COMMITTEE ON RULES
OF
PRACTICE AND PROCEDURE

San Francisco, CA
January 13-14, 2005
Volume II

AGENDA
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
JANUARY 13-14, 2005

1. Opening Remarks of the Chair

   A. Report on the September 2004 Judicial Conference session
   B. Transmission of Judicial Conference-approved proposed rules amendments to the Supreme Court
   C. Expedited consideration of proposed rules amendments authorizing a court to require electronic filing

2. **ACTION** – Approving Minutes of June 2004 Committee Meeting

3. Report of the Administrative Office

   A. Legislative Report
   B. Administrative Report

4. Report of the Federal Judicial Center

5. Report of the Appellate Rules Committee

6. Report of the Bankruptcy Rules Committee

   A. **ACTION** – Approving and transmitting to the Judicial Conference a proposed technical amendment to Rule 7007.1 without publication
   B. **ACTION** – Approving publishing for public comment proposed amendments to Rules 1014 and 3007
   C. Minutes and other informational items

7. Report of the Civil Rules Committee

   A. **ACTION** – Approving and transmitting to the Judicial Conference proposed new Rule 5.1 and conforming amendments to Rule 24(c)
   B. **ACTION** – Approving publishing for public comment proposed restyled Rule 23 and Rules 64 to 86
   C. **ACTION** – Approving publication of noncontroversial style-substance amendments to Rules 64 to 86
   D. **ACTION** – Approving proposed amendments resolving "global issues"
   E. **ACTION** – Approving publication of restyled Rules 1- 86, as revised, for public comment beginning in February 2005 and ending December 31, 2005
   F. Minutes and other informational items

8. Report of the Criminal Rules Committee

9. Report of the Evidence Rules Committee

10. Request to Recommit Proposed Amendments to Criminal Rule 29 to Advisory Committee on Criminal Rules for Further Consideration

11. Report of the Technology Subcommittee

12. Long-Range Planning Report

13. Panel Discussion of Transnational Simplified Rules

14. Next Meeting: June 16-17, 2005, in Boston, Massachusetts

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

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

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

Date: **December 17, 2004**

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

Introduction

The Civil Rules Advisory Committee met in Santa Fe, New Mexico, on October 28 and 29, 2004. Draft Minutes of the meeting are attached.

Part I of this report presents action items. Part I A recommends transmission for approval of new Civil Rule 5.1 and conforming amendments to Civil Rule 24(c). These proposals were published for comment in August 2003. They were discussed and revised at the April and October 2004 meetings. The Committee believes that the revisions do not require republication.

Part I B recommends publication in February 2005 of a complete Style package of Civil Rules 1 through 86. The Standing Committee previously approved the publication of Rules 1 through 63; Rules 64 through 86 are presented now. The February 2005 publication of the entire package will permit a comment period of roughly eleven months for the bench, bar, and academy to evaluate this large set of materials. Closing the comment period in January 2006 provides sufficient time for the Committee and the Standing Committee Style Subcommittee to analyze the comments in preparation for the June 2006 Standing Committee meeting. At the June 2004 meeting, the Civil Rules Committee expects to recommend publication of corresponding style amendments to the forms.

Part I B includes a recommendation for simultaneous publication of a small parallel set of "Style-Substance" amendments. These amendments are very modest and seem noncontroversial. They are put on a separate track only because they do seem to change meaning, making them inappropriate for the pure style package. Finally, a memorandum by Professor Kimble explains the protocols and conventions used in the Style Project to improve consistency and clarity. Such a memorandum will accompany the publication of the Style package and will be a helpful guide to the decisions and choices reflected in the amendments.

Part I C describes the Committee's recommendation to publish a Civil Rule 5(e) amendment that would authorize local rules that require electronic filing. This recommendation has been approved by the Standing Committee, along with similar changes in other the Appellate and Bankruptcy Rules. Publication occurred in November 2004.

Part II of this report presents information items. Progress on a rule to implement the E-Government Act of 2002 is described. Other matters reported include the conclusion of the Federal Judicial Center's study of filed and sealed settlement agreements and the Committee's recommendation following that study; development of a Federal Judicial Center study to bring up to date earlier studies of Civil Rule 11; and matters being considered for future work.

I Action Items

A. Rules for Adoption: New Civil Rule 5.1 — Notice of Constitutional Question; Conforming Rule 24 Changes

The Advisory Committee recommends approval for adoption of new Civil Rule 5.1, and a conforming amendment of Civil Rule 24(c), as follow on the next pages:

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE*

Rule 5.1. Constitutional Challenge to a Statute — Notice, Certification, and Intervention

1 **(a) Notice by a Party.** A party that files a pleading, written
2 motion, or other paper drawing into question the
3 constitutionality of a federal or state statute must promptly:
4 **(1)** file a notice of constitutional question stating the
5 question and identifying the paper that raises it, if:
6 **(A)** a federal statute is questioned and neither the
7 United States nor any of its agencies, officers, or
8 employees is a party in an official capacity, or
9 **(B)** a state statute is questioned and neither the state
10 nor any of its agencies, officers, or employees is a
11 party in an official capacity; and
12 **(2)** serve the notice and paper on the Attorney General of
13 the United States if a federal statute is challenged — or on
14 the state attorney general if a state statute is challenged —
15 either by certified or registered mail or by sending it to an

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

16 electronic address designated by the attorney general for
17 this purpose.

18 **(b) Certification by the Court.** The court must, under 28
19 U.S.C. § 2403, certify to the Attorney General of the United
20 States that there is a constitutional challenge to a federal
21 statute, or certify to the state attorney general that there is a
22 constitutional challenge to a state statute.

23 **(c) Intervention; Final Decision on the Merits.** Unless the
24 court sets a later time, the attorney general may intervene
25 within 60 days after the notice of constitutional question is
26 filed or after the court certifies the challenge, whichever is
27 earlier. Before the time to intervene expires, the court may
28 reject the constitutional challenge, but may not enter a final
29 judgment holding the statute unconstitutional.

30 **(d) No Forfeiture.** A party's failure to file and serve the
31 notice, or the court's failure to certify, does not forfeit a
32 constitutional claim or defense that is otherwise timely
33 asserted.

Committee Note

Rule 5.1 implements 28 U.S.C. § 2403, replacing the final three sentences of Rule 24(c). New Rule 5.1 requires a party that files a

pleading, written motion, or other paper drawing in question the constitutionality of a federal or state statute to file a notice of constitutional question and serve it on the United States Attorney General or state attorney general. The party must promptly file and serve the notice of constitutional question. This notice requirement supplements the court's duty to certify a constitutional challenge to the United States Attorney General or state attorney general. The notice of constitutional question will ensure that the attorney general is notified of constitutional challenges and has an opportunity to exercise the statutory right to intervene at the earliest possible point in the litigation. The court's certification obligation remains, and is the only notice when the constitutionality of a federal or state statute is drawn in question by means other than a party's pleading, written motion, or other paper.

Moving the notice and certification provisions from Rule 24(c) to a new rule is designed to attract the parties' attention to these provisions by locating them in the vicinity of the rules that require notice by service and pleading.

Rule 5.1 goes beyond the requirements of § 2403 and the former Rule 24(c) provisions by requiring notice and certification of a constitutional challenge to any federal or state statute, not only those "affecting the public interest." It is better to assure, through notice, that the attorney general is able to determine whether to seek intervention on the ground that the act or statute affects a public interest. Rule 5.1 refers to a "federal statute," rather than the § 2403 reference to an "Act of Congress," to maintain consistency in the Civil Rules vocabulary. In Rule 5.1 "statute" means any congressional enactment that would qualify as an "Act of Congress."

Unless the court sets a later time, the 60-day period for intervention runs from the time a party files a notice of constitutional question or from the time the court certifies a constitutional challenge, whichever is earlier. Rule 5.1(a) directs that a party promptly serve the notice of constitutional question. The court may extend the 60-period on its own or on motion. One occasion for extension may arise if the court certifies a challenge under § 2403 after a party files a notice of constitutional question. Pretrial activities may continue without interruption during the intervention

period, and the court retains authority to grant interlocutory relief. The court may reject a constitutional challenge to a statute at any time. But the court may not enter a final judgment holding a statute unconstitutional before the attorney general has responded or the intervention period has expired without response. This rule does not displace any of the statutory or rule procedures that permit dismissal of all or part of an action — including a constitutional challenge — at any time, even before service of process.

Rule 24(c)

The provisions of Rule 24(c) that now address the questions covered by new Rule 5.1 should be deleted if Rule 5.1 is approved for adoption:

1 **(c) Procedure.** A person desiring to intervene shall serve a
2 motion to intervene upon the parties as provided in Rule 5.
3 The motion shall state the grounds therefor and shall be
4 accompanied by a pleading setting forth the claim or defense
5 for which intervention is sought. The same procedure shall be
6 followed when a statute of the United States gives a right to
7 intervene. ~~When the constitutionality of an Act of Congress~~
8 ~~affecting the public interest is drawn in question in any action~~
9 ~~in which the United States or an officer, agency, or employee~~
10 ~~thereof is not a party, the court shall notify the Attorney~~
11 ~~General of the United States as provided in Title 28, U.S.C.,~~
12 ~~§ 2403. When the constitutionality of any statute of a State~~
13 ~~affecting the public interest is drawn in question in any action~~

14 ~~in which that State or any agency, officer, or employee thereof~~
15 ~~is not a party, the court shall notify the attorney general of the~~
16 ~~State as provided in Title 28, U.S.C. § 2403. A party~~
17 ~~challenging the constitutionality of legislation should call the~~
18 ~~attention of the court to its consequential duty, but failure to~~
19 ~~do so is not a waiver of any constitutional right otherwise~~
20 ~~timely asserted.~~

Rules 5.1 and 24(c) as published

Rule 24(c) was published in the form recommended.

This recommendation modifies the version of Rule 5.1 that was published for comment. The changes are shown by overstriking and underlining:

Rule 5.1. Constitutional Challenge to a Statute — Notice, ~~and~~ Certification, and Intervention

1 **(a)** ***Notice by a Party.*** A party that files a pleading, written
2 motion, or other paper ~~that~~ drawing~~s~~ into question the
3 constitutionality of a~~n Act of Congress~~ federal or ~~a~~ state
4 statute must promptly:
5 **(1)** ~~if the question addresses an Act of Congress and no~~
6 ~~party is the United States, a United States agency, or an~~

7 ~~officer or employee of the United States sued in an~~
8 ~~official capacity:~~
9 ~~(A)~~ file a ~~N~~notice of ~~C~~constitutional ~~Q~~question~~,~~
10 stating the question and identifying the ~~pleading,~~
11 ~~written motion, or other~~ paper that raises it, if: ~~the~~
12 ~~question, and~~
13 ~~(B) serve the Notice and the pleading, written motion,~~
14 ~~or other paper that raises the question on the Attorney~~
15 ~~General of the United States in the manner provided~~
16 ~~by Rule 4(i)(1)(B);~~
17 **(A)** a federal statute is questioned and neither the
18 United States nor any of its agencies, officers, or
19 employees is a party in an official capacity, or
20 **(B)** a state statute is questioned and neither the state
21 nor any of its agencies, officers, or employees is a
22 party in an official capacity; and
23 **(2)** ~~if the question addresses a state statute and no party is~~
24 ~~the state or a state officer, agency, or employee sued~~
25 ~~in an official capacity:~~

26 ~~(A) file a Notice of Constitutional Question, stating~~
27 ~~the question and identifying the pleading, written~~
28 ~~motion, or other paper that raises the question, and~~
29 ~~(B)~~ serve the ~~N~~notice and ~~the pleading, written~~
30 ~~motion, or other paper that raises the question~~ paper
31 on the ~~State~~ Attorney General of the United States if
32 a federal statute is challenged — or on the state
33 attorney general if a state statute is challenged —
34 either by certified or registered mail or by sending it
35 to an electronic address designated by the attorney
36 general for this purpose.

37 **(b)** ***Certification by the Court.*** ~~When the constitutionality of~~
38 ~~an Act of Congress or a state statute is drawn in question t~~The
39 court must, under 28 U.S.C. § 2403, certify ~~that fact~~ to the
40 Attorney General of the United States that there is a
41 constitutional challenge to a federal statute, or certify to the
42 ~~S~~state ~~A~~attorney ~~G~~general that there is a constitutional
43 challenge to a state statute ~~under 28 U.S.C. § 2403~~.

44 **(c)** ***Intervention; Final Decision on the Merits.*** ~~The court~~
45 ~~must set a time not less than 60 days from the Rule 5.1(b)~~

46 ~~certification for intervention by~~ Unless the court sets a later
47 time, the ~~A~~attorney ~~G~~general ~~or State Attorney General~~ may
48 intervene within 60 days after the notice of constitutional
49 question is filed or after the court certifies the challenge,
50 whichever is earlier. Before the time to intervene expires, the
51 court may reject the constitutional challenge, but may not
52 enter a final judgment holding the statute unconstitutional.
53 **(d)** ***No forfeiture.*** A party's failure to file and serve the ~~a Rule~~
54 ~~5.1(a)~~ notice, or ~~a~~ the court's failure to certify, ~~make a Rule~~
55 ~~5.1(b) certification,~~ does not forfeit a constitutional ~~right~~
claim or defense that is otherwise timely asserted.

Committee Note

Rule 5.1 implements 28 U.S.C. § 2403, replacing the final three sentences of Rule 24(c). New Rule 5.1 requires a party ~~who~~ that files a pleading, written motion, or other paper ~~that~~ drawing~~s~~ in question the constitutionality of a~~n Act of Congress~~ federal or state statute to file a ~~N~~notice of ~~C~~constitutional question ~~Challenge~~ and serve it on the United States Attorney General or ~~S~~state ~~A~~attorney ~~G~~general. The party ~~notice~~ must ~~be~~ promptly file~~d~~ and serve~~d~~ the notice of constitutional question. This notice requirement supplements the court's duty to certify a constitutional challenge to the United States Attorney General or ~~S~~state ~~A~~attorney ~~G~~general. The notice of constitutional question will ensure that the ~~A~~attorney ~~G~~general is notified of constitutional challenges and has an opportunity to exercise the statutory right to intervene at the earliest possible point in the litigation. The court's certification obligation remains, and is the only notice when the constitutionality of a~~n Act of Congress~~

federal or state statute is drawn in question by means other than a party's pleading, written motion, or other paper.

Moving the notice and certification provisions from Rule 24(c) to a new rule is designed to attract the parties' attention to these provisions by locating them in the vicinity of the rules that require notice by service and pleading.

Rule 5.1 goes beyond the requirements of § 2403 and the former Rule 24(c) provisions by requiring notice and certification of a constitutional challenge to any ~~Act of Congress~~ federal or state statute, not only those "affecting the public interest." It is better to assure, through notice, that the ~~A~~attorney ~~G~~general is able to determine whether to seek intervention on the ground that the act or statute affects a public interest. Rule 5.1 refers to a "federal statute," rather than the § 2403 reference to an "Act of Congress," to maintain consistency in the Civil Rules vocabulary. In Rule 5.1 "statute" means any congressional enactment that would qualify as an "Act of Congress."

Unless the court sets a later time, ~~T~~the 60-day period for intervention ~~mirrors the time to answer set by Rule 12(a)(3)(A)~~ runs from the time a party files a notice of constitutional question or from the time the court certifies a constitutional challenge, whichever is earlier. Rule 5.1(a) directs that a party promptly serve the notice of constitutional question. The court may extend the 60-day period on its own or on motion. One occasion for extension may arise if the court certifies a challenge under § 2403 after a party files a notice of constitutional question. Pretrial activities may continue without interruption during th~~is~~e intervention period, and the court retains authority to grant ~~any appropriate~~ interlocutory relief. The court may~~,~~ ~~on the other hand,~~ reject a constitutional challenge to a statute at any time.[**] But ~~to make this period effective,~~ the court ~~should~~ may not enter a final judgment holding a statute ~~invalid~~ unconstitutional before the ~~A~~attorney ~~G~~general has responded or the intervention period has expired without response. This rule does not displace any

[**] This sentence has been relocated by putting it before, not after, the next sentence.

of the statutory or rule procedures that permit dismissal of all or part of an action — including a constitutional challenge — at any time, even before service of process.

Changes Made After Publication and Comment

Rule 5.1 as proposed for adoption incorporates several changes from the published draft. The changes were made in response to public comments and Advisory Committee discussion.

The Advisory Committee debated at length the question whether the party who files a notice of constitutional question should be required to serve the notice on the appropriate attorney general. The service requirement was retained, but the time for intervention was set to run from the earlier of the notice filing or the court's certification. The definition of the time to intervene was changed in tandem with this change. The published rule directed the court to set an intervention time not less than 60 days from the court's certification. This was changed to set a 60-day period in the rule "[u]nless the court sets a later time." The Committee Note points out that the court may extend the 60-day period on its own or on motion, and recognizes that an occasion for extension may arise if the 60-day period begins with the filing of the notice of constitutional question.

The method of serving the notice of constitutional question set by the published rule called for serving the United States Attorney General under Civil Rule 4, and for serving a state attorney general by certified or registered mail. This proposal has been changed to provide service in all cases either by certified or registered mail or by sending the Notice to an electronic address designated by the attorney general for this purpose.

The rule proposed for adoption brings into subdivision (c) matters that were stated in the published Committee Note but not in the rule text. The court may reject a constitutional challenge at any time, but may not enter a final judgment holding a statute unconstitutional before the time set to intervene expires.

The published rule would have required notice and certification when an officer of the United States or a state brings suit in an official capacity. There is no need for notice in such circumstances. The words "is sued" were deleted to correct this oversight.

Several style changes were made at the Style Subcommittee's suggestion. One change that straddles the line between substance and style appears in Rule 5.1(d). The published version adopted the language of present Rule 24(c): failure to comply with the Notice or certification requirements does not forfeit a constitutional "right." This expression is changed to "claim or defense" from concern that reference to a "right" may invite confusion of the no-forfeiture provision with the merits of the claim or defense that is not forfeited.

Discussion

The impetus for adopting a new rule to implement the certification requirements of 28 U.S.C. § 2403 has been described in earlier reports. The Attorney General — and several state attorneys general — report that they experience imperfect implementation of the court's duty to certify a constitutional challenge to a statute. Present Rule 24(c) is intended to remind the parties and court of § 2403, but location of this provision in the rule governing intervention means that it is likely to be consulted only when someone is seeking to intervene. Relocation to a position at the beginning of the rules may better draw attention to the statute and its implementation.

Beyond relocation, several changes from present Rule 24(c) may improve the implementation of § 2403. Some of the changes are drawn from the model of Appellate Rule 44. The change most likely to make a difference is the creation of a dual-notice requirement. A party who files a notice of constitutional question must serve the notice on the Attorney General, while § 2403 itself continues to require that the court certify the question. The party's service will often occur well before the court even becomes aware of the question. Many states have similar dual-notice requirements, which seem to work well.

Rule 5.1 was published for comment in August 2003, along with conforming changes in Rule 24(c). The public comments and

renewed discussion at the April Advisory Committee meeting raised questions that were discussed further at the October 2004 Advisory Committee meeting. Changes were made to reflect the discussion and the rule proposed for adoption was approved by e-mail Committee ballot.

The list of changes from the published draft may seem long, but the Advisory Committee believes that the revised Rule 5.1 can be recommended for adoption without republication. There was a point in the April meeting when republication was recommended because the Committee had decided to eliminate the published requirement that the party filing a Notice of Constitutional Question serve the notice on the Attorney General. Restoration of the service requirement eliminates the basis for the recommendation. Most of the remaining changes clearly do not warrant republication — they involve style improvements, or bring into the text of the rule matters that were included in the published Committee Note. The only new issue that could not have been anticipated in the original comment period is the decision to run intervention time from the earlier of notice filing or certification. That change does not seem to warrant republication, particularly in light of the provision that allows the court to set a later time. Department of Justice representatives have worked closely with the Advisory Committee and are satisfied not only with the recommended rule but also with the notice and intervention-time changes made from the published draft.

Summary of Comments: August 2003 Rule 5.1

03-CV-005, Hon. Geraldine Mund: As to style, it is better to say "A party who" rather than "A party that." This rule should be incorporated in the Bankruptcy Rules "as we receive constitutional challenges to both state and federal statutes and there is no requirement here that notice be given in a bankruptcy case."

03-CV-008, State Bar of California Committee on Federal Courts: (1) Creating a new Rule 5.1 "seems likely to highlight the notice requirement in a way the current rules fail to do." The Committee supports this. (2) Rather than set a minimum 60-day period for intervention, the period should be set in the district court's discretion. Action is likely to be frozen for the 60 days, and that can thwart

timely relief. Rule 24 requires timely intervention; that suffices. There is no indication that state or federal governments have suffered for lack of an explicit time period for intervention. The analogy to the 60-day answer period in Rule 12(b)(3)(A) is not persuasive; the statutory challenge may arise later in the litigation, and for that matter some statutes require the government to answer in less than 60 days. (3) Literally, Rule 5.1 may require multiple notices; a party should be required to file only one notice in a single case.

03-CV-005, State Bar of Michigan Committee on Federal Courts: (1) Delete "sued" from both (a)(1) and (a)(2): "and no party is the United States, a United States agency, or an officer or employee of the United States ~~sued~~ in an official capacity." Notice should not be required if an officer or employee of the United States is a plaintiff in an official capacity. Appellate Rule 44 reads: "in which the United States or its agency, officer, or employee is not a party in an official capacity." (2) There is no reason to require the party to give notice; notice from the court clerk, required by statute, suffices. (3) But if the rule does provide that the party give notice, (a)(2)(B) should specify the method of serving notice on the State Attorney General: "serve * * * the State Attorney General by sending copies by registered or certified mail."

03-CV-010, Bill Lockyer, Attorney General of California: Supports the proposal. "It is this office's experience that the clerk's-notice requirements of current Rule 24(c) often go unsatisfied. As a result, we are frequently ignorant of pending litigation in district court that involves the constitutionality of a state statute. Proposed Rule 5.1 increases the likelihood that an Attorney General will be notified of such litigation * * *." And it is good to reach all statutes, not only those that affect the public interest.

03-CV-011, Peter D. Keisler, Assistant Attorney General, Civil Division, U. S. Department of Justice: Expresses the Department of Justice's "strong support of the final proposal." (1) Despite § 2403 and Civil Rule 24(c), "there have been many instances in which the Attorney General has not been provided with notice of constitutional challenges or has received informal notice at a late stage of a proceeding." Requiring notice by a party in addition to the court certification "will ensure that the Attorney General is made aware of

constitutional challenges in a timely manner." The incremental burden on the parties is slight — Rule 24(c) now requires the party to call the court's attention to the duty to certify. (2) The 60-day intervention period recognizes "the Department's internal administrative procedures that must be followed upon receipt of a notice." But the Committee Note should state that Rule 5.1 does not itself restrict the Attorney General's opportunity to intervene more than 60 days after the Rule 5.1(b) certification, and that the rule does not limit the opportunity to intervene after final judgment if a party or the court fails to comply with the duty to give notice or certify. (3) After considering other possible methods of serving the party's notice, the Department has concluded that service in the manner provided by Civil Rule 4(i)(1)(B) "will best ensure timely and proper processing of notices." (4) The differences between Civil Rule 5.1 and Appellate Rule 44 are justified. It is important that the government have an opportunity to be present "as a party in district court, where the factual record is made and constitutional arguments are developed." In addition, notice "under Appellate Rule 44 functions more smoothly given the nature of the appeals process and the centralized circuit court structure." (This comment also expresses approval of several other features of proposed Rule 5.1 that have not drawn adverse comment by other participants.)

03-CV-013, Federal Magistrate Judges Assn., by Hon. Louisa S Porter: Supports Rule 5.1, and specifically mentions (1) moving this out from Rule 24(c); (2) placing the burden of notification on the party that brings constitutionality into question; (3) addressing the "interface with" the § 2403 certification requirement; and (4) establishing a 60-day intervention period.
Ken Salazar, Attorney General of Colorado, October 20, 2004: Under the present rule, "I am not confident that the notices of challenges are sent consistently to my office. By placing the obligation for notice on the party challenging the statute in addition to the court, the new rule will result in a greater likelihood that the attorneys general will receive notification of challenge to the constitutionality of a state statute in a prompt manner." This obligation "will not be new to Colorado practitioners." Colorado state practice imposes a similar obligation. Placing the new requirement in a separate rule is a good idea; present Rule 24(c) "can easily be overlooked." And it is wise to expand the notice requirement by deleting the § 2403 limit that requires certification only if the statute affects the public interest; it is better that the attorney general determine whether to seek intervention on the ground that the public interest is affected.

Patrick C. Lynch, Attorney General of Rhode Island, October 20, 2004: "I write to strongly support the adoption of Proposed Federal Rule of Civil Procedure 5.1." The requirement that a party file a Notice of Constitutional Challenge and serve it on the Attorney General "will ensure that proper and timely notice is given to the State Attorney General of constitutional challenges."

28 U.S.C.A. § 2403

§ 2403. Intervention by United States or a State; constitutional question

(a) In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The United States shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

(b) In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

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

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

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class. **(4)** When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.	**(3)** ***Judgment.*** Whether or not favorable to the class, the judgment in a class action must: **(A)** for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and **(B)** for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members. **(4)** ***Particular Issues.*** When appropriate, an action may be maintained as a class action with respect to particular issues. **(5)** ***Subclasses.*** When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(d) Conducting the Class Action.

(1) ***In General.*** In a class action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require — to protect class members and fairly conduct the action — giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to inform the court whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) ***Combining and Amending Orders.*** An order under Rule 23(d)(1) may be altered or amended as desirable and may be combined with an order under Rule 16.

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

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

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

COMMITTEE NOTE

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

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

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

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

COMMITTEE NOTE

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

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

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

In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character, and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if the party does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.	**(3)** ***Expediting the Preliminary-Injunction Hearing.*** If the order is issued without notice, the motion for a preliminary injunction must be set for hearing at the earliest possible time, taking precedence over all other matters except hearings on older matters of the same character. At the hearing, the party who obtained the order must proceed with the motion; if the party does not, the court must dissolve the order. **(4)** ***Motion to Dissolve.*** On 2 days' notice to the party who obtained the order without notice — or on shorter notice set by the court — the adverse party may appear and move to dissolve or modify the order. The court must then hear and decide the motion as promptly as justice requires.
(c) Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof. The provisions of Rule 65.1 apply to a surety upon a bond or undertaking under this rule.	**(c) Security.** If the court issues a preliminary injunction or a temporary restraining order, the court must require the movant to give security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. The United States, its officers, and its agencies are not required to give security.

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

COMMITTEE NOTE

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

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

COMMITTEE NOTE

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

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

COMMITTEE NOTE

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

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

COMMITTEE NOTE

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

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

COMMITTEE NOTE

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

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

COMMITTEE NOTE

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

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

COMMITTEE NOTE

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

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

COMMITTEE NOTE

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

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

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

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

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

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

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

(k) Condemnation Under a State's Power of Eminent Domain. The practice as herein prescribed governs in actions involving the exercise of the power of eminent domain under the law of a state, provided that if the state law makes provision for trial of any issue by jury, or for trial of the issue of compensation by jury or commission or both, that provision shall be followed.	**(k) Condemnation Under a State's Power of Eminent Domain.** This rule governs an action involving eminent domain under state law. But if state law provides for trying an issue by jury — or for trying the issue of compensation by jury or commission or both — that law governs.
(l) Costs. Costs are not subject to Rule 54(d).	**(l) Costs.** Costs are not subject to Rule 54(d).

COMMITTEE NOTE

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

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

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

COMMITTEE NOTE

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

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

COMMITTEE NOTE

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

Rule 74. [Abrogated.]	Rule 74.

COMMITTEE NOTE

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

Rule 75. [Abrogated.]	Rule 75.

COMMITTEE NOTE

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

Rule 76. [Abrogated.]	Rule 76.

COMMITTEE NOTE

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

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

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

COMMITTEE NOTE

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

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

COMMITTEE NOTE

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

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

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

COMMITTEE NOTE

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

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

COMMITTEE NOTE

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

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

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

(3) In proceedings under Title 9, U S.C , relating to arbitration, or under the Act of May 20, 1926, ch. 347, § 9 (44 Stat. 585), U.S.C., Title 45, § 159, relating to boards of arbitration of railway labor disputes, these rules apply only to the extent that matters of procedure are not provided for in those statutes. These rules apply to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings.

(4) These rules do not alter the method prescribed by the Act of February 18, 1922, ch. 57, § 2 (42 Stat. 388), U.S.C., Title 7, § 292; or by the Act of June 10, 1930, ch. 436, § 7 (46 Stat. 534), as amended, U.S.C., Title 7, § 499g(c), for instituting proceedings in the United States district courts to review orders of the Secretary of Agriculture; or prescribed by the Act of June 25, 1934, ch. 742, § 2 (48 Stat. 1214), U.S.C., Title 15, § 522, for instituting proceedings to review orders of the Secretary of the Interior; or prescribed by the Act of February 22, 1935, ch. 18, § 5 (49 Stat. 31), U.S.C., Title 15, § 715d(c), as extended, for instituting proceedings to review orders of petroleum control boards; but the conduct of such proceedings in the district courts shall be made to conform to these rules as far as applicable.

(5) ***Proceedings Involving a Subpoena.*** These rules apply to proceedings to compel testimony or the production of documents through a subpoena issued by a United States officer or agency under a federal statute, except as otherwise provided by statute, by local rule, or by court order in the proceedings.

(6) ***Other Proceedings.*** These rules, to the extent applicable, govern proceedings under the following laws, except as these laws provide other procedures.

(A) 7 U.S.C. §§ 292, 499g(c), for reviewing an order of the Secretary of Agriculture;

(B) 9 U S.C., relating to arbitration;

(C) 15 U.S.C. § 522, for reviewing an order of the Secretary of the Interior;

(D) 15 U.S.C. § 715d(c), for reviewing an order denying a certificate of clearance;

(E) 29 U.S.C. §§ 159, 160, for enforcing an order of the National Labor Relations Board;

(F) 33 U.S.C. §§ 918, 921, for enforcing or reviewing a compensation order under the Longshore and Harbor Workers' Compensation Act; and

(G) 45 U.S.C. § 159, for reviewing an arbitration award in a railway-labor dispute.

(5) These rules do not alter the practice in the United States district courts prescribed in the Act of July 5, 1935, ch. 372, §§ 9 and 10 (49 Stat. 453), as amended, U.S.C., Title 29, §§ 159 and 160, for beginning and conducting proceedings to enforce orders of the National Labor Relations Board; and in respects not covered by those statutes, the practice in the district courts shall conform to these rules so far as applicable.

(6) These rules apply to proceedings for enforcement or review of compensation orders under the Longshoremen's and Harbor Workers' Compensation Act, Act of March 4, 1927, c. 509, §§ 18, 21 (44 Stat. 1434, 1436), as amended, U.S.C., Title 33, §§ 918, 921, except to the extent that matters of procedure are provided for in that Act. The provisions for service by publication and for answer in proceedings to cancel certificates of citizenship under the Act of June 27, 1952, ch 477, Title III, c. 2, § 340 (66 Stat. 260), U.S.C., Title 8, § 1451, remain in effect.

(7) **[Abrogated.]**

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

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

COMMITTEE NOTE

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

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

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

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

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

COMMITTEE NOTE

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

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

COMMITTEE NOTE

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

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

COMMITTEE NOTE

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

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

COMMITTEE NOTE

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

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

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

COMMITTEE NOTE

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

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

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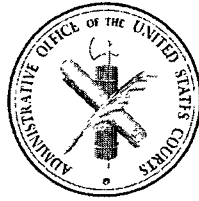

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December 20, 2004

MEMORANDUM TO STANDING COMMITTEE

Subject: *Noncontroversial Style-Substance Amendments to Civil Rules 64 to 86*

Attached are "style-substance" amendments to Civil Rules 71A (redesignated as Rule 71.1) and 78, which were approved by the Civil Rules Committee at its October 2004 meeting. The Civil Rules Committee recommends that the Standing Committee approve publishing the proposed amendments in February 2005, along with the other "style-substance" amendments earlier approved by the Standing Committee for publication.

John K. Rabiej

Attachment

Additions to Style-Substance Track, July 2004

Three Style-Substance Track suggestions emerged from the July meetings of Subcommittees A and B. Two of them go with present Rule 71A(d). They are shown here both with the Style Rules and with the present rules. The present rules would be used for publication; the style versions will be substituted if the Style Rules are adopted as anticipated.

Present Rule 71A(d)(2)

(2) Same; Form. Each notice shall state the court, the title of the action, the name of the defendant to whom it is directed, that the action is to condemn property, a description of the defendant's property sufficient for its identification, the interest to be taken, the authority for the taking, the uses for which the property is to be taken, that the defendant may serve upon the plaintiff's attorney an answer within 20 days after service of the notice, ~~and~~ that the failure so to serve an answer constitutes a consent to the taking and to the authority of the court to proceed to hear the action and to fix the compensation, and that a defendant who does not serve an answer may file a notice of appearance. The notice shall conclude with the name, telephone number, and electronic-mail address of the plaintiff's attorney, and an address within the district in which the action is brought where the attorney may be served. The notice need contain a description of no other property than that to be taken from the defendants to whom it is directed.

Committee Note

Rule 71A(e) allows a defendant to appear without answering. Form 28 includes information about this right in the Rule 71A(d)(2) notice. It is useful to confirm this practice in the rule.

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

Style Rule 71.1(d)(2)(A)(vii), (B)

Rule 71.1. Condemning Real or Personal Property

* * * * *

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

2 **(A)** *Main Contents.* Each notice must name the court, the title

3 of the action, and the defendant to whom it is directed. It must

4 describe the property sufficiently to identify it, but need not describe

5 any property other than that to be taken from the named defendant.

6 The notice must also state:

7 **(i)** that the action is to condemn property;

8 **(ii)** the interest to be taken;

9 **(iii)** the authority for the taking;

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

11 **(v)** that the defendant may serve an answer on the

12 plaintiff's attorney within 20 days after service of the

13 notice; ~~and~~

14 **(vi)** that the failure to so serve an answer constitutes

15 consent to the taking and to the court's authority to

16 proceed with the action and fix the compensation;

17 and

18 (vii) that a defendant who does not serve an

19 answer may file a notice of appearance.

20 **(B)** *Conclusion.* The notice must conclude with the

21 name, telephone number, and electronic-mail address of

22 the plaintiff's attorney, and an address within the district

23 in which the action is brought where the attorney may be

24 served.

25 * * * * *

Committee Note

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

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

Present Rule 78

Rule 78. Motion Day

Unless local conditions make it impracticable, each district court shall establish regular times and places, at intervals sufficiently frequent for the prompt dispatch of business, at which motions

requiring notice and hearing may be heard and disposed of~~; but the judge at any time or place and on such notice, if any, as the judge considers reasonable may make orders for the advancement, conduct, and hearing of actions~~.

* * * * *

Committee Note

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

Style Rule 78

Rule 78. Hearing Motions; Advancing an Action

1 **(a) Providing a Regular Schedule for Oral Hearings~~; Other~~**

2 **~~Orders~~.** A district court may establish regular times and places for

3 oral hearings on motions. ~~But at any time or place, on notice that the~~

4 ~~judge considers reasonable, the judge may make an order to advance,~~

5 ~~conduct, and hear an action.~~

6 * * * * *

Committee Note

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

7D

TO BE DISTRIBUTED IN A LATER MAILING

7E

B. STYLE RULES 1-86 RECOMMENDED FOR PUBLICATION

In 1991, the Standing Committee embarked on the Style Project to promote uniformity among the different sets of rules and to simplify and clarify them. This ambitious project began with the Rules of Appellate Procedure, which published its proposed restyling amendments in 1996; those amendments became effective in 1998. The Rules of Criminal Procedure published proposed restyled amendments in 2000; those became effective in 2002. The successful completion of the restyled Rules of Criminal and Appellate Procedure demonstrated the benefits of the project. The restyled rules are simply easier to understand and use.

The Style Project was begun by Judge Robert E. Keeton, then the chair of the Standing Committee. Judge Keeton established a Subcommittee on Style, which was first chaired by one of the country's premier experts on procedure, Professor Charles Alan Wright. Professor Wright asked Bryan A. Garner, a leading legal-writing scholar, to assist the subcommittee. Bryan Garner prepared drafting guidelines to serve as a common set of style preferences; those guidelines have been published as the Guidelines for Drafting and Editing Court Rules. The Standing and Civil Rules Committees recognized that restyling the Civil Rules presented significant challenges. The number and complexity of the Civil Rules, and the fact that they have been amended with some frequency and inconsistency since their adoption in the 1930s, led the Committees to schedule this project after the Appellate and Criminal Rules had been successfully restyled. The Civil Rules Style Project benefitted enormously from the lessons learned during the two preceding projects.

The Advisory Committee on Federal Rules of Civil Procedure has completed its style revision of the Civil Rules in accordance with the uniform drafting guidelines and recommends that they be published for the extended comment period. The Standing Committee has previously approved Rules 1 to 63 for publication in February 2005, for a public comment period of approximately eleven months. Rules 64 to 83 are presented with a recommendation that they be approved for publication with the previously-approved rules. In addition, the Civil Rules Committee recommends for approval for publication of a final set of minor "style/substance" amendments, making modest and uncontroversial changes that make enough of a substantive meaning change to warrant publication on a separate, but parallel, track. The Civil Rules Committee also recommends publication of a memorandum setting out the protocols and conventions used throughout the style process and explaining the reasons for many of the decisions and changes. Such a memorandum will accompany the publication of the Civil Rules package and will facilitate public comment. The public comment period is expected to end in January 2006, which will allow the Civil Rules Committee to study the resulting comments and make a recommendation to the Standing Committee at its June 2006 meeting. If the timetable proceeds on the customary schedule, the restyled rules would become effective December 1, 2007.

The Civil Rules Committee is indebted to many for the effort and work represented in this final piece of the package. They of course include the Standing Committee Style Subcommittee, Judge Garvin Murtha, Judge Tom Thrash, and Dean Mary Kay Kane, the Civil Rules Committee Reporter, Professor Edward Cooper; the special reporters who served as consultants for this project, Professor Richard Marcus and Professor Thomas Rowe; and Joseph F. Spaniol, Jr., who has served as a consultant to this project since 1991. One person deserves special recognition. Professor Joseph Kimble has been indispensable. His patience, dedication, and discipline are reflected in every word and line. We are all beneficiaries.

STYLE 631

Proposed Amendments to the Federal Rules of Civil Procedure

Restyled Rules 1–15

December 17, 2004

I. SCOPE OF RULES — ONE FORM OF ACTION Rule 1. Scope and Purpose of Rules	TITLE I. SCOPE OF RULES; FORM OF ACTION Rule 1. Scope and Purpose
These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.	These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.

COMMITTEE NOTE

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

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

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

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

COMMITTEE NOTE

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

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

COMMITTEE NOTE

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

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

(d) Waiver of Service; Duty to Save Costs of Service; Request to Waive.

(1) A defendant who waives service of a summons does not thereby waive any objection to the venue or to the jurisdiction of the court over the person of the defendant.

(2) An individual, corporation, or association that is subject to service under subdivision (e), (f), or (h) and that receives notice of an action in the manner provided in this paragraph has a duty to avoid unnecessary costs of serving the summons. To avoid costs, the plaintiff may notify such a defendant of the commencement of the action and request that the defendant waive service of a summons. The notice and request

(A) shall be in writing and shall be addressed directly to the defendant, if an individual, or else to an officer or managing or general agent (or other agent authorized by appointment or law to receive service of process) of a defendant subject to service under subdivision (h);

(B) shall be dispatched through first-class mail or other reliable means;

(C) shall be accompanied by a copy of the complaint and shall identify the court in which it has been filed;

(D) shall inform the defendant, by means of a text prescribed in an official form promulgated pursuant to Rule 84, of the consequences of compliance and of a failure to comply with the request;

(E) shall set forth the date on which the request is sent;

(F) shall allow the defendant a reasonable time to return the waiver, which shall be at least 30 days from the date on which the request is sent, or 60 days from that date if the defendant is addressed outside any judicial district of the United States; and

(G) shall provide the defendant with an extra copy of the notice and request, as well as a prepaid means of compliance in writing.

If a defendant located within the United States fails to comply with a request for waiver made by a plaintiff located within the United States, the court shall impose the costs subsequently incurred in effecting service on the defendant unless good cause for the failure be shown

(d) Waiving Service.

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

(A) be in writing and be addressed:

(i) to the individual defendant; or

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

(B) name the court where the complaint has been filed;

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

(D) inform the defendant, using text prescribed in Official Form 1A, of the consequences of waiving and not waiving service;

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

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

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

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

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

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

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

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

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(h) Service Upon Corporations and Associations. Unless otherwise provided by federal law, service upon a domestic or foreign corporation or upon a partnership or other unincorporated association that is subject to suit under a common name, and from which a waiver of service has not been obtained and filed, shall be effected:

(1) in a judicial district of the United States in the manner prescribed for individuals by subdivision (e)(1), or by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant, or

(2) in a place not within any judicial district of the United States in any manner prescribed for individuals by subdivision (f) except personal delivery as provided in paragraph (2)(C)(i) thereof.

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(h) Serving a Corporation, Partnership, or Association. Unless federal law provides otherwise or the defendant's waiver has been filed, a domestic or foreign corporation, or a partnership or other unincorporated association that is subject to suit under a common name, must be served:

(1) in a judicial district of the United States:

(A) in the manner prescribed by Rule 4(e)(1) for serving an individual; or

(B) by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process and — if the agent is one authorized by statute and the statute so requires — by also mailing a copy of each to the defendant; or

(2) at a place not within any judicial district of the United States, in any manner prescribed by Rule 4(f) for serving an individual, except personal delivery under Rule 4(f)(2)(C)(i).

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

(1) Service upon the United States shall be effected

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

COMMITTEE NOTE

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

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

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

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

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

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

COMMITTEE NOTE

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

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

(b) Making Service.

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

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

(A) Delivering a copy to the person served by:

(i) handing it to the person;

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

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

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

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

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

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

(b) Service: How Made.

(1) ***Serving an Attorney.*** If a party is represented by an attorney, service under this rule must be made on the attorney unless the court orders service on the party.

(2) ***Service in General.*** A paper is served under this rule by:

(A) handing it to the person;

(B) leaving it:

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

(ii) if the person has no office or the office is closed, at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there;

(C) mailing it to the person's last known address — in which event service is complete upon mailing;

(D) leaving it with the court clerk if the person's address is unknown;

(E) sending it by electronic means if the person consented in writing — in which event service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served; or

(F) delivering it by any other means that the person consented to in writing — in which event service is complete when the person making service delivers it to the agency designated to make delivery.

(3) ***Using Court Facilities.*** If a local rule so authorizes, a party may use the court's transmission facilities to make service under Rule 5(b)(2)(E).

(c) Same: Numerous Defendants. In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(c) Serving Numerous Defendants.

(1) ***In General.*** If an action involves an unusually large number of defendants, the court may, on motion or on its own, order that:

(A) defendants' pleadings and replies to them need not be served on other defendants;

(B) any crossclaim, counterclaim, avoidance, or affirmative defense in those pleadings and replies to them will be treated as denied or avoided by all other parties; and

(C) filing any such pleading and serving it on the plaintiff constitutes notice of the pleading to all parties.

(2) ***Notifying Parties.*** A copy of every such order must be served on the parties as the court directs.

(d) Filing; Certificate of Service. All papers after the complaint required to be served upon a party, together with a certificate of service, must be filed with the court within a reasonable time after service, but disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: (i) depositions, (ii) interrogatories, (iii) requests for documents or to permit entry upon land, and (iv) requests for admission.

(e) Filing With the Court Defined. The filing of papers with the court as required by these rules shall be made by filing them with the clerk of court, except that the judge may permit the papers to be filed with the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. A court may by local rule permit papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules. The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices.

(d) Filing.

(1) ***Required Filings; Certificate of Service.*** Any paper after the complaint that is required to be served — together with a certificate of service — must be filed within a reasonable time after service. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: depositions, interrogatories, requests for documents or to permit entry onto land, and requests for admission.

(2) ***How Filing Is Made — In General.*** A paper is filed by delivering it:

(A) to the clerk; or

(B) to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk.

(3) ***Electronic Filing, Signing, or Verification.*** A court may, by local rule, allow papers to be filed, signed, or verified by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. A paper filed by electronic means in compliance with a local rule is a written paper for purposes of these rules.

(4) ***Acceptance by the Clerk.*** The clerk must not refuse to file a paper solely because it is not in the form prescribed by these rules or by a local rule or practice.

COMMITTEE NOTE

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

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

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

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

Rule 6. Time	Rule 6. Computing and Extending Time
(a) Computation. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk of the district court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule and in Rule 77(c), "legal holiday" includes New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the district court is held.	**(a) Computing Time.** The following rules apply in computing any time period specified in these rules or in any local rule, court order, or statute: **(1)** ***Day of the Event Excluded.*** Exclude the day of the act, event, or default that begins the period. **(2)** ***Exclusions from Brief Periods.*** Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days. **(3)** ***Last Day.*** Include the last day of the period unless it is a Saturday, Sunday, legal holiday, or — if the act to be done is filing a paper in court — a day on which weather or other conditions make the clerk's office inaccessible. When the last day is excluded, the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible. **(4)** ***"Legal Holiday" Defined.*** As used in these rules, "legal holiday" means: **(A)** the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day; and **(B)** any other day declared a holiday by the President, Congress, or the state where the district court is located.
(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), and 60(b), except to the extent and under the conditions stated in them.	**(b) Extending Time.** **(1)** ***In General.*** When an act may or must be done within a specified time, the court may, for good cause, extend the time: **(A)** with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or **(B)** on motion made after the time has expired if the party failed to act because of excusable neglect. **(2)** ***Exceptions.*** A court must not extend the time to act under Rules 50(b) and (c)(2), 52(b), 59(b), (d), and (e), and 60(b), except as those rules allow.

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

COMMITTEE NOTE

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

1. A proposed amendment of present Rule 6(e) is pending before the Supreme Court. If it is adopted, the Style Rule 6(d) will conclude: "Three days are added after the time would otherwise expire under Rule 6(a)."

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

COMMITTEE NOTE

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

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

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

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

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

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

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

COMMITTEE NOTE

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

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

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

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

COMMITTEE NOTE

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

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

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

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

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

(h) Admiralty and Maritime Claims. A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims. If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not. The amendment of a pleading to add or withdraw an identifying statement is governed by the principles of Rule 15. A case that includes an admiralty or maritime claim within this subdivision is an admiralty case within 28 U.S.C. § 1292(a)(3).	**(h) Admiralty or Maritime Claim.** **(1)** ***How Designated.*** If a claim for relief is within the admiralty or maritime jurisdiction and also within the court's subject-matter jurisdiction on some other ground, the pleading may designate the claim as an admiralty or maritime claim for purposes of Rules 14(c), 38(e), and 82 and the Supplemental Rules for Certain Admiralty and Maritime Claims. A claim cognizable only in the admiralty or maritime jurisdiction is an admiralty or maritime claim for those purposes, whether or not so designated. **(2)** ***Amending a Designation.*** Rule 15 governs amending a pleading to add or withdraw a designation. **(3)** ***Designation for Appeal.*** A case that includes an admiralty or maritime claim within this subdivision (h) is an admiralty case within 28 U.S.C. § 1292(a)(3).

COMMITTEE NOTE

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

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

COMMITTEE NOTE

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

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

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

(1) How Initiated.

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

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

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

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

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

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

(c) Sanctions.

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

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

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

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

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

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

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

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

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

COMMITTEE NOTE

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

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

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(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

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(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;

(2) lack of personal jurisdiction;

(3) improper venue;

(4) insufficient process;

(5) insufficient service of process;

(6) failure to state a claim upon which relief can be granted; and

(7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

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(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

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(c) Motion for Judgment on the Pleadings. After the pleadings are closed — but early enough not to delay trial — a party may move for judgment on the pleadings.

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(d) Result of Presenting Matters Outside the Pleadings. If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

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(d) Preliminary Hearings. The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.	[*Rule 12(d) has become restyled Rule 12(i).*]
(e) Motion for More Definite Statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.	**(e) Motion for a More Definite Statement.** A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 10 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other order that it considers appropriate.
(f) Motion to Strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.	**(f) Motion to Strike.** The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act on its own or on motion made by a party either before responding to the pleading or, if a response is not allowed, within 20 days after being served with the pleading.
(g) Consolidation of Defenses in Motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.	**(g) Consolidating Defenses in a Motion.** **(1)** ***Consolidating Defenses.*** A motion under this rule may be joined with any other motion allowed by this rule. **(2)** ***Limitation on Further Motions.*** Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

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

COMMITTEE NOTE

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

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

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

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

COMMITTEE NOTE

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

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

Rule 14. Third–Party Practice

(a) When Defendant May Bring in Third Party. At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff. The third-party plaintiff need not obtain leave to make the service if the third-party plaintiff files the third-party complaint not later than 10 days after serving the original answer. Otherwise the third-party plaintiff must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make any defenses to the third-party plaintiff's claim as provided in Rule 12 and any counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert any defenses as provided in Rule 12 and any counterclaims and cross-claims as provided in Rule 13. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to the third-party defendant for all or part of the claim made in the action against the third-party defendant. The third-party complaint, if within the admiralty and maritime jurisdiction, may be in rem against a vessel, cargo, or other property subject to admiralty or maritime process in rem, in which case references in this rule to the summons include the warrant of arrest, and references to the third-party plaintiff or defendant include, where appropriate, a person who asserts a right under Supplemental Rule C(6)(b)(i) in the property arrested.

Rule 14. Third-Party Practice

(a) When a Defending Party May Bring in a Third Party.

(1) ***Timing of the Summons and Complaint.*** A defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it. But the third-party plaintiff must, by motion, obtain the court's leave if it files the third-party complaint more than 10 days after serving its original answer.

(2) ***Third-Party Defendant's Claims and Defenses.*** The person served with the summons and third-party complaint — the "third-party defendant":

(A) must assert any defense against the third-party plaintiff's claim under Rule 12;

(B) must assert any counterclaim against the third-party plaintiff under Rule 13(a), and may assert any counterclaim against the third-party plaintiff under Rule 13(b) or any crossclaim against another third-party defendant under Rule 13(g);

(C) may assert against the plaintiff any defense that the third-party plaintiff has to the plaintiff's claim; and

(D) may also assert against the plaintiff any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff.

(3) ***Plaintiff's Claims Against a Third-Party Defendant.*** The plaintiff may assert against the third-party defendant any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The third-party defendant must then assert any defense under Rule 12 and any counterclaim under Rule 13(a), and may assert any counterclaim under Rule 13(b) or any crossclaim under Rule 13(g).

(4) ***Motion to Strike, Sever, or Try Separately.*** Any party may move to strike the third-party claim, to sever it, or to try it separately.

(5) ***Third-Party Defendant's Claim Against a Nonparty.*** A third-party defendant may proceed under this rule against a nonparty who is or may be liable to the third-party defendant for all or part of any claim against it.

(6) ***Third-Party Complaint in Rem.*** If it is within the admiralty or maritime jurisdiction, a third-party complaint may be in rem. In that event, a reference in this rule to the "summons" includes the warrant of arrest, and a reference to the defendant or third-party plaintiff includes, when appropriate, a person who asserts a right under Supplemental Rule C(6)(b)(i) in the property arrested.

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

COMMITTEE NOTE

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

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

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

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

COMMITTEE NOTE

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

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

STYLE 632

Proposed Amendments to the Federal Rules of Civil Procedure

Restyled Rules 16–25

December 17, 2004

Rule 16. Pretrial Conferences; Scheduling; Management	Rule 16. Pretrial Conferences; Scheduling; Management
(a) Pretrial Conferences; Objectives. In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as **(1)** expediting the disposition of the action; **(2)** establishing early and continuing control so that the case will not be protracted because of lack of management; **(3)** discouraging wasteful pretrial activities; **(4)** improving the quality of the trial through more thorough preparation, and; **(5)** facilitating the settlement of the case.	**(a) Purposes of a Pretrial Conference.** In any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as: **(1)** expediting disposition of the action; **(2)** establishing early and continuing control so that the case will not be protracted because of lack of management; **(3)** discouraging wasteful pretrial activities; **(4)** improving the quality of the trial through more thorough preparation; and **(5)** facilitating settlement.

(b) Scheduling and Planning. Except in categories of actions exempted by district court rule as inappropriate, the district judge, or a magistrate judge when authorized by district court rule, shall, after receiving the report from the parties under Rule 26(f) or after consulting with the attorneys for the parties and any unrepresented parties by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time **(1)** to join other parties and to amend the pleadings; **(2)** to file motions; and **(3)** to complete discovery. The scheduling order may also include **(4)** modifications of the times for disclosures under Rules 26(a) and 26(e)(1) and of the extent of discovery to be permitted; **(5)** the date or dates for conferences before trial, a final pretrial conference, and trial; and **(6)** any other matters appropriate in the circumstances of the case. The order shall issue as soon as practicable but in any event within 90 days after the appearance of a defendant and within 120 days after the complaint has been served on a defendant. A schedule shall not be modified except upon a showing of good cause and by leave of the district judge or, when authorized by local rule, by a magistrate judge.	**(b) Scheduling.** **(1)** ***Scheduling Order.*** Except in categories of actions exempted by local rule, the district judge — or a magistrate judge when authorized by local rule — must issue a scheduling order: **(A)** after receiving the parties' report under Rule 26(f); or **(B)** after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference or by telephone, mail, or other means. **(2)** ***Time to Issue.*** The judge must issue the scheduling order as soon as practicable, but in any event within 120 days after any defendant has been served with the complaint and within 90 days after any defendant has appeared. **(3)** ***Contents of the Order.*** **(A)** *Required Contents.* The scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions. **(B)** *Permitted Contents.* The scheduling order may: **(i)** modify the timing of disclosures under Rules 26(a) and 26(e)(1); **(ii)** modify the extent of discovery; **(iii)** set dates for pretrial conferences and for trial; and **(iv)** include other appropriate matters. **(4)** ***Modifying a Schedule.*** A schedule may be modified only for good cause and with the judge's consent.

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

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

(d) Final Pretrial Conference. Any final pretrial conference shall be held as close to the time of trial as reasonable under the circumstances. The participants at any such conference shall formulate a plan for trial, including a program for facilitating the admission of evidence. The conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties.	**(d) Pretrial Orders.** After any conference under this rule, the court should issue an order reciting the action taken. This order controls the course of the action unless the court modifies it.
(e) Pretrial Orders. After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.	**(e) Final Pretrial Conference and Orders.** The court may hold a final pretrial conference to formulate a trial plan, including a plan to facilitate the admission of evidence. The conference must be held as close to the start of trial as is reasonable, and must be attended by at least one attorney who will conduct the trial for each party and by any unrepresented party. The court may modify an order issued after a final pretrial conference only to prevent manifest injustice.

(f) Sanctions. If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.	**(f) Sanctions.** **(1)** ***In General.*** On motion or on its own, the court may issue any just orders, including those authorized by Rule 37(b)(2)(B), (C), and (D), if a party or its attorney: **(A)** fails to appear at a scheduling or other pretrial conference; **(B)** is substantially unprepared to participate — or does not participate in good faith — in the conference; or **(C)** fails to obey a scheduling or other pretrial order. **(2)** ***Imposing Fees and Costs.*** Instead of or in addition to any other sanction, the court must order the party, its attorney, or both to pay the reasonable expenses — including attorney's fees — incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust.

COMMITTEE NOTE

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

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

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

COMMITTEE NOTE

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

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

COMMITTEE NOTE

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

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

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

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

COMMITTEE NOTE

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

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

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

COMMITTEE NOTE

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

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

COMMITTEE NOTE

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

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

COMMITTEE NOTE

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

RESTYLED RULE 23
IS LOCATED BEHIND TAB 7 (B)

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

COMMITTEE NOTE

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

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

COMMITTEE NOTE

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

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

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

COMMITTEE NOTE

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

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

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

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

COMMITTEE NOTE

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

STYLE 633

Proposed Amendments to the Federal Rules of Civil Procedure

Restyled Rules 26–37

December 17, 2004

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

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

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

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

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

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

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

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) that the disclosure or discovery not be had;

(2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters;

(c) Protective Orders.

(1) ***In General.*** A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending — or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery;

(B) specifying terms, including time and place, for the disclosure or discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(5) that discovery be conducted with no one present except persons designated by the court;

(6) that a deposition, after being sealed, be opened only by order of the court;

(7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or other person provide or permit discovery The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(E) requiring the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

(2) ***Ordering Discovery.*** If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.

(3) ***Awarding Expenses.*** Rule 37(a)(5) applies to the award of expenses.

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

(f) Conference of Parties; Planning for Discovery. Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E) or when otherwise ordered, the parties must, as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), confer to consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by Rule 26(a)(1), and to develop a proposed discovery plan that indicates the parties' views and proposals concerning:

(1) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement as to when disclosures under Rule 26(a)(1) were made or will be made;

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

(3) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(4) any other orders that should be entered by the court under Rule 26(c) or under Rule 16(b) and (c).

The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. A court may order that the parties or attorneys attend the conference in person. If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule (i) require that the conference between the parties occur fewer than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b), and (ii) require that the written report outlining the discovery plan be filed fewer than 14 days after the conference between the parties, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

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

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

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

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

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

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

(C) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

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

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

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

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

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

[1] This change was made to achieve consistency between Rules 26(g)(1) and 11(b)(2).

COMMITTEE NOTE

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

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

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

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

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

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

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

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

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<tr><th>Rule 27. Depositions before Action or Pending Appeal</th><th>Rule 27. Depositions to Perpetuate Testimony</th></tr>
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(a) Before Action.

(1) Petition. A person who desires to perpetuate testimony regarding any matter that may be cognizable in any court of the United States may file a verified petition in the United States district court in the district of the residence of any expected adverse party. The petition shall be entitled in the name of the petitioner and shall show: 1, that the petitioner expects to be a party to an action cognizable in a court of the United States but is presently unable to bring it or cause it to be brought, 2, the subject matter of the expected action and the petitioner's interest therein, 3, the facts which the petitioner desires to establish by the proposed testimony and the reasons for desiring to perpetuate it, 4, the names or a description of the persons the petitioner expects will be adverse parties and their addresses so far as known, and 5, the names and addresses of the persons to be examined and the substance of the testimony which the petitioner expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

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(a) Before an Action Is Filed.

(1) ***Petition.*** A person who wants to perpetuate testimony about any matter cognizable in a United States court may file a verified petition in the district court for the district where any expected adverse party resides. The petition must ask for an order authorizing the petitioner to depose the named persons in order to perpetuate their testimony. The petition must be titled in the petitioner's name and must show:

(A) that the petitioner expects to be a party to an action cognizable in a United States court but cannot presently bring it or cause it to be brought;

(B) the subject matter of the expected action and the petitioner's interest;

(C) the facts that the petitioner wants to establish by the proposed testimony and the reasons to perpetuate it;

(D) the names or a description of the persons whom the petitioner expects to be adverse parties and their addresses, so far as known; and

(E) the name, address, and expected substance of the testimony of each deponent.

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

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

COMMITTEE NOTE

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

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Rule 28. Persons Before Whom Depositions May Be Taken

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(a) Within the United States. Within the United States or within a territory or insular possession subject to the jurisdiction of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, or before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony. The term officer as used in Rules 30, 31 and 32 includes a person appointed by the court or designated by the parties under Rule 29.

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(a) Within the United States.

(1) ***In General.*** Within the United States or a territory or insular possession subject to United States jurisdiction, a deposition must be taken before:

(A) an officer authorized to administer oaths either by federal law or by the law in the place of examination; or

(B) a person appointed by the court where the action is pending to administer oaths and take testimony.

(2) ***Definition of "Officer."*** The term "officer" in Rules 30, 31, and 32 includes a person appointed by the court under this rule or designated by the parties under Rule 29(a).

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(b) In Foreign Countries. Depositions may be taken in a foreign country (1) pursuant to any applicable treaty or convention, or (2) pursuant to a letter of request (whether or not captioned a letter rogatory), or (3) on notice before a person authorized to administer oaths in the place where the examination is held, either by the law thereof or by the law of the United States, or (4) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of the commission to administer any necessary oath and take testimony. A commission or a letter of request shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter of request that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter of request may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter of request may be addressed "To the Appropriate Authority in [here name the country]." When a letter of request or any other device is used pursuant to any applicable treaty or convention, it shall be captioned in the form prescribed by that treaty or convention. Evidence obtained in response to a letter of request need not be excluded merely because it is not a verbatim transcript, because the testimony was not taken under oath, or because of any similar departure from the requirements for depositions taken within the United States under these rules.

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(b) In a Foreign Country.

(1) ***In General.*** A deposition may be taken in a foreign country:

(A) under an applicable treaty or convention;

(B) under a letter of request, whether or not captioned a "letter rogatory";

(C) on notice, before a person authorized to administer oaths either by federal law or by the law in the place of examination; or

(D) before a person commissioned by the court to administer any necessary oath and take testimony.

(2) ***Issuing a Letter of Request or a Commission.*** A letter of request, a commission, or both may be issued:

(A) on appropriate terms after an application and notice of it; and

(B) without a showing that taking the deposition in another manner is impracticable or inconvenient.

(3) ***Form of a Request, Notice, or Commission.*** When a letter of request or any other device is used according to a treaty or convention, it must be captioned in the form prescribed by that treaty or convention. A letter of request may be addressed "To the Appropriate Authority in [name of country]." A deposition notice or a commission must designate by name or descriptive title the person before whom the deposition is to be taken.

(4) ***Letter of Request — Admitting Evidence.*** Evidence obtained in response to a letter of request need not be excluded merely because it is not a verbatim transcript, because the testimony was not taken under oath, or because of any similar departure from the requirements for depositions taken within the United States.

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

COMMITTEE NOTE

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

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

COMMITTEE NOTE

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

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

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

(6) A party may in the party's notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules **(7)** The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone or other remote electronic means For the purposes of this rule and Rules 28(a), 37(a)(1), and 37(b)(1), a deposition taken by such means is taken in the district and at the place where the deponent is to answer questions.	**(6)** ***Notice or Subpoena Directed to an Organization.*** In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, or a governmental agency and may describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

(c) Examination and Cross-Examination; Record of Examination; Oath; Objections. Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Federal Rules of Evidence except Rules 103 and 615. The officer before whom the deposition is to be taken shall put the witness on oath or affirmation and shall personally, or by someone acting under the officer's direction and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other method authorized by subdivision (b)(2) of this rule. All objections made at the time of the examination to the qualifications of the officer taking the deposition, to the manner of taking it, to the evidence presented, to the conduct of any party, or to any other aspect of the proceedings shall be noted by the officer upon the record of the deposition; but the examination shall proceed, with the testimony being taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and the party taking the deposition shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

(c) Examination and Cross-Examination; Record of the Examination; Objections; Written Questions.

(1) ***Examination and Cross-Examination.*** The examination and cross-examination of a deponent proceed as they would at trial under the Federal Rules of Evidence, except Rules 103 and 615. After putting the deponent under oath or affirmation, the officer must record the testimony by the method designated under Rule 30(b)(3)(A). The testimony must be recorded by the officer personally or by a person acting in the presence and under the direction of the officer.

(2) ***Objections.*** An objection at the time of the examination -- whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition -- must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3).

(3) ***Participating Through Written Questions.*** Instead of participating in the oral examination, a party may serve written questions in a sealed envelope on the party noticing the deposition, who must deliver them to the officer. The officer must ask the deponent those questions and record the answers verbatim.

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

(1) Any objection during a deposition must be stated concisely and in a non-argumentative and non-suggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion under Rule 30(d)(4).

(2) Unless otherwise authorized by the court or stipulated by the parties, a deposition is limited to one day of seven hours. The court must allow additional time consistent with Rule 26(b)(2) if needed for a fair examination of the deponent or if the deponent or another person, or other circumstance, impedes or delays the examination.

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

(d) Duration; Sanction; Motion to Terminate or Limit.

(1) ***Duration.*** Unless otherwise stipulated or ordered by the court, a deposition is limited to 1 day of 7 hours. The court must allow additional time consistent with Rule 26(b)(2) if needed for a fair examination of the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.

(2) ***Sanction.*** The court may impose an appropriate sanction — including the reasonable expenses and attorney's fees incurred by any party — on a person who impedes, delays, or frustrates the fair examination of the deponent.

(4) At any time during a deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it may be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition must be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(3) ***Motion to Terminate or Limit.***

(A) *Grounds.* At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. The motion may be filed in the court where the action is pending or the deposition is being taken. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order.

(B) *Order.* The court may order that the deposition be terminated or may limit its scope and manner as provided in Rule 26(c) If terminated, the deposition may be resumed only by order of the court where the action is pending.

(C) *Award of Expenses* Rule 37(a)(5) applies to the award of expenses.

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

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

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

COMMITTEE NOTE

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

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

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

COMMITTEE NOTE

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

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

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

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

(d) Effect of Errors and Irregularities in Depositions.

(1) As to Notice. All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(2) As to Disqualification of Officer. Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) As to Taking of Deposition.

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

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

(d) Waiver of Objections.

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

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

(A) before the deposition begins; or

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

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

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

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

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

(ii) it is not timely made during the deposition.

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

COMMITTEE NOTE

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

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

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

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

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

COMMITTEE NOTE

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

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

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

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

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

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

COMMITTEE NOTE

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

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

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

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

COMMITTEE NOTE

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

Rule 36. Requests for Admission

(a) Request for Admission. A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b)(1) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Without leave of court or written stipulation, requests for admission may not be served before the time specified in Rule 26(d).

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow or as the parties may agree to in writing, subject to Rule 29, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify an answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that the party has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why the party cannot admit or deny it.

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pre-trial conference or at a designated time prior to trial. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

Rule 36. Requests for Admission

(a) Scope and Procedure.

(1) *Scope.* A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(1) relating to:

(A) facts, the application of law to fact, or opinions about either; and

(B) the genuineness of any described documents.

(2) ***Form; Copy of a Document.*** Each matter must be separately stated. A request to admit the genuineness of a document must be accompanied by a copy of the document unless it is, or has been, otherwise furnished or made available for inspection and copying.

(3) ***Time to Respond; Effect of Not Responding.*** A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney. A shorter or longer time for responding may be ordered by the court or stipulated to under Rule 29.

(4) ***Answer.*** If a matter is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it. A denial must fairly respond to the substance of the matter; and when good faith requires that a party qualify an answer or deny only a part of a matter, the answer must specify the part admitted and qualify or deny the rest. The answering party may assert lack of information or knowledge as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny.

(5) ***Objections.*** The grounds for objecting to a request must be stated.

(6) ***Matter Presenting a Trial Issue.*** A party must not object to a request solely on the ground that it presents a genuine issue for trial. The party may deny the matter or state why it cannot admit or deny.

(7) ***Motion Regarding the Sufficiency of an Answer or Objection.*** The requesting party may move to determine the sufficiency of an answer or objection. Unless the court finds an objection justified, it must order that an answer be served. On finding that an answer does not comply with this rule, the court may order either that the matter is admitted or that an amended answer be served. The court may defer its final decision until a pretrial conference or a specified time before trial. Rule 37(a)(5) applies to an award of expenses.

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

COMMITTEE NOTE

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

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

Rule 37. Failure to Make Disclosure or Cooperate in Discovery; Sanctions	Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions
(a) Motion For Order Compelling Disclosure or Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling disclosure or discovery as follows: **(1) Appropriate Court.** An application for an order to a party shall be made to the court in which the action is pending. An application for an order to a person who is not a party shall be made to the court in the district where the discovery is being, or is to be, taken. **(2) Motion.** **(A)** If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.	**(a) Motion for an Order Compelling Disclosure or Discovery.** **(1)** ***In General.*** On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action. **(2)** ***Appropriate Court.*** A motion for an order to a party must be made in the court where the action is pending. A motion for an order to a nonparty must be made in the court where the discovery is or will be taken. **(3)** ***Specific Motions.*** **(A)** *To Compel Disclosure.* If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions.

(B) If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order. **(3) Evasive or Incomplete Disclosure, Answer, or Response.** For purposes of this subdivision an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond.	**(B)** *To Compel a Discovery Response.* A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if: **(i)** a deponent fails to answer a question asked under Rule 30 or 31; **(ii)** a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a)(4); **(iii)** a party fails to answer an interrogatory submitted under Rule 33; or **(iv)** a party fails to respond that inspection will be permitted — or fails to permit inspection — as requested under Rule 34. **(C)** *Related to a Deposition.* When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order. **(4)** ***Evasive or Incomplete Disclosure, Answer, or Response.*** For purposes of this subdivision (a), an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.

(4) Expenses and Sanctions.

(A) If the motion is granted or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust.

(B) If the motion is denied, the court may enter any protective order authorized under Rule 26(c) and shall, after affording an opportunity to be heard, require the moving party or the attorney filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(C) If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26(c) and may, after affording an opportunity to be heard, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

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

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

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

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

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

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

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

(b) Failure to Comply With Order.

(1) Sanctions by Court in District Where Deposition Is Taken. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) Sanctions by Court in Which Action Is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring that party to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that that party is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(b) Failure to Comply with a Court Order.

(1) ***Sanctions in the District Where the Deposition Is Taken.*** If the court where the discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court.

(2) ***Sanctions in the District Where the Action Is Pending.***

(A) *For Not Obeying a Discovery Order.* If a party or a party's officer, director, or managing agent — or a witness designated under Rule 30(b)(6) or 31(a)(4) — fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:

(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(iii) striking pleadings in whole or in part;

(iv) staying further proceedings until the order is obeyed;

(v) dismissing the action or proceeding in whole or in part;

(vi) rendering a default judgment against the disobedient party; or

(vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

(B) *For Not Producing a Person for Examination.* If a party fails to comply with an order under Rule 35(a) requiring it to produce another person for examination, the court may issue any of the orders listed in Rule 37(b)(2)(A)(i)-(vi), unless the disobedient party shows that it cannot produce the other person.

(C) *Payment of Expenses.* Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

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

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

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

COMMITTEE NOTE

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

STYLE 634

Proposed Amendments to the Federal Rules of Civil Procedure

Restyled Rules 38–63

December 17, 2004

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

COMMITTEE NOTE

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

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

COMMITTEE NOTE

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

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

COMMITTEE NOTE

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

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

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

COMMITTEE NOTE

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

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

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

COMMITTEE NOTE

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

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

COMMITTEE NOTE

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

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

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

COMMITTEE NOTE

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

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

COMMITTEE NOTE

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

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

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

(2) Subject to the provisions of clause (ii) of subparagraph (c)(3)(A) of this rule, a subpoena may be served at any place within the district of the court by which it is issued, or at any place without the district that is within 100 miles of the place of the deposition, hearing, trial, production, or inspection specified in the subpoena or at any place within the state where a state statute or rule of court permits service of a subpoena issued by a state court of general jurisdiction sitting in the place of the deposition, hearing, trial, production, or inspection specified in the subpoena. When a statute of the United States provides therefor, the court upon proper application and cause shown may authorize the service of a subpoena at any other place. A subpoena directed to a witness in a foreign country who is a national or resident of the United States shall issue under the circumstances and in the manner and be served as provided in Title 28, U.S.C. § 1783.

(3) Proof of service when necessary shall be made by filing with the clerk of the court by which the subpoena is issued a statement of the date and manner of service and of the names of the persons served, certified by the person who made the service.

(2) ***Service in the United States.*** Subject to Rule 45(c)(3)(A)(ii), a subpoena may be served at any place:

(A) within the district of the issuing court;

(B) outside that district but within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection;

(C) within the state of the issuing court if a state statute or court rule allows service at that place of a subpoena issued by a state court of general jurisdiction sitting in the place specified for the deposition, hearing, trial, production, or inspection; or

(D) that the court authorizes on motion and for good cause, if a federal statute so provides.

(3) ***Service in a Foreign Country.*** 28 U.S.C. § 1783 governs issuing and serving a subpoena directed to a United States national or resident who is in a foreign country.

(4) ***Proof of Service.*** Proving service, when necessary, requires filing with the issuing court a statement showing the date and manner of service and the names of the persons served. The statement must be certified by the server.

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(c) Protecting a Person Subject to a Subpoena.

(1) ***Avoiding Undue Burden or Expense; Sanctions.*** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply.

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

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the party who served the subpoena.

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(d) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(d) Duties in Responding to a Subpoena.

(1) ***Producing Documents.*** A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(2) ***Claiming Privilege or Protection.*** A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(A) expressly assert the claim; and

(B) describe the nature of the withheld documents, communications, or things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

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

COMMITTEE NOTE

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

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

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

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

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

COMMITTEE NOTE

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

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

COMMITTEE NOTE

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

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

COMMITTEE NOTE

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

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

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

COMMITTEE NOTE

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

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

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

COMMITTEE NOTE

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

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

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

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

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

COMMITTEE NOTE

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

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

(c) Judgment on Partial Findings. If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence. Such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule.	**(c) Judgment on Partial Findings.** If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue. The court may, however, decline to render any judgment until the close of the evidence. A judgment on partial findings must be supported by findings of fact and conclusions of law as required by Rule 52(a).

COMMITTEE NOTE

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

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

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

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

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

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

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

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

COMMITTEE NOTE

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

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

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

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

COMMITTEE NOTE

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

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

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

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

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

COMMITTEE NOTE

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

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

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

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

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

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

COMMITTEE NOTE

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

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

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

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

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

COMMITTEE NOTE

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

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

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

COMMITTEE NOTE

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

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

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

COMMITTEE NOTE

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

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

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

COMMITTEE NOTE

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

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

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

COMMITTEE NOTE

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

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

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

COMMITTEE NOTE

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

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

COMMITTEE NOTE

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

RESTYLED RULES 64 TO 86
ARE LOCATED BEHIND TAB 7 (B)

Informational Items

II Information Items

A. AMENDED RULE 5(e): LOCAL RULES MANDATING ELECTRONIC FILING

At the October meeting the Advisory Committee recommended publication of a Rule 5(e) amendment that would authorize local rules that require electronic filing. The Committee on Court Administration and Case Management had recommended that each set of rules be amended to this effect, and the Bankruptcy Rules Advisory Committee had already recommended publication of a similar amendment. The Appellate Rules Advisory Committee, meeting after the Bankruptcy and Civil Rules Committees, made the same recommendation. (The Criminal Rules incorporate the Civil Rules service provisions; no parallel change is needed if the Civil Rule recommendation is adopted.) The change is designed to enable districts that find themselves ready to take this step to reap the advantages that flow from electronic filing. Many districts already have adopted mandatory electronic-filing rules. These rules include exceptions that excuse electronic filing in various circumstances. It is anticipated that experience with these local rules will facilitate gradual convergence on good practices, perhaps to be adopted one day into uniform national rules.

There has been some concern that a local rule might purport to require consent to electronic service, contrary to the Civil Rule 5(b)(2)(D) provision that allows electronic service only with the written consent of the person to be served. No local rule has yet presented that problem. It was concluded that there is no need to address this remote possibility in either Rule 5(e) or the Committee Note.

Professor Coquillette, the Standing Committee Reporter, transmitted the Appellate, Bankruptcy, and Civil Rules Advisory Committees proposals to the Standing Committee on November 10. The proposals were published for comment on that day. The comment period closes on February 15, 2005.

The Civil Rules Committee will review the public comments on the proposals at its April meeting, looking toward a recommendation for action by the Standing Committee in June 2005.

B. E-Government Act Template Rule

Judge Fitzwater, Chair of the E-Government Act Rule Subcommittee, and Professor Capra, lead reporter for the template rule, attended the Civil Rules Advisory Committee meeting. They presented the draft that was developed after the Subcommittee met in June. The discussion is summarized in the draft minutes. Professor Capra has developed further drafts that reflect discussion in the several Advisory Committees. The E-Government Act Rule Subcommittee is presenting the current draft separately for discussion at this meeting.

C. Filed and Sealed Settlement Agreements

Members of Congress continue to be concerned about public access to court records. Bills reflecting these concerns have introduced in each of the last several Congresses. The importance of considering Congressional concerns in the Rules Enabling Act process has led to several Advisory Committee projects in this area. The most recent project was prompted by concerns that filed and sealed settlement agreements may conceal information important to the public health and safety, or to public interests in matters of public importance.

The Advisory Committee enlisted the Federal Judicial Center to undertake an empirical study of the frequency and possible impact of allowing settlement agreements to be filed under seal. The study examined the records of 288,846 civil actions and found 1,272 cases in which a sealed settlement agreement was filed. It further found that in 1,234 of these actions the complaints remained in the public file, providing access to information sufficient to identify any matter of public health, safety, or interest that might be involved. Looking at the cases with sealed settlement agreements from another perspective, it was concluded that 109 of these cases involved some issue of public interest. The complaint was sealed in only one of those cases. Finally, it was possible to obtain access to some of the sealed settlement agreements. None of the agreements contained any information bearing on any public interest. They simply deny liability and state the amount of money to be paid.

The results of the FJC study support the conclusion that there is no need to consider present rulemaking action. The vast majority of settlement agreements are never filed. The motives for filing seem to respond either to the need to obtain court approval in some circumstances or to the desire to ensure continuing jurisdiction to enforce the settlement. There is no apparent reason to believe that any rule addressing filed and sealed settlement agreements would accomplish any significant increase in public access to information affecting public interests.

Although there is no sufficient reason to undertake rulemaking now, the Committee will continue to consider questions of public access to court records. The E-Government Act rule is one current example. Other projects will be considered as reasons arise.

Informational Items

D. Rule 11

Members of Congress continue to express interest in Civil Rule 11 and advance different proposals, often in forms that would directly amend Rule 11. The common theme is that in one way or another, the 1993 amendments that softened Rule 11 were a mistake. Attention commonly focuses on two aspects of the 1993 amendments. Until 1993, a court that found a Rule 11 violation was required to impose a sanction. The 1993 amendments gave the court discretion whether to impose a sanction, and emphasized that the purpose of imposing sanctions is to deter groundless litigation. They also introduced a "safe harbor," prohibiting a party from filing a Rule 11 motion unless the challenged paper is not withdrawn or corrected within 21 days after the motion is served on the offending party. The concern underlying these bills seems to be that there is too much groundless litigation. The hope is that there will be less groundless litigation if sanctions are made mandatory, or if the safe harbor is eliminated.

The Federal Judicial Center conducted a survey of district judges in 1995 to assess experience with the 1993 amendments. The survey showed strong support for the 1993 amendments. The Center has agreed to undertake a new survey of district judges to assess experience with Rule 11 more than a decade after the amendments took effect. The results of the survey will provide important information both for Congress and for the Advisory Committee as it determines whether further Rule 11 amendments should be proposed.

E. Future Projects

The spring meeting of the Civil Rules Committee will be devoted to electronic discovery; the level of interest in the proposed amendments is reflected in the large number requesting to testify at the three public hearings and written comments already received. Completing the Style Project will also occupy significant time and effort, but the extended public comment period for that project allows us some time to select and prepare future projects.

1. All-Committees Project

The rules for calculating time periods set by the Civil Rules have been adjusted by repeated amendments. Each amendment has been designed to bring some small measure of relief from the anxiety that lawyers continually encounter in calculating the times to take various actions. Comments on these proposals, however, regularly urge that more sweeping changes should be made. Two major objectives are advanced. First, it is urged that the methods for calculating time should be made as simple and foolproof as possible, and should be made uniform for each body of rules. Second, it is urged that at least some of the time periods set in the present rules are unrealistic.

The Standing Committee has expressed support for a project that would coordinate simultaneous consideration of time periods by all of the Advisory Committees. The Civil Rules

Committee believes that the project is important. The major challenge will be to find a time when all of the Committees can make the required time available in their often busy schedules. The next step may be to begin working toward a date to launch the project that will give the Committees adequate opportunity to make room on their agendas.

Further discussion of planning this project at this meeting, or at a meeting soon after this meeting, would be welcome.

2. Joint Evidence-Civil Rules Project

Proposed and actual amendments of various Civil Rules regularly raise the question whether the Civil Rules should be better integrated with the Evidence Rules. Several Civil Rules address the admission of evidence. Many of these provisions may rank as nothing more than a residue from the days before the Evidence Rules were adopted. Cogent arguments have been made that such provisions should be transferred from the Civil Rules to the Evidence Rules. It is convenient to have a single authoritative source that addresses all evidence questions. It also is desirable to eliminate the occasional inconsistencies that can be found, whether by revising the present Civil Rule, the present Evidence Rule, or both. But some evidence provisions may usefully remain in the Civil Rules. Evidence Rule 65(a)(2), for example, provides that evidence taken in a preliminary injunction hearing "becomes part of the record on the trial and need not be repeated upon the trial." This provision applies only if the evidence is admissible at trial, and may be more a matter of injunction procedure than the rules of evidence. Location in the injunction rule, moreover, is a useful reminder both at the preliminary injunction hearing and later.

The Civil Rules Advisory Committee is willing to work with the Evidence Rules Committee in a joint project to reconcile the two sets of rules with respect to evidence provisions. Here too, the present obstacle is to set upon a launch date that will accommodate the schedules of both Committees.

3. Other Projects

A number of other potential projects remain on the Advisory Committee agenda. Some will be removed from the agenda because they do not offer sufficient promise of important improvements. Others will be held for further study.

Several potential projects occupy relatively high places in the array of priorities. A partial list illustrates the number of areas involved.

Only crowded agendas have delayed full consideration of a proposal by the Solicitor General to adopt a rule recognizing the practice of making "indicative rulings" while a pending appeal has ousted district-court jurisdiction to act on a motion for relief from a judgment.

Informational Items

A suggestion at the June Standing Committee meeting has led to preliminary drafting of a Rule 48 provision on polling the jury after a verdict is returned.

Discovery is never far from the agenda. Among other topics, a thoughtful proposal has been made to consider the evolution of practice under the Rule 30(b)(6) provision for deposing an organization through representatives designated by the organization. The proponents of change point to some troubling decisions, and describe some apparently untoward practices. This subject presents at least two familiar issues. A few wrong decisions do not, without more, justify rules amendments; developing practice often works through the problem, or shows that the practice is right, or — by demonstrating the full nature of the problem — helps to shape a solution. And if it is possible to identify a problem that deserves solution, it still may not be possible to find a solution that does more good than harm.

The Style Project has generated a number of suggestions to reform rule provisions that must be accepted as they are for purposes of restyling. One general area of interest revives periodic suggestions that the set of pleading rules should be studied, either for small changes or for more comprehensive revision. These suggestions might be combined with long-lingering proposals for specific revisions of the amendment provisions in Rule 15.

Contemplation of pleading reform has combined with the ongoing study of discovering computer-based information to raise the question whether the time may soon come to reopen the attempt to devise simplified rules that might reduce cost and delay in some types of litigation.

Summary-judgment practice was addressed several years ago by a proposal to revise Rule 56 extensively without changing the standard for summary judgment. The proposal was rejected at the September 1992 meeting of the Judicial Conference. Those earlier efforts might be revived as the basis for developing a new proposal.

DRAFT MINUTES
CIVIL RULES ADVISORY COMMITTEE
OCTOBER 28-29, 2004

The Civil Rules Advisory Committee met on October 28 and 29, 2004, at the La Fonda hotel in Santa Fe, New Mexico. The meeting was attended by Judge Lee H. Rosenthal, Chair; Judge Jose A. Cabranes; Frank Cicero, Jr., Esq.; Daniel C. Girard, Esq.; Judge C. Christopher Hagy; Justice Nathan L. Hecht; Robert C. Heim, Esq.; Dean John C. Jeffries, Jr.; Hon. Peter D. Keisler; Judge Paul J. Kelly, Jr.; Professor Myles V. Lynk; Judge Thomas B. Russell; and Judge Shira Ann Scheindlin. Retiring members Judge Richard H. Kyle, Professor Myles V. Lynk, and Andrew M. Scherffius, Esq. also attended. Professor Edward H. Cooper was present as Reporter, Professor Richard L. Marcus was present as Special Reporter, and Professor Thomas D. Rowe, Jr., was present as Consultant. Judge David F. Levi, Chair, Judge Sidney A. Fitzwater, and Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. Judge James D. Walker, Jr., attended as liaison from the Bankruptcy Rules Committee. Judge J. Garvan Murtha, chair of the Standing Committee Style Subcommittee, and Style Subcommittee members Judge Thomas W. Thrash, Jr., and Dean Mary Kay Kane also attended. Professor R. Joseph Kimble and Joseph F. Spaniol, Jr., Style Consultants to the Standing Committee, were present. Professor Daniel J. Capra, Reporter for the Evidence Rules Committee, attended as Lead Reporter for the E-Government Act Subcommittee. Peter G. McCabe, John K. Rabiej, James Ishida, and Robert Deyling represented the Administrative Office. Tim Reagan represented the Federal Judicial Center. Ted Hirt, Esq., and Elizabeth Shapiro, Esq., Department of Justice, were present. Brooke D. Coleman, Esq., attended as Rules Law Clerk for Judge Levi. Observers included Jeffrey Greenbaum, Esq. (ABA Litigation Section Liaison); Loren Kieve and Irwin Warren (ABA Litigation Section Style Liaisons); and Alfred W. Cortese, Jr., Esq..

Judge Rosenthal opened the meeting by asking all participants and observers to identify themselves, and by extending congratulations to the Boston Red Sox fans on the World Series sweep. She introduced new members Cabranes and Girard, and noted that new member Chilton Varner was prevented from attending by an unalterable obligation to appear in a West Virginia state court.

The three new members replace three outgoing members who have distinguished themselves by hard work and exemplary contributions to the Committee's work. They also have been marvelous friends, whose companionship will be sorely missed.

Judge Rosenthal went on to report on the September meeting of the Judicial Conference. The Conference approved proposed amendments to Civil Rules 6, 27, and 45, and also Supplemental Rules B and C, for transmission to the Supreme Court. It devoted much of its attention to the budget challenges that confront the federal courts.

Proposed rules amendments published in August included a new Supplemental Rule G for civil forfeiture proceedings, a revision of Rule 50(b), and discovery rules provisions designed to deal with discovery of electronically stored information. The discovery amendments are already attracting close attention in formal conferences and bar groups, and written comments have begun to arrive. Requests for time at the scheduled public hearings also are being made.

It is desirable that as many Committee members as possible attend the public hearings. The hearings are always important, and will be particularly important with respect to discovery of computer-based information because the bar knows about developing practice and problems in ways that do not quickly come to the attention of judges. We are likely to hear from many different experiences and perspectives. To the extent possible, it helps to look at written comments even before the hearings to become familiar with the sorts of issues that are being raised. Even now, committee members who participate in bar conferences are learning things that were not learned during the years of careful work that led up to the proposed amendments.

Last June, the Standing Committee approved Style Rules 38 through 63 for eventual publication as part of a complete set of Style rules. The cycle of style work is precisely on schedule.

Minutes

The minutes for the April 14-15, 2004 meeting were approved.

52 *Legislative Report*

53 John Rabiej noted that the House passed a bill that would amend Civil Rule 11 in several
54 respects. The changes would delete the "safe harbor" and would make sanctions mandatory. In
55 addition, state courts would be obliged to apply the federal rule in actions that grow out of events
56 affecting commerce. As Secretary of the Judicial Conference, Leonidas Ralph Mecham sent a
57 letter on this bill to Senator Hatch as Chair of the Senate Judiciary Committee. The letter
58 recounts the history of the 1983-1993 period when Rule 11 mandated sanctions, including the
59 several FJC studies that found a consensus that there are better ways to deal with abusive
60 litigation. The letter also explains the reasons for changing to discretionary sanctions in the 1993
61 Rule 11 amendments, describes the FJC study of the effects of the 1993 amendments, and urges
62 that the present rule is working well. These bills will come back in the next Congress. It may be
63 desirable to consider asking the FJC to undertake a further study of judges' views on the ongoing
64 operation of present Rule 11.

65 An observer suggested that if there is to be a Rule 11 survey, it would be useful to include
66 experience under the Rule 11 provisions of the Private Securities Litigation Reform Act. There
67 is a "breathtaking lack of case law to show what actual practice is" under this statute.

68 Others observed that academics of all shades of view, liberal and conservative, oppose the
69 Rule 11 bills. And state judges strongly oppose the idea that Congress should legislate state
70 procedure. Texas, for example, had mandatory sanctions in its equivalent to Rule 11, and — just
71 as with Rule 11 — chose to go back to a system of discretionary sanctions.

72 Class-action reform legislation again passed in the House, but stalled in the Senate. It is
73 likely to come back in the next Congress.

74 Judge Levi noted that Congress at present seems fairly aggressive about rules of
75 procedure. Part of his job as Standing Committee Chair is to remind Congress of the Enabling
76 Act process. He regularly suggests that it would be useful to have Congressional staff attend
77 advisory committee meetings to learn about the actual operation of the process. These
78 suggestions have not been notably successful.

79 *Rule 5(e): Permission for Mandatory E-Filing Rules*

80 The Committee on Court Administration and Case Management (CACM) has asked
81 adoption on an expedited basis of rules that would authorize local rules that require electronic
82 filing. For the Civil Rules, the amendment to Rule 5(e) is simple:

83 **(c) Filing with the Court Defined.** * * * A court may by local rule permit <u>or</u>
84 <u>require</u> papers to be filed, signed, or verified by electronic means that are
85 consistent with technical standards, if any, that the Judicial Conference of
86 the United States establishes.

87 If at least the Bankruptcy, Civil, and perhaps Criminal Rules Advisory Committees agree
88 that this change is proper and not controversial, the plan is to seek Standing Committee approval
89 by mail ballot for publication in November, 2004, with a public comment period that closes on
90 February 15, 2005. The advisory committees could consider the public comments and — if all
91 goes well — recommend approval for adoption at the June 2005 Standing Committee meeting.

92 CACM believes that expedited action is desirable for two sets of reasons. First,
93 electronic filing saves money for the courts. This saving does not represent a transfer of costs to
94 electronic filers; to the contrary, a careful study has shown that electronic filers also save time
95 and money. Second, district courts already are requiring electronic filing. At the latest count, 31
96 districts by standing order, procedural manual, or local rule require electronic filing of all
97 documents, and seven more require that some documents be filed electronically. This number is
98 an impressive proportion of the courts that have gone "online" with the Court
99 Management/Electronic Case Filing system (CM/ECF). The national rules should catch up with
100 the reality of actual practice.

101 Several participants noted that the bar and courts, including state courts, have become
102 enthusiastic converts to the advantages of electronic filing. Initial fears that small law offices
103 would be put at a disadvantage have disappeared in face of the reality that small offices reap
104 proportionally greater benefits than do large offices.
105 It was asked whether the need for speed is so great as to suggest asking Congress to adopt
106 an amendment that would take effect before the contemplated December 1, 2006 effective date of
107 the Rule 5(e) amendment. Several responses were offered. One was that if it goes to Congress,
108 there might be pressure to adopt a mandatory national rule, not one that relies on local discretion.
109 In turn, that could choke off desirable experimentation that will generate a sound basis for
110 eventual adoption of a nationally uniform set of qualifications or exceptions. As a practical
111 matter, moreover, the mere publication of the proposed amendments will give the amendments
112 immediate effect. Districts that want to require electronic filing will feel free to follow the lead
113 of the many districts that already do so. In these circumstances, finally, the adoption of an
114 accelerated publication and comment period does not do violence to the ordinary pace of
115 rulemaking.
116 The Bankruptcy Rules Advisory Committee has already adopted the CACM proposal.
117 The Bankruptcy Rule amendment is accompanied by a brief Committee Note set out in the
118 agenda materials.
119 The proposed Rule 5(e) amendment does not attempt to identify the circumstances in
120 which exceptions should be permitted. Present practices uniformly allow exceptions for pro se
121 litigants, recognizing that many of them are not prepared to participate in electronic filing. It is
122 not enough to have access to a computer; appropriate programs must be used, and the user must
123 become adept in using them. The survey of electronic filing experience shows that small firms
124 have had to acquire new software and train staff in its use or even, at times, hire new staff.
125 Individual litigants cannot be expected to undertake this effort. Apart from this identifiable
126 category of concerns, there also may be concerns that some materials can be transformed to
127 electronic form for filing only with considerable expense and difficulty. Yet other needs for
128 exceptions may arise. Although provision for exceptions could be made by a general "good
129 cause" provision, it seems too early to attempt to draft national-rule provisions that qualify the
130 permission to adopt local rules. More particularly, it would be difficult to draft a sound rule for
131 adoption on an expedited basis.
132 The lack of any qualifications or exceptions in the proposed amendment opens the
133 question whether the Committee Note should attempt to offer guidance on these or other
134 questions. The Bankruptcy Rule Note includes a paragraph suggesting that "courts can include
135 provisions to protect access to the courts for those who may not have access to or the resources
136 for electronic filing." A shorter alternative proposed for consideration in the agenda materials
137 suggests that local rules and the model rule "will generate experience that will facilitate gradual
138 convergence on uniform exceptions to account for circumstances that warrant paper filing." This
139 language is more general, reflecting the thought that there may be good reasons for excusing
140 electronic filing of some materials even when the parties are generally filing in electronic form.
141 A second question also might be addressed in the Committee Note. Rule 5(b)(2)(D)
142 permits electronic service only if "consented to in writing by the person served." Some courts are
143 treating participation in electronic filing as consent to electronic service. There is no collision if
144 a party has a free choice whether to agree to electronic filing. But if local rules or practice
145 require participation in electronic filing, a rule that exacts consent to electronic service as part of
146 electronic filing defeats the consent protection embodied in Rule 5(b)(2)(D). The agenda
147 includes a draft committee note paragraph stating that a court that wishes to couple electronic
148 filing with electronic service must adopt a provision that enables a party to withdraw from
149 electronic service, whether by withdrawing from electronic filing entirely or by withdrawing

150 consent only as to electronic service.
151 A motion to say nothing in the Committee Note about the Rule 5(b)(2)(D) question was
152 adopted without dissent.
153 It was suggested that the alternative brief Committee Note in the agenda materials was
154 preferable to the Bankruptcy Rules Committee Note. But it was recognized that all committees
155 should adopt a common note, and that the form to be published will be worked out under
156 Standing Committee auspices in the next few days.
157 Publication of the proposed Rule 5(e) amendment with an accelerated comment period
158 was approved unanimously.
159 *Style Project: Rules 64-86*
160 Style Rules 64 through 86 were reviewed by Subcommittees A and B in July, and are now
161 ready for consideration by the full Advisory Committee. If approved, the entire Style package of
162 rules can be presented to the Standing Committee in January for approval for publication in mid-
163 February. Publication of the full package will justify a lengthy comment period. If the comment
164 period closes in mid-January 2006, hearings could be held toward the close of the period, perhaps
165 including one in conjunction with the January Standing Committee meeting. Then the comments
166 would be considered at the spring Advisory Committee meeting. If all goes well, approval for
167 adoption could be recommended to the June 2006 Standing Committee meeting, looking for an
168 effective date of December 1, 2007.
169 It is important to present as clean a package as possible to the Standing Committee.
170 Some of the decisions to be made at this meeting will require implementation. And there will be
171 a "final sweep" through the full package to check for uniform adherence to the resolution of
172 global issues and to find overlooked glitches. No major issues are anticipated. The final review
173 process will be undertaken by Judge Rosenthal as Committee chair, with the concurrence of the
174 consultants and reporters.
175 The issues presented by the Style Project are important. The gains can be great. But we
176 are bound by a vow not to change meaning. In the process, the Committee has "touched on all
177 the great issues of the day." Indeed the recurring question whether to render a present-rule
178 "shall" as "must" or "may" found a parallel at oral argument this month in the Supreme Court
179 cases considering application of the *Blakely* decision to the federal Sentencing Guidelines: the
180 statutory "shall" provoked an exchange on the question whether "shall" can mean "may."
181 Rule 64. Present Rule 64 adopts state remedies for seizure of person and property, "regardless of
182 whether by state procedure the remedy is ancillary to an action or must be obtained by an
183 independent action." Style Rule 64(b) reduces this to "however designated and regardless of
184 whether state procedure requires an independent action." It was agreed that it is proper to delete
185 "ancillary to an action"; "regardless of whether state procedure requires an independent action"
186 clearly reaches both remedies that are provided in the main action and those that must be pursued
187 through an independent action.
188 Rule 65. It was noted that Style Rule 65(b)(3) retains "older matters of the same character,"
189 replacing an earlier style suggestion that this phrase be replaced by "temporary restraining orders
190 issued earlier without notice." Professor Rowe's research suggests that there is no clear case-law
191 treatment defining the "older matters of the same character" that do not take precedence over a
192 preliminary injunction hearing that follows issuance of a no-notice TRO. It seems better to carry
193 forward the present language, which may recognize that "the same character" may refer to the
194 same character of urgency.

195 Present Rule 65(b) requires that a TRO granted without notice "be filed forthwith." Style
196 Rule 65(b)(2) directs that it "be promptly filed." It was asked whether "promptly" conveys the
197 same sense of immediacy as "forthwith." Views were offered that "forthwith" indeed sets a

198 shorter deadline. But it was objected that "forthwith" seems antique. It is a good lawyerly term
199 that means "right now." "Promptly," on the other hand, implies reasonableness. The suggestion
200 that "immediately" might be substituted was met by the observation that it is not an established
201 term of lawyerly art.
202 It was agreed that Rule 65(b) requires the court, not a party, to file the TRO. This might
203 have a bearing on the word chosen to convey the desire for expeditious entry. But the question
204 seems one appropriately resolved by the Style Subcommittee. Although three Committee
205 members voted that the Committee should make a choice, it was concluded that the choice
206 whether to substitute some word for "forthwith" — likely "immediately" — would be referred to
207 the Style Subcommittee.
208 An observer suggested that two deletions from present Rule 65(b) should be restored.
209 The present rule speaks of an order issued without notice "to the adverse party or that party's
210 attorney," and requires the applicant's attorney to certify "in writing" the efforts made to give
211 notice. Style Rule 65(b)(1) deletes the reference to notice to the party's attorney, and also deletes
212 "in writing." These proceedings are done on an emergency basis. It may be possible to give
213 notice to an adverse party's attorney when it is not possible to give notice to the party, and it is
214 important to recognize that. It was responded that throughout the rules, we say "without notice"
215 without adding a reference to a party's attorney. So too, "certify" appears in many places: do we
216 want to create an inconsistency — with possible negative implications — by adding "in writing"
217 here but not elsewhere?
218 Others expressed concern that no-notice TRO procedure is special, and deserves special
219 safeguards. Often a party does not have an attorney when the action is filed, and often enough
220 the plaintiff will not know whether there is an attorney. But there may be, and it was urged that
221 this is a reason to restore the reference to an attorney. It was asked whether the result is that the
222 party requesting a TRO has a choice whether to serve the adverse party or the adverse party's
223 attorney, and responded that restoring this reference would leave the Style Rule exactly where the
224 present rule is. It was suggested that if you know an adverse party has representation, rules of
225 professional responsibility require that notice be directed to the attorney. Compare Rule 5(b)(1),
226 directing service on the attorney when a party is represented by an attorney. If we delete "or its
227 attorney," we seem to suggest that it is proper to serve only the party.
228 On two motions, it was voted with one dissent to restore "or its attorney," and voted
229 unanimously to restore "in writing." The result is:
230 **(1) *Issuing Without Notice.*** The court may issue a temporary restraining order
231 without notice to the adverse party or its attorney only if: * * *
232 **(B)** the movant's attorney certifies in writing any efforts made to give
233 notice * * *.
234 The Committee referred to the Style Subcommittee the suggestion that the tag line for
235 Style Rule 65(d)(2) should be "**(2)** ***~~Scope~~ Persons Bound.***"
236 It was noted that Style Rule 65(d)(1)(C) directs that the order granting an injunction
237 describe the acts restrained "or required." "Required" is new, but appropriately reflects
238 abandonment of the old fiction that an injunction can only forbid, not require, action by the party
239 enjoined.
240 Present Rule 65(e) refers to a statute relating to temporary restraining orders "and"
241 preliminary injunctions in actions affecting employer and employee. Style Rule 65(e)(1) changes
242 "and" to "or." This change was accepted.
243 Rule 65.1. Present Rule 65.1 refers to security given "in the form of a bond or stipulation or other
244 undertaking with one or more sureties." Style Rule 65.1 deletes "stipulation." It was asked
245 whether "stipulation" has some distinctive technical meaning that requires that it be restored.
246 Two responses defeated any suggestion that "stipulation" be restored. No case interpreting the

247 rule has discussed this word. And "or other undertaking with one or more sureties" — which is
248 retained in the Style Rule — seems all-encompassing. Still, it may be useful to identify this issue
249 as one on which comment will be helpful.
250 Rule 66. Present Rule 66 requires a court order for dismissal of an action "wherein a receiver has
251 been appointed." Style Rule 66 at first suggested changing "has been" to "is" appointed. A
252 question arose whether court approval should be required if dismissal is sought after a receiver is
253 appointed and then is discharged. Research by Professor Rowe suggested that it would be risky
254 to change "has been" to "is." The Committee agreed with the Style Subcommittee decision to
255 restore "has been."
256 Rule 67. No issues required further discussion.
257 Rule 68. Present Rule 68 provides for an offer of judgment after a determination of liability
258 when the extent of liability remains to be determined "by further proceedings." Earlier Style
259 drafts deleted "by further proceedings." Subcommittee A asked for research on the possible
260 meaning of this phrase. Professor Rowe's research suggested that it would be safer to restore this
261 phrase. Restoration was approved.
262 The choice between "adverse party" and "opposing party" has been resolved as a global
263 matter by preferring "opposing party" unless "adverse party" is required for substantive reasons.
264 It was agreed that "opposing party" should be substituted in Style Rule 68(a) in the two places
265 where "adverse party" has been carried forward from present Rule 68.
266 Another global issue has involved the choice between "allow" and permit. Present Rule
267 68 and Style Rule 68(a) both refer to an offer to "allow" judgment to be entered. It was agreed
268 that the Style Subcommittee should make the final choice.
269 It was observed that both present Rule 68 and Style Rule 68(d) do not expressly limit
270 liability for costs to the setting in which the offer of judgment is not accepted. The omission
271 does not seem important, although a judgment based on an accepted offer is literally not more
272 favorable than the offer. It is understood that the sanction is available only when the offer is not
273 accepted. But it may be helpful to indicate this proposition in the tag-line for subdivision (d),
274 referring to "Offer not Accepted" or something of the sort. This suggestion was referred to the
275 Style Subcommittee.
276 Rule 69. In keeping with the global resolution, it was agreed that Style Rule 69(a)(1) properly
277 deletes "district" from the reference to "the state where the ~~district~~ court is located."
278 Present Rule 69(b) states both that in an action against a revenue officer or an officer of
279 Congress the final judgment shall be satisfied as provided in two designated statutes and also that
280 execution shall not issue against the officer or the officer's property. Style Rule 69(b) omits the
281 provision that execution shall not issue. The Department of Justice has explored this omission,
282 without drawing any particular conclusion. It would be possible to say that the judgment "must
283 be executed and satisfied" as provided in the designated statutes, but that might carry an
284 untoward implication that a judgment can be "executed" against the United States. 28 U.S.C. §
285 2006, one of the statutes, provides for satisfaction, not execution. It was suggested that the
286 present rule provides a substantive protection for the officer that should not be changed. But it
287 was noted that the Style Rule carries this protection forward by providing that "the judgment
288 must be satisfied as those statutes provide." The statutes bar execution against the officer, and
289 this protection is incorporated by this language. Both § 2006 and 2 U.S.C. § 118, further,
290 provide protection against execution in circumstances not reflected in the language of present
291 Rule 69(b). It was agreed that Style Rule 69(b) should be proposed as drafted, with the addition
292 of this paragraph to the Committee Note:
293 Amended Rule 69(b) incorporates directly the provisions of 2 U.S.C. §
294 118 and 28 U.S.C. § 2006, deleting the incomplete statement in former Rule 69(b)
295 of the circumstances in which execution does not issue against the officer.

296 Rule 70. Present Rule 70 refers to a judgment that "directs" a party to execute a conveyance.
297 Style Rule 70(a) had this as "orders," but in its current form has it as "requires." The Style
298 Subcommittee is free to conform this word to whatever global resolution is finally adopted.
299 A later part of Style Rule 70(a) provides that the court may "order" another person to do
300 an act commanded. It was agreed that the tag line should be changed to reflect this word:
301 "~~Directing~~ **Ordering Another to Act.**"
302 Present Rule 70 begins the sentence on a vesting order: "If real or personal property is
303 within the district * * *." Style Rule 70(b) adds "the": "If the real or personal property is within
304 the district * * *." It was agreed that this addition properly reflects the limit that authorizes a
305 vesting order only as to property that is within the district.
306 Present Rule 70 authorizes sequestration or attachment of property on application of a
307 party entitled to performance. Style Rule 70(c) adds three words: "entitled to performance of an
308 act." The addition was approved.
309 Rule 71: No issues required further discussion.
310 Rule 71.1. (Present Rule 71A has been renumbered as 71.1 to conform to the convention used
311 for all other rules interpolated between whole-numbered rules.)
312 It was agreed that as with Rule 65, the word to be substituted for "forthwith" should be
313 left to the Style Subcommittee.
314 Present Rule 71A(c)(2) says that "process" shall be served as provided in subdivision (d).
315 Style Rule 71.1(c)(4) changes this to "notice." Both present Rule 71A(d) and Style Rule 71.1(d)
316 speak throughout of "notice." The reference to "process" seems misleading, even though the rule
317 expressly provides that delivering the notice to the clerk and serving it have the same effect as
318 serving a summons under Rule 4, see Style Rule 71.1(d)(4). But this provision justifies carrying
319 forward the present tag line for subdivision (d) as "Process."
320 Present Rule 71A(d)(1) says that notices are directed to the defendants "named or
321 designated in the complaint." Style Rule 71.1(d)(1) shortens this to "the named defendants." It
322 was agreed that it is proper to delete "or designated." Under Style Rule 71.1(c)(1) the property is
323 both "named" and "designated" as a defendant, so "named" will cover both the property and the
324 individual defendants.
325 Present Rule 71A(c) refers to the "use" for which property is to be taken, while present
326 Rule 71A(d)(2) refers to "uses." It was agreed that these provisions should be uniform. Because
327 property may be taken for multiple uses, it was further agreed that "uses" would be chosen for
328 both Style 71.1(c)(2)(B) and (d)(2)(A)(iv).
329 An extraneous "of" will be deleted from Style Rule 71.1(d)(2)(A)(v).
330 Two Style-Substance Track amendments were approved. In the present rule, both appear
331 in Rule 71A(d)(2). The first would add an explicit reminder — already provided in Form 28 —
332 that a party who does not serve an answer may file a notice of appearance. The second would
333 parallel Style-Substance Track amendments of Rules 11(a) and 26(g)(1), by directing that the
334 notice include the telephone number and electronic-mail address of the plaintiff's attorney.
335 These changes would be made in Style Rule 71.1 by adding a new item (vii) to subdivision
336 (d)(2)(A) and by revising subdivision (d)(2)(B).
337 Present Rule 71A(d)(3)(B) says that when the appropriate circumstances are shown,
338 service by publication "shall be made" in the described manner. Style Rule 71.1(d)(3)(B) renders
339 this as "[s]ervice is then made * * *." This rendition was accepted. This is one of the instances in
340 which a present rule uses "shall" to describe how an act is done when someone undertakes to do
341 it.
342 Present Rule 71A(e) states that "the defendant may serve a notice of appearance
343 designating the property in which the defendant claims to be interested. Thereafter, the
344 defendant shall receive notice of all proceedings affecting *it*." The question is whether "it"

345 should be rendered in Style Rule 71.1(e)(1) as "it," "the property," or "the defendant."
346 Complicated arguments can be made to imagine proceedings that affect a defendant but do not
347 affect the underlying property — there may be no dispute about the taking and no dispute about
348 total compensation, but a dispute between different claimants over distribution of the
349 compensation. It is more difficult to imagine a dispute that affects the property but does not also
350 affect an individual claiming an interest in it. One resolution of the ambiguity may be: "notice of
351 all later proceedings relating to the property." Although the Style project has often carried
352 forward an ambiguity that does not seem to yield to ready clarification, this ambiguity should be
353 clarified if possible. The "proceedings relating to the property" approach seems to work — it
354 would reach distribution of proceeds. Concern was expressed that this formula might be too
355 broad. It often happens that in proceedings to condemn a large number of small parcels many of
356 the defendants seek to participate only in the distribution. Must they be given notice of all
357 proceedings that relate to the property, including those that challenge the taking? Suppose co-
358 owners of a single piece of property disagree about the taking itself — one resists condemnation,
359 while the other welcomes it: must notice of proceedings on the taking issue go to the co-owner
360 who is interested only in compensation? It was suggested that proceedings affecting "the
361 defendant" is the broader and better term. If we believe that the authors of the present rule were
362 drafting carefully, that is indeed what "it" means now: the only antecedent in this sentence is "the
363 defendant." The next sentence, moreover, having referred first to the defendant and then to the
364 property, closes by requiring the defendant to answer after service "upon the defendant." Respect
365 for our predecessors suggests we give them credit for intending the apparent meaning of "it."
366 The motion passed: Rule 71.1(e)(1) will conclude: "notice of all later proceedings affecting the
367 defendant." But it will be useful to point to the choice and solicit comment on this question.
368 Present Rule 71A(f) allows free amendment of the complaint, but prohibits an
369 amendment "which will result in a dismissal forbidden by subdivision (i)." The difficulty is that
370 subdivision (i) does not directly forbid dismissals; the first two paragraphs describe means by
371 which a plaintiff may dismiss in certain circumstances. Style 71.1(f) carries forward the
372 reference to a dismissal "forbidden by" subdivision (i). It was suggested that perhaps this would
373 better say "a dismissal not authorized by (i)(1) or (2)." But it is not clear whether (i) is properly
374 described as authorizing a dismissal. It was agreed that "inconsistent" would be substituted.
375 This part of Style Rule 71.1(f) will read: "But no amendment may be made if it would result in a
376 dismissal inconsistent with Rule 71.1(i)(1) or (2)."
377 Four means of determining compensation are provided by present Rule 71A(h). The final
378 sentence is "Trial of all issues shall otherwise be by the court." As to compensation, the rule
379 earlier provides that compensation is determined by any tribunal specially constituted by Act of
380 Congress, and that if there is no such tribunal compensation is determined by a jury if a party has
381 demanded a jury unless the court orders that compensation is to be determined by a three-person
382 commission. It was agreed that under the present rule, a three-person commission can be
383 appointed only if there is no statutory tribunal and if a party has demanded a jury. If there is no
384 jury demand, compensation is determined by the court. The means of expressing these
385 alternatives in Style Rule 71.1(h) has proved difficult. Doubt was expressed whether the Style
386 draft was clear enough on the proposition that the court determines compensation unless one of
387 the other three methods applies. One suggestion was that 71.1(h)(1) could begin: "the court must
388 try all issues, except when compensation is determined * * *." An alternative was "the court
389 must try all issues, including compensation, except when compensation must be determined * *
390 *." The "flow" of this version was doubted. In the end, it was agreed that, subject to final review
391 by the Style Subcommittee, Style Rule 71.1(h)(1) would begin: "In an action involving eminent
392 domain under federal law, the court ~~must try~~ tries all issues, including compensation, except ~~that~~
393 when compensation must be determined * * *."

It was asked whether Style Rule 71.1(h)(1)(A) and (B) would be better tied together by adding a few words to (B): "if there is no ~~such~~ tribunal specially constituted, either party * * *." The answer was that under the Style Project conventions, "such" is the proper cross-reference back to a preceding provision. The reader of subparagraph (B) should understand that "such" ties back to the tribunal described in subparagraph (A).

Style Rule 71.1(i)(1) allows a plaintiff to dismiss "without a court order." It was agreed that the choice whether to include the "a" can be left for resolution as a global matter.

Present Rule 71A(i)(2) concludes by providing that on stipulation by the parties "the court may vacate any judgment that has been entered." Style Rule 71.1(i)(2) added several words: "may vacate a judgment already entered that did not vest title." The suggestion that these words be deleted was approved. Although the present rule is ambiguous, practice recognizes that a judgment vesting title may be vacated on stipulation of the plaintiff and the other parties.

Style Rule 71.1(j)(2) initially deleted many words from present Rule 71A(j), so as to say only that the court must enter judgment for the deficiency when a defendant is awarded greater compensation than provided by an initial deposit, and that the court must enter judgment for the overpayment when a defendant is awarded less compensation than provided by an initial deposit. Concern was expressed that this reduced language might lead to "netting" — if one defendant is overcompensated and another defendant is undercompensated, the court might enter judgment for one defendant against the other, not the plaintiff. The result might be a loss if the defendant ordered to pay cannot be made to pay. To address this concern, the Style draft restored the full language of the present rule. It was agreed that the same effect can be achieved by again deleting some of these words. As revised, Style Rule 71.1(j)(2) will read:

> the court must enter judgment ~~for that defendant and~~ against the plaintiff for the deficiency. If the compensation awarded to a defendant is less than the amount distributed to that defendant, the court must enter judgment ~~for the plaintiff and~~ against that defendant for the overpayment.

Rule 72. It was asked whether Style Rule 72(a) could be shortened by providing that the magistrate judge "issue a written ~~order stating the~~ decision." The next sentences repeatedly refer to objections to the order, and so on. Each of these references would have to be changed to "decision." In the end it was decided to make no change. What you object to is the order, not the explanation of it by the decision.

Rule 72 also became the occasion to discuss the choice between using numerals and spelling out numbers. One suggestion was to spell out only "one," leaving all other numbers to numerals. A second suggestion was to spell every number from one through ten. More complex suggestions were that numerals could be used for days, no matter how few; that words should be used as part of compound structures, such as "three-judge court;" that words should be used for plural numbers (twos, not 2s); that numbers should be spelled at the beginning of a sentence, no matter how large; that numerals should be used when any number in the same sentence is a numeral — use "6" if the same sentence also refers to "12." It was observed that the criminal rules use numerals throughout, however small the number; after extensive discussion, the Appellate Rules came to the same practice. The view was expressed that it is better not to use numerals whenever possible. The apparent conclusion was that the Style Subcommittee should adopt methods consistent with the Appellate and Criminal Rules.

Rule 73. It was agreed that Style Rule 73(a) should conclude: "must be made in accordance~~ing to~~ with 28 U.S.C. § 636(c)(5)."

The final sentence of present Rule 73(b) states that a district judge may vacate a reference to a magistrate judge "under extraordinary circumstances shown by a party." It was asked whether "extraordinary" should be changed to "exceptional." "Exceptional" is used in some other rules, and may mean the same thing. It was urged that the same word should be used everywhere

443 in the rules. But it also was argued that "extraordinary" is a term of art, and should be retained.
444 It sets a higher standard than "exceptional," and the choice is deliberate. The risk to be feared is
445 judge-shopping, that a party who has consented to trial by a magistrate judge will seek to renege
446 when events seem to be taking an unpleasant turn. It also was suggested that use of a single word
447 can itself be confusing — that "exceptional" actually has different meanings in each of the four
448 uses identified in this discussion. On motion, it was decided to retain "extraordinary" in Style
449 Rule 73(b)(3), ten yes and no contrary votes.
450 Earlier drafts of Style 73(a) began "When specially designated by local rule or a district
451 court order, a magistrate judge may, if all parties consent, conduct the proceedings in a civil
452 action." This was changed to "When authorized under 28 U.S.C. § 636(c) * * * " because local
453 rules designate magistrate judges generally. But it was observed that some courts allow the
454 parties to consent to appointment of a magistrate judge other than the one designated by the
455 general selection system. Does Style Rule 73(b)(1) reflect this clearly enough? Should we
456 restore more of the present rule's "consent to the exercise by a magistrate judge of civil
457 jurisdiction over the case, as authorized by Title 28, U.S.C. § 636(c)"? It was responded that
458 these words in the present rule do not clarify the ability to consent to a different magistrate judge.
459 Further discussion suggested that there may be differences among the districts in the manner of
460 designating magistrate judges for specific cases. It also was suggested that a court may not want
461 to designate all magistrate judges for all cases, that individual judge designations are proper.
462 One approach would be to change Style Rule 73(b) to the active voice: "When the court has
463 designated a magistrate judge to conduct a civil action * * *." This language would apply both to
464 a general designation and to a specific judge designation. That is what the present rule should
465 mean. But it was responded that the change to the active voice does not help, and might cause
466 some confusion. The question whether the Committee Note to Style Rule 73 should address this
467 question was opened but not decided.
468 The tag line for Style Rule 73(c), "Normal Appeal Route," has drawn suggestions for
469 revision. It was agreed that the question is a matter of style to be resolved by the Style
470 Subcommittee.
471 <u>Rules 74, 75, and 76</u>. These rules were abrogated in 1997. There was no further discussion of the
472 decision to reserve these rule numbers for possible future use, avoiding any renumbering of
473 Rules 77 through 86.
474 <u>Rule 77.</u> Present Rule 77(a) says the district courts "shall be deemed always open." Style Rule
475 77(a) says every district court "is always open." But not all courts have drop boxes. Not all are
476 in fact always open. Appellate Rule 45(a)(2) says a court of appeals is always open. Criminal
477 Rule 56(a) says a district court is "considered" always open. The manner of speech may be tied
478 to electronic filing, for which courts perhaps will be always open apart from power failures or
479 equipment failures. It was concluded that it remains useful to recognize the fiction in the Style
480 rule, which will say that "Every district court is <u>considered</u> always open." The Style
481 Subcommittee can decide whether the tag line for subdivision (a) should incorporate
482 "considered."
483 Style Rule 77 also presents the question whether some substitute should be found for
484 repeated references to "mesne" process. Present Rule 77(a) refers to issuing and returning
485 "mesne and final process"; Style Rule 77(a) refers simply to "issuing and returning process," and
486 no one has objected to that. Present Rule 77(c) directs that the clerk may issue "mesne process"
487 and "final process to enforce and execute judgments." Style Rule 77(c)(2) separates these as
488 subparagraph (A) — "issue mesne process" — and subparagraph (B) — "issue final process to
489 enforce and execute a judgment." It was suggested that (c)(2) should be revised on the model of
490 (a), combining subparagraphs (A) and (B) into one (A): "issue process." A counter-suggestion
491 was to keep (A) and (B) separate, but revise (A) to "issue intermediate" process. It was noted

492 that Rule 4 process is neither "mesne" nor "final" process, but initial or initiating process, and
493 that Rule 4 has its own provisions for issuing the summons. Rule 4, however, does not seem to
494 complicate the drafting of Rule 77. In the end it was suggested that combining subparagraphs
495 (A) and (B) may make sense, but that this is a matter for final resolution by the Style
496 Subcommittee.
497 Style Rule 77(d)(1) carries forward the cross-reference to Rule 5(b) that was added to
498 present Rule 77(d) in 2001. It was concluded that the specific reference to subdivision (b) should
499 not be changed.
500 Rule 78. Style Rule 78(a) omits parts of the present rule that may seem to affect meaning.
501 Earlier versions of Style Rule 78(a) began: "Unless local conditions make it impracticable," and
502 went on to say that the district court must establish regular times and places for hearing motions
503 "often enough to dispatch business promptly." These qualifications were omitted from the
504 current draft on the theory that they have been made obsolete by the widespread shift from master
505 calendars to individual judge dockets. It was protested that nonetheless they have meaning, and
506 should not be deleted. But it was countered that there is no real need for Style Rule 78(a) at all
507 — it orders the court to do something that no courts do. It is individual judges who set times for
508 hearing motions, and this actual practice can be recognized. We have established the proposition
509 that a rule that has lost its apparent meaning to substantially uniform and contrary practice can be
510 changed to reflect reality; Rule 33(c) is a clear example.
511 It was agreed that Style Rule 78(a) should carry forward as presented. But the Committee
512 Note should be supplemented by a statement that a court that wishes to do so can establish
513 regular times and places for oral hearings on motions. The Note also will observe that most
514 courts have moved away from this practice.
515 The Committee also approved the Style-Substance Track proposal to amend Rule 78 by
516 deleting the provision that the judge may make an order to advance, conduct, and hear an action.
517 Rule 16, revised repeatedly since Rule 78 was adopted, now covers all of this provision. It was
518 also noted that the tag line for the Style-Substance version of Style Rule 78 should be revised by
519 deleting "other orders."
520 The second paragraph of present Rule 78, allowing for submission of motions without
521 oral hearing, begins "To expedite its business," the court may make such provisions. Style Rule
522 78(b) omits this preface. It was suggested that these words establish a limit on the reasons that
523 justify submission without oral hearing; they are more than a mere intensifier, and should be
524 retained. This suggestion was echoed with a lament that the diminution of oral argument is
525 unfortunate, however necessary it may be. But a motion to restore "to expedite its business"
526 failed with one vote yes and eleven votes no.
527 Rule 79. It was agreed that a late change in Style Rule 79(a)(3) is an improvement: "Each entry
528 ~~Entries~~ must briefly show * * *."
529 Rule 80. Present Rule 80(c) refers to testimony "at a trial or hearing." Style Rule 80 reverses the
530 sequence to "at a hearing or trial." The theory is that hearings ordinarily come before trials in the
531 sequence of trial-court events. The change was accepted as a matter of style.
532 Rule 81. Present Rule 81(a)(4) refers, among others, to proceedings under 15 U.S.C. § 715d(c)
533 "to review orders of petroleum review boards." The snag is that § 715 does not provide any
534 name for the review boards. A full description might be "an order denying a certificate of
535 clearance issued by a board appointed by the President or by any agency, officer, or employee
536 designated by the President under 15 U.S.C. § 715j." It was agreed that Style Rule 81(a)(6)(D)
537 should be revised to read: "15 U.S.C. § 715d(c) for reviewing an order denying a certificate of
538 clearance."
539 Present Rule 81(f) provides that any rule that refers to an officer of the United States
540 includes a district director of internal revenue, a former district director or collector, or the

541 personal representative of a deceased district director or collector. All of these offices have been
542 abolished. There is no substantive right that might be affected by reflecting the disappearance of
543 these offices in Style Rule 81. It was agreed that it is proper to abandon the original Style Rule
544 81(e) that carried forward the provisions of present Rule 81(f).
545 <u>Rule 82.</u> No issues required further discussion.
546 <u>Rule 83.</u> No issues required further discussion.
547 <u>Rule 84.</u> No issues required further discussion.
548 <u>Rule 85.</u> No issues required further discussion.
549 <u>Rule 86.</u> No issues required further discussion.
550 *Style Project: Rule 23*
551 Because class actions are an enormously sensitive area, and because Rule 23 has been
552 recently amended, Rule 23 was considered separately in the Style Project. It was reviewed in
553 subcommittee, and is now ready for its first consideration by the Committee as the final rule in
554 the Style Project.
555 The sensitivity of Rule 23 has led to retaining many words that might have been changed
556 on a more aggressive styling approach.
557 Style Rule 23(b)(1)(A) carries forward the language of present Rule 23(b)(1)(A):
558 "inconsistent or varying adjudications with respect to individual class members ~~which~~ <u>that</u> would
559 establish incompatible standards of conduct * * *." "[T]hat" is a remote pronoun, separated from
560 its antecedent "adjudications." But it was agreed that there is no ready fix for the remoteness; no
561 change will be made.
562 Present Rule 23(b)(1)(B) refers to adjudications with respect to individual class members
563 that would as a practical matter be dispositive of "the interests of the other members not parties
564 to the adjudication." The draft Style Rule 23(b)(1)(B) changes this to "the other nonparty
565 members' interests." This formula was challenged, and several substitutes were suggested:
566 "interests of nonparty class members," "other class members," "interests of other nonparty class
567 members," and "absent class members' interests." The phrases that referred to "nonparty" class
568 members were challenged on the ground that they will give rise to arguments about the status of
569 class members as parties or as not parties for such purposes as discovery, intervention, and
570 counterclaims. The underlying problem is that the rule addresses the setting in which no class
571 has yet been certified or defined; it speaks to those who would be members of the putative class
572 if it is certified in terms of the requested definition. It was concluded that the only safe course is
573 to revert to the present rule language, adding a reference to the anticipated independent
574 adjudications that makes it clear that they are adjudications in individual actions: "that, as a
575 practical matter, would be dispositive of the ~~other nonparty members'~~ interests <u>of the other</u>
576 <u>members not parties to the individual adjudications</u> * * *."
577 The resolutions proposed by footnotes 4, 5, 6, 7, and 8 on pages 19 and 20 of the agenda
578 materials were all approved.
579 Style Rule 23(d)(1) begins by carrying forward the present rule's reference to
580 "appropriate" orders. It was agreed that this word should be deleted in accord with the general
581 style: "the court may issue ~~appropriate~~ orders * * *."
582 It was agreed that Style Rule 23(d)(1)(B)(iii) properly carries forward notice to class
583 member of the right to "come into" the action. The same conclusion was reached as to Style
584 Rule 23(d)(1)(D)'s reference to allegations about "representation of absent persons."
585 Style Rule 23(d)(2) generated substantial discussion. The final sentence of present Rule
586 23(d) reads: "The orders may be combined with an order under Rule 16, and may be altered or
587 amended as may be desirable from time to time." Style Rule 23(d)(2) reduces this: "An order
588 under (d)(1) may be combined with an order under Rule 16, and may be altered or amended."
589 The comma separating Rule 16 from the rest of the sentence was attacked as incorrect. It was

590 defended as a separation essential to prevent confusion of the liberal standard for amending a
591 Rule 23(d) order from the demanding standards set for amending a Rule 16 order. It was readily
592 agreed that the standards are quite different. But the method of suggesting the difference was
593 disputed.
594 The first suggestion was that the comma be deleted, but "also" be added: "with an order
595 under Rule 16 and also may be altered or amended." The next suggestion was that the sentence
596 be made two sentences. One illustration of the second sentence was: "Either order may be
597 altered or amended." Then it was suggested that a single sentence could be preserved by
598 reordering the thoughts: "An order under (d)(1) — which may be altered or amended — may be
599 combined with an order under Rule 16."
600 Further discussion focused on "as may be desirable from time to time." This language is
601 emphasized in the cases, which focus on the need for flexibility in revisiting Rule 23(d) orders as
602 the case moves along. Flexibility should be encouraged. It was also suggested, however, that
603 most of the cases focusing on flexibility and freedom to change deal with reconsideration of the
604 class certification and class definition under Rule 23(c). It was further noted that Rule 23(c) was
605 recently amended, in part to discourage the occasional practice of tentative certifications. It also
606 was suggested that "the court has to manage the action. We all know that."
607 Discussion returned to the proposition that the standard for amending a Rule 16 order is
608 more demanding than the standard for amending a Rule 23(d) order. It is useful to make sure
609 that this liberality is preserved by the language of Style Rule 23.
610 It was agreed, 8 yes and 5 no, to restore these words: "altered or amended as may be
611 desirable from time to time." Style 23(d)(2) would read:
612 An order under (d)(1) — which may be altered or amended as may be desirable
613 from time to time — may be combined with an order under Rule 16.
614 It was further agreed that the Style Subcommittee may choose to divide this provision into two
615 sentences.
616 The Committee Note should state that the Rule 16 standard is different from the Rule 23
617 standard.
618 Style Rule 23(e) rearranges the structure of present Rule 23(e), which was adopted on
619 December 1, 2003. Despite the recent adoption of the rule, and despite the potential confusion
620 that may arise from misleading references in the 2003 Committee Note, it was agreed that the
621 rearrangement is an improvement and should be retained. A suggestion that the 2003 Committee
622 Notes be rewritten to reflect the changed designations was rejected. Several other Style Rules
623 change subdivision and other designations; the effort to establish a lengthy concordance in
624 various notes, or separately, runs the risk of incompleteness. To be complete, a concordance
625 should reflect the occasional drastic rearrangements of provisions even within a single present
626 subdivision, and could easily generate more confusion than assistance.
627 Present Rule 23(f), adopted in 1998, states that a court of appeals may "in its discretion"
628 permit appeal from an order granting or denying class certification. Style Rule 23(f) deletes "in
629 its discretion" as an undesirable intensifier. The deletion was accepted. A substantial body of
630 case law has emerged, clearly establishing the open-ended nature of the discretion and identifying
631 considerations that guide the exercise of discretion. But the Committee Note may explain that
632 the scope of appellate discretion remains unchanged.
633 Present Rule 23(f) provides for an application made to the court of appeals. Style Rule
634 23(f) provides instead for a petition filed with "the circuit clerk." It was protested that there is no
635 such thing as a circuit clerk; there is a clerk for the circuit court of appeals. But Appellate Rule
636 5(a)(1), governing the procedure in the court of appeals, provides for a petition filed with the
637 circuit clerk. The Appellate Rules Committee discussed this phrase at length and adopted it. It
638 was agreed that Style Rule 23(f) should reflect the style of the complementary Appellate Rule.

639 Style Rule 23(g)(1)(C) says that the court may "direct" potential class counsel to provide
640 information. The Style Subcommittee will decide whether as a matter of global style "direct"
641 should be changed to "order."
642 It was noted that the standard Style Project Committee Note language should be added
643 after Rule 23.
644 A motion to submit Style Rules 64 through 86 and Style Rule 23 to the Standing
645 Committee with a recommendation for publication as part of a comprehensive Style package of
646 Rules 1 through 86 was approved unanimously.
647 *Style: Global Issues*
648 The method of expressing cross-references within a single rule has varied throughout the
649 course of the Civil Rules Style Project. Different conventions have been used at different times.
650 Current drafts reflect the most succinct possible method. Three methods seem to be the leading
651 candidates for adoption.
652 The choice can be illustrated by looking to Appellate Rule 27(a)(3)(B). This
653 subparagraph refers back to the preceding subparagraph by saying that the time[s] to respond to a
654 new motion and to reply to the response "are governed by Rule 27(a)(3)(A) and (a)(4)." This
655 method is the convention adopted in styling the Appellate Rules and the Criminal Rules. It was
656 adopted after extensive discussion by the advisory committees. They recognized that these cross-
657 references seem ungainly at times, but concluded that this is the clearest available method. This
658 method was used at the beginning of the Civil Rules Style project, and in drafting some recent
659 Civil Rules amendments.
660 A second approach — the one adopted in the current Civil Rules Style Project drafts —
661 would cross-refer not to "Rule 27(a)(3)(A)," but only to "(A)." This approach saves space; over
662 the course of the many internal cross-references found in several of the Civil Rules, it saves a
663 considerable amount of space. It relies on the proposition that a reader who sees a reference to
664 (A) or to (C) in subparagraph (B) will immediately understand that the reference is to another
665 subparagraph in the parallel series. The concern, however, is that occasional users of the rules
666 may find this bald form of cross-reference confusing. It is not yet a general convention, and will
667 catch some readers off guard.
668 A third approach, rather close to common practice in the present rules, is to provide an
669 additional word cue. In Rule 27(a)(3)(B), for example, the cross-reference would be to
670 "subparagraph (A)," not to "(A)" naked. The descriptive word would attach to the highest part of
671 the rule referred to. If Rule 27(a)(3)(B) were to refer to [the nonexistent] 27(b)(2)(A), for
672 example, it would refer to "subdivision (b)(2)(A)." This approach scores high on the elegance
673 scale. It is easily understood — the reader need only track to (b) to know what is a subdivision.
674 But again, it uses words and increases the word count for the entire set of Civil Rules.
675 Discussion focused on the advantages of adhering to the model used in the Appellate and
676 Criminal Rules. One advantage is that of consistency of style across different sets of rules. That
677 advantage is not an inexorable command — it has been agreed that style conventions need not be
678 frozen by the first style project, but may evolve as further style experience suggests significant
679 improvements. But the advantage is real. In addition, several Committee members thought that
680 this style is the clearest, and is the most "user-friendly." Young lawyers, confronted with a
681 reference simply to (g)(2)(H) will be confused. And computers are completely literal — a search
682 for 27(a)(3)(A) may work better than a search for (a)(3)(A), and surely will work better than a
683 search for (A).
684 It was protested that when Rule 27(a)(3)(B) refers to Rule 27(a)(3)(A), there is a miscue.
685 The reader will expect that attention is being directed further away than the immediately
686 preceding subparagraph. This protest availed not.
687 The Committee voted, 13 yes and zero no, to adhere to the full Rule cross-reference

688 convention adopted by the Appellate and Criminal Rules.

689 *Style Rules 1-63 (Apart from 23)*

690 Judge Rosenthal introduced the current drafts of Style Rules 1 through 63 by noting that
691 each rule had earlier been reviewed by a subcommittee and the full Committee. The Standing
692 Committee has approved each for publication as part of a comprehensive Style package of all the
693 Civil Rules. The present review is designed to elicit comments about implementation of the
694 conventions that have been adopted to resolve the "global issues," and to present a final
695 opportunity for pre-publication comment on individual rules.
696 An observer suggested that Style Rule 23.1(b)(1) should be revised. The present rule
697 requires an allegation that the plaintiff was a shareholder at the time of the complained-of
698 transaction or that the plaintiff's share "thereafter devolved on the plaintiff by operation of law."
699 The Style draft eliminates "operation of," saying only "devolved on it by law." The rule
700 addresses involuntary acquisitions, such matters as inheritance, or an executor who steps into the
701 shoes of a deceased shareholder, or acquisition of shares through a merger. This thought was
702 echoed by a member who observed that there is a lot of case law on what "by operation of law"
703 means.
704 The Committee voted to restore "by <u>operation of</u> law."
705 Another observer suggested that there may be an inconsistency between the notice
706 provisions of Style Rule 23.1 and the provisions of Rule 23(e). Rule 23(e) now requires notice
707 of a voluntary dismissal to class members only if the class members would be bound by the
708 dismissal. This provision was added in 2003, changing the result of several cases that had ruled
709 that notice must be given even if a voluntary dismissal comes before certification and does not
710 bind class members. Rule 23.1, both in present and in Style forms, seems to require notice
711 whether or not shareholders or members would be bound by the dismissal. It was agreed that any
712 inconsistency involves matters of meaning that cannot be addressed in the Style Project. The
713 question is one that may deserve study in the Reform Agenda.
714 Style document 625, Item 4, describes the global choices made in saying "terms" or
715 "conditions." It includes a suggestion that "terms" be used consistently through Style Rule 62(b),
716 (c), and (h). The Committee approved these choices.
717 Style 625 Item 5 addresses the use of "undue hardship" and "undue burden." It
718 recommends "undue burden" throughout. The present Style draft uses "undue hardship" in Rules
719 26(b)(3)(A)(ii) and 45(c)(3)(C)," and "undue burden" in six other rules. But questions have been
720 raised as to substituting "undue burden" for "undue hardship" where it is used now. First is Rule
721 26(b)(3), the work-product rule. This rule is special, allowing work-product protection to be
722 defeated only on showing that a party cannot effectively present its case without discovery of the
723 protected information. The Style Subcommittee, moreover, has been reluctant to tinker with the
724 discovery rules — they are used constantly, and are litigated frequently. It was agreed that
725 "undue hardship" should remain the term in Rule 26(b)(3)(A)(ii).
726 Then it was noted that the reporter had acquiesced in changing Rule 45(c)(3)(C)(i) from
727 "undue hardship" to "undue burden." This position arose from the view that although hardship is
728 quite different from burden, the qualification added by "undue" seems to obliterate the
729 distinction. It is difficult to find a meaningful distinction between "undue hardship" and "undue
730 burden." But it was pointed out that "undue burden" seems to imply a balancing process — the
731 weight of the burden is compared to the advantages to be gained. "Undue hardship" may
732 authorize closer attention to the cost to a particular person — a burden that may be due in
733 relation to the possible advantages still may impose an undue hardship on a person ill-equipped
734 to carry the burden. Rule 45 is part of the discovery rules, and should be treated with a measure
735 of respect comparable to the respect paid the rules from 26 through 37.
736 The Committee voted, 13 yes to zero no, to restore "undue hardship" to Style Rule

737 45(c)(3)(C)(i).
738 The Committee voted to change Style Rule 9(h)(3) to the form of earlier Style drafts and
739 the present Rule: "~~An action~~ A case that includes * * *."
740 The Committee considered whether to delete "substantial" from Style Rule 25(d)(1) in
741 keeping with the global convention. It was decided to retain "substantial" because it may be
742 intended to distinguish between substantive rights and procedural rights: "any misnomer not
743 affecting the parties' substantial rights must be disregarded."
744 Style 625 identifies several uses of "certificate" and "certification." It was agreed that the
745 Department of State should be consulted on the choice between "certificate" and "certification" in
746 Style Rule 44.
747 Judge Rosenthal observed that a number of open issues remain in the footnotes to the
748 Style drafts of Rules 1 through 63. Those that have not been raised at this meeting will be
749 resolved by the Style Subcommittee, Judge Rosenthal, the consultants, and the reporter in
750 preparing the final package of rules to be submitted to the Standing Committee with a
751 recommendation for publication. Committee members should offer suggestions to anyone in this
752 group. The Committee approved this method of preparing the final publication package.
753 By 13 votes yes and zero votes no, the Committee approved transmission to the Standing
754 Committee for publication of the Style package of Rules 1 through 86.
755 The Committee expressed its congratulations to the Style Subcommittee, the consultants,
756 and Judge Levi for the great progress made in the speedy creation of the Style Package.
757 *Rule 5.1: Notice of Constitutional Challenge*
758 A proposed new Rule 5.1 was published in August 2003. The rule would embrace and
759 substantially change the provisions of present Rule 24(c) that implement 28 U.S.C. § 2403.
760 Section 2403 requires a court of the United States to certify to the United States Attorney General
761 or the Attorney General of any State the fact that the constitutionality of an Act of Congress or
762 state statute has been drawn in question. Certification is designed to implement the statute's
763 further creation of a right to intervene.
764 Proposed Rule 5.1 goes beyond the requirements of § 2403 in several directions. Section
765 2403 applies only if the Act of Congress or state statute affects the public interest; Rule 5.1
766 applies without requiring any determination whether the statute affects the public interest.
767 Section 2403 applies only if the United States "or any agency, officer or employee thereof is not a
768 party." Rule 5.1 applies if a United States or state officer or employee is a party but only in an
769 individual capacity. Section 2403 requires only that the court certify the fact that
770 constitutionality is drawn in question. Rule 5.1 requires that the party drawing the question file a
771 Notice of Constitutional Question and serve the notice on the Attorney General; the court still is
772 obliged to certify the challenge.
773 The comments on proposed Rule 5.1 were discussed at the April 2004 Committee
774 meeting, and new questions were raised within the Committee. The discussion is summarized in
775 the April Minutes. It was agreed that it is wise to relocate the new provisions away from Rule
776 24(c), where the implementation of § 2403 has been effectively buried. Present Rule 24(c) calls
777 on the parties to remind the court of its § 2403 certification duty, and it was agreed that the new
778 rule should continue to impose some such duty on the parties. But there was disagreement
779 whether to add to the notice requirement imposed on the party who draws the constitutionality of
780 a statute into question. The published rule requires both that the party file a Notice of
781 Constitutional Question and also that the party serve the notice on the Attorney General. It was
782 agreed that the service requirement be changed to state directly that service is made by certified
783 or registered mail, rather than indirectly by incorporating Rule 4(i)(1)(B). But the Committee
784 first determined to remove any requirement that a party serve notice on the Attorney General.
785 Then the Committee voted to reconsider, and was unable to complete consideration of this issue

786 in the time available.
787 The April discussion also raised questions about the published provision that required the
788 court to set a time for intervention not less than 60 days from the court's certification to the
789 Attorney General, and about the Committee Note statements describing the activities that might
790 properly continue during the period set for intervention.
791 All of these questions were brought back for further discussion. It was noted that letters
792 supporting the published rule had been received from Patrick C. Lynch, Attorney General of
793 Rhode Island, and Ken Salazar, Attorney General of Colorado. Attorney General Salazar noted
794 that a Colorado rule and the state declaratory judgment statute require party notice to the
795 Attorney General, and that this practice works well. Later, it was noted that other attorneys
796 general and the conference of attorneys general support the party-notice requirement.
797 Committee discussion focused on a discussion draft rule that restores the requirement that
798 the challenging party serve notice on the Attorney General and departs from the published draft
799 in several details. Changes approved at the April meeting were carried forward. The change to a
800 direct statement of the method of serving by certified or registered mail has been noted already.
801 In addition, the published draft would have required notice when an officer of the United States
802 or of a state brings suit in an official capacity; there is no need for notice to the United States or
803 state Attorney General of such actions, and this requirement was dropped.
804 The discussion draft also specifically addresses action by the court during the period set
805 for intervention. The court may reject the constitutional challenge during this period, but may
806 not enter a final judgment holding the statute invalid. The Committee Note would continue to
807 amplify this provision by describing other permissible actions, such as entering an interlocutory
808 injunction restraining a challenged statute. This Note discussion would have a stronger
809 foundation in the rule with the added rule text.
810 Following a review of the published draft, attention turned to a letter from Assistant
811 Attorney General Keisler stating in detail the reasons for the Department of Justice's support of
812 the proposed rule. The first concern is that failure to get notice of constitutional challenges is a
813 significant problem. An extreme illustration is provided by the Telecommunications Act of 1996
814 — it was challenged in 180 cases, but § 2403 certifications were made to the Attorney General in
815 only 13 of those cases. In one of the cases without certification the district court held the statute
816 invalid. Another frequently challenged statute, the Religious Land Use and Institutionalized
817 Persons Act of 2000, yielded a better but still unsatisfactory count. Of some 71 district court
818 challenges, certification was made in approximately 50; in six cases the court upheld the statute
819 without having certified the case to the Attorney General. There are no comprehensive statistics
820 to measure experience across the full range of constitutional challenges, but an incomplete survey
821 found several other cases in which the certification duty was overlooked.
822 The effect of no notice, or late notice, is that the Department of Justice enters these
823 actions late. Late intervention is a burden on the parties, on the court, and on the Department.
824 Even if a statute is upheld, the Department has lost the opportunity to participate in building the
825 record for appeal.
826 The second observation offered by the Department of Justice was that there is little reason
827 for concern about imposing on the parties an obligation to notify the Attorney General. Rule
828 24(c) already states that a party challenging the constitutionality of legislation should call the
829 court's attention to the certification duty. Adding a requirement that the party also notify the
830 Attorney General is a small incremental burden. A party who brings an action against the United
831 States to declare a statute invalid perforce gives notice to the United States. The effect of an
832 invalidating judgment in litigation among others is similar, and a similar notice requirement is
833 appropriate. Seven districts have adopted local rules that require party notice, and there is no
834 indication that they impose undue burdens. Thirty-six states have adopted some form of the

835 Uniform Declaratory Judgment Act, which requires that a party serve the attorney general with a
836 copy of any proceeding that asserts the unconstitutionality of a statute, ordinance, or franchise.
837 In addition 18 states have statutes that require party notice in any type of case, and 7 other states
838 have party notification rules that apply at the appeal stage. These statutes have not provoked
839 complaints of undue burden.
840 As a general matter, it was urged that party notice will more often advance efficiency, not
841 impede it. Party notice often will reach the attorney general well ahead of court certification, and
842 may prompt earlier intervention.
843 The third Department of Justice suggestion was that it is better to set a specific 60-day
844 intervention period in the rule. If the rule is changed to say expressly that the court can reject the
845 constitutional challenge during the intervention period, the rule and the Committee Note will
846 make it clear that proceedings can continue. The intervention period need not delay the progress
847 of the action. The Department will benefit from a 60-day period because it has internal processes
848 designed to concentrate in a few persons the final decision whether the United States should
849 intervene. These questions arise regularly, coming from all parts of the country, and uniform
850 national control is essential but also time-consuming.
851 General discussion began by asking whether a provision requiring a reasonable time to
852 intervene would work. It was responded that a general provision of this sort might work, but that
853 the proposed expansion of subdivision (c) ensures that district-court proceedings will not be
854 delayed by a set 60-day period. The Department will benefit from an assured 60 days. And the
855 concern about delay is further assuaged by the fact that the Department often is able to file its
856 brief with the motion to intervene.
857 It was suggested that it would be better to state the time to intervene as a reasonable
858 period no greater than 60 days. Or the time might be a reasonable period no less than 60 days.
859 But further support was offered for the flat 60-day period.
860 A different perspective was offered. A comprehensive survey of local rules shows that
861 when national rules call for action within a reasonable time, there is a strong tendency for related
862 local rules to set a specific time. A uniform specific time in the national rule will be useful.
863 This part of the discussion concluded by agreeing that the rule should say: "The Attorney
864 General has 60 days after the certification to intervene." Later discussion, however, modified
865 this provision to set the time as 60 days after the earlier of party notice or court certification, as
866 described below.
867 The question whether the challenging party should notify the Attorney General was
868 reopened. The need may be reduced by the simple relocation of the rule to a place that will draw
869 attention. Courts will be less likely to fail the duty to certify the challenge. The burden on the
870 party, moreover, is untoward. Perhaps the present experience that courts do not always certify
871 arises from failure of parties to honor the present Rule 24(c) behest that they call the court's
872 attention to the certification duty. At any rate, sophisticated attorneys now frequently provide
873 direct notice to the Department and find it difficult to elicit a reaction. The response may well
874 be: We cannot tell you what we will do. Go ahead and file the challenge and we will decide.
875 "Notice to the Department does not do much good."
876 One response was that in Pennsylvania state courts parties are required to notify the state
877 Attorney General of challenges to a statute. This practice works very well in Pennsylvania, and
878 apparently works well in other states. The local federal district rules also seem to work. The
879 burden is slight. The modest increase in the party's burden is far outweighed by the benefit of
880 notice. A challenge to an Act of Congress is a serious matter. The United States has a substantial
881 interest, and should have notice. "This is a sensible way to move the action forward, to bring the
882 right parties before the court at the right time."
883 It also was suggested that an anomaly will arise if party notice is not required on

884 challenging a statute of a state that requires party notice to the attorney general when the
885 challenge is made in a state court. A state should not be less well protected when its statute is
886 challenged in federal court.
887 There is a separate question about the consequences of a party's failure to give the
888 required notice. Will delay ensue when belated notice is given, or when the Department
889 intervenes? What if the Department intervenes after judgment? If we assume that notice has
890 desirable effects, why not state a consequence for failure to give notice? The "no forfeiture"
891 provision proposed in subdivision (d), carried forward from present Rule 24(c), may not fix the
892 problem. It was responded that other procedure rules impose obligations without defining
893 specific sanctions for nonobservance. The most likely consequence is that failure to give notice
894 will slow the action down a bit. And the most likely means of enforcement is that the first time
895 the issue is raised, perhaps at a pretrial conference, the court will direct that notice be given.
896 The need to worry about consequences for failure to give notice was addressed to pro se
897 cases. Forma pauperis actions are screened, but not other pro se cases.
898 Other issues also were raised. Section 2403 requires certification only when the Act of
899 Congress or state statute affects the public interest. Rule 5.1, both as published and in the
900 discussion draft, omits this limit. The Committee Note explains that the Attorney General should
901 have the opportunity to determine whether to argue that the public interest is affected.
902 Eliminating this requirement also relieves the court of any sense that it must draw fine
903 distinctions in deciding whether to certify the challenge. Appellate Rule 44(a), moreover, has
904 eliminated the "public interest" element. It is desirable to maintain consistency among the rules
905 in this respect.
906 The published draft and discussion draft carry forward the no-forfeiture language of
907 present Rule 24(c), stating that failure to serve the required notice, or the court's failure to
908 certify, do not forfeit "a constitutional right" otherwise timely asserted. It was objected that
909 "right" smacks too much of a legal conclusion — we do not know whether there is a right until
910 the question has been decided on the merits. It was concluded that "right" should be changed to
911 "claim or defense."
912 The provision for notice by certified or registered mail was questioned on the ground that
913 it is obsolete now, or will be in the near future. Provision should be made for notice by
914 electronic mail. This provision in the rule will encourage Attorneys General to develop
915 electronic mail boxes for this specific purpose, greatly facilitating the speed of notice and
916 immediate attention to it. It was agreed that the method of service should be expanded by adding
917 a provision allowing service by sending notice to any electronic mail address established by an
918 attorney general for this purpose. It was further observed that with the CM/ECF system, a court
919 could set up its system to send notice to the Attorney General automatically when a Notice of
920 Constitutional Question is filed, reducing still further the slight burdens imposed by the service
921 requirement.
922 A final suggestion was that those who are responsible for developing the civil cover sheet
923 should consider adding a box that directs attention to Rule 5.1. This strategy will not do much to
924 bring notice home to defendants who raise constitutional challenges, but it would help.
925 It was suggested that discussion draft 5.1(a)(1) should be revised to expand the Notice of
926 Constitutional Question. Present Rule 24(c) calls on the party to notify the court of the § 2403
927 certification duty. It was agreed that if this provision is to be added, the language would be:
928 "stating the question, identifying the paper that raises it, and calling the court's attention to its
929 certification duty under 28 U.S.C. § 2403." Support for the provision was found in concern that
930 simply filing the Notice of Constitutional Question will not actually bring the notice to the
931 court's attention. With electronic filing systems, judges get daily electronic notices of hundreds
932 of events. Some judges never see the notices, unless they say "motion." Others depend on their

933 case managers to sort through the notices. But it seems undesirable to address this level of detail
934 in a national court rule. Filing the Notice should suffice to call the court's attention — adding
935 more words to the Notice is not likely to make any difference in drawing the court's attention to
936 the Notice, and once the Notice has come to the court's attention the certification question is
937 sufficiently identified. In the end, this provision was removed from the motion to approve the
938 discussion draft with a number of changes.
939 Discussion then turned to the combined effect of the party-notice requirement and the
940 time to intervene. It was urged that the time to intervene should run from the Notice, if Notice is
941 given earlier than the court's certification. Time periods generally run from party notice.
942 An immediate response was that if the intervention period is tied to the Notice of
943 Constitutional question, it should not be tied to service of the Notice. The time of service can be
944 difficult to determine. If electronic service is adopted, moreover, filing and service will be
945 virtually simultaneous. Filing is a better trigger.
946 It was asked whether the Attorney General's interests are sufficiently protected by setting
947 the intervention period to the earlier of party notice or certification. Court certification suggests
948 that the court is taking the question seriously — that it is not inclined to dismiss the challenge
949 without further consideration. That may influence the Attorney General's evaluation of the need
950 to intervene. It was responded that the party notice should provide sufficient information to
951 make an informed decision whether to intervene.
952 The problem of tying intervention time to the party Notice was approached from a
953 different angle. A time period that runs from certification has a clear point of reference; there is
954 no need to determine the time of service, and no need to worry about the need to specify a time
955 for service after filing that ensures that the Attorney General actually receives the notice early in
956 the intervention period. There is a further advantage in looking to certification. Section 2403
957 requires the court to certify the question and permit the United States to intervene. What happens
958 if the court certifies the fact of the challenge more than 60 days after the party notice? There is
959 no reason to consider exercising the Enabling Act authority to supersede the statute. Section
960 2403 probably requires the court to allow intervention after certification unless Rule 5.1 is
961 intended to supersede. Why create a rule that may cause confusion about supersession, and — if
962 there is no supersession — will be at odds with the statute?
963 Discussion continued by accepting a motion that the rule provide that the court may
964 enlarge or reduce the 60-day presumptive intervention period. Turning to the event that triggers
965 the intervention period, it was urged that the period should run from the earlier event of notice or
966 certification. The parties can move to enlarge or shorten the period. Failure to rely on the earlier
967 event will result in delay. This suggestion was met by renewal of the arguments that it is simpler
968 to rely on certification to begin the intervention period. What is the purpose in requiring
969 certification if the time to intervene runs from notice? Notice is made to take over the role of
970 certification whenever it occurs earlier, and it is likely that certification will come first. In many
971 cases, indeed, the court may not be aware of the action for some time after the Notice is filed.
972 The expanded version of Rule 5.1(c) ensures that the court can continue to act during the
973 intervention period, doing everything it otherwise might do apart from entering a final judgment
974 invalidating a statute. In response, it was suggested that the period should run from the party
975 Notice as a reward for filing the Notice.
976 This discussion prompted the suggestion that Rule 5.1(a)(2) should direct that the Notice
977 be "filed and served." Rule 5.1(a)(1), however, directs filing. There is no need to repeat the
978 command to file.
979 A renewed suggestion that intervention time should run from the court's certification was
980 met by a motion that time should run from the earlier of party notice or certification. It was
981 noted that the Department of Justice does rely on the certification as an indication that the court

982 takes the constitutional challenge seriously. It was further noted that the concern about delay can
983 be met by the parties — they can urge the court to certify promptly. But it was suggested that
984 some judges may not be interested in prompt certification; when parallel cases involve
985 overlapping constitutional challenges, some judges may prefer that the challenges be resolved by
986 other courts and delay certification to give the other actions a head start.
987 The motion to set intervention time from the earlier of the Notice of Constitutional
988 Question or the court's certification passed, 8 votes yes to 6 votes no.
989 A polished draft Rule 5.1 will be prepared and circulated for review and vote by
990 electronic mail.
991 The Committee did not discuss the question whether the cumulative effect of the changes
992 to be made from the published proposal make it desirable to republish the revised rule for further
993 comment.
994 *Electronic Government Act Template Rule*
995 Section 205(c)(3) of the E-Government Act of 2002 directs exercise of the Enabling Act
996 rulemaking authority to adopt rules "to protect privacy and security concerns relating to
997 electronic filing of documents and the public availability * * * of documents filed electronically."
998 Because the Appellate, Bankruptcy, Civil, and Criminal Rules are involved, the Standing
999 Committee has created a subcommittee chaired by Judge Fitzwater to coordinate work by the
1000 several advisory committees. Professor Capra, Reporter for the Evidence Rules Committee, is
1001 the Lead Reporter for the Subcommittee. A template rule was prepared, and was revised
1002 extensively after a productive Subcommittee meeting in June 2004.
1003 The June Template Rule provided the focus for discussion. Professor Capra noted that
1004 the goal of the work is to achieve as much uniformity as possible among the several sets of rules.
1005 The Subcommittee hopes to help guide the advisory committees toward this end.
1006 One general question is raised by subdivision (e). The background assumption, based on
1007 the policies developed by the Committee on Court Administration and Case Management
1008 (CACM), is that ordinarily nonparties have full access to electronic case files. It makes no
1009 difference whether access is sought from a computer terminal in the courthouse or from a
1010 computer half a world away. Subdivision (e) in its present form qualifies this assumption in
1011 actions for benefits under the Social Security Act. The parties are allowed full electronic access
1012 to the court file, and nonparties are allowed full access from the court's on-site computer. But
1013 nonparties are not allowed "remote electronic access" to anything more than the docket and the
1014 court's "opinion, order, judgment, or other disposition." The Department of Justice recommends
1015 that this exemption be expanded to include immigration cases that involve immigration benefits,
1016 detention, or removal. CACM has responded by recommending a "compromise provision." This
1017 provision would begin by exempting the administrative record in immigration cases from
1018 electronic filing until a system is perfected for redacting the administrative record at the time it is
1019 prepared. Electronic filing, with redaction, would be required for all documents prepared for
1020 original filing in the district court or court of appeals. The Department of Justice could accept
1021 the CACM proposal, but believes that immigration cases should be treated in the same way as
1022 Social Security cases. There are tens of thousands of immigration cases every year, and many of
1023 them find their way to the courts. The records commonly include great amounts of intensely
1024 private information. This may be particularly true in asylum cases. Some courts are swamped
1025 with immigration cases; they account for an astonishing portion of the Ninth Circuit docket, and
1026 a large portion of the Second Circuit docket. The rule will be less complicated if it treats social
1027 security and immigration cases the same way.
1028 Professor Capra supported the Department position to the extent of suggesting that
1029 immigration cases either should be treated in the same way as social security cases or should not
1030 be given any special treatment. The middle road is not attractive.

1031 It was suggested that the immigration bar will likely provide useful commentary on the
1032 desirability of the proposal for limited access. One special concern arises from projects to study
1033 the actual implementation of the immigration laws. Academic inquiry will be much easier with
1034 full electronic access from a remote location, and may be possible only on that basis. Template
1035 subdivision (e) provides that a court may allow remote access to the full file by remote means,
1036 but perhaps that is not protection enough.
1037 The Committee was asked to consider three approaches to immigration cases. The first
1038 was the "compromise" suggested by CACM; this approach was rejected. The second was to treat
1039 immigration cases in the same way as social security cases; the third was to say nothing about
1040 immigration cases in the rule. The Committee voted, with one abstention, to treat immigration
1041 cases in the same way as social security cases.
1042 One judge asked why social security cases are given special treatment. Much of the
1043 information initially protected by the template rule is revealed in the opinion deciding the case.
1044 But it was agreed that not all of the information is revealed in the opinion, and agreed that the
1045 most sensitive and intimate information is most likely to be omitted from the opinion.
1046 Judge Fitzwater expressed the Subcommittee's hope that the advisory committees will
1047 adopt specific rules. The Subcommittee will try to offer its help as a resource on global issues.
1048 Work has begun on the assumption that the committees should accept the policy choices already
1049 recommended by CACM and adopted by the Judicial Conference. Departures should be
1050 undertaken only on finding strong justification.
1051 One question specific to the Civil Rule is whether a minor's name should be redacted to
1052 initials only, as provided by Template (a)(2). The Bankruptcy Rules Committee has limited the
1053 redaction requirement by adopting it for adversary proceedings and contested matters unless the
1054 minor being identified is the debtor in the case. If the minor is the debtor, full identification is
1055 necessary. It was observed that minors may be parties to litigation that is really brought and
1056 driven by their parents. And they may be parties to other forms of litigation that involve horrific
1057 events. The full name of the party may be important to the other parties, but the circumstances
1058 may call for denial of public access. There is no real risk that a party will not be able to identify
1059 its adversaries — if for some unusual reason the parties cannot agree to exchange the necessary
1060 information outside court filings, the court can order exchange on appropriate terms.
1061 A general question facing all the rules is posed by subdivision (f). This subdivision
1062 allows the court to limit or prohibit remote electronic access by nonparties to protect against
1063 widespread disclosure of private or sensitive information that is not otherwise protected by
1064 redaction under subdivision (a). The present draft may be longer than necessary to express the
1065 thought, but the central question is whether this is a desirable additional protection. The courts
1066 undoubtedly have authority to limit access without this express provision. But it helps to make
1067 the authority clear and to remind the parties. This thought was expanded by the observation that
1068 there is a big difference between allowing electronic access at the courthouse and allowing
1069 electronic access to anyone anywhere in the world. The template rule does not protect the last
1070 four numbers of social security, tax identification, or financial account numbers. Those four
1071 numbers alone are frequently used in requests to verify identity for telephone or on-line
1072 transactions. Diligent combing of court files could facilitate extensive identity theft. Some states
1073 may conclude that even this much remote electronic access is too much. But the Subcommittee
1074 has proceeded on the assumption that it is too late to reconsider the CACM decision to generally
1075 allow remote electronic access to anything that is accessible at the courthouse. Subdivision (f)
1076 may be all the more important in light of that basic starting point.
1077 This concern about remote electronic access was met by the observation that as the
1078 PACER system operates today, remote access is allowed only with a password. Access is not
1079 available to random web surfers. At the same time, attorneys are advised to be careful about

1080 filing sensitive information. The Template Rule Committee Note repeats this advice.
1081 In the end, the Committee concluded that subdivision (f) is clearly acceptable.
1082 A separate question asked whether the categories of information protected by redaction
1083 should include home addresses. Earlier drafts called for disclosure only of the city and state of
1084 residence. The Bankruptcy Rules Committee believes that bankruptcy practice needs full home
1085 addresses. CACM spent a long time on this question, and concluded that generally redaction is
1086 not necessary. The Subcommittee has suggested that the Criminal Rules Committee may want to
1087 protect this information. But there has been a value judgment by CACM that generally redaction
1088 is not appropriate. At the same time, defendants in notorious cases may need protection.
1089 Individual defendants in securities or corporate implosion cases involving widespread public
1090 injury, for example, may be besieged by unhappy citizens if their home addresses are readily
1091 available in the files of high-profile litigation. Protection against remote electronic access under
1092 subdivision (f) may be some help, but perhaps greater protection is needed.
1093 An observer asked how this system is expected to work. If only the redacted paper is
1094 filed, how do other parties know what is intended? Part of the answer is that the rule does not
1095 require that an unredacted copy be filed. Subdivision (b) grants permission to file an unredacted
1096 copy under seal, but only if a redacted copy also is filed. To this extent it relies on the authority
1097 provided by § 205(c)(3)(A)(iv) to adopt court rules that make the sealed copy "in addition to[] a
1098 redacted copy in the public file." But subdivision (b) does not require that an unredacted copy be
1099 filed. The problem is addressed directly by subdivision (c) for cases in which a party elects to
1100 file a sealed reference list that describes full "identifiers" and associates each with a redacted
1101 identifier that is used in the filed papers. Presumably other parties will have access to the
1102 reference list, and will readily identify the redacted information. (And perhaps other parties will
1103 be able to adopt the first reference list, although that would create difficulties with the right to
1104 amend the reference list.) If there is no subdivision (c) reference list, a party who genuinely does
1105 not understand what is intended by any part of a redacted filing should be able to find out.
1106 Normally the filing party can be expected to provide the information directly to other parties. If
1107 cooperation is withheld, the court can decide whether there is reason to maintain confidentiality
1108 even among the parties.
1109 One clear problem that has not been addressed arises from trial transcripts. It may be
1110 self-defeating to redact trial testimony, and often it will be difficult. The status of trial transcripts
1111 as "filed" or not "filed" is unclear. It seems clear enough that a trial transcript is filed when it
1112 becomes part of the process of preparing a record for appeal. Similar questions arise with respect
1113 to trial exhibits — many courts do not now require that they be filed, but others may require
1114 filing. And the gradual adoption of electronic trial recording may lead to electronic imaging of
1115 trial exhibits. Further information is needed to support a coherent approach to trial transcripts
1116 and exhibits. The committees should work further on these questions.
1117 Further discussion of the question whether minors' names should be redacted to initials
1118 led to a different question. Subdivision (g) provides that a party may waive protection of its own
1119 information by filing the information without redaction. Does this override the provision of
1120 subdivision (a) that allows a court to override redaction of the listed forms of information? This
1121 question in turn led to the observation that the "unless the court orders otherwise" provision in
1122 subdivision (a) seems calculated to authorize greater disclosure, and does not address greater
1123 protection.
1124 The greater protection question in turn led to the question whether the Template Rule
1125 limits the court's authority to order protection under other rules or as a matter of inherent power.
1126 The Template Rule is deliberately not designed to address the general questions of sealing court
1127 records or access to trial. It does not address such other rules as the discovery protective order
1128 provisions in Rule 26(c). Rule 16 also may be a source of protective authority. But subdivision

1129 (a) might seem to imply a presumption that it is proper to disclose a minor's initials, the last four
1130 digits of a social security number, and so on. There may be legitimate needs for protection, and
1131 some litigants may be willing to seek advantage from another party's fear of injury from
1132 disclosure of even redacted information. It was agreed that a paragraph should be drafted for the
1133 Committee Note to address this concern, stating that the new rule does not imply any limitation
1134 on the exercise of other sources of protective authority.

1135 *Filed-Sealed Settlement Agreements*

1136 Tim Reagan presented a succinct reminder of the major findings of the FJC study of
1137 sealed settlement agreements. A survey of 288,846 civil cases found 1,270 cases — 0.44% of the
1138 total — with filed and sealed settlement agreements. They are rare. In almost all of these cases,
1139 the rest of the court file remained open and revealed any information about the litigation that
1140 might be a matter of public interest. Examination of a number of sealed agreements that became
1141 available for examination, moreover, showed that the settlement agreements themselves do not
1142 include any information of general public interest. They deny liability and state the amount of
1143 money to be paid, nothing more.

1144 The Committee approved, without dissent, a motion to ask Leonidas Ralph Mecham to
1145 send a letter to Senator Kohl describing the Federal Judicial Center's work and advising that the
1146 Advisory Committee will continue to monitor court practices but does not intend to propose any
1147 new rules at this time.

1148 *Spring Meeting*

1149 Judge Rosenthal observed that the spring meeting will be busy with the need to consider
1150 public comments on the rules published for comment last August. The electronic discovery rules
1151 in particular are likely to generate extensive comment. But it also is desirable to begin planning
1152 for work to be done as the discovery and style projects wind down.

1153 One category of future work will involve matters of the sort that traditionally move
1154 directly between the Advisory Committee and the Standing Committee. Some possible topics
1155 are noted in the agenda materials. There is a thoughtful proposal to study developing practices
1156 in taking Rule 30(b)(6) depositions of organizations. The longstanding proposal to adopt a rule
1157 that directly addresses the practice of securing "indicative rulings" from district courts while an
1158 appeal is pending seems useful. The ABA Litigation Section already has expressed approval of a
1159 Rule 48 amendment to cover jury polling. The Style Project has generated a number of ideas for
1160 a "Reform Agenda." One of these ideas revives longstanding proposals to reconsider the entire
1161 package of pleading rules, whether for small changes or perhaps for more comprehensive
1162 revision. It even may be time to revive the Simplified Procedure project, in part because
1163 developing experience with discovery of computer-based information may make a simplified
1164 alternative system more attractive to more litigants.

1165 A second category of future work will involve other advisory committees. Every time a
1166 proposal dealing with the rules for counting time is published, one or more observers lament the
1167 confusions that inhere in the time rules and urge that a comprehensive revision be undertaken. It
1168 would be a great benefit to the bar if a uniform and clear set of time-counting conventions could
1169 be adopted for all of the rules sets. The task, however, will be complicated. It may invite
1170 reconsideration of the times presently allowed to take various actions. A change in the method of
1171 calculating periods of less than eleven days, for example, would virtually force reconsideration of
1172 the periods themselves.

1173 A second trans-committee project involves the evidence rules that linger on in the Civil
1174 Rules. There is a plausible argument that all evidence rules should be located in the Evidence
1175 Rules; the provisions in the Civil Rules may be seen as a simple residue of the days before the
1176 Evidence Rules were adopted. Some of the Civil Rules provisions, moreover, seem inconsistent
1177 with the Evidence Rules — Rule 32, for example, seems to permit use of deposition testimony in

1178 some circumstances not authorized by the Evidence Rules. And some of the Civil Rules
1179 provisions may escape much attention — Rule 65(a)(2), for example, provides that evidence
1180 taken at a preliminary injunction hearing becomes part of the record on the trial and need not be
1181 repeated at trial. Working out the details of this project may prove difficult, particularly if the
1182 committees disagree on which rule should be favored in reconciling inconsistencies.
1183 All Committee members indicated that both the time-counting and the evidence rules
1184 projects are worthy subjects for future work.
1185 Before the Spring meeting, a memorandum will be circulated suggesting items for
1186 deletion from the standing (and growing) agenda, with the opportunity to nominate any of them
1187 for discussion at the meeting.
1188 Committee members were asked to consider priorities. Which projects are more
1189 pressing? Should the long-deferred project to revise the Rule 56 summary-judgment procedures
1190 be taken on at last, either to address relatively minor matters such as the brevity of the periods
1191 provided for responding to a motion or to undertake more thorough revisions to reflect long
1192 experience with local rules?

The date for the Spring meeting will be set soon, most likely for some time in April.

Respectfully submitted,

Edward H. Cooper
Reporter

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JUDICIAL CONFERENCE OF THE UNITED STATES
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CRIMINAL RULES

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EVIDENCE RULES

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

FROM: **Hon. Susan C. Bucklew, Chair**
Advisory Committee on Federal Rules of Criminal Procedure

SUBJECT: **Report of the Advisory Committee on Criminal Rules**

DATE: **December 2, 2004**

I. Introduction

The Advisory Committee on the Rules of Criminal Procedure met on October 30, 2004, in Santa Fe, New Mexico, and took action on a number of proposed amendments to the Rules of Criminal Procedure. The Minutes of that meeting are included at Appendix A.

This Report addresses several informational items. The Committee has no items requiring action by the Standing Committee.

II. Information Item—Proposed Amendments Pending Before the Supreme Court

A. Rule 12.2. Notice of Insanity Defense; Mental Examination

The amendment to Rule 12.2 includes a new provision for sanctions in those cases where the defense fails to disclose the results of a mental examination conducted by the defense expert.

B. Rules 29, 33, 34 and 46. Proposed Amendments re Rulings by Court

Rules 29, 33, and 34 require that certain motions be filed within 7 days of the times specified in those rules. In the alternative, the moving party may obtain an extension of time for filing the motions, but the court must grant the extension and fix a new due date within the original 7-day period specified in each rule. The amendments to those three rules address the problem when a motion for an extension of time is filed in a timely fashion, but the court fails to rule on that request within the seven days. Under the proposed amendments, the court could grant the motion for an extension at any time after the seven-day period has expired, as long as the motion is filed within the seven-day period.

The Committee also proposed a conforming amendment to Rule 46 concerning timely filings.

C. Rule 32. Proposed Amendment Regarding Victim Allocution.

In June 2004, the Committee approved proposed amendments to Rule 32 that would have expanded victim allocution in all felony offenses, with the understanding that if Congress enacted pending legislation on the same subject, the proposed amendment could be withdrawn from further consideration. In September 2004, the amendment was approved by the Judicial Conference; subsequently, Congress amended Rule 32 to provide for even broader victim allocution. In light of that legislation, the Executive Committee of the Judicial Conference was polled, and the amendment to Rule 32 was withdrawn. The Criminal Rules Committee will continue to study the victim's rights legislation with a view toward possibly amending other rules as well as Rule 32.

D. Rule 32.1. Revoking or Modifying Probation or Supervised Release

Currently, there is no provision in Rule 32.1 for the defendant's right to allocution when probation or supervised release is being revoked. The proposed amendment to Rule 32.1 would provide for the right of allocution.

E. Proposed Rule Regarding Appeal of Rulings by Magistrate Judges

A proposed new rule, Rule 59, parallels Rule of Civil Procedure 72(a), which addresses what counsel must do to preserve an issue for appeal from a magistrate judge's ruling on nondispositive and dispositive matters.

III. Rules Published for Public Comment.

At its June 2004 meeting, the Standing Committee approved publication of proposed amendments to the following rules. The comment period expires on February

15, 2005. The Criminal Rules Committee has scheduled two hearings on those proposed amendments: January 21, 2005 in Tampa, Florida and February 4, 2005 in Washington, D.C.

A. Rule 5. Initial Appearance.

The proposed amendment to Rule 5 permits transmission of documents by reliable electronic means. This is one of several amendments to the rules that would permit use of electronic transmission of various documents.

B. Rule 32.1. Revoking or Modifying Probation or Supervised Release.

The proposed amendment to Rule 32.1 would permit transmission of documents by reliable electronic means and parallels the amendment to Rule 5, *supra*.

C. Rule 40. Arrest for Failing to Appear in Another District.

The proposed amendment to Rule 40 would fill a gap in the rules and authorize a magistrate judge in the district of the arrest to set conditions of release for an arrested person who fails to appear or violates any other condition of release.

D. Rule 41. Search and Seizure.

The proposed amendment to Rule 41 permits transmission of documents by reliable electronic means.

E. Rule 58. Petty Offenses and Other Misdemeanors.

The amendment to Rule 58 is intended to eliminate a conflict between that rule and Rule 5.1 regarding the right to a preliminary hearing and also clarifies the advice that must be given to a person during an initial appearance.

IV. Information Item—Rules Under Consideration by Criminal Rules Committee

At its meeting on October 30, 2004, the Criminal Rules Committee considered proposed amendments to several rules. Those proposals are being actively researched and prepared for further discussion at the Committee's April 2005 meeting.

A. Proposed New Rule 49.1 to Implement E-Government Act.

The Committee is in the process of drafting a proposed new Rule 49.1 that would follow the template rule drafted by Professor Capra, Reporter to the E-Government Subcommittee. The Committee is considering several additional provisions, however, to account for criminal cases.

For example, the Committee added to the exemptions from redaction the following: habeas case filings made under 28 U.S.C. §§ 2241, 2254, and 2255, arrest warrants, any filings made before the filing of a criminal charge, criminal case cover sheets, and charging documents. The Committee will continue to consider these additional exemptions, with a view toward presenting a proposed rule for publication to the Standing Committee at its June 2005 meeting.

B. Amendment to Criminal Rules Regarding Local Rule for Mandatory Electronic Filings.

At the request of Judge Levi, the Committee considered whether to propose an amendment to Rule 49 to provide that courts could require electronic filings. That suggestion had originated from the Committee on Court Administration and Management, which recommended that each of the Committees consider the issue, draft amending language, and publish those rules for public comment on an expedited basis.

Currently, Criminal Rule 49(d) provides that "A paper must be filed in a manner provided for in a civil action." Although there was a proposal to draft a new Rule 49(e) that would have explicitly addressed electronic filings, the Committee ultimately decided not to amend the rule, with the understanding that the proposed (and now published) amendments to Civil Rule 5 will also apply, through Criminal Rule 49(d), to criminal cases as well.

C. Rules 11 & Rule 16; Proposed Amendment Regarding Disclosure of *Brady* Information; Report of Subcommittee.

For the past several meetings, the Committee has considered a proposal from the American College of Trial Lawyers that the Criminal Rules be amended to address the *Brady* discovery issues. A subcommittee consisting of Mr. Goldberg (chair), Professor King, Mr. Fiske, Mr. Campbell, and Ms. Rhodes has worked on gathering data on the issue and has drafted a preliminary proposal that would amend Rule 16 to require pretrial disclosure of *Brady* material. Following an extensive discussion at the Committee's last meeting, there was a consensus that the subcommittee should continue its work, with a view toward presenting another draft at the Committee's Spring 2005 meeting.

D. Rule 45; Amendment to Provide for Extending Time for Filing.

The Committee is considering an amendment to Rule 45(c), which would provide for additional time for service if service is by mail, leaving with the clerk of the court, or by electronic means, under Civil Rule 5(b)(2)(B), (C) or (D) respectively. The amendment, which will be on the agenda for the Committee's next meeting, would parallel a similar amendment to Civil Rule 6, which would clarify that the three-day period is added *after* the prescribed period in the rules. The Civil Rule 6 amendment has been approved by the Judicial Conference and is pending before the Supreme Court. The Appellate Rules Committee is considering a similar amendment to its rules.

V. Information Item—Other Rules Pending Consideration

A. Rule 29. Proposed Amendment Regarding Appeal for Judgments of Acquittal.

At the Standing Committee's June 2004 meeting, Judge Carnes (the then chair of the Criminal Rules Committee) reported that the Committee had considered a proposal from the Department of Justice to amend Rule 29. The amendment would have required the court to defer any decision on a motion for a judgment of acquittal until after the jury has returned its verdict, in order to protect the government's right to appeal an adverse ruling on the motion. The Committee, following extensive discussion voted to reject the proposal. Judge Carnes explained the Committee's action on the proposed amendment and pointed out the lack of data showing that an amendment was needed.

At the same meeting, the Department informed the Standing Committee that it would like to present the proposal directly to the Standing Committee at its January 2005 meeting. At its October meeting in Santa Fe, the Criminal Rules Committee was informed that the Department feels strongly about the proposal and that it anticipates presenting additional data to the Standing Committee.

If the Standing Committee should decide that it is appropriate for the Criminal Rules Committee to give further consideration to an amendment, the Committee stands ready to do so.

B. Rule 41, Status of Amendments Concerning Tracking-Device Warrants.

The Criminal Rules Committee continues to monitor the status of a proposed amendment to Rule 41, which would provide guidance on the issuance of tracking-device warrants.

In June 2003, the Committee presented a proposed amendment to Rule 41 that would, inter alia, address the topic of tracking-device warrants. The proposal was generated during the restyling project several years ago and was driven in large part by magistrate judges who believed it would be very helpful to have some guidance on tracking-device warrants. Following the comment period in the Spring 2003, the Committee made several changes to the rule and committee note to address concerns raised by the Department of Justice.

At the Standing Committee meeting in June 2003, the Committee voted to approve and forward the amendment to the Judicial Conference. After the meeting, however, the Deputy Attorney General (who had abstained on the vote) asked the Committee to defer forwarding the proposal to the Judicial Conference, in order to permit the Department to consider and present its concerns to the Standing Committee. Because there was a belief that the Department had proposed the tracking-device amendments, the proposed amendment was deferred.

To date, there has been no further report from the Department of Justice on the proposed amendment. This matter was discussed at the Committee's meeting in Santa Fe, and Judge Battaglia reported that he had polled magistrate judges and that there was still high interest in the amendment. The Committee subsequently asked Ms. Rhodes, a member of the Committee, to determine the status of the Department's review of the proposed amendment to Rule 41. Although technically the amendment is pending before the Standing Committee, the Criminal Rules Committee continues to have an interest in the amendment.

Attachment:

A. Minutes of October 2004 Meeting

APPENDIX A
[Minutes of October 2003 Meeting]

[DRAFT] MINUTES
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE

October 30, 2004
Santa Fe, New Mexico

The Advisory Committee on the Federal Rules of Criminal Procedure met at Santa Fe, New Mexico on October 30, 2004. These minutes reflect the discussion and actions taken at that meeting.

I. CALL TO ORDER & ANNOUNCEMENTS

Judge Bucklew, Chair of the Committee, called the meeting to order at 8:00 a.m. on Saturday, October 30, 2004. The following persons were present for all or a part of the Committee's meeting:

Hon. Susan C. Bucklew, Chair
Hon. Richard C. Tallman
Hon. Paul L. Friedman
Hon. David G. Trager
Hon. Harvey Bartle, III
Hon. James P. Jones
Hon. Anthony J. Battaglia
Prof. Nancy J. King
Mr. Donald J. Goldberg
Mr. Lucien B. Campbell
Ms. Deborah J. Rhodes, designate of the Asst. Attorney General for the Criminal Division, Department of Justice
Prof. David A. Schlueter, Reporter

Mr. Robert Fiske participated by telephone conference call. Also present at the meeting were: Hon. David Levi, chair of the Standing Committee, Hon. Mark R. Kravitz, member of the Standing Committee and liaison to the Criminal Rules Committee; Professor Daniel Coquillette, Reporter to the Standing Committee, Mr. Peter McCabe and Mr. James Ishida of the Administrative Office of the United States Courts; Mr. John Rabiej, Chief of the Rules Committee Support Office of the Administrative Office of the United States Courts; Professor Dan Capra, Reporter to the Evidence Rules Committee; Hon. Edward E. Carnes, past chair of the Criminal Rules Committee; Mr. Jonathan Wroblewski of the Department of Justice; Professor Sara Sun Beale, Duke University School of Law, and Ms. Brooke Coleman, law clerk to Judge Levi.

Judge Bucklew welcomed a new member, Judge Tallman, who will replace Judge Edward Carnes. She praised Judge Carnes for his service as chairman and hard work during the restyling project and presented a resolution to him for his years of productive work on the Committee. Judge Carnes responded by noting that serving on the Committee had been a high honor and privilege. Judge Bucklew noted that Judge Reta Struhbar, who had retired, had resigned from the Committee but that no replacement had been selected.

II. APPROVAL OF MINUTES

Judge Battaglia moved that the minutes of the Committee's meeting in Monterey, California in May 2004 be approved. The motion was seconded by Judge Trager and, following corrections to the Minutes, carried by a unanimous vote.

III. STATUS OF PROPOSED AMENDMENTS TO RULES PENDING BEFORE THE SUPREME COURT

A. Rule Amendments Approved by the Supreme Court and Pending Before Congress

Mr. Rabiej informed the Committee that the package of amendments submitted to, and approved by the Judicial Conference in September 2003 (Rules Governing § 2254 Proceedings, Rules Governing § 2255 Proceedings, and the Official Forms Accompanying those Rules, and Rule 35), had been approved by the Supreme Court in May 2004 and were currently pending before Congress.

B. Proposed Amendments Approved by Standing Committee and Judicial Conference and Now Pending Before the Supreme Court.

Mr. Rabiej also reported that amendments to the following rules had been approved by the Standing Committee (at its June 2004 meeting) and the Judicial Conference, and that they had been forwarded to the Supreme Court with the understanding that if Congress enacted pending legislation regarding Rule 32 the amendment to that rule would be withdrawn. He noted that after the rules were forwarded to the Court, Congress had amended Rule 32 to expand victim allocution, and that following a poll of the executive committee of the Judicial Conference, the Committee's proposed amendment to Rule 32 was withdrawn:

1. Rule 12.2. Notice of Insanity Defense; Mental Examination. Proposed Amendment Regarding Sanction for Defense Failure To Disclose Information.

2. Rules 29, 33 and 34; Proposed Amendments Re Rulings By Court

On Motions to Extend Time for Filing Motions Under Those Rules.

3. Rule 32, Sentencing; Proposed Amendment Re Allocution Rights of Victims of Non-Violent and Non-Sexual Abuse Felonies.

4 Rule 32.1. Revoking or Modifying Probation or Supervised Release. Proposed Amendments to Rule Concerning Defendant's Right of Allocution.

5. Rule 59; Proposed New Rule Concerning Rulings By Magistrate Judges.

Judge Levi commented that Congress had become more active in proposing amendments to the rules and that it was important not to take an adversarial approach in addressing those proposed amendments. Professor Coquillette observed that a 1995 article in the American Law Review had chronicled what can go wrong when the Rules Enabling Act is not followed and Congress directly amends the rules.

Judge Levi also reported that the Criminal Law Committee was studying the impact of the Supreme Court's decision in *Blakely v Washington* on federal sentencing procedures. Judge Friedman added that the American Bar Association had formed a special committee on the same subject, and Ms. Rhodes informed the Committee that the Sentencing Commission was also studying the problem.

C. Proposed Amendments to Rules Which Have Been Published for Public Comment.

Professor Schlueter informed the Committee that the following rules had been published for comment, that the comment period ends on February 15, 2005, and that a public hearing on the proposed amendments had been scheduled for January 21, 2005 in Tampa, Florida.

1. Rule 5. Initial Appearance. Proposed amendment permits transmission of documents by reliable electronic means.

2. Rule 32.1. Revoking or Modifying Probation or Supervised Release. Proposed amendment permits transmission of documents by reliable electronic means.

3. Rule 40. Arrest for Failing to Appear in Another District. Proposed Amendment to provide authority to set conditions for release where the person was arrested for violating conditions set in another district.

4. Rule 41. Search and Seizure. Proposed amendment permits transmission of search warrant documents by reliable electronic means.

5. Rule 58. Petty Offenses and Other Misdemeanors. Amendment to make it clear that Rule 5.1 governs when a defendant is entitled to a preliminary hearing.

IV. PROPOSED AMENDMENTS TO RULES UNDER ACTIVE CONSIDERATION

A. Proposed Amendments to Criminal Rules to Implement E-Government Act.

Judge Bucklew stated that three members of the Committee had served on a Subcommittee for the E-Government Act (Judges Bartle and Struhbar, and Ms. Rhodes). Ms. Rhodes represented the Criminal Rules Committee at the same subcommittee meeting.

Judge Levi (chair of the Standing Committee) had appointed an E-Government Subcommittee with liaisons from each of the Rules Advisory Committees. The Subcommittee had met in June 2004 and had provided comments on a template for a standard rule for implementing Congress' directive that the courts develop rules for maintaining privacy in electronic filings.

Professor Dan Capra, Reporter to the Evidence Rules Committee and Reporter for the E-Government Subcommittee, provided background information on the work of the Subcommittee and expressed the hope that each of the various committees would adopt uniform language for their rules that would accomplish Congress' intent. He reported that after the Subcommittee meeting in June, he had prepared yet another version of the standard template language, which in turn had been provided to the Criminal Rules Committee. In doing so, he added that the Subcommittee had identified several areas where the Criminal Rules Committee might wish to modify or delete certain provisions. He noted that the Subcommittee recognized that each of the Committees would have to tailor the standard language of the template to meet the purposes and needs of a particular area of practice. In particular, he noted that the Bankruptcy rules presented particular problems that would not necessarily be faced by the Criminal Rules Committee.

He also stated that the Civil Rules Committee had provided some suggested style changes to the template language. They had also added a special provision for court orders and recommended that language be added to the template Committee Note that would state that the list of items exempted from inclusion in the filings was only a "baseline" provision and that other material might be included in that list.

Professor Capra stated that the Subcommittee hopes that the various Committees will be able to finalize the language for their individual rules by their Spring meetings, with the view toward publishing them for public comment in August 2005.

Professor Schlueter pointed out that he has used Professor Capra's template and attempted to tailor it for criminal practice. He noted that the Criminal Rules Committee would have to address certain questions about the draft.

The Committee then considered proposed Rule 49.1(a), which provides that if a filing (whether paper or electronic) includes listed identifiers, only certain information may be disclosed. First, the Committee addressed the question of whether information about a person's home address should be limited to city and state. Following a brief discussion, the Committee approved the proposed language limiting a home address to city and state. As part of that discussion, a question was raised about whether a person's driver license number or alien registration number should be exempted from redaction. Judge Friedman commented that the overall purpose of Congress' intent was to make as much information public as possible. The Committee ultimately decided not to include those items in the list.

The Committee engaged in an extensive discussion about the E-Government Act in general and in particular the concerns about protecting the privacy of certain information and at the same time providing public access to important information. That discussion in turn led to the question of whether additional items should be added to the list of exemptions in proposed Rule 49.1(d). Following a brief discussion, the Committee agreed to add to the list, "official records of a state court proceeding in an action removed to federal court;" "filings in any court in relation to a criminal matter or investigation…;" arrest warrants; charging documents; and criminal case cover sheets.

Although several members raised questