIAL PROCEEDINGS Rule 71.1. Condemning Real or Personal Property
(a) Applicability of Other Rules. The Rules of Civil Procedure for the United States District Courts govern the procedure for the condemnation of real and personal property under the power of eminent domain, except as otherwise provided in this rule.	**(a) Applicability of Other Rules.** These rules govern proceedings to condemn real and personal property by eminent domain, except as this rule provides otherwise.
(b) Joinder of Properties. The plaintiff may join in the same action one or more separate pieces of property, whether in the same or different ownership and whether or not sought for the same use.	**(b) Joinder of Properties.** The plaintiff may join separate pieces of property in a single action, no matter who owns them or whether they are sought for the same use.
(c) Complaint. **(1) Caption.** The complaint shall contain a caption as provided in Rule 10(a), except that the plaintiff shall name as defendants the property, designated generally by kind, quantity, and location, and at least one of the owners of some part of or interest in the property. **(2) Contents.** The complaint shall contain a short and plain statement of the authority for the taking, the use for which the property is to be taken, a description of the property sufficient for its identification, the interests to be acquired, and as to each separate piece of property a designation of the defendants who have been joined as owners thereof or of some interest therein. Upon the commencement of the action, the plaintiff need join as defendants only the persons having or claiming an interest in the property whose names are then known, but prior to any hearing involving the compensation to be paid for a piece of property, the plaintiff shall add as defendants all persons having or claiming an interest in that property whose names can be ascertained by a reasonably diligent search of the records, considering the character and value of the property involved and the interests to be acquired, and also those whose names have otherwise been learned. All others may be made defendants under the designation "Unknown Owners."	**(c) Complaint.** **(1)** ***Caption.*** The complaint must contain a caption as provided in Rule 10(a). The plaintiff must, however, name as defendants both the property — designated generally by kind, quantity, and location — and at least one owner of some part of or interest in the property. **(2)** ***Contents.*** The complaint must contain a short and plain statement of the following: **(A)** the authority for the taking; **(B)** the uses for which the property is to be taken; **(C)** a description sufficient to identify the property; **(D)** the interests to be acquired; and **(E)** for each piece of property, a designation of each defendant who has been joined as an owner or owner of an interest in it. **(3)** ***Parties.*** When the action commences, the plaintiff need join as defendants only those persons who have or claim an interest in the property and whose names are then known. But before any hearing on compensation, the plaintiff must add as defendants all those persons who have or claim an interest and whose names have become known or can be found by a reasonably diligent search of the records, considering both the property's character and value and the interests to be acquired. All others may be made defendants under the designation "Unknown Owners."

Process shall be served as provided in subdivision (d) of this rule upon all defendants, whether named as defendants at the time of the commencement of the action or subsequently added, and a defendant may answer as provided in subdivision (e) of this rule. The court meanwhile may order such distribution of a deposit as the facts warrant. **(3) Filing.** In addition to filing the complaint with the court, the plaintiff shall furnish to the clerk at least one copy thereof for the use of the defendants and additional copies at the request of the clerk or of a defendant.	**(4)** ***Procedure.*** Notice must be served on all defendants as provided in Rule 71.1(d), whether they were named as defendants when the action commenced or were added later. A defendant may answer as provided in Rule 71.1(e). The court, meanwhile, may order any distribution of the deposit that the facts warrant. **(5)** ***Filing; Additional Copies.*** In addition to filing the complaint, the plaintiff must give the clerk at least one copy for the defendants' use and additional copies at the request of the clerk or a defendant.
(d) Process. **(1) Notice; Delivery.** Upon the filing of the complaint the plaintiff shall forthwith deliver to the clerk joint or several notices directed to the defendants named or designated in the complaint. Additional notices directed to defendants subsequently added shall be so delivered. The delivery of the notice and its service have the same effect as the delivery and service of the summons under Rule 4.	**(d) Process.** **(1)** ***Delivering Notice to the Clerk.*** On filing a complaint, the plaintiff must promptly deliver to the clerk joint or several notices directed to the named defendants. When adding defendants, the plaintiff must deliver to the clerk additional notices directed to the new defendants.
(2) Same; Form. Each notice shall state the court, the title of the action, the name of the defendant to whom it is directed, that the action is to condemn property, a description of the defendant's property sufficient for its identification, the interest to be taken, the authority for the taking, the uses for which the property is to be taken, that the defendant may serve upon the plaintiff's attorney an answer within 20 days after service of the notice, and that the failure so to serve an answer constitutes a consent to the taking and to the authority of the court to proceed to hear the action and to fix the compensation. The notice shall conclude with the name of the plaintiff's attorney and an address within the district in which action is brought where the attorney may be served. The notice need contain a description of no other property than that to be taken from the defendants to whom it is directed.	**(2)** ***Contents of the Notice.*** **(A)** *Main Contents.* Each notice must name the court, the title of the action, and the defendant to whom it is directed. It must describe the property sufficiently to identify it, but need not describe any property other than that to be taken from the named defendant. The notice must also state: **(i)** that the action is to condemn property; **(ii)** the interest to be taken; **(iii)** the authority for the taking; **(iv)** the uses for which the property is to be taken; **(v)** that the defendant may serve an answer on the plaintiff's attorney within 20 days after being served with the notice; and **(vi)** that the failure to so serve an answer constitutes consent to the taking and to the court's authority to proceed with the action and fix the compensation. **(B)** *Conclusion.* The notice must conclude with the name of the plaintiff's attorney and an address within the district in which the action is brought where the attorney may be served.

