To: Honorable Alicemarie H. Stotler, Chair, Committee on Rules of Practice and Procedure

From: Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules

Date: May 18, 1998

Re: Report of the Advisory Committee on Civil Rules

I Introduction

The Advisory Committee on Civil Rules met at the Duke University School of Law on March 16 and 17, 1998. The Committee's deliberations focused in large part on proposals to amend the discovery rules. These proposals are set out in the Part II recommendations for action with the request that this Committee approve publication of the proposals for comment. Publication also is recommended for changes in Civil Rules 4 and 12 to provide for service on the United States and 60 days to answer in an action brought against a federal officer or employee in an individual capacity. Technical conforming amendments are recommended in Civil Rule 6(b) and Form 2. Part III describes many other activities of the Advisory Committee for information.

II ACTION ITEMS

Rules Proposed for Publication

Discovery Rules

When I assumed responsibilities as Chair of the Civil Rules Advisory Committee, existing proposals for change to the discovery rules had been pending for years. The American Bar Association had suggested narrowing the scope of discovery in the 1970s and this proposal to change Rule 26 has been the centerpiece of a more recent proposal by the American College of Trial Lawyers. Also, members of Congress had been pressing the Committee to make changes to the protective order rule. And finally, complaints persisted about the overall cost of discovery. In addition, the Committee was beginning to receive the results from its 1993 experimental changes to authorize local courts to require mandatory disclosure. To focus a project on these discovery proposals and to attempt to put all open items to rest, I posed the following questions to the Committee:

1. When fully used, is the discovery process too expensive for what it contributes to the dispute resolution process?

2. Are there rule changes that can be made which might reduce the cost and delay of discovery without undermining a policy of full disclosure?

3. Should the federal rules for discovery, applying to cases involving national substantive law and procedure, be made uniform throughout the United States?

In posing these questions, I did not intend that we again review the question of discovery abuse. Rather, I suggested that we undertake a look at and evaluate the architecture of discovery as it was designed.

A discovery subcommittee, chaired by Judge David F. Levi, was appointed, and Professor Richard L. Marcus was retained as Special Reporter. The subcommittee set to work immediately, establishing the framework for a conference that was held in January 1997 with a group of litigators drawn from a wide array of practice areas and locations. The views expressed at that conference helped shape the planning for a major conference held at Boston College Law School in September 1997.

The Boston College conference, to which we invited members of the academic community, the bench, the bar and various bar associations, was particularly successful. We invited responses and ideas from the major bar associations and received written responses from the American Bar Association Section of Litigation, the American College of Trial Lawyers, the American Trial Lawyers Association, the Defense Research Institute, the Trial Lawyers for Public Justice, and the Product Liability Advisory Council. At our request, the Federal Judicial Center conducted a survey of attorneys across the country about discovery, and we also asked the RAND Institute for Civil Justice to reevaluate its database collected in connection with its work under the Civil Justice Reform Act for information on discovery practice.

We learned from the Federal Judicial Center study, based on a survey of 2,000 attorneys to which it received 1,200 responses, that in average cases discovery costs represent about 50% of litigation expenses but that at the 95th percentile they constitute 90% of litigation costs. In high-discovery cases, these costs were higher for plaintiffs than for defendants. Of all types of discovery, depositions were the single greatest item of cost, costing nearly twice as much, on average, as document production.

The study also revealed that 83% of those responding wanted changes made to discovery rules, involving principally: (1) better access to judges; (2) greater uniformity of discovery rules; (3) greater sanctions for abuse; and (4) adoption of a code of civility. We heard from practitioners directly that depositions and document production presented the greatest costs.

After we received oral comments and papers from this wide group of rule users and students, the following matters about discovery emerged:

1. The desire for information in connection with the resolution of civil disputes was nearly universal. No one seemed to advocate the elimination of requiring full disclosure of relevant information.

2. Discovery is now working effectively and efficiently in a majority of the cases, which represent the "routine" cases.

3. In cases where discovery was actively used, it was frequently thought to be unnecessarily expensive and burdensome. Plaintiffs' lawyers seemed most concerned with the length, number, and cost of depositions, and defendants' lawyers seemed most concerned by the number of documents required in document production and the cost of selecting and producing them.

4. In districts where initial mandatory disclosure has been practiced, it is generally liked, and the users believe that it lessens the cost of litigation.

5. There was an overwhelming and emphatic support for national uniformity of the discovery rules, and almost all commentors favored the elimination of the local options afforded by Rule 26. There was substantial disagreement, however, on what the national rule should be.

6. The belief was almost universal that the cost of discovery disputes could be reduced by greater judicial involvement and that the earlier in the process that judges became involved, the better.

7. Many observed that the necessary strict observance of the attorney-client privilege, and the current principles defining how that privilege is waived, added substantial time to discovery compliance. Lawyers felt that a relaxation of the waiver rules for purposes of discovery would significantly lessen costs.

8. It was generally believed that discovery costs could be reduced without eroding full disclosure by adopting presumed limits on the length of depositions and on the scope of discovery, particularly in connection with the production of documents.

9. Early discovery cutoff dates and firm trial dates were recognized as the best court management tool to reduce the costs of discovery, and the RAND Institute data appears to have confirmed that conclusion.

The discovery subcommittee drew from the Boston College conference and from the studies conducted by the Federal Judicial Center and the RAND Institute to present a group of possible rule revisions and alternatives to the October 1997 Advisory Committee meeting. The Committee considered the options and provided instruction to the discovery subcommittee on various specific changes that it would like to consider.

Following the guidance of the Advisory Committee, the discovery subcommittee met in January 1998 to frame specific proposals and alternatives. These proposals were studied by the

Advisory Committee at its March 1998 meeting at Duke University and gave rise to the proposals now recommended for publication and public comment.

Before addressing the specific proposals, which are somewhat major, you should know that we have not proposed reducing the breadth of discovery, nor have we intended to undermine the policy of full and fair disclosure in litigation. Where we have narrowed the scope of attorney managed discovery, we have preserved the original scope under court supervision. Thus, you will note that under the proposed change, attorney-managed discovery is no longer allowed for all matters related to the "subject matter" of the litigation, but rather, it must be related to claims or defenses. We still permit judges, however, to afford discovery that reaches to the original scope. Similarly, while we have limited the length of depositions under attorney management, we have invited the attorneys to agree to longer depositions and we have authorized the courts to regulate their length.

Also, we have re-emphasized the policy — first announced in 1983, with the adoption of Rule 26(b)(2)'s proportionality provisions — that full disclosure does not require the production of all witnesses or of all documents. As we continue to adapt to this information age, the notion of having all information on a subject is almost unattainable. We are going to have to move increasingly to a notion that although disclosure must be fair and full it does not necessarily require that every copy of every document that relates to a particular proposition be produced. You only have to think about the amount of material on every desktop computer in a large corporation to visualize what that entails. This policy is manifested in our proposal to involve the court in the decision whether discovery should extend beyond the claims and defenses raised in the pleadings, and in our authorization to courts to require payment for duplicate and peripheral discovery.

And finally, we have tried to effect the changes in a manner that does not give an advantage to plaintiffs or defendants. During our conferences, we heard that plaintiffs were most concerned about the costs of depositions, and the defendants about the costs of producing documents. We have tried to adopt changes that give effect in a balanced way to both observations, leaving open the right of either side to have the broadest reasonable scope of discovery.

Moving to the specific changes, it will be useful first to summarize them and then provide a more detailed account.

First, Rule 5(d) is amended to provide that disclosures under Rules 26(a)(1) and (2), and discovery requests and responses, need not be filed until the discovery materials are used in the proceeding.

The initial disclosure procedure adopted as Rule 26(a)(1) in 1993 would be significantly limited. National uniformity is established by rescinding the portion that authorizes individual districts to opt out by local rule. The scope of the disclosure obligation is substantially reduced, however, so that it would require disclosure only of the identity of witnesses and documents that support the disclosing party's position. Even supporting information need not be disclosed if it is aimed solely at impeachment. Other changes are proposed in addition to these major changes. In part because local rules are now barred, the rule lists several categories of proceedings that are exempt from disclosure requirements. A party who believes that disclosure is not appropriate in the

circumstances of the action can secure a judicial determination by stating the objection in the Rule 26(f) report. Explicit provision is made for disclosure by late-added parties. And, to be consistent with the proposed Rule 5(d) amendments, the present Rule 26(a)(4) provision for filing all disclosures is moved to Rule 26(a)(3) and limited to pretrial disclosures under (a)(3).

The scope of discovery defined by Rule 26(b)(1) is retained, but divided to distinguish between attorney-managed and court-managed discovery. Attorney-managed discovery is limited to matters relevant to the claims or defenses of the parties. Discovery that reaches beyond the claims or defenses of the parties, embracing the "subject matter involved in the action," remains available, but only on court order for good cause. A less important change to subdivision (b)(1) emphasizes that information not admissible in evidence can be discovered only if relevant and reasonably calculated to lead to the discovery of admissible evidence. Finally, a new sentence is added as a reminder of the important limitations imposed by subdivision (b)(2).

Rule 26(b)(2) is changed to delete the authorization for local rules that change the presumptive national limits on the frequency or duration of discovery requests.

The Rule 26(d) discovery moratorium is amended to allow the parties to proceed immediately with discovery in cases categorically excluded from initial disclosure requirements by proposed Rule 26(a)(1)(E).

Rule 26(f) is amended to delete the authorization for local rules that exempt cases from its requirements. Its terminology is changed by referring to a "conference" rather than a "meeting". This change reflects concerns that face-to-face meetings, although highly desirable, may impose untoward burdens in districts that cover broad territories. The value of face-to-face meetings is recognized, however, by authorizing local rules that require meetings in some or all cases. The times for conferring and reporting are changed to ensure the court an adequate opportunity to consider the report before a scheduling conference.

Rule 30(d)(2) is changed by establishing a presumptive limit of "one day of seven hours" for a deposition. The presumptive limit can be changed by court order, or by a stipulation of the parties joined by the deponent. Paragraphs (d)(1) and (d)(3) are changed to make it clear that the limits on objections reach all objections by any person, and that sanctions may be imposed for any improper impediment or delay.

Rule 34(b) is amended to make explicit the power, now believed to be implicit in Rules 26(b)(2) and 26(c), to allow a party to pursue a discovery request that otherwise would violate the limits of Rule 26(b)(2) on condition that the requesting party pay part or all of the reasonable costs of responding.

Rule 37 now authorizes sanctions for failure to supplement disclosures under Rule 26(e)(1), but says nothing of failure to supplement discovery responses under Rule 26(e)(2). This omission would be cured by the proposal to add Rule 26(e)(2) to the rule.

As a final preliminary note, it should be explained that the Committee has made a deliberate decision not to attempt to restyle the subdivisions that would be changed by these proposed amendments. Discovery remains a controversial subject. The Committee believes that these

proposals are carefully calculated to maintain all of the useful effects of present discovery practice, and at the same time to reduce unnecessary costs. But it is important to focus public comment and testimony on the substance of the intended changes. To couple general style revision with these changes would be to incite suspicions about the purposes of the style revisions and to diffuse comments.

Disclosure

National Uniformity. Rule 26(a)(1), first added in 1993, permitted local defection by local rule. This express invitation to disuniform practice arose from a two-fold concern for experiments under the Civil Justice Reform Act. In part, the Committee was moved by the fact that some districts had adopted local rules modeled on the first proposal published by the Committee; it was anxious not to defeat this reliance by adopting a different national rule, even as it believed that the first proposal must be improved before adoption as a national rule. And in part, the Committee believed that local experimentation might provide valuable information for future refinements of disclosure practice.

However good these motives were, the wide disparities of practice from district to district have been found undesirable for several reasons. One set of reasons is practical. There are increasing numbers of lawyers who practice in different districts, and many clients who have litigation in several districts. Attorneys find it confusing to shift from one system to another. Clients are even more baffled by the different obligations they encounter. The other set of reasons is more conceptual. There is a strong belief that the Enabling Act contemplates a uniform national procedure. This belief allies with an increasing concern that local rules have proliferated on a variety of subjects, undesirably diluting the values of uniform federal procedure.

There is another consequence of local autonomy. It entrenches local folkways and increases resistance to "outside" interference. The longer local rules are allowed to persist, the more difficult it will be to restore any semblance of national uniformity. The taste of independence provided by local rules also seems at times to encourage adoption of practices that are not consistent with the national rules. Expert-witness disclosure under Rule 26(a)(2) and pretrial disclosure under Rule 26(a)(3) provide illustrations. Although these paragraphs do not authorize departure by local rule, the most recent Federal Judicial Center study of disclosure practices shows that a dozen districts have opted out of these disclosure requirements. See D. Stienstra, *Implementation of Disclosure in United States District Courts* 5 (FJC March 30, 1998).

Given these concerns and constraints, the Committee chose not to attempt any judgment on the desirability of Rule 26(a)(1) as it now stands. After a period of some uncertainty as to just what was being said, the RAND study of CJRA plans found too little experience with the brand-new Rule 26(a)(1) to reach any conclusions as to its effects. The FJC study of discovery suggests that Rule 26(a)(1) disclosure most often is neutral, but that when it has effects they are those that the Committee intended — reductions in cost and delay, support for earlier settlement, and better trials. Some districts that have adhered to 26(a)(1) seem pleased with the results. These findings are suggestive, but by no means conclusive.

Set against this course is the concern that local variations should not be endured any longer than necessary. Remembering the controversy that swirled around Rule 26(a)(1) — and particularly

remembering that it became effective only because Congress ran out of time to reject it — the Committee concluded that it is better to propose a less controversial rule for national uniformity. The beginning was a strong disclosure rule that could be, and was, defeated by local option. The next step is a diluted disclosure rule that cannot be defeated by local option. Perhaps in several more years the time will come for a strong disclosure rule that cannot be defeated by local option.

Supporting information. Rule 26(a)(1)(A) and (B) now require disclosure of the identity of witnesses and documents likely to have information relevant to disputed facts alleged with particularity in the pleadings. The proposed amendment narrows the obligation to information that supports the disclosing party's "claims or defenses, unless solely for impeachment." The change would mean that a party need no longer do an adversary's work, nor guess what are the "disputed facts alleged with particularity in the pleadings." Instead a party need only figure out its own positions and disclose the identity of witnesses and documents that support those positions.

This proposal responds to one of the fundamental objections that has been addressed to current initial disclosure practice. Opposition to present Rule 26(a)(1) draws great force from the belief that one side should not be forced to work for the other side. A party who understands the litigation better than its adversary may, by disclosing the identity of witnesses and documents, reveal damaging theories of law or fact that, absent disclosure, would never be recognized by the adversary. Some proponents of broad disclosure believe that this is a desirable consequence. Others believe that it is a price to be paid for the benefit of "jump-starting" the discovery process by requiring disclosure of information that otherwise would inevitably be demanded in the first wave of any competent discovery program. Whatever the best long-term accommodation of these competing arguments may be, the better answer for the time being is clear. Initial disclosure remains highly controversial. The adversary system should not yet be qualified by disclosure to the extent of forcing the more sophisticated litigant to disclose even the mere identity of witnesses and documents that a less sophisticated adversary may not manage to uncover by discovery.

The Committee divided on a drafting question. As determined by the majority, the draft Rule 26(a)(1) refers to "supporting information." The alternative preferred by a few would refer to information that the disclosing party "may use to support its claims or defenses, unless solely for impeachment." It is anticipated that if these proposals are approved for publication, the letter inviting comments and testimony will ask for comments on this alternative drafting choice.

"Low-end" Exclusions. Proposed Rule 26(a)(1)(E) is an attempt to avoid the risk that disclosure may become an undesirable burden in cases that do not need it. The starting point is the simple fact that many federal cases have no discovery at all. A broad disclosure obligation of the sort embodied by present 26(a)(1) might satisfy the needs of discovery in some cases that now have discovery, at lower cost, but it also may impose unnecessary costs and delays in many cases that do not have discovery, do not need discovery, and will not benefit from disclosure.

Under present Rule 26(a)(1), local rules can exempt cases from disclosure requirements. Districts that have retained some form of disclosure have exempted a bewildering variety of cases — one district even has taken care to exempt "prize cases." The proposal to remove the local-rule option justifies an attempt to forge a national set of exemptions from the lessons of local experience.

Rule 26(a)(1)(E) in the draft lists ten separately itemized categories of proceedings that are exempt from initial disclosure and also from the Rule 26(f) conference. This proposal in particular is one that will benefit from public comments and testimony. One set of questions is obvious: are these cases properly excluded, and should others be added to the (already long) list? The other set may, alas, be equally obvious: how well are the categories described? If we can be reasonably confident of some descriptions — such as an action to enforce an arbitration award — we are obviously making a preliminary stab at other descriptions, such as "an action for review on an administrative record" or "an action by the United States to recover benefit payments."

"High-end Exclusion." At the other end of the litigation line lie cases that engender great volumes of discovery and that require — and usually receive — substantial judicial management. The Committee has heard from many observers that disclosure is not appropriate in these cases, and routinely is not practiced. No party will accept disclosures as a reason for diminishing in any way the sweep of discovery requests. It is better to get directly to the tasks of management and discovery.

Apart from the "big discovery" cases, it also may make sense to postpone disclosure pending disposition of preliminary motions. A strongly supported challenge to subject-matter or personal jurisdiction is an obvious illustration. So may be a powerful motion to dismiss for failure to state a claim. Allowing these motions to accomplish an automatic stay of disclosure, however, would be clearly undesirable. Too many motions are at best wishful, and too many more would be encouraged by the prospect of deferring disclosure and discovery.

These observations have been persuasive, but have not solved the drafting problem. It does not seem useful to draft a rule that exempts "big discovery" or "problem discovery" cases. The resolution, reflected in the final portion of Rule 26(a)(1), is to allow the parties to stipulate that there is to be no initial disclosure, or to allow any party to object during the Rule 26(f) conference that disclosure is not appropriate. The objection must be stated in the discovery plan, and stalls disclosure until the court decides what disclosure — "if any" — should be made. One purpose of this approach is to provide one spur for early judicial supervision of disclosure and discovery, the one remedy that commands more hope and respect from practicing lawyers than any other.

Late-added Parties. The final portion of proposed Rule 26(a)(1) also addresses a problem that appears on the face of the present rule. Nothing in the rule now addresses the initial disclosure obligations of parties added after the Rule 26(f) conference. After experimenting with a series of increasingly detailed drafts, the proposal takes a reasonably simple approach. "Any party first served or otherwise joined after" the 26(f) conference has 30 days to make initial disclosures.

Filing. The filing requirements for disclosures are changed by proposed Rules 26(a)(3) and (4), in conjunction with proposed Rule 5(d). Rule 26(a)(4) now requires that all disclosures be filed. This requirement would be deleted. Rule 5(d) provides that initial disclosures under Rule 26(a)(1) and expert witness disclosures under Rule 26(a)(2) need not be filed until they are used in the proceeding. Amended Rule 26(a)(3) would provide that pretrial disclosures must be promptly filed with the court. Pretrial disclosures may be helpful in final pretrial planning, and in any event must be filed because of the requirements that objections based on the disclosures must be made within the time set by Rule 26(a)(3).

Time. The final paragraph of Rule 26(a)(1) would change the time for disclosures from 10 days after the Rule 26(f) conference to 14 days after the conference. This change is integrated with proposed time changes in Rule 26(f) to ensure that the parties and the court have adequate opportunity to consider the disclosures and Rule 26(f) report before a scheduling conference or order is due.

Scope of Discovery: Rule 26(b)(1)

The American College of Trial Lawyers has revived, and urged on the Committee, a proposal first advanced in 1977 by a Section of Litigation Special Committee for the Study of Discovery Abuse. Although the proposal has been repeatedly considered and somewhat modified by the Advisory Committee over the years, this history of continued rejection does not carry the precedential weight that might seem appropriate. Instead, the Committee has attempted a variety of less sweeping approaches. Twenty years of failure to reduce worrisome discovery problems to tolerable levels may justify resort to stronger medicine. The current proposal to amend Rule 26(b)(1) adopts a reduced form of the initial proposal, but with one vitally important qualification. As reformulated, the proposal does not narrow the overall scope of discovery. Instead, it introduces a distinction between lawyer-managed discovery and court-managed discovery. The full sweep of discovery remains available, but the broader reaches require court supervision when the parties cannot agree.

Rule 26(b)(1) now defines the scope of discovery as matter "relevant to the subject matter involved in the pending action." The original Section of Litigation proposal was to limit the scope to "issues raised by the claims or defenses of any party." This has been softened to "matter relevant to the claim or defense of any party," without requiring clearly focused or identified issues.

At the same time as this presumptive limit is proposed, the court is given power to broaden discovery back to "any information relevant to the subject matter involved in the action." Only "good cause" need be shown. This structure is calculated to force judicial supervision of the problem cases that need judicial supervision. The scope of routine discovery is narrowed in some measure. The proposed Committee Note states that the court has authority to confine discovery to the pleadings, and that — without court permission — the parties are not entitled to discovery to develop new claims or defenses not identified in the pleadings. The parties of course can agree to broader discovery. The Rule 26(f) conference is one obvious occasion for forging agreements. But if the parties cannot agree, the court must resolve the dispute.

As thus developed, the Rule 26(b)(1) proposal is not an effort to narrow the scope of useful discovery. Instead it is an effort to change the balance between attorney-controlled discovery and court-controlled discovery. Time and again, lawyers have told the Committee that the one effective discovery reform will be to encourage trial judges to assert control. Judicial involvement is needed when there are legitimate disputes. It also is needed when one party is being unreasonable. All reasonably needed discovery will remain available.

Rule 26(b)(1) is changed in two additional respects. A new emphasis is added to the present final sentence. Discovery of information inadmissible at trial is retained, but it is emphasized that the information must be relevant. Although it is difficult to imagine that information not relevant to the parties' claims or defenses might be reasonably calculated to lead to the discovery of

admissible evidence, the new emphasis will stop up one possible argument for excessive inquiry. The second change adds an explicit reminder that all discovery is subject to the limitations imposed by Rule 26(b)(2). There is widespread feeling that at least some courts are not using as vigorously as should be the power to control excessive discovery established by subdivision (b)(2). The new reminder is intended to encourage more frequent consideration of the (b)(2) principles.

Local Rules: Rule 26(b)(2)

Rule 26(b)(2) now authorizes local rules that alter the national-rule limits on the numbers of depositions or interrogatories, and that set limits on the length of depositions. The proposed amendment removes this authorization. The Committee does not believe that variations in individual district practices, perhaps as influenced by local state practice, justify departure from the numbers of depositions and interrogatories set by Rules 30, 31, and 33. Proposed Rule 30(d)(2) would establish a national limit on the length of depositions, and again there is no apparent justification for allowing defeat of the national rule by local rules. Adjustment of these matters must be made by order in a specific case, not by local rule or "standing order." Authority to set local-rule limits on the number of Rule 36 requests for admissions is retained, however, because there are no limits in the national rules and a number of districts have adopted such local rules. (It may be noted that the Discovery Subcommittee and the Advisory Committee have discussed the possibility of adopting a quantitative limit on Rule 34 requests to produce. No workable means has been found to implement a limit. A numerical limit on the number of requests would jeopardize the Rule 34(b) requirement that requests be framed with "reasonable particularity." A numerical limit on the number of items produced would be nonsensical. A local rule that purported to establish such limits would be inconsistent with Rule 34.)

Discovery Moratorium: Rule 26(d)

As amended in 1993, Rule 26(d) as a general matter bars discovery before the parties have met as required by Rule 26(f). This moratorium continues to be desirable despite the narrowing of initial disclosure requirements. The moratorium not only ensures that disclosure is not superseded by earlier discovery, but — and perhaps more important — also preserves the rule of the Rule 26(f) conference as a discovery-planning event. The present rule grants authority is granted to change the moratorium by local rule. The proposed amendments delete the authority for local rules. In addition, the categories of proceedings exempted from initial disclosure by proposed Rule 26(a)(1)(E) are exempted from the discovery moratorium. It is expected that ordinarily there will be little or no discovery in these cases, but they are exempted from the moratorium because they are exempted also from the Rule 26(f) conference. This structure means that in theory a plaintiff could begin discovery immediately on filing an action, imposing disadvantages on a defendant who is obliged to respond within the ordinary discovery time limits. The Committee considered resurrection of the time provisions that, until 1993, granted defendants additional time to respond to discovery demands made at the initiation of an action. In the end, it was concluded that there is little need to further complicate the discovery rules for this purpose. If there are any cases in which a plaintiff seeks to take unfair advantage of this new opportunity, the courts have ample power to protect the defendant under Rule 26(c) and otherwise.

Rule 26(f) Conference

The proceedings exempted from initial disclosure by proposed Rule 26(a)(1)(E) are exempted also from the Rule 26(f) conference. These proceedings are not likely to benefit from a conference requirement because they are not likely to involve extensive discovery.

The times for the conference and the report are changed. The present rule sets the conference at 14 days before a scheduling conference is held or a scheduling order is due, and sets the time for the report at 10 days after the conference. Since Rule 6(a) excludes intermediate weekend days and holidays from the 10-day period, it is possible that the report will be due on the day of the scheduling conference or order. The proposed amendments set the conference at 21 days before the scheduling conference or order, and set the report at 14 days after the conference. Because the 14-day period is not extended under Rule 6(a), these changes ensure that the court and the parties will have adequate time to consider the disclosures and report.

Finally, the Rule 26(f) obligation to "meet" is changed to an obligation to "confer." This proposal reflects conflicting concerns. The Committee believes that the Rule 26(f) procedure has been the most successful of all the 1993 discovery amendments, and that its success is significantly enhanced by a face-to-face meeting. At the same time, however, it must be recognized that some districts cover great reaches of thinly populated territory. A face-to-face meeting requirement can impose undue burdens on the parties to ordinary litigation in such circumstances. These concerns were resolved by proposing to substitute a conference for a meeting, but also by authorizing local rules that require the parties or attorneys to attend the conference in person. Local rules seem suitable in this setting because there are clear local differences in geography. A local rule that requires personal attendance, but excuses personal attendance beyond a specified distance, would be consistent with this authorization.

Deposition Length

In 1991, the Committee published for comment a proposal to establish a 6-hour time limit for oral depositions. Although many of those who commented or testified agreed that ordinarily it should be possible to depose a witness in 6 hours, the proposed amendment was not sent forward for adoption. Complaints about unnecessarily prolonged depositions continue to be made, however, and the Committee has concluded that a presumptive limit should be established.

The Rule 30(d)(2) proposal adopts a presumptive limit of "one day of seven hours." The one-day limit was added because it was feared that a simple 7-hour limit might be subject to abuse by repeated convening and adjourning. Seven hours was chosen, recognizing the potential arbitrariness of any specific duration, as the measure of a reasonable working day. The sense that this protection should operate to protect the deponent as well as the parties is reflected in the requirement that the deponent join any stipulation to extend the period.

The court is authorized to change the time limit, and also to alter the "one day" presumption. A physician, for example, may prefer to practice medicine all day and tend to a deposition in the late afternoon or early evening hours. It may make sense to accommodate such needs by allowing the deposition to be scheduled for two or even more sessions. A similar course might be followed if

there are foreseeable reasons to explore preliminary matters first, followed by an interval for further investigation before concluding a deposition.

Other Rule 30(d) Changes

Other but modest changes are proposed for Rule 30(d). The first, in Rule 30(d)(1), makes it clear that all objections are covered, not only those that can be characterized as objections "to evidence." The second, also in Rule 30(d)(1), makes it clear that the limits on instructing a deponent not to answer apply to any person, not only to a party.

Rule 30(d)(2) is changed to make it clear that additional time can be allowed for a deposition when an impediment or delay arises from a "circumstance" as well as conduct of a deponent or other person. Examples might include mechanical failures, health problems, or the like.

The present final sentence of Rule 30(d)(2) is redesignated as Rule 30(d)(3), and changed to ensure that sanctions can be imposed for any impediment, delay, or other conduct that frustrates fair examination.

Cost-Bearing: Rule 34(b)

It is proposed to amend Rule 34(b) by adding a provision that recognizes the court's power to implement the limitations that Rule 26(b)(2) places on excessive discovery by conditioning discovery on payment by the requesting party of part or all of the reasonable expenses incurred by the responding party. The draft Committee Note states that this provision makes explicit a power that now is implicit in Rule 26(b)(2) and explicit in Rule 26(c). The reason for adding this explicit recognition to Rule 34(b) rather than to Rule 26(b)(2) is that protests about excessive document production demands continue to be the most regular and vehement source of discovery complaints. An effort has been made to draft the Note to make it clear that this explicit statement in Rule 34(b) is not intended to negate the use of cost-bearing orders with respect to excessive uses of other discovery methods, including expensive depositions that may place untoward financial burdens on parties with few resources for litigation.

The Note also makes it clear that cost-bearing is not a routine measure to be used in every case. The Committee has been advised by many lawyers that Rule 26(b)(2) has not always fulfilled its promise as an effective restraint on discovery excesses. There has been no hint that Rule 26(b)(2) has been used with excessive enthusiasm. There is little reason to fear that courts will be infected with a sudden desire to redistribute the expenses of complying with reasonable discovery requests. At the same time, it does not seem appropriate to limit cost-bearing orders to "extraordinary" or "massive discovery" cases. Expensive or largely redundant discovery may be disproportionate to the needs of modest cases even if the discovery itself would be clearly appropriate in larger-scale litigation. The guides of Rule 26(b)(2)(i), (ii), and (iii) are sufficient.

Cost-bearing is likely to be faced in one of two procedural settings. In the first, the party resisting discovery may move for a Rule 26(c) protective order; cost-bearing may be an appropriate response, even if the requested relief is an outright denial of discovery. In the second, the party seeking discovery may move to compel discovery under Rule 37(a); it is expected that the party resisting discovery will have raised the Rule 26(b)(2) objection in response to the discovery request,

and the cost-bearing issue will be framed naturally. Both Rules 26(c) and 37(a) require that before making a motion the moving party confer, or attempt to confer, with the opposing party; the conference should be a fruitful occasion for resolving these matters on a pragmatic basis.

The Discovery Subcommittee originally proposed that cost-bearing be added to Rule 26(b)(2) rather than Rule 34(b). This question continues to stir differences of opinion. It is anticipated that if these proposals are approved for publication, the letter inviting public comment and testimony will identify this question as an issue for comment.

Failure To Supplement Discovery Responses

Rule 37(c)(1) now provides sanctions for failure to supplement disclosures, but does not provide sanctions for failure to supplement discovery responses. It is proposed to add Rule 26(e)(2) to Rule 37(c)(1), so that there is a clear sanction provision for failure to discharge the duty to supplement discovery responses.

Filing Discovery Materials

Rule 5(d) provides that the court may order that discovery materials not be filed "unless on order of the court or for use in the proceeding." A majority of the districts have adopted local rules that prohibit filing. The Local Rules Project concluded in 1989 that these local rules are invalid, but urged the Advisory Committee to consider amending Rule 5(d). Again in 1997, the Judicial Conference of the Ninth Circuit found many of these local rules, concluded with regret that they are invalid, but urged the Advisory Committee to amend Rule 5(d). In responding to this advice, the Advisory Committee concluded that there is no apparent reason for adopting different filing requirements for different districts. Even if some districts vary in their present capacities to receive filing, there is little reason to take these conditions as a permanent feature that must be recognized for all time.

If local rules are not the best answer, the collective wisdom reflected in so many local rules strongly supports the conclusion that routine filing of all discovery materials is inappropriate. Filing adds burdens and expenses not only on the courts but also on the parties. Some portion of discovery materials — probably a large portion in many cases — is never used for any purpose. There are indications that even in districts that do not have local rules barring filing, nonfiling is a routine habit with many attorneys.

It is proposed to amend Rule 5(d) to provide that Rule 26(a)(1) and (2) disclosures, and Rule 30, 31, 33, 34, and 36 discovery materials "need not be filed until they are used in the proceeding or the court orders filing." Any use of discovery materials will require filing of the materials used — the most common illustrations will be uses to support motions, including summary-judgment motions, or use at trial. The filing requirement is limited to the materials used, although the court may order filing of additional materials to support its deliberations or to ensure public access to information of interest to the public. A party who wishes to file discovery materials, moreover, may file them without awaiting either a court order or use in the proceeding. This permission to file will enhance the opportunity for public access in districts that now prohibit filing by local rule, so long as there is no protective order limiting or barring access.

Pending Discovery Questions

The Discovery Subcommittee has not been discharged. It has been asked to continue to study additional proposals. One of these proposals is that a presumptive time limit be adopted for document requests. One form of the limit would be that good cause need be shown to win production of documents created more than seven years before the events giving rise to the claims or defenses in the action. Another proposal is that pattern discovery requests be developed for use in specific types of litigation. A pilot project has been launched by two experienced antitrust attorneys to attempt to develop a pattern acceptable to plaintiffs and defendants. If this approach proves feasible, the Committee will consider the best means of pursuing it.

The problems arising from discovery of electronically stored and retrieved information are acute, and are evolving at a dizzying pace. These questions have been committed to the Technology Subcommittee to hold for future consideration when there may be a reasonable foundation for advancing responsible recommendations.

Discovery Changes Passed By

The Advisory Committee has concluded that no need has been shown to revise Rule 26(c) to ensure public access to discovery information that may bear on public health or safety. Despite frequent anecdotes of injuries that might have been prevented by earlier public access to discovery information hidden by protective orders, no persuasive showing has been made that actual current practice supports the anecdotes. The earlier-published proposal to amend Rule 26(c) to emphasize the present power to modify or vacate a protective order has been removed from the Committee agenda.

The question of a presumptive cutoff time was debated by the Committee at length, with advice from the Discovery Subcommittee. It is clear that Rule 16 establishes full authority to order discovery time limits, and many courts exercise this authority on a regular basis. The question is whether Rule 16 should be amended to specify a particular, if only presumptive, time for concluding discovery. The purpose of the amendment would be to force all courts to adopt the good practices followed in most courts. Although this purpose may be desirable, it runs up against the conclusion that district dockets vary too widely to permit a national rule that sets a presumptive trial date for civil cases. Without a presumptive trial date, a presumptive discovery cut-off could be worse than pointless — in some cases, at least, it would require unnecessary early work and distort the trial preparation process. With some regret, the Committee concluded that it is not possible to recommend further national rulemaking on this topic.

PROPOSED AMENDMENTS TO THE

FEDERAL RULES OF CIVIL PROCEDURE*

Rule 5. Service and Filing Pleadings and Other Papers

* * * * *

(d) Filing; Certificate of Service. All papers after the complaint required to be served upon a party, together with a certificate of service, shall be filed with the court within a reasonable time after service, but disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses need 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~~the court may on motion of a party or on its own initiative order that depositions upon oral examination and interrogatories, requests for documents, requests for admission, and answers and responses thereto not be filed unless on order of the court or for use in the proceeding~~.

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* New matter is underlined; matter to be omitted is lined through.

COMMITTEE NOTE

Subdivision (d). Rule 5(d) is amended to provide that disclosure under Rule 26(a)(1) and (2), and discovery requests and responses under Rules 30, 31, 33, 34, and 36 need not be filed until they are used in the action. "Discovery requests" includes deposition notices and "discovery responses" includes objections. The rule supersedes and invalidates local rules that forbid or require filing of these materials before they are used in the action. The former Rule 26(a)(4) requirement that disclosures under Rule 26(a)(1) and (2) be filed has been removed. Disclosures under Rule 26(a)(3), however, must be promptly filed as provided in Rule 26(a)(3). Filings in connection with Rule 35 examinations, which involve a motion proceeding when the parties do not agree, are unaffected by these amendments.

Recognizing the costs imposed on parties and courts by required filing of discovery materials that are never used in an action, Rule 5(d) was amended in 1980 to authorize court orders that excuse filing. Since then, many districts have adopted local rules that excuse or forbid filing. In 1989 the Judicial Conference Local Rules Project concluded that these local rules were inconsistent with Rule 5(d), but urged the Advisory Committee to consider amending the rule. Local Rules Project at 92 (1989). The Judicial Conference of the Ninth Circuit gave the Committee similar advice in 1997. The reality of nonfiling reflected in these local rules has even been assumed in drafting the national rules. In 1993, Rule 30(f)(1) was amended to direct that the officer presiding at a deposition file it with the court or send it to the attorney who arranged for the transcript or recording. The Committee Note explained that this alternative to filing was designed for "courts which direct that depositions not be automatically filed."

Although this amendment is based on widespread experience with local rules, and confirms the results directed by these local rules, it is designed to supersede and invalidate local rules. There is no apparent reason to have different filing rules in different districts. Even if districts vary in present capacities to store filed materials that are not used in an action, there is little reason to continue expending court resources for this purpose. These costs and burdens would likely grow as parties make increased use of audio- and videotaped depositions. Equipment to facilitate review and reproduction of such discovery materials may prove costly to acquire, maintain, and operate.

When the rule was amended in 1980, there was concern about access to discovery materials. The widespread adoption of local rules - sometimes forbidding, not just excusing, filing - raises doubts about the ongoing importance of filing as a means of access to discovery materials. Unlike some local rules, Rule 5(d) permits any party to file discovery materials if it so chooses (subject to the provisions of any applicable protective order), thus potentially facilitating access. In addition, the court may order filing.

The amended rule provides that discovery materials and disclosures under Rule 26(a)(1) and (a)(2) need not be filed until they are "used in the proceeding." This phrase is meant to refer to proceedings in court. Accordingly, "use" of discovery materials such as documents in other discovery activities, such as depositions, would not trigger the filing requirement. In connection with proceedings in court, however, the rule is to be interpreted broadly; any use of discovery materials in court in connection with a motion, a pretrial conference under Rule 16, or otherwise, should be interpreted as use in the proceeding.

Once discovery or disclosure materials are used in the proceeding, the filing requirements of Rule 5(d) should apply to them. But because the filing requirement applies only with regard to materials that are used, only those parts of voluminous materials that are actually used need be filed. Any party would be free to file other pertinent portions of materials that are so used. See Fed. R. Evid. 106; cf. Rule 32(a)(4). If the parties are unduly sparing in their submissions, the court may order further filings. By local rule, a court could provide appropriate direction regarding the filing of discovery materials, such as depositions, that are used in proceedings.

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

(a) Required Disclosures; Methods to Discover Additional Matter.

(1) Initial Disclosures. Except in categories of proceedings specified in subparagraph (E), or to

the extent otherwise stipulated or directed by order ~~or local rule~~, a party shall, 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 supporting its claims or defenses, unless solely for impeachment~~relevant to disputed facts alleged with particularity in the pleadings~~, 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 support its claims or defenses, unless solely for impeachment~~that are relevant to disputed facts alleged with particularity in the pleadings~~;

(C) a computation of any category of damages claimed by the disclosing party, making

available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(E) The following categories of proceedings are exempt from initial disclosure under paragraph (1): (i) a proceeding withdrawn under Title 28, U.S.C. § 157(d) from reference to a bankruptcy judge; (ii) a bankruptcy appeal; (iii) an action for review on an administrative record; (iv) a petition for habeas corpus or other proceeding to

challenge a criminal conviction or sentence; (v) an action brought without counsel by a person in custody of the United States, a state, or a state subdivision; (vi) an action to enforce or quash an administrative summons or subpoena; (vii) an action by the United States to recover benefit payments; (viii) an action by the United States to collect on a student loan guaranteed by the United States; (ix) a proceeding ancillary to proceedings in other courts; and (x) an action to enforce an arbitration award.

~~Unless otherwise stipulated or directed by the court,~~ Tthese disclosures mustshall be made at or within 1410 days after the subdivision (f) conference~~meeting of the parties under subdivision (f).~~ 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 subdivision (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 subdivision (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 mustshall 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.

* * * * *

(3) Pretrial Disclosures. In addition to the disclosures required by Rule 26(a)(1) and (2)in the preceding paragraphs, a party shall 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 purposes:

(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 shall 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 subparagraph (B) and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under subparagraph (C). Objections not so disclosed, other than objections under Rules 402 and 403 of the Federal Rules of Evidence, shall be deemed waived unless excused by the court for good cause shown.

(4) Form of Disclosures~~; Filing~~. Unless the court orders otherwise~~ directed by order or local rule~~, all disclosures under paragraphs (1) through (3) mustshall be made in writing, signed, and served.~~, and promptly filed with the court.~~

* * * * *

(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, thatwhich is

relevant to ~~the subject matter involved in the pending action, whether it relates to~~ the claim or defense of ~~the party seeking discovery or to the claim or defense of~~ any ~~other~~ 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 shown, the court may order discovery of any information relevant to the subject matter involved in the action. Relevant~~The~~ information ~~sought~~ need not be admissible at the trial if the discovery ~~information sought~~ appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by subdivision (b)(2)(i), (ii), and (iii).

(2) Limitations. By order ~~or by local rule~~, the court may alter the limits in these rules on the number of depositions and interrogatories, or ~~and may also limit~~ the length of depositions under Rule 30. ~~and~~ 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 subdivision (c).

* * * * *

(d) Timing and Sequence of Discovery. Except in categories of proceedings exempted from initial disclosure

under subdivision (a)(1)(E), or when authorized under these rules or by ~~local rule,~~ order~~,~~ or agreement of the parties,. a party may not seek discovery from any source before the parties have ~~met and~~ conferred as required by subdivision (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, shall not operate to delay any other party's discovery.

* * * * *

(f) Conference~~Meeting~~ of Parties; Planning for Discovery. Except in categories of proceedings~~actions~~ exempted from initial disclosure under subdivision (a)(1)(E)~~by local rule~~ or when otherwise ordered, the parties shall, as soon as practicable and in any event at least 21~~14~~ days before a scheduling conference is held or a scheduling order is due under Rule 16(b), confer~~meet~~ to consider~~discuss~~ 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 subdivision

(a)(1), and to develop a proposed discovery plan. The plan shall indicate the parties' views and proposals concerning:

(1) what changes should be made in the timing, form, or requirement for disclosures under subdivision (a) ~~or local rule~~, including a statement as to when disclosures under subdivision (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 subdivision (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~~and being present or represented at the meeting~~, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14~~10~~ days after the conference~~meeting~~ a written report outlining the plan. A court may by local rule or order require that the parties or attorneys attend the conference in person.

COMMITTEE NOTE

Purposes of amendments. The Rule 26(a)(1) initial disclosure provisions are amended to establish a nationally-uniform practice. The scope of the disclosure obligation is narrowed to cover only information that supports the disclosing party's position. In addition, the rule exempts specified categories of proceedings from initial disclosure, and permits a party who contends that disclosure is not appropriate in the circumstances of the case to present its objections to the court, which must then determine whether disclosure should be made. Related changes are made in Rules 26(d) and (f).

The initial disclosure requirements added by the 1993 amendments permitted local rules directing that disclosure would not be required or altering its operation. The inclusion of the "opt out" provision reflected the strong opposition to initial disclosure felt in some districts, and permitted experimentation with differing disclosure rules in those districts that were favorable to disclosure. The local option also recognized that - partly in response to the first publication in 1991 of a proposed disclosure rule - many districts had adopted a variety of disclosure programs under the aegis of the Civil Justice Reform Act. It was hoped that developing experience under a variety of disclosure systems would support eventual refinement of a uniform national disclosure practice. In addition, there was hope that local experience could identify categories of actions in which disclosure is not useful.

A striking array of local regimes in fact emerged for disclosure and related features introduced in 1993. See D. Stienstra,

Implementation of Disclosure in United States District Courts, With Specific Attention to Courts' Responses to Selected Amendments to Federal Rule of Civil Procedure 26 (Federal Judicial Center, March 30, 1998). In its final report to Congress on the CJRA experience, the Judicial Conference recommended reexamination of the need for national uniformity, particularly in regard to initial disclosure. Judicial Conference, Alternative Proposals for Reduction of Cost and Delay: Assessment of Principles, Guidelines and Techniques, 175 F.R.D. 62, 98 (1997).

At the Committee's request, the Federal Judicial Center undertook a survey in 1997 to develop information on current disclosure and discovery practices. See T. Willging, J. Shapard, D. Steinstra & D. Miletich, Discovery and Disclosure Practice: Problems, and Proposals for Change (Federal Judicial Center, 1997). In addition, the Committee convened two conferences on discovery involving lawyers from around the country and received reports and recommendations on possible discovery amendments from a number of bar groups. Papers and other proceedings from the second conference are published in 39 Boston Col. L. Rev. ____ (forthcoming 1998).

The Committee has discerned widespread support for national uniformity. Many lawyers have experienced difficulty in coping with divergent disclosure and other practices as they move from one district to another. Clients can be bewildered by the conflicting obligations they face when sued in different districts. Lawyers surveyed by the Federal Judicial Center ranked adoption of a uniform national disclosure rule second among proposed rule changes (behind increased availability of judges to resolve discovery disputes) as a means to reduce litigation expenses without interfering with fair outcomes. Discovery and Disclosure Practice, supra, at 44-45. National uniformity is also a central purpose of the Rules Enabling Act of 1934, as amended, 28 U.S.C. § 2072.

These amendments restore national uniformity to disclosure practice. Uniformity is also restored to other aspects of discovery by deleting most of the provisions authorizing local rules that vary the number of permitted discovery events or the length of depositions. Local rule options are also deleted from Rules 26(d) and (f).

Subdivision (a)(1). The amendments remove the authority to alter or opt out of the national disclosure requirements by local rule, invalidating not only formal local rules but also informal "standing" orders of an individual judge or court that purport to create

exemptions from - or limit or expand - the disclosure provided under the national rule. See Rule 83. Case-specific orders remain proper, however, and are expressly required if a party objects that initial disclosure is not appropriate in the circumstances of the action. Specified categories of proceedings are excluded from initial disclosure under subdivision (a)(1)(E). In addition, the parties can stipulate to forgo disclosure, as was true before. But even in a case excluded by subdivision (a)(1)(E) or in which the parties stipulate to bypass disclosure, the court can order exchange of similar information as a feature of its management of the action under Rule 16.

The initial disclosure obligation of subdivisions (a)(1)(A) and (B) has been narrowed to identification of witnesses and documents that support the claims or defenses of the disclosing party. A party is no longer obligated to disclose witnesses or documents that would harm its position. The scope of the disclosure obligation connects directly to the exclusion sanction of Rule 37(c)(1), for it requires disclosure of the sort of material that would be subject to exclusion. Because the disclosure obligation is limited to supporting material, it is no longer tied to particularized allegations in the complaint. Subdivision (e)(1), which is unchanged, requires supplementation if information later acquired would have been subject to the disclosure requirement.

The disclosure obligation applies to "claims and defenses," and therefore requires a defendant to disclose information supporting its denials of the allegations or claim of another party. It thereby bolsters the requirements of Rule 11(b)(4), which authorizes denials "warranted on the evidence," and disclosure should include all information that supports such denials.

Subdivision (a)(3) presently excuses pretrial disclosure of information solely for impeachment. This information is similarly excluded from the initial disclosure requirement.

Subdivisions (a)(1)(C) and (D) are not changed. Should a case be exempted from initial disclosure by Rule 26(a)(1)(E) or by agreement or order, the insurance information described by subparagraph (D) should be subject to discovery, as it would have been under the principles of former Rule 26(b)(2), which was added in 1970 and deleted in 1993 as redundant in light of the new initial disclosure obligation.

New subdivision (a)(1)(E) excludes ten specified categories

of proceedings from initial disclosure. The objective of this listing is to identify cases in which there is likely to be little or no discovery, or in which initial disclosure appears unlikely to contribute to the effective development of the case. The list was developed after a review of the categories excluded by local rules in various districts from the operation of Rule 16(b) and the conference requirements of subdivision (f). Subdivision (a)(1)(E) refers to categories of "proceedings" rather than categories of "actions" because some might not properly be labeled "actions." Case designations made by the parties or the clerk's office at the time of filing do not control application of the exemptions. The descriptions in the rule are generic and are intended to be administered by the parties - and, when needed, the courts - with the flexibility needed to adapt to gradual evolution in the types of proceedings that fall within these general categories.

Subdivision (a)(1)(E) is likely to exempt a substantial proportion of the cases in most districts from the initial disclosure requirement. Federal Judicial Center staff estimate that, nationwide, these categories total approximately one-third of all civil filings.

The categories of proceedings listed in subdivision (a)(1)(E) are also exempted from the subdivision (f) conference requirement and from the subdivision (d) moratorium on discovery. Although there is no restriction on commencement of discovery in these cases, it is not expected that this opportunity will often lead to abuse since there should be little or no discovery in most such cases. Should a defendant need more time to respond to discovery requests filed at the beginning of an exempted action, it can seek relief by motion under Rule 26(c) if the plaintiff is unwilling to defer the due date by agreement.

Subdivision (a)(1)(E)'s enumeration of exempt categories is exclusive. Although a case-specific order can alter or excuse initial disclosure, local rules or "standing" orders that purport to create general exemptions are invalid. See Rule 83.

The time for initial disclosure is extended to 14 days after the subdivision (f) conference unless the court orders otherwise. This change is integrated with corresponding changes requiring that the subdivision (f) conference be held 21 days before the Rule 16(b) scheduling conference or scheduling order, and that the report on the subdivision (f) conference be submitted to the court 14 days after the meeting. These changes provide a more orderly opportunity for the parties to review the disclosures, and for the court to consider the

report. In many instances, the subdivision (f) conference and the effective preparation of the case would benefit from disclosure before the conference, and earlier disclosure is therefore encouraged in appropriate cases.

The presumptive disclosure date does not apply if a party objects to initial disclosure during the subdivision (f) conference and states its objection in the subdivision (f) discovery plan. The right to object to initial disclosure is not intended to afford parties an opportunity to "opt out" of disclosure unilaterally, but only when disclosure would be "inappropriate in the circumstances of the action." Making the objection permits the objecting party to present the question to the judge before any party is required to make disclosure. The court must then rule on the objection and determine what disclosures, if any, should be made. Ordinarily, this determination would be included in the Rule 16(b) scheduling order, but the court could handle the matter in a different fashion. Even when circumstances warrant suspending some disclosure obligations, others - such as the damages and insurance information called for by subparagraphs (a)(1)(C) and (D) - may continue to be appropriate.

The presumptive disclosure date is also inapplicable to a party who is "first served or otherwise joined" after the subdivision (f) conference. This phrase refers to the date of service of a claim on a party in a defensive posture (such as a defendant or third-party defendant), and the date of joinder of a party added as a plaintiff or an intervenor. Absent court order or stipulation, a new party has 30 days in which to make its initial disclosures. But it is expected that later-added parties will ordinarily be treated the same as the original parties when the original parties have stipulated to forgo initial disclosure, or the court has ordered disclosure in a modified form.

Subdivision (a)(3). The amendment to Rule 5(d) exempts disclosures under subdivisions (a)(1) and (a)(2) from filing until they are used in the proceeding, and this change is reflected in an amendment to subdivision (a)(4). Disclosure under subdivision (a)(3), however, may be important to the court in connection with the final pretrial conference or otherwise in preparing for trial. The requirement that objections to certain matters be filed points up the court's need to be provided with these materials. Accordingly, the requirement that subdivision (a)(3) materials be filed has been retained and moved to subdivision (a)(3), and it has also been made clear that they should be filed "promptly."

Subdivision (a)(4). The filing requirement has been removed from this subdivision. Rule 5(d) has been amended to provide that disclosures under subdivisions (a)(1) and (a)(2) need not be filed until used in the proceeding. Subdivision (a)(3) has been amended to require that the disclosures it directs, and objections to them, be filed promptly. Subdivision (a)(4) continues to require that all disclosures under subdivisions (a)(1), (a)(2), and (a)(3) be in writing, signed and served.

Subdivision (b)(1). In 1978, the Committee published for comment a proposed amendment, suggested by the Section of Litigation of the American Bar Association, to refine the scope of discovery by deleting the "subject matter" language. This proposal was withdrawn, and the Committee has since then made other changes in the discovery rules to address concerns about overbroad discovery. Concerns about costs and delay of discovery have persisted nonetheless, and other bar groups have repeatedly renewed similar proposals for amendment to this subdivision to delete the "subject matter" language. Nearly one-third of the lawyers surveyed in 1997 by the Federal Judicial Center endorsed narrowing the scope of discovery as a means of reducing litigation expense without interfering with fair case resolutions. Discovery and Disclosure Practice, supra, at 44-45 (1997). The Committee has heard that in some instances, particularly cases involving large quantities of discovery, parties seek to justify discovery requests that sweep far beyond the claims and defenses of the parties on the ground that they nevertheless have a bearing on the "subject matter" involved in the action.

The amendments proposed for subdivision (b)(1) include one element of these earlier proposals but also differ from these proposals in significant ways. The similarity is that the amendments describe the scope of party-controlled discovery in terms of matter relevant to the claim or defense of any party. The court, however, retains authority to order discovery of any matter relevant to the subject mater involved in the action on a good-cause showing. The amendment is designed to involve the court more actively in regulating the breadth of discovery in cases involving sweeping or contentious discovery. The Committee has been informed repeatedly by lawyers that involvement of the court in managing discovery is an important method of controlling problems of inappropriately broad discovery. Increasing the availability of judicial officers to resolve discovery disputes and increasing court management of discovery were both strongly endorsed by the attorneys surveyed by the Federal

Judicial Center. See Discovery and Disclosure Practice, supra, at 44. Under the amended provisions, if there is an objection that discovery goes beyond material relevant to the claims or defenses, the court would become involved to determine whether the discovery is relevant to the claims or defenses and, if not, whether good cause exists for authorizing it so long as it is relevant to the subject matter of the action. The good cause standard warranting broader discovery is meant to be flexible.

The Committee intends to focus the parties and the court on the actual claims and defenses involved in the action. The dividing line between information relevant to the claims and defenses and that relevant only to the subject matter of the action cannot be defined with precision. However, the rule change signals to the court that it has the authority to confine discovery to the claims and defenses asserted in the pleadings, and signals to the parties that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings. In general, it is hoped that reasonable lawyers can cooperate to manage discovery without the need for judicial intervention. When judicial intervention is invoked, the actual scope of discovery should be determined according to the reasonable needs of the action. The court may permit broader discovery in a particular case depending on the circumstances of the case, the nature of the claims and defenses, and the scope of the discovery requested.

The amendments also modify the provision regarding discovery of information not admissible in evidence. As added in 1946, this sentence was designed to make clear that otherwise relevant material could not be withheld because it was hearsay or otherwise inadmissible. The Committee was concerned that the "reasonably calculated to lead to the discovery of admissible evidence" standard set forth in this sentence might swallow any other limitation on scope of discovery. Accordingly, this sentence has been amended to clarify that information must be relevant to be discoverable, even though inadmissible, and that discovery of such material is permitted if reasonably calculated to lead to the discovery of admissible evidence.

Finally, a sentence has been added calling attention to the limitations of subdivision (b)(2)(i), (ii), and (iii). These limitations apply to discovery that is otherwise within the scope of subdivision (b)(1). The Committee has been told repeatedly that courts have not implemented these limitations with the vigor that was contemplated. See 8 Federal Practice & Procedure § 2008.1 at 121. This otherwise

redundant cross-reference has been added to emphasize the need for active judicial use of subdivision (b)(2) to control excessive discovery. Cf. Crawford-El v. Britton, 118 S. Ct.___, 1998 WL 213193 at *14 (U.S., May 4, 1998) (quoting Rule 26(b)(2)(iii) and stating that "Rule 26 vests the trial judge with broad discretion to tailor discovery narrowly").

Subdivision (b)(2). Rules 30, 31, and 33 establish presumptive national limits on the numbers of depositions and interrogatories. New Rule 30(d)(2) establishes a presumptive limit on the length of depositions. Subdivision (b)(2) is amended to remove the previous permission for local rules that establish different presumptive limits on these discovery activities. There is no reason to believe that unique circumstances justify varying these nationally-applicable presumptive limits in certain districts. The limits can be modified by court order or agreement in an individual action. Because there is no national rule limiting the number of Rule 36 requests for admissions, the rule continues to authorize local rules that impose numerical limits on them.

Subdivision (d). The amendments remove the prior authority to exempt cases by local rule from the moratorium on discovery before the subdivision (f) conference, but the categories of proceedings exempted from initial disclosure under subdivision (a)(1)(E) are excluded from subdivision (d). The parties may agree to disregard the moratorium where it applies, and the court may so order in a case.

Subdivision (f). As in subdivision (d), the amendments remove the prior authority to exempt cases by local rule from the conference requirement. The Committee has been informed that the addition of the conference was one of the most successful changes made in the 1993 amendments, and it therefore has determined to apply the conference requirement nationwide. The categories of proceedings exempted from initial disclosure under subdivision (a)(1)(E) are exempted from the conference requirement for the reasons that warrant exclusion from initial disclosure. The court may order that the conference need not occur in a case where otherwise required, or that it occur in a case otherwise exempted by subdivision (a)(1)(E). "Standing" orders altering the conference requirement for categories of cases are not authorized.

The rule is amended to require only a "conference" of the parties, rather than a "meeting." There are important benefits to face-to-face discussion of the topics to be covered in the conference, and

those benefits might be lost if other means of conferring were routinely used when face-to-face meetings would not impose burdens. Nevertheless, geographic conditions in some districts may exact costs far out of proportion to these benefits. Because these conditions vary from district to district, the amendment allows local rules to require face-to-face meetings. Such a local rule might wisely mandate face-to-face meetings only when the parties or lawyers are in sufficient proximity to one another.

As noted concerning the amendments to subdivision (a)(1), the time for the conference has been changed to at least 21 days before the scheduling conference, and the time for the report is changed to no more than 14 days after the conference. This should ensure that the court will have the report well in advance of the Rule 16 scheduling conference or the entry of the scheduling order.

Rule 30. Depositions Upon Oral Examination

* * * * *

(d) Schedule and Duration; Motion to Terminate or Limit Examination.

(1) Any objection ~~to evidence~~ during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. A person~~party~~ may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ~~on evidence~~ directed by the court, or to present a motion under paragraph (4~~3~~).

(2) Unless otherwise authorized by the court or stipulated by the parties and the deponent, a deposition is limited to one day of seven hours. ~~By order or local rule, t~~The court ~~may limit the time permitted for the conduct of a deposition, but~~ shall 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~~party~~, or other circumstance, impedes or delays the examination.

(3) If the court finds that any~~such an~~ impediment, delay, or other conduct ~~that~~ has frustrated the fair examination of the deponent, it may impose upon the persons responsible an appropriate sanction, including the reasonable costs and attorney's fees incurred by any parties as a result thereof.

(4~~3~~) 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 shall 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 shall 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.

COMMITTEE NOTE

Subdivision (d). Paragraph (1) has been amended to clarify the terms regarding behavior during depositions. The references to objections "to evidence" and limitations "on evidence" have been removed to avoid disputes about what is "evidence" and whether an objection is to, or a limitation is on, discovery instead. It is intended that the rule apply to any objection to a question or other issue arising during a deposition, and to any limitation imposed by the court in connection with a deposition, which might relate to duration or other matters.

The current rule places limitations on instructions that a witness not answer only when the instruction is made by a "party." Similar limitations should apply with regard to anyone who might purport to instruct a witness not to answer a question. Accordingly, the rule is amended to apply the limitation to instructions by any person.

Paragraph (2) imposes a presumptive durational limitation of one day of seven hours for any deposition. The Committee has been informed that overlong depositions can result in undue costs and delays in some circumstances. The presumptive duration may be extended, or otherwise altered, by agreement. Because this provision is designed partly to protect the deponent, an agreement by the parties to exceed the limitation is not sufficient unless the deponent also agrees. Absent such an agreement, a court order is needed. The party seeking a court order to extend the examination, or otherwise alter the limitations, is expected to show good cause to justify such an order.

It is expected that in most instances the parties and the witness will make reasonable accommodations to avoid the need for resort to the court. The limitation is phrased in terms of a single day on the assumption that ordinarily a single day would be preferable to a deposition extending over multiple days; if alternative arrangements would better suit the parties and the witness, they may agree to them. It is also assumed that there will be reasonable breaks during the day. Preoccupation with timing is to be avoided.

The rule directs the court to allow additional time where consistent with Rule 26(b)(2) if needed for a fair examination of the deponent. In addition, if the deponent or another person impedes or delays the examination, the court should authorize extra time. The amendment makes clear that additional time should also be allowed where the examination is impeded by an "other circumstance," which might include a power outage, a health emergency, or other event.

In keeping with the amendment to Rule 26(b)(2), the provision added in 1993 granting authority to adopt a local rule limiting the time permitted for depositions has been removed. The court may enter a case-specific order directing shorter depositions for all depositions in a case or with regard to a specific witness. The court may also order that a deposition be taken for limited periods on several days.

Paragraph (3) includes sanctions provisions formerly included in paragraph (2). It authorizes the court to impose an appropriate sanction on any person responsible for an impediment that frustrated the fair examination of the deponent. This could include the deponent, any party, or any other person involved in the deposition. If the impediment or delay results from an "other circumstance" under paragraph (2), ordinarily no sanction would be appropriate.

Former paragraph (3) has been renumbered (4) but is otherwise unchanged.

Rule 34. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes

* * * * *

(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. On motion under Rule 37(a) or Rule 26(c), or on its own motion, the court shall - if appropriate to implement the limitations of Rule 26(b)(2)(i), (ii), or (iii) - limit the discovery or require the party seeking discovery to pay part or all of the reasonable expenses incurred by the responding party.

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.

COMMITTEE NOTE

Subdivision (b). The amendment makes explicit the court's authority to condition document production on payment by the party seeking discovery of part or all of the reasonable costs of that document production if the request exceeds the limitations of Rule 26(b)(2)(i), (ii), or (iii). This authority was implicit in the 1983 adoption of Rule 26(b)(2), which states that in implementing its limitations the court may act on its own initiative or pursuant to a motion under Rule 26(c). The court should continue to have such

authority with regard to all discovery devices. If the court concludes that a proposed deposition, interrogatory or request for admission exceeds the limitations of Rule 26(b)(2)(i), (ii), or (iii), it may, under authority of that rule and Rule 26(c), deny discovery or allow it only if the party seeking it pays part or all of the reasonable costs.

This authority to condition discovery on cost-bearing is made explicit with regard to document discovery because the Committee has been informed that in some cases document discovery poses particularly significant problems of disproportionate cost. Cf. Rule 45(c)(2)(B) (directing the court to protect a nonparty against "significant expense" in connection with document production required by a subpoena). The Federal Judicial Center's 1997 survey of lawyers found that "[o]f all the discovery devices we examined, document production stands out as the most problem-laden." T. Willging, J. Shapard, D. Steinstra & D. Miletich, Discovery and Disclosure Practice, Problems, and Proposals for Change, at 35 (1997) These problems were "far more likely to be reported by attorneys whose cases involved high stakes, but even in low-to-medium stakes cases . . . 36% of the attorneys reported problems with document production." Id. Yet it appears that the limitations of Rule 26(b)(2) have not been much implemented by courts, even in connection with document discovery. See 8 Federal Practice & Procedure § 2008.1 at 121. Accordingly, it appears worthwhile to make the authority for a cost-bearing order explicit in regard to document discovery.

Cost-bearing might most often be employed in connection with limitation (iii), but it could be used as well for proposed discovery exceeding limitation (i) or (ii). It is not expected that this cost-bearing provision would be used routinely; such an order is only authorized when proposed discovery exceeds the limitations of subdivision (b)(2). But it cannot be said that such excesses might only occur in certain types of cases; even in "ordinary" litigation it is possible that a given document request would be disproportionate or otherwise unwarranted.

The court may employ this authority if doing so would be "appropriate to implement the limitations of Rule 26(b)(2)(i), (ii), or (iii)." In any situation in which a document request exceeds these limitations, the court may fashion an appropriate order including cost-bearing. When appropriate it could, for example, order that some requests be fully satisfied because they are not disproportionate, excuse compliance with certain requests altogether, and condition production in response to other requests on payment by the party

seeking the discovery of part or all of the costs of complying with the request. In making the determination whether to order cost-bearing, the court should ensure that only reasonable costs are included, and (as suggested by Rule 26(b)(2)(iii)) it may take account of the parties' relative resources in determining whether it is appropriate for the party seeking discovery to shoulder part or all of the cost of responding to the discovery.

The court may enter such a cost-bearing order in connection with a Rule 37(a) motion by the party seeking discovery, or on a Rule 26(c) motion by the party opposing discovery. The responding party may raise the limits of Rule 26(b)(2) in its objection to the document request or in a Rule 26(c) motion. Alternatively, as under Rule 26(b)(2), the court may act on its own initiative, either in a Rule 16(b) scheduling conference or order or otherwise.

Rule 37. Failure to Make disclosure or Cooperate in Discovery; Sanctions

* * * * *

(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 26(e)(2) shall not, unless such failure is harmless, be 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 subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule and may include informing the jury of the failure to make the disclosure.

COMMITTEE NOTE

Subdivision (c)(1). When this subdivision was added in 1993 to direct exclusion of materials not disclosed as required, the duty to supplement discovery responses pursuant to Rule 26(e)(2) was omitted. In the face of this omission, courts may rely on inherent power to sanction for failure to supplement as required by Rule 26(e)(2), see 8 Federal Practice & Procedure § 2050 at 607-09, but that is an uncertain and unregulated ground for imposing sanctions. There is no obvious occasion for a Rule 37(a) motion in connection with failure to supplement, and ordinarily only Rule 37(c)(1) exists as rule-based authority for sanctions if this supplementation obligation is violated.

The amendment explicitly adds failure to comply with Rule 26(e)(2) as a ground for sanctions under Rule 37(c)(1), including exclusion of withheld materials. The rule provides that this sanction power only applies when the failure to supplement was "without substantial justification," and a party should be allowed to use the material that was not disclosed if the lack of earlier notice was harmless.

APPENDIX

REPORTERS' PREFERRED ALTERNATIVE REGARDING COST-BEARING

At the Duke meeting, the Committee elected to insert cost-bearing in Rule 34(b) rather than Rule 26(b)(2), which had been proposed in the materials circulated in advance of the meeting. There was limited discussion of this question, and much more about how to phrase the provision in Rule 34(b). After the meeting, the drafters (Levi, Cooper and Marcus) concluded that Rule 26(b)(2) was actually the better placement for such a provision. The Discovery Subcommittee was able to meet on April 24 and discuss this question, and at that time the members voted 3-2 in favor of inclusion in Rule 26(b)(2). The three judicial members (Levi, Doty and Rosenthal) favored including the provision in Rule 26(b)(2), while the two lawyer members (Kasanin and Fox) favored Rule 34(b) because they were concerned that it would suffer the fate of the other provisions of Rule 26(b)(2) if placed there (i.e., being disregarded).

There was some discussion of polling the full Advisory Committee on whether to change the decision to include the cost-bearing provision in Rule 34(b) and instead to publish a Rule 26(b)(2) version for comment. After the Subcommittee's meeting, however, it was decided not to do so. This Appendix presents this alternative treatment for the information of the Committee, in the expectation that public comment could be invited on the Rule 26(b)(2) alternative.

There are essentially two types of arguments for inclusion of the provision in Rule 26(b)(2). First, as a policy matter it is more evenhanded and complete to include the provision there. Treatment in Rule 34(b) may be seen as primarily benefitting defendants, who are usually the parties with large repositories of documentary information. Depositions, on the other hand, may be exceedingly burdensome to plaintiffs but the Rule 34(b) provision does not apply to them.

Second, as a matter of drafting the cost-bearing provision fits better in Rule 26(b)(2). Including it in Rule 34(b) creates the possibility of a negative implication about the power of the court to enter a similar order with regard to other types of discovery. The draft Advisory Committee Note to Rule 34(b) above tries to defuse that implication, but this risk remains. Moreover, there is a jarring dissonance between Rule 26(b)(2), which says that if there is a violation of (i), (ii), or (iii) the discovery shall be limited, and Rule 34(b), which says it doesn't have to be limited if the party seeking discovery will pay. It is true that, in a way, this dissonance points up the apparent authority to enter such an order under the current provisions with regard to other types of discovery, but that is also another way of recognizing the tension that dealing with the problem in Rule 34(b) creates.

RULE 26(b)

* * * * *

(2) Limitations. By order ~~or by local rule~~, the

court may alter the limits in these rules on the number of depositions and interrogatories, or ~~and may also limit~~ the length of depositions under Rule 30. ~~and~~ By order or local rule, the court may also limit the number of requests under Rule 36. The court shall limit 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~~, or require a party seeking discovery to pay part or all of the reasonable expenses incurred by the responding party, 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 subdivision (c).

COMMITTEE NOTE

Subdivision (b)(2). Rules 30, 31, and 33 establish presumptive national limits on the numbers of depositions and interrogatories. New Rule 30(d)(2) establishes a presumptive limit on the length of depositions. Subdivision (b)(2) is amended to remove the previous permission for local rules that establish different presumptive limits on these discovery activities. There is no reason to believe that unique circumstances justify varying these nationally-applicable presumptive limits in certain districts. The limits can be modified by court order or agreement in an individual action. Because there is no national rule limiting the number of Rule 36 requests for admissions, the rule continues to authorize local rules that impose numerical limits on them.

The amended rule also makes explicit the authority that the Committee believes already exists under subdivision (b)(2) to condition marginal discovery on cost-bearing - to offer a party that has sought discovery beyond the limitations of subdivision (b)(2)(i), (ii), or (iii) the alternative of bearing part or all of the cost of that peripheral discovery rather than to forbid it altogether. The authority to order cost-bearing might most often be employed in connection with limitation (iii), but it could be used as well for proposed discovery exceeding limitation (i) or (ii). It is not expected that this cost-bearing provision would be used routinely; such an order is only authorized when proposed discovery exceeds the limitations of subdivision (b)(2). But it cannot be said that such excesses might only occur in certain types of cases. The limits of (i), (ii), and (iii) can be violated even in "ordinary" litigation. It may be that discovery requests exceeding the limitations of subdivision (b)(2) occur most frequently in connection with document requests under Rule 34, cf. Rule 45((c)(2)(B) (directing the court to protect a nonparty against "significant expense" in connection with document production required by a subpoena), but the limitations also apply to discovery by other means.

In any situation in which discovery requests are challenged as exceeding the limitations of subdivision (b)(2), the court may fashion an appropriate order including cost-bearing. Where appropriate it

could, for example, order that some discovery requests be fully satisfied because they are not disproportionate, direct that certain requests not be answered at all, and condition responses to other requests on payment by the party seeking the discovery of part or all of the costs of complying with the request. In determining whether to order cost-bearing, the court should ensure that only reasonable costs are included, and (as suggested by limitation (iii)) it may take account of the parties' relative resources in determining whether it is appropriate for the party seeking discovery to shoulder part or all of the cost of responding to the discovery.

The proposals to amend Civil Rules 4 and 12 form a package. These proposals stem from recommendations made by the Department of Justice, and were reshaped before Advisory Committee consideration through extensive exchanges between the Advisory Committee Reporter and Department of Justice officials. Both proposals are designed to accommodate the ways in which the United States, acting through the Department of Justice, becomes involved in litigation brought against a United States officer or employee to assert individual liability for acts connected with the United States office or employment. The Department of Justice often provides representation for the individual officer or employee, and it is common for the United States to be substituted as defendant in place of the individual officer or employee. This involvement requires that the United States receive assured notice of the action through service on the United States, and that the time to answer be extended to the 60-day period now allowed to answer in an action against the United States or an officer sued in an official capacity.

Civil Rule 4(i) would be changed in two ways. New subparagraph (2)(B) covers "[s]ervice 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." Service is made on the United States in the usual manner under Rule 4(i)(1), and service is made on the individual defendant in the usual manner under Rule 4(e), (f), or (g). The Note reminds readers that reliance on Rule 4(e), (f), or (g) also invokes the waiver-of-service provisions of Rule 4(d). The most difficult drafting challenge in this proposal is the need to find words that distinguish actions on purely individual claims from actions on claims that have a sufficient nexus to the United States office or employment. United States officers and employees engage in the same full range of private activities as other persons. There is no reason to bring the United States into routine private tort actions, domestic disputes, contract disagreements, or the like. The term chosen, "occurring in connection with the performance of duties on behalf of the United States," has no clear pedigree. It was chosen for that reason. The two alternatives presented to the Advisory Committee each resonate to more familiar phrases. One looked to acts "arising out of the course of the United States office or employment," language in part made familiar by workers' compensation systems. The other looked to acts "performed in the scope of the office or employment," a frequently used phrase that appears, among other places, in the Federal Employees Liability Reform and Compensation Act of 1988, 28 U.S.C. § 2679(b)(1). A third alternative, not formally drafted but discussed by the Advisory Committee, would refer to "color of office or employment." It was feared that adoption of any of these phrases would risk encumbering the new rule with unintended complications arising from long use for different purposes. What is needed is a common-sense approach, and new language seems best adapted to that purpose.

The other change in Rule 4(i) amends paragraph (3) to ensure that a claim is not defeated by failure to recognize the need to serve the United States in an action framed only against an individual defendant. New subparagraph (3)(B) provides that a reasonable time to serve the United States must be allowed if the individual officer or employee has been served and new subparagraph (2)(B) requires service on the United States. The current provision of paragraph (3) also would be modified slightly. New subparagraph 3(A) carries forward the essence of present paragraph (3), but makes it clear that a reasonable opportunity must be afforded to serve a United states agency, corporation,

or officer sued in an official capacity if the United States has been served, not only if — as the present rule clearly covers — there are "multiple" agencies (or the like) to be served, but also if there is only one agency (or the like) to be served.

Rule 12(a)(3) would be amended by adding a new subparagraph (B). A 60-day answer period is allowed in an action against 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. This period is allowed whether or not the United States decides to provide representation or to substitute the United States as defendant. The additional time is required to determine whether to do these things, even if it is decided not to do them.

Rules Amendments Proposed for Adoption Without Publication

Civil Rule 6(b)

A conforming amendment of Rule 6(b) is required to reflect the 1997 abrogation of Rule 74(a), one of the former rules that regulated appeals under the abandoned procedure that allowed parties to consent to appeal to the district court from the final judgment of a magistrate judge. The change is simple and technical. The reference to Rule 74(a) should be stricken from the catalogue of time periods that cannot be extended by the district court:

> * * * 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), ~~and 74(a),~~ except to the extent and under the conditions stated in them.

This change is a "technical or conforming amendment" that, under Paragraph 4(d) of the Procedures for the Conduct of Business, need not be published for comment. The Advisory Committee recommends that it be transmitted to the Judicial Conference at a suitable time.

Rule 4. Summons

* * * * *

(i) Servingee Upon the United States, and iIts Agencies, Corporations, or Officers.

* * * * *

(2) (A) Service ~~upon~~ on an ~~officer,~~ agency~~,~~ or corporation of the United States, or an officer of the United States sued in an official capacity, ~~shall be~~ is effected by serving the United States in the manner prescribed by paragraph (1) of this subdivision and by also sending a copy of the summons and ~~of the~~ complaint by registered or certified mail to the officer, 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 is effected by serving the United States in the manner prescribed by paragraph (1) of this subdivision and by serving the officer or employee in the manner prescribed by subdivisions (e), (f), or (g).

(3) The court shall allow a reasonable time ~~for~~ to serve~~ice of~~ process under this subdivision for the purpose of curing the failure to serve:

(A) all persons required to be served in an action governed by subparagraph 2(A), ~~multiple officers, agencies, or corporations of the~~

~~United States~~ if the plaintiff has ~~effected service on~~ served either the United States attorney or the Attorney General of the United States,or

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

Committee Note

Paragraph (2) is added to Rule 4(i) to require service on the United States when a United States officer or employee is sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States. Decided cases provide uncertain guidance on the question whether the United States must be served in such actions. See *Vaccaro v. Dobre*, 81 F.3d 854, 856-857 (9th Cir., 1996); *Armstrong v. Sears*, 33 F.3d 182, 185-187 (2d Cir.1994); *Ecclesiastical Order of the Ism of Am v. Chasin*, 845 F.2d 113, 116 (6th Cir.1988); *Light v. Wolf*, 816 F.2d 746 (D.C.Cir., 1987); see also *Simpkins v. District of Columbia*, 108 F.3d 366, 368-369 (D.C.Cir.1997). Service on the United States will help to protect the interest of the individual defendant in securing representation by the United States, and will expedite the process of determining whether the United States will provide representation. It has been understood that the individual defendant must be served as an individual defendant, a requirement that is made explicit. Invocation of the individual service provisions of subdivisions (e), (f), and (g) invokes also the waiver-of-service provisions of subdivision (d).

Subparagraph 2(B) reaches service when an officer or employee of the United States is sued in an individual capacity "for acts or omissions occurring in connection with the performance of duties on behalf of the United States." This phrase has been chosen as a functional phrase that can be applied without the occasionally distracting associations of such phrases as "scope of employment," "color of office," or "arising out of the employment." Many actions are brought against individual federal officers or employees of the United States for acts or omissions that have no connection whatever

to their governmental roles. There is no reason to require service on the United States in these actions. The connection to federal employment that requires service on the United States must be determined as a practical matter, considering whether the individual defendant has reasonable grounds to look to the United States for assistance and whether the United States has reasonable grounds for demanding formal notice of the action.

An action against a former officer or employee of the United States is covered by subparaph (2)(B) in the same way as an action against a present officer or employee. Termination of the relationship between the individual defendant and the United States does not reduce the need to serve the United States.

Paragraph (3) is amended to ensure that failure to serve the United States in an action governed by subparagraph 2(B) does not defeat an action. This protection is adopted because there will be cases in which the plaintiff reasonably fails to appreciate the need to serve the United States. There is no requirement, however, that the plaintiff show that the failure to serve the United States was reasonable. A reasonable time to effect service on the United States must be allowed after the failure is pointed out. An additional change ensures that if the United States or United States Attorney is served in an action governed by subparagraph 2(A), additional time is to be allowed even though no officer, agency, or corporation of the United States was served.

Rule 12. Defenses and Objections — When and How Presented — By Pleading or Motion — Motion for Judgment on the Pleadings

(a) When Presented.

* * * * *

(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 ~~to a~~ cross-claim~~,~~ — or a reply to a counterclaim~~,~~ — within 60 days after ~~the service upon~~ the United States attorney is served with ~~of~~ the pleading ~~in which~~ asserting the claim ~~is asserted~~.

(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 ~~to a~~ cross-claim~~,~~ — or a reply to a counterclaim~~,~~ — within 60 days after ~~the later of~~ service on the officer or employee, or service on the United States Attorney, whichever is later.

Committee Note

Rule 12(a)(3)(B) is added to complement the addition of Rule 4(i)(2)(B). The purposes that underlie the requirement that service be made on the United States in an action that asserts individual liability of a United States officer or employee for acts occurring in connection with the performance of duties on behalf of the United States also require that the time to answer be extended to 60 days. Time is needed for the United States to determine whether to provide representation to the defendant officer or employee. If the United States provides representation, the need for an extended answer period is the same as in actions against the United States, a United States agency, or a United States officer sued in an official capacity.

An action against a former officer or employee of the United States is covered by subparaph (2)(B) in the same way as an action against a present officer or employee. Termination of the relationship between the individual defendant and the United States does not reduce the need for additional time to answer.

Form 2

Form 2, paragraph (a), describes an allegation of diversity jurisdiction. It must be adjusted to conform to the statutory increase in the required amount in controversy. Rather than court the risk of continued revisions as the statutory amount may be changed in the future, the Advisory Committee recommends adoption of a dynamic conformity to the statute:

> The matter in controversy exceeds, exclusive of interest and costs, the sum specified by 28 U.S.C. § 1332 ~~fifty thousand dollars~~.

This change also is a technical or conforming amendment that, under paragraph 4(d) of the Procedures for the Conduct of Business, need not be published for comment. The change, to be sure, is not as purely technical as an amendment to substitute $75,000 for $50,000. It does reflect a conclusion that the form need not, for the guidance of the singularly uninformed, attempt to state the amount required by the current diversity statute. Virtually all lawyers should become aware of statutory changes before it is possible to adjust the form. This conclusion, however, does not seem the sort of policy judgment that should require publication and delay of yet another year in adjusting the form to the current statute. The Advisory Committee recommends that the change be transmitted to the Judicial Conference at a suitable time.

The Advisory Committee renewed the question whether it should be possible to amend the Forms without going through the full Enabling Act process. In 1993 and 1994 the Committee considered a proposal to amend Rule 84(a) by adding a new final sentence: "The Judicial Conference of the United States may authorize additional forms and may revise or delete forms." At the April, 1994 meeting the Advisory Committee concluded that this proposal would exceed the limits of Enabling Act authority. It also was concluded that it would be desirable to recommend legislation establishing Judicial Conference authority to revise the Forms. It is not clear that there is anything more to be done on this subject.

III INFORMATION ITEMS

Federal Rules of Attorney Conduct

The Advisory committee reached consensus on several points raised by Professor Coquillette's report on the draft Federal Rules of Attorney Conduct.

Any federal rule or rules should be adopted in a form that is independent of any of the existing sets of rules. It does not make sense to incorporate rules of attorney conduct separately in each of several existing sets of rules. If special rules are adopted for bankruptcy proceedings, these rules should be incorporated in the body of general rules. Bankruptcy matters often move between the district court and a bankruptcy judge, making it desirable to have a single set of rules. And it emphasizes the continuity and force of the rules to adapt to the needs of bankruptcy by making special provisions — whether or not framed as exceptions — in a single body of rules.

The Advisory Committee is not ready to offer advice on the question whether to adopt a core of federal rules to provide uniform answers to the questions of attorney conduct that most frequently come before federal courts. There are persuasive arguments in favor of relying entirely on dynamic conformity to local state law. The arguments in favor of uniform federal principles also are powerful. The contending interests are important.

The issues raised by Model Rule 4.2 and the draft FRAC 10 are difficult. The Advisory Committee is not yet ready to offer advice on these issues.

The Advisory Committee believes it can best participate in further deliberation of these matters by designating members to an ad hoc committee constituted by appointment of members from the interested committees.

E-Mail Comments on Rules Proposals

The Advisory Committee considered the recommendation of the Standing Committee on Technology that e-mail comments on published rules proposals be accepted by the Administrative Office for a two-year experimental period. The recommendation was approved according to its terms.

Uniform Effective Date for Local Rules

The Advisory Committee began consideration of a proposal to establish a uniform effective date for local rules. The first draft of a revised Rule 83(a)(1) read: "A local rule takes effect on ~~the date specified by the district court~~ January 1 of the year following

adoption unless the district court specifies an earlier date to meet a[n emergency] {special} need, and remains in effect * * *." Only preliminary consideration was given to this proposal. The Committee believes that other local rules topics also deserve study. Among other possibilities, the enforceability of a local rule could be expressly conditioned on compliance with the present requirements for numbering, publication, and filing with the judicial council and Administrative Office. The Committee was advised that the uniform effective date issue need not be resolved at this meeting in order to keep in step with other advisory committees.

Enabling Act Time Chart

Congress deliberately adopted a protracted process for adopting Enabling Act rules. Time and again, the advantages of repeated committee considerations and public testimony and comment have revealed the general wisdom of this approach. The delay is often frustrating, however, in a variety of settings. Even when purely technical or conforming amendments are adopted without a period for public comment, an anomalous rule may remain in seeming effect for an embarrassing period. Urgent needs for rule activity may arise from new legislation or other events. And at times the greater speed of congressional processes provides a temptation to bypass the Enabling Act in favor of legislation that does not enjoy the Enabling Act benefits of careful consideration by many different interested and expert participants. The Advisory Committee plans to consider these matters at its fall meeting, including a review of the relevant suggestions in the Long Range Planning Subcommittee's *Self-Study of Federal Judicial Rulemaking*.

Rule 51

The Ninth Circuit Judicial Council has recommended that Rule 51 be amended to legitimate local rules that require submission of proposed jury instructions before trial begins. Preliminary review of the recommendation suggests that if indeed it is desirable to allow a district court to require pretrial submission, Rule 51 should be amended to authorize this procedure on a nationally uniform basis. There is no apparent reason to leave this issue to resolution by local rule. A proposal has been published to amend Criminal Rule 30 to allow instruction requests "at the close of the evidence, or at any earlier time that the court reasonably directs." It seems too late to catch up to the Criminal Rules schedule. More important, if Rule 51 is to be amended, thought should be given to the possibility of other changes. If pretrial submission is directed, for example, it may be useful to provide guidance on the standards for allowing later requests to conform to trial evidence. This and related Rule 51 topics will be

on the fall agenda.

Working Group on Mass Torts

The continuing study of class actions and Rule 23 has included many proposals addressed to mass-tort litigation; the Rule 23 study, indeed, was prompted in part by the recommendations of the ad hoc committee on asbestos litigation. These proposals often suggested the need for coordinated development of Enabling Act rules and legislation. The Advisory Committee became persuaded that it would be useful to establish a group to review the possibilities of such action. The Chief Justice has authorized appointment of a Mass Torts Working Group that is to study mass tort litigation and report within one year. Judge Scirica is chair of the group, which includes two additional members of the Civil Rules Advisory Committee, liaison members from the Judicial Conference Committees on Bankruptcy Administration, Court Administration and Case Management, Federal-State Jurisdiction, and Magistrate Judges, and a liaison member from the Judicial Panel on Multidistrict Litigation. Professor Francis E. McGovern is a consultant. The Working Group will seek to develop two papers. The first will describe mass-tort litigation, and seek to identify any problems that deserve legislative and rulemaking attention. The second will identify the legislative and rulemaking approaches that might be taken to reduce these problems. The Working Group has planned two meetings with small groups of highly experienced judges, lawyers, and academics. It will work toward recommendations over the summer. The Advisory Committee will seek to set its fall meeting at a time that supports review of as advanced a draft Working Group report as can be managed.

Copyright Rules of Practice

The questions raised by the obsolete Copyright Rules of Practice have been on the Advisory Committee agenda for some time. Advice has been sought from intellectual property law groups, and the Committee believes that it has a good grasp of the issues. Drafts have been prepared to abrogate the Copyright Rules, add a new provision to apply Rule 65 procedure to Copyright impoundment proceedings, and amend Rule 81. These changes would confirm the actual practice reflected in published district-court opinions. Action on these drafts has been postponed to the fall meeting, however, because members of Congress are concerned that any change in copyright enforcement procedures might be misunderstood in the international community. These concerns may be mollified by fall.

Rule 44

The Evidence Rules Committee suggested that Civil Rule 44

should be reviewed because it overlaps many different Evidence Rules. Correspondence between the committee reporters led to the conclusions that Rule 44 may retain some independent meaning, that it would be difficult to ensure that no unintended changes would flow from rescinding Rule 44, and that the current situation has not caused any apparent difficulties. Acting in anticipation of a parallel recommendation to the Evidence Rules Committee, the Civil Rules Committee concluded that there is no need to reconsider Rule 44 so long as the Evidence Rules Committee reaches the same conclusion.

42 U.S.C. § 1997e(g)

The Prison Litigation Reform Act of 1995 amended the Civil Rights of Institutionalized Persons Act by adding a provision that allows any defendant sued by a prisoner under federal law to "waive the right to reply." The rule provides that the waiver does not admit the complaint's allegations, "[n]otwithstanding any other law or rule of procedure." The purpose of waiver is established by the final sentence of 42 U.S.C. § 1997e(g)(1): "No relief shall be granted to the plaintiff unless a reply has been filed." The court may order a reply on finding "that the plaintiff has a reasonable opportunity to prevail on the merits." The Advisory Committee will study the question whether this provision should be reflected by amending Civil Rules 8(d) and 12(a) to say that an answer need not be filed when a statute provides otherwise.