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

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

(h) Trial. If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of that issue; but if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix, unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it. In the event that a commission is appointed the court may direct that not more than two additional persons serve as alternate commissioners to hear the case and replace commissioners who, prior to the time when a decision is filed, are found by the court to be unable or disqualified to perform their duties. An alternate who does not replace a regular commissioner shall be discharged after the commission renders its final decision. Before appointing the members of the commission and alternates the court shall advise the parties of the identity and qualifications of each prospective commissioner and alternate and may permit the parties to examine each such designee. The parties shall not be permitted or required by the court to suggest nominees. Each party shall have the right to object for valid cause to the appointment of any person as a commissioner or alternate.	**(h) Trial of the Issues.** **(1)** ***Issues Other Than Compensation; Compensation.*** In an action involving eminent domain under federal law, the court tries all issues, including compensation, except when compensation must be determined: **(A)** by any tribunal specially constituted by a federal statute to determine compensation; or **(B)** if there is no such tribunal, by a jury when a party demands one within the time to answer or within any additional time the court sets, unless the court appoints a commission. **(2)** ***Appointing a Commission; Commission's Powers and Report.*** **(A)** *Reasons for Appointing.* If a party has demanded a jury, the court may instead appoint a three-person commission to determine compensation because of the character, location, or quantity of the property to be condemned or for other just reasons. **(B)** *Alternate Commissioners.* The court may appoint up to two additional persons to serve as alternate commissioners to hear the case and replace commissioners who, before a decision is filed, the court finds unable or disqualified to perform their duties. Once the commission renders its final decision, the court must discharge any alternate who has not replaced a commissioner.
If a commission is appointed it shall have the authority of a master provided in Rule 53(c) and proceedings before it shall be governed by the provisions of Rule 53(d). Its action and report shall be determined by a majority and its findings and report shall have the effect, and be dealt with by the court in accordance with the practice, prescribed in Rule 53(e), (f), and (g). Trial of all issues shall otherwise be by the court.	**(C)** *Examining the Prospective Commissioners.* Before making its appointments, the court must advise the parties of the identity and qualifications of each prospective commissioner and alternate, and may permit the parties to examine them. The parties may not suggest appointees, but for good cause may object to the appointment of a commissioner or alternate. **(D)** *Commission's Powers and Report* A commission has the powers of a master under Rule 53(c). Its action and report are determined by a majority. Rule 53(d), (e), and (f) apply to its action and report.

(i) Dismissal of Action. **(1) As of Right.** If no hearing has begun to determine the compensation to be paid for a piece of property and the plaintiff has not acquired the title or a lesser interest in or taken possession, the plaintiff may dismiss the action as to that property, without an order of the court, by filing a notice of dismissal setting forth a brief description of the property as to which the action is dismissed. **(2) By Stipulation.** Before the entry of any judgment vesting the plaintiff with title or a lesser interest in or possession of property, the action may be dismissed in whole or in part, without an order of the court, as to any property by filing a stipulation of dismissal by the plaintiff and the defendant affected thereby; and, if the parties so stipulate, the court may vacate any judgment that has been entered. **(3) By Order of the Court.** At any time before compensation for a piece of property has been determined and paid and after motion and hearing, the court may dismiss the action as to that property, except that it shall not dismiss the action as to any part of the property of which the plaintiff has taken possession or in which the plaintiff has taken title or a lesser interest, but shall award just compensation for the possession, title or lesser interest so taken. The court at any time may drop a defendant unnecessarily or improperly joined. **(4) Effect.** Except as otherwise provided in the notice, or stipulation of dismissal, or order of the court, any dismissal is without prejudice.	**(i) Dismissal of the Action.** **(1)** ***By the Plaintiff.*** If no compensation hearing on a piece of property has begun, and if the plaintiff has not acquired title or a lesser interest or taken possession, the plaintiff may, without a court order, dismiss the action as to that property by filing a notice of dismissal briefly describing the property. **(2)** ***By Stipulation.*** Before a judgment is entered vesting the plaintiff with title or a lesser interest in or possession of property, the plaintiff and affected defendants may, without a court order, dismiss the action in whole or in part by filing a stipulation of dismissal. And if the parties so stipulate, the court may vacate a judgment already entered. **(3)** ***By Court Order.*** At any time before compensation has been determined and paid, the court may, after a motion and hearing, dismiss the action as to a piece of property. But if the plaintiff has already taken title, a lesser interest, or possession as to any part of it, the court must award compensation for the title, lesser interest, or possession taken. The court may at any time dismiss a defendant who was unnecessarily or improperly joined. **(4)** ***Effect.*** A dismissal is without prejudice unless otherwise stated in the notice, stipulation, or court order.
(j) Deposit and Its Distribution. The plaintiff shall deposit with the court any money required by law as a condition to the exercise of the power of eminent domain; and, although not so required, may make a deposit when permitted by statute. In such cases the court and attorneys shall expedite the proceedings for the distribution of the money so deposited and for the ascertainment and payment of just compensation. If the compensation finally awarded to any defendant exceeds the amount which has been paid to that defendant on distribution of the deposit, the court shall enter judgment against the plaintiff and in favor of that defendant for the deficiency. If the compensation finally awarded to any defendant is less than the amount which has been paid to that defendant, the court shall enter judgment against that defendant and in favor of the plaintiff for the overpayment.	**(j) Deposit and Its Distribution.** **(1)** ***Deposit.*** The plaintiff must deposit with the court any money required by law as a condition to the exercise of eminent domain and may make a deposit when allowed by statute. **(2)** ***Distribution; Adjusting Distribution.*** After a deposit, the court and attorneys must expedite the proceedings so as to distribute the deposit and to determine and pay compensation. If the compensation finally awarded to a defendant exceeds the amount distributed to that defendant, the court must enter judgment against the plaintiff for the deficiency. If the compensation awarded to a defendant is less than the amount distributed to that defendant, the court must enter judgment against that defendant for the overpayment.
(k) Condemnation Under a State's Power of Eminent Domain. The practice as herein prescribed governs in actions involving the exercise of the power of eminent domain under the law of a state, provided that if the state law makes provision for trial of any issue by jury, or for trial of the issue of compensation by jury or commission or both, that provision shall be followed.	**(k) Condemnation Under a State's Power of Eminent Domain.** This rule governs an action involving eminent domain under state law. But if state law provides for trying an issue by jury — or for trying the issue of compensation by jury or commission or both — that law governs.

(l) **Costs.** Costs are not subject to Rule 54(d).	(l) **Costs.** Costs are not subject to Rule 54(d).

COMMITTEE NOTE

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

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

Restyling Project Comments

Restyled Rule 71.1(c)(4). The restyled rule refers to "the deposit", while the existing rule refers to "a deposit". Since a deposit may not be required pursuant to Restyled Rule 71.1 (j), the change could cause confusion. Suggestion: change "the deposit" to "a deposit".

Rule 72. Magistrate Judges; Pretrial Orders	Rule 72. Magistrate Judges: Pretrial Order
(a) Nondispositive Matters. A magistrate judge to whom a pretrial matter not dispositive of a claim or defense of a party is referred to hear and determine shall promptly conduct such proceedings as are required and when appropriate enter into the record a written order setting forth the disposition of the matter. Within 10 days after being served with a copy of the magistrate judge's order, a party may serve and file objections to the order; a party may not thereafter assign as error a defect in the magistrate judge's order to which objection was not timely made. The district judge to whom the case is assigned shall consider such objections and shall modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law.	**(a) Nondispositive Matters.** When a pretrial matter not dispositive of a party's claim or defense is referred to a magistrate judge to hear and decide, the magistrate judge must promptly conduct the required proceedings and, when appropriate, issue a written order stating the decision. A party may serve and file objections to the order within 10 days after being served with a copy. A party may not assign as error a defect in the order not timely objected to. The district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law.
(b) Dispositive Motions and Prisoner Petitions. A magistrate judge assigned without consent of the parties to hear a pretrial matter dispositive of a claim or defense of a party or a prisoner petition challenging the conditions of confinement shall promptly conduct such proceedings as are required. A record shall be made of all evidentiary proceedings before the magistrate judge, and a record may be made of such other proceedings as the magistrate judge deems necessary. The magistrate judge shall enter into the record a recommendation for disposition of the matter, including proposed findings of fact when appropriate. The clerk shall forthwith mail copies to all parties. A party objecting to the recommended disposition of the matter shall promptly arrange for the transcription of the record, or portions of it as all parties may agree upon or the magistrate judge deems sufficient, unless the district judge otherwise directs. Within 10 days after being served with a copy of the recommended disposition, a party may serve and file specific, written objections to the proposed findings and recommendations. A party may respond to another party's objections within 10 days after being served with a copy thereof. The district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.	**(b) Dispositive Motions and Prisoner Petitions.** **(1)** ***Findings and Recommendations.*** A magistrate judge must promptly conduct the required proceedings when assigned, without the parties' consent, to hear a pretrial matter dispositive of a claim or defense or a prisoner petition challenging the conditions of confinement. A record must be made of all evidentiary proceedings and may, at the magistrate judge's discretion, be made of any other proceedings. The magistrate judge must enter a recommended disposition, including, if appropriate, proposed findings of fact. The clerk must promptly mail a copy to each party. **(2)** ***Objections.*** Within 10 days after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations. A party may respond to another party's objections within 10 days after being served with a copy. Unless the district judge orders otherwise, the objecting party must promptly arrange for transcribing the record, or whatever portions of it the parties agree to or the magistrate judge considers sufficient. **(3)** ***Resolving Objections.*** The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.

COMMITTEE NOTE

The language of Rule 72 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Restyling Project Comments

Restyled Rule 72(a). Rule 72 was intended to track the Magistrate Judges' Act (28

U.S.C. § 631 *et seq.*) (the "Act"), which uses "hear and determine" instead of "hear and decide", the language in the restyled rule. Likewise, the restyled rule uses the word "decision" rather than the Act's "disposition". Given the history of this rule, we do not believe it is appropriate to change the statutory terms. Suggestion: change "decide" to "determine" and "decision" to "disposition".

Restyled Rule 72(b)(1). The restyling changes the language of the Act and the existing rule, "recommendation for disposition", to "recommended disposition". Although the second paragraph of the existing rule does use "recommended disposition", it does so only after having provided in the first paragraph that the "magistrate judge shall enter into the record a recommendation for disposition of the matter". As with the previous section, we suggest that the Act's language should be retained.

Restyled Rule 72(b)(3). The Act and the existing rule do not contemplate that the magistrate judge will make a "disposition", but merely a recommendation for disposition. Suggestion: change "disposition" to "recommendation for disposition".

Rule 73. Magistrate Judges; Trial by Consent and Appeal Options	Rule 73. Magistrate Judges: Trial by Consent; Appeal
(a) Powers; Procedure. When specially designated to exercise such jurisdiction by local rule or order of the district court and when all parties consent thereto, a magistrate judge may exercise the authority provided by Title 28, U.S.C. § 636(c) and may conduct any or all proceedings, including a jury or nonjury trial, in a civil case. A record of the proceedings shall be made in accordance with the requirements of Title 28, U.S.C. § 636(c)(5).	**(a) Trial by Consent.** When authorized under 28 U.S.C. § 636(c), a magistrate judge may, if all parties consent, conduct the proceedings in a civil action, including a jury or nonjury trial. A record of the proceedings must be made in accordance with 28 U.S.C. § 636(c)(5).
(b) Consent. When a magistrate judge has been designated to exercise civil trial jurisdiction, the clerk shall give written notice to the parties of their opportunity to consent to the exercise by a magistrate judge of civil jurisdiction over the case, as authorized by Title 28, U.S.C. § 636(c). If, within the period specified by local rule, the parties agree to a magistrate judge's exercise of such authority, they shall execute and file a joint form of consent or separate forms of consent setting forth such election. A district judge, magistrate judge, or other court official may again advise the parties of the availability of the magistrate judge, but, in so doing, shall also advise the parties that they are free to withhold consent without adverse substantive consequences. A district judge or magistrate judge shall not be informed of a party's response to the clerk's notification, unless all parties have consented to the referral of the matter to a magistrate judge. The district judge, for good cause shown on the judge's own initiative, or under extraordinary circumstances shown by a party, may vacate a reference of a civil matter to a magistrate judge under this subdivision.	**(b) Consent Procedure.** **(1)** ***In General.*** When a magistrate judge has been designated to conduct civil actions, the clerk must give the parties written notice of their opportunity to consent under 28 U.S.C. § 636(c). To signify their consent, the parties must jointly or separately file a statement consenting to the referral. A district judge or magistrate judge may be informed of a party's response to the clerk's notice only if all parties have consented to the referral. **(2)** ***Reminding the Parties About Consenting.*** A district judge, magistrate judge, or other court official may again advise the parties of the magistrate judge's availability, but must also advise them that they are free to withhold consent without adverse substantive consequences. **(3)** ***Vacating a Referral.*** On its own for good cause — or when a party shows extraordinary circumstances — the district judge may vacate a referral to a magistrate judge under this rule.
(c) Appeal. In accordance with Title 28, U.S.C. § 636(c)(3), appeal from a judgment entered upon direction of a magistrate judge in proceedings under this rule will lie to the court of appeals as it would from a judgment of the district court.	**(c) Appealing a Judgment.** In accordance with 28 U.S C. § 636(c)(3), an appeal from a judgment entered at a magistrate judge's direction may be taken to the court of appeals as would any other appeal from a district-court judgment.
(d) [Abrogated.]	

COMMITTEE NOTE

The language of Rule 73 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Restyling Project Comments

Restyled Rule 73(a). The deletion of the phrase "any or all", the language used in the

Magistrate Judges' Act (28 U.S.C. § 631 *et seq.*) and existing rule, could be interpreted to alter meaning. Suggestion: change "the proceedings" to "any or all proceedings".

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

(c) Clerk's Office and Orders by Clerk. The clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays, but a district court may provide by local rule or order that its clerk's office shall be open for specified hours on Saturdays or particular legal holidays other than New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, and Christmas Day. All motions and applications in the clerk's office for issuing mesne process, for issuing final process to enforce and execute judgments, for entering defaults or judgments by default, and for other proceedings which do not require allowance or order of the court are grantable of course by the clerk; but the clerk's action may be suspended or altered or rescinded by the court upon cause shown.	**(c) Clerk's Office Hours; Clerk's Orders.** **(1)** ***Hours.*** The clerk's office — with a clerk or deputy on duty — must be open during business hours every day except Saturdays, Sundays, and legal holidays. But a court may, by local rule or order, require that the office be open for specified hours on Saturday or a particular legal holiday other than one listed in Rule 6(a)(4)(A). **(2)** ***Orders.*** Subject to the court's power to suspend, alter, or rescind the clerk's action for good cause, the clerk may: **(A)** issue process; **(B)** enter a default; **(C)** enter a default judgment under Rule 55(b)(1); and **(D)** act on any other matter that does not require the court's action.
(d) Notice of Orders or Judgments. — Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry in the manner provided for in Rule 5(b) upon each party who is not in default for failure to appear, and shall make a note in the docket of the service. Any party may in addition serve a notice of such entry in the manner provided in Rule 5(b) for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure.	**(d) Serving Notice of an Order or Judgment.** **(1)** ***Service.*** Immediately after entering an order or judgment, the clerk must serve notice of the entry, as provided in Rule 5(b), on each party who is not in default for failing to appear. The clerk must record the service on the docket. A party also may serve notice of the entry as provided in Rule 5(b). **(2)** ***Time to Appeal Not Affected by Lack of Notice.*** Lack of notice of the entry does not affect the time for appeal or relieve — or authorize the court to relieve — a party for failing to appeal within the time allowed, except as allowed by Federal Rule of Appellate Procedure (4)(a).

COMMITTEE NOTE

The language of Rule 77 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Restyling Project Comments

Restyled Rule 77(c)(2). Existing Rule 77(c) specifies that certain motions and applications are "grantable of course" by the clerk. This usage implies (1) that the clerk's duty is ministerial, requiring that the motion or application be granted when properly presented, and (2) that the clerk may only take action in response to such an application or motion. Restyled Rule 77(c)(2) indicates that the clerk "may" perform the specified duty, with no mention made of a motion or application. This usage implies a degree of discretion on the part of the clerk, not present in the existing rule, in the decision whether to take the requested action. It also implies that the clerk could act *sua sponte*. Suggestion: change "the clerk may" to "the clerk shall as of course grant motions and applications to".

Rule 78. Motion Day	Rule 78. Hearing Motions; Advancing an Action
Unless local conditions make it impracticable, each district court shall establish regular times and places, at intervals sufficiently frequent for the prompt dispatch of business, at which motions requiring notice and hearing may be heard and disposed of; but the judge at any time or place and on such notice, if any, as the judge considers reasonable may make orders for the advancement, conduct, and hearing of actions. To expedite its business, the court may make provision by rule or order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition.	(a) **Providing a Regular Schedule for Oral Hearings; Other Orders.** A court may establish regular times and places for oral hearings on motions. But at any time or place, on notice that the judge considers reasonable, the judge may issue an order to advance, conduct, and hear an action. (b) **Providing for Submission on Briefs.** By rule or order, the court may provide for submitting and determining motions on briefs, without oral hearings.

COMMITTEE NOTE

The language of Rule 78 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Restyling Project Comments

Restyled Rule 78(a). Existing Rule 78 requires the district court to establish regular times for hearing motions, qualifying that duty only in the event that "local conditions make it impracticable". The proposed restyling would convert an obligation that is subject to an express qualification into a matter entirely within the district court's discretion. Suggestion: include this proposal in the style/substance track.

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

(b) Civil Judgments and Orders. The clerk shall keep, in such form and manner as the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States may prescribe, a correct copy of every final judgment or appealable order, or order affecting title to or lien upon real or personal property, and any other order which the court may direct to be kept.	**(b) Civil Judgments and Orders.** The clerk must keep a copy of every final judgment and appealable order; of every order affecting title to or a lien on real or personal property; and of any other order that the court directs to be kept. The clerk must keep these in the form and manner prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States.
(c) Indices; Calendars. Suitable indices of the civil docket and of every civil judgment and order referred to in subdivision (b) of this rule shall be kept by the clerk under the direction of the court. There shall be prepared under the direction of the court calendars of all actions ready for trial, which shall distinguish "jury actions" from "court actions."	**(c) Indexes; Calendars.** Under the court's direction, the clerk must: **(1)** keep indexes of the docket and of the judgments and orders described in Rule 79(b); and **(2)** prepare calendars of all actions ready for trial, distinguishing jury trials from nonjury trials.
(d) Other Books and Records of the Clerk. The clerk shall also keep such other books and records as may be required from time to time by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States.	**(d) Other Records.** The clerk must keep any other records required by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States.

COMMITTEE NOTE

The language of Rule 79 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 80. Stenographer; Stenographic Report or Transcript as Evidence	Rule 80. Transcript as Evidence
(a) [Abrogated.] (b) [Abrogated.] (c) **Stenographic Report or Transcript as Evidence.** Whenever the testimony of a witness at a trial or hearing which was stenographically reported is admissible in evidence at a later trial, it may be proved by the transcript thereof duly certified by the person who reported the testimony.	If testimony at a hearing or trial is admissible in evidence at a later trial, the testimony may be proved by a transcript certified by the person who recorded it.

COMMITTEE NOTE

The language of Rule 80 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 80(c) was limited to testimony "stenographically reported." It is revised to reflect the use of other methods of recording testimony at a trial or hearing.

Restyling Project Comments

Restyled Rule 80. We recommend against the restyling for substantive and practical reasons. *First*, existing Rule 80(c) is an evidentiary provision that stands intact from the original, 1938 Federal Rules of Civil Procedure. The original rulemakers, aware of doubts about the propriety of treating evidence under the Rules Enabling Act of 1934, did so "lightly". As noted elsewhere, Chief Justice Rehnquist opposed any restyling of the evidence rules; any change may be deemed to be more than stylistic; and there is a looming supersession issue — will any change supersede relevant provisions in the Federal Rules of Evidence, most of which remain statutory? *Second*, the restyled rule doesn't work. The person who will have "recorded" a videotaped deposition — the video technician — is not a court reporter and is not qualified to certify any kind of writing. Compounding this problem, the technician is often, by stipulation, someone affiliated with one side's counsel. *Third*, under Fed.R.Civ.P. 26(a)(3)(b), the party offering a video- or audiotaped deposition already must provide a transcript of it to the court in advance of trial — so a transcript exists. *Fourth*, for practical reasons, videotaped testimony is often transcribed by the court reporter at trial (for financial reasons — more pages of transcript to sell). *Fifth*, it is common that videotaped testimony is simultaneously recorded stenographically, further rendering this a non-issue. Suggestion: refer the matter to the Evidence Rules Committee.

XI. GENERAL PROVISIONS **Rule 81. Applicability in General**	TITLE XI. GENERAL PROVISIONS **Rule 81. Applicability of the Rules in General; Removed Actions**
(a) Proceedings to Which the Rules Apply. (1) These rules do not apply to prize proceedings in admiralty governed by Title 10, U.S.C., §§ 7651-7681. They do apply to proceedings in bankruptcy to the extent provided by the Federal Rules of Bankruptcy Procedure. (2) These rules are applicable to proceedings for admission to citizenship, habeas corpus, and quo warranto, to the extent that the practice in such proceedings is not set forth in statutes of the United States, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Proceedings, and has heretofore conformed to the practice in civil actions.	**(a) Applicability to Particular Proceedings.** (1) ***Prize Proceedings.*** These rules do not apply to prize proceedings in admiralty governed by 10 U.S.C. §§ 7651–7681. (2) ***Bankruptcy.*** These rules apply to bankruptcy proceedings to the extent provided by the Federal Rules of Bankruptcy Procedure. (3) ***Citizenship.*** These rules apply to proceedings for admission to citizenship to the extent that the practice in those proceedings is not specified in federal statutes and has previously conformed to the practice in civil actions. The provisions of 8 U.S.C. § 1451 for service by publication and for answer apply in proceedings to cancel citizenship certificates. (4) ***Special Writs.*** These rules apply to proceedings for habeas corpus and for quo warranto to the extent that the practice in those proceedings: **(A)** is not specified in a federal statute, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Cases; and **(B)** has previously conformed to the practice in civil actions.

(3) In proceedings under Title 9, U.S.C., relating to arbitration, or under the Act of May 20, 1926, ch. 347, § 9 (44 Stat. 585), U.S.C., Title 45, § 159, relating to boards of arbitration of railway labor disputes, these rules apply only to the extent that matters of procedure are not provided for in those statutes. These rules apply to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings. (4) These rules do not alter the method prescribed by the Act of February 18, 1922, ch. 57, § 2 (42 Stat. 388), U.S.C., Title 7, § 292; or by the Act of June 10, 1930, ch. 436, § 7 (46 Stat. 534), as amended, U.S.C., Title 7, § 499g(c), for instituting proceedings in the United States district courts to review orders of the Secretary of Agriculture; or prescribed by the Act of June 25, 1934, ch. 742, § 2 (48 Stat. 1214), U.S.C., Title 15, § 522, for instituting proceedings to review orders of the Secretary of the Interior; or prescribed by the Act of February 22, 1935, ch. 18, § 5 (49 Stat. 31), U.S.C., Title 15, § 715d(c), as extended, for instituting proceedings to review orders of petroleum control boards; but the conduct of such proceedings in the district courts shall be made to conform to these rules so far as applicable.	(5) ***Proceedings Involving a Subpoena.*** These rules apply to proceedings to compel testimony or the production of documents through a subpoena issued by a United States officer or agency under a federal statute, except as otherwise provided by statute, by local rule, or by court order in the proceedings. (6) ***Other Proceedings.*** These rules, to the extent applicable, govern proceedings under the following laws, except as these laws provide other procedures: **(A)** 7 U.S.C. §§ 292, 499g(c), for reviewing an order of the Secretary of Agriculture; **(B)** 9 U.S.C., relating to arbitration; **(C)** 15 U.S.C. § 522, for reviewing an order of the Secretary of the Interior; **(D)** 15 U.S.C. § 715d(c), for reviewing an order denying a certificate of clearance; **(E)** 29 U.S.C. §§ 159, 160, for enforcing an order of the National Labor Relations Board; **(F)** 33 U.S.C. §§ 918, 921, for enforcing or reviewing a compensation order under the Longshore and Harbor Workers' Compensation Act; and **(G)** 45 U.S.C. § 159, for reviewing an arbitration award in a railway-labor dispute.
(5) These rules do not alter the practice in the United States district courts prescribed in the Act of July 5, 1935, ch. 372, §§ 9 and 10 (49 Stat. 453), as amended, U.S.C., Title 29, §§ 159 and 160, for beginning and conducting proceedings to enforce orders of the National Labor Relations Board; and in respects not covered by those statutes, the practice in the district courts shall conform to these rules so far as applicable. (6) These rules apply to proceedings for enforcement or review of compensation orders under the Longshoremen's and Harbor Workers' Compensation Act, Act of March 4, 1927, c. 509, §§ 18, 21 (44 Stat. 1434, 1436), as amended, U.S.C., Title 33, §§ 918, 921, except to the extent that matters of procedure are provided for in that Act. The provisions for service by publication and for answer in proceedings to cancel certificates of citizenship under the Act of June 27, 1952, ch. 477, Title III, c. 2, § 340 (66 Stat. 260), U.S.C., Title 8, § 1451, remain in effect. **(7) [Abrogated.]**	

(b) Scire Facias and Mandamus. The writs of scire facias and mandamus are abolished. Relief heretofore available by mandamus or scire facias may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules.	**(b) Scire Facias and Mandamus.** The writs of scire facias and mandamus are abolished. Relief previously available through them may be obtained by appropriate action or motion under these rules.
(c) Removed Actions. These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal.	**(c) Removed Actions.** **(1)** ***Applicability.*** These rules apply to a civil action after it is removed from a state court.
Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, the defendant shall answer or present the other defenses or objections available under these rules within 20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based, or within 20 days after the service of summons upon such initial pleading, then filed, or within 5 days after the filing of the petition for removal, whichever period is longest. If at the time of removal all necessary pleadings have been served, a party entitled to trial by jury under Rule 38 shall be accorded it, if the party's demand therefor is served within 10 days after the petition for removal is filed if the party is the petitioner, or if not the petitioner within 10 days after service on the party of the notice of filing the petition.	**(2)** ***Further Pleading.*** After removal, repleading is unnecessary unless the court orders it. A defendant who did not answer before removal must answer or present other defenses or objections under these rules within the longest of these periods: **(A)** 20 days after receiving — through service or otherwise — a copy of the initial pleading stating the claim for relief; **(B)** 20 days after being served with the summons for an initial pleading on file at the time of service; or **(C)** 5 days after the notice of removal is filed.
A party who, prior to removal, has made an express demand for trial by jury in accordance with state law, need not make a demand after removal. If state law applicable in the court from which the case is removed does not require the parties to make express demands in order to claim trial by jury, they need not make demands after removal unless the court directs that they do so within a specified time if they desire to claim trial by jury. The court may make this direction on its own motion and shall do so as a matter of course at the request of any party. The failure of a party to make demand as directed constitutes a waiver by that party of trial by jury.	**(3)** ***Demand for a Jury Trial.*** **(A)** *As Affected by State Law.* A party who, before removal, expressly demanded a jury trial in accordance with state law need not renew the demand after removal. If the state law did not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time. The court must so order at a party's request and may so order on its own. A party who fails to make a demand when so ordered waives a jury trial. **(B)** *Under Rule 38* If all necessary pleadings have been served at the time of removal, a party entitled to a jury trial under Rule 38 must be given one if the party serves a demand within 10 days after: **(i)** it files a notice of removal; or **(ii)** it is served with a notice of removal filed by another party.

(d) [Abrogated.] (e) Law Applicable. Whenever in these rules the law of the state which the district court is held is made applicable, the law applied in the District of Columbia governs proceedings in the United States District Court for the District of Columbia. When the word "state" is used, it includes, if appropriate, the District of Columbia. When the term "statute of the United States" is used, it includes, so far as concerns proceedings in the United States District Court for the District of Columbia, any Act of Congress locally applicable to and in force in the District of Columbia. When the law of a state is referred to, the word "law" includes the statutes of that state and the state judicial decisions construing them.	**(d) Law Applicable.** **(1)** ***State Law.*** When these rules refer to state law, the term "law" includes the state's statutes and the state's judicial decisions. **(2)** ***District of Columbia.*** The term "state" includes, where appropriate, the District of Columbia. When these rules provide for state law to apply, in the District Court for the District of Columbia: **(A)** the law applied in the District governs; and **(B)** the term "federal statute" includes any Act of Congress that applies locally to the District.
(f) References to Officer of the United States. Under any rule in which reference is made to an officer or agency of the United States, the term "officer" includes a district director of internal revenue, a former district director or collector of internal revenue, or the personal representative of a deceased district director or collector of internal revenue.	[Current Rule 81(f) is deleted.]

COMMITTEE NOTE

The language of Rule 81 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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

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

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

Restyling Project Comments

Restyled Rule 81(a)(6) Restyled Rule 81(a)(6) specifies that the rules "govern proceedings under the following laws, except as these laws provide other procedures". Rule 81(a)(6)(B) then identifies "9 U.S.C., relating to arbitration". Title 9 of the U.S. Code is not a law. Suggestion: substitute "All laws codified in 9 U.S.C. relating to arbitration".

Restyled Rule 81(d)(1). The proposed alteration of existing Rule 81(e) to reflect the

Supreme Court's decision in *Erie R.R. v. Tompkins* is problematic. "[I]ncludes" does not necessarily mean "includes only", and the Committee Note implies that the change reflects actual practice. But the revised definition does not include court rules, which are mentioned in the Committee Note, and, more important, it does not include state constitutional provisions. Suggestion: abrogate this part of Rule 81 as unnecessary (and/or, unless further revised, potentially misleading).

Rule 82. Jurisdiction and Venue Unaffected	Rule 82. Jurisdiction and Venue Unaffected
These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. An admiralty or maritime claim within the meaning of Rule 9(h) shall not be treated as a civil action for the purposes of Title 28, U.S.C., §§ 1391–1392.	These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts. An admiralty or maritime claim under Rule 9(h) is not a civil action for purposes of 28 U.S.C. §§ 1391–1392.

COMMITTEE NOTE

The language of Rule 82 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 83. Rules by District Courts; Judge's Directives	Rule 83. Rules by District Courts; Judge's Directives
(a) Local Rules. (1) Each district court, acting by a majority of its district judges, may, after giving appropriate public notice and an opportunity for comment, make and amend rules governing its practice. A local rule shall be consistent with—but not duplicative of—Acts of Congress and rules adopted under 28 U.S.C. §§ 2072 and 2075, and shall conform to any uniform numbering system prescribed by the Judicial Conference of the United States. A local rule takes effect on the date specified by the district court and remains in effect unless amended by the court or abrogated by the judicial council of the circuit. Copies of rules and amendments shall, upon their promulgation, be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public. (2) A local rule imposing a requirement of form shall not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement.	**(a) Local Rules.** (1) *In General.* After giving public notice and an opportunity for comment, a district court, acting by a majority of its district judges, may adopt and amend rules governing its practice. A local rule must be consistent with — but not duplicate — federal statutes and rules adopted under 28 U.S.C. §§ 2072 and 2075, and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. A local rule takes effect on the date specified by the district court and remains in effect unless amended by the court or abrogated by the judicial council of the circuit. Copies of rules and amendments must, on their adoption, be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public. (2) *Requirement of Form.* A local rule imposing a requirement of form must not be enforced in a way that causes a party to lose any right because of a nonwillful failure to comply.
(b) Procedures When There is No Controlling Law. A judge may regulate practice in any manner consistent with federal law, rules adopted under 28 U.S.C. §§ 2072 and 2075, and local rules of the district. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local district rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.	**(b) Procedure When There Is No Controlling Law.** A judge may regulate practice in any manner consistent with federal law, rules adopted under 28 U.S.C. §§ 2072 and 2075, and the district's local rules. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

COMMITTEE NOTE

The language of Rule 83 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 84. Forms; Technical Amendments	Rule 84. Forms
The forms contained in the Appendix of Forms are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate.	The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.

COMMITTEE NOTE

The language of Rule 84 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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

COMMITTEE NOTE

The language of Rule 85 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 86. Effective Date	Rule 86. Effective Dates
(a) These rules will take effect on the day which is 3 months subsequent to the adjournment of the second regular session of the 75th Congress, but if that day is prior to September 1, 1938, then these rules will take effect on September 1, 1938. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies.	These rules and any amendments take effect at the time specified by the Supreme Court, subject to 28 U.S.C. § 2074. They govern: (11) proceedings in an action commenced after their effective date; and (12) proceedings after that date in an action then pending unless: (C) the Supreme Court specifies otherwise; or (D) in the district court's opinion, applying them in a particular action would be infeasible or work an injustice.
(b) **Effective Date of Amendments.** The amendments adopted by the Supreme Court on December 27, 1946, and transmitted to the Attorney General on January 2, 1947, shall take effect on the day which is three months subsequent to the adjournment of the first regular session of the 80th Congress, but, if that day is prior to September 1, 1947, then these amendments shall take effect on September 1, 1947. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.	
(c) **Effective Date of Amendments.** The amendments adopted by the Supreme Court on December 29, 1948, and transmitted to the Attorney General on December 31, 1948, shall take effect on the day following the adjournment of the first regular session of the 81st Congress.	
(d) **Effective Date of Amendments.** The amendments adopted by the Supreme Court on April 17, 1961, and transmitted to the Congress on April 18, 1961, shall take effect on July 19, 1961. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.	

(e) Effective Date of Amendments. The amendments adopted by the Supreme Court on January 21, 1963, and transmitted to the Congress on January 21, 1963, shall take effect on July 1, 1963. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.	

COMMITTEE NOTE

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

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

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

Rule 4. Summons

* * * * *

(k) Territorial Limits of Effective Service.

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

* * * * *

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

(~~**D**~~**C**) when authorized by a federal statute.

* * * * *

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* New material is underlined; matter to be omitted is lined through. Rules incorporate changes made in style revision project.

Committee Note

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

Rule 8. General Rules of Pleading

(a) Claim for Relief. A pleading that states a claim for relief — whether an original claim, a counterclaim, a crossclaim, or a third-party claim — must contain:

* * * * *

(3) a demand for the relief sought, which may include ~~relief in the~~ alternative <u>forms</u> or different types of relief.

* * * * *

Committee Note

Subdivision (a) — "alternative forms . . . of relief" is a style improvement of the present rule's "relief in the alternative." No changed meaning is intended.

Restyling Project Comments

Revised Rule 8. A review of the original FRCP and the explanation given by Major Tolman to Congress in 1938 suggests that this proposed change would be misguided. The language, "relief in the alternative", was designed to authorize a pleading like that in existing Form 10, in which

the plaintiff does not know which of a number of defendants may be liable to him and pleads in the alternative for "judgment against C.D. or against E.F. or against both". Apart from failing to capture this meaning, "alternative forms or different types of relief" appears to be an example of what Fowler called "elegant variation", which is to say that it is redundant.

Rule 9. Pleading Special Matters

* * * * *

(h) Admiralty or Maritime Claim.

* * * * *

~~(2) *Amending a Designation.* Rule 15 governs amending a pleading to add or withdraw a designation.~~

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

Committee Note

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

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

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

* * * * *

Committee Note

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

Restyling Project Comments

Revised Rule 11. Even today, not all people have email addresses, and it seems appropriate to make clear in the rule that it does not affirmatively require signers to have email addresses, only that they supply them if they have them. Cf. the Committee Note to Revised Rule 26. Suggestion: restore ", if any".

Rule 14. Third-Party Practice

* * * * *

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

* * * * *

Committee Note

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

Rule 16. Pretrial Conferences; Scheduling; Management

* * * * *

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

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

* * * * *

Committee Note

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

Rule 26. Duty to Disclose; General Provisions Governing Discovery

* * * * *

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

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

* * * * *

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

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

* * * * *

Committee Note

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

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

Restyling Project Comments

Revised Rule 26(g)(1). As indicated in our comment on Revised Rule 11, we believe the information provided in the Committee Note to this rule should be conveyed in the text. Suggestion: add ", if any" after "electronic-mail address".

Rule 30. Depositions by Oral Examination

* * * * *

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

* * * * *

(3) ***Method of Recording.***

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

* * * * *

(6) ***Notice or Subpoena Directed to an Organization.*** In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, ~~or~~ a governmental agency, or other entity, and describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors,

or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

* * * * *

Committee Note

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

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

Rule 31. Depositions by Written Questions

* * * * *

(c) Notice of Completion or Filing.

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

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

Committee Note

The party who noticed a deposition on written questions must notify all other parties when the deposition is completed, so that they may make use of the deposition.

Restyling Project Comments

Revised Rule 31(c)(1). The reference to the completion of the deposition on written questions is confusing. For a variety of reasons, including consistency with Rules 30(e) and 30(f) (which are incorporated by reference in Rule 31(b)), we believe that the notification should occur when the transcription, deponent review and certification procedures have occurred, both during and at the conclusion of the deposition. Suggestion: delete "when the deposition is completed", and substitute "upon receipt of the certified transcript".

Rule 36. Requests for Admission

* * * * *

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

Committee Note

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

Restyling Project Comments

Revised Rule 36(b). Rule 16(d) does not provide any standard with respect to modifying pretrial orders. Rule 16(e) does contain a standard for such modifications, but only when issued after a final pretrial conference. Accordingly, the only required carve-out from the general Rule 36(b) standard relates to attempts to withdraw or amend admissions that have been incorporated in a final pretrial order. Suggestion: change "that has not been incorporated in a pretrial order" to "that has not been incorporated in an order issued after a final pretrial conference".

Rule 40. Scheduling Cases for Trial

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

Committee Note

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

Rule 71.1. Condemning Real or Personal Property

* * * * *

(d) Process.

* * * * *

(2) ***Contents of the Notice.***

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

(i) that the action is to condemn property;

(ii) the interest to be taken;

(iii) the authority for the taking;

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

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

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

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

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

* * * * *

Committee Note

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

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

Rule 78. Hearing Motions; Advancing an Action

(a) Providing a Regular Schedule for Oral Hearings~~; Other Orders~~. A court may establish regular times and places for oral hearings on motions. ~~But at any time or place, on notice that the judge considers reasonable, the judge may issue an order to advance, conduct, and hear an action.~~

* * * * *

Committee Note

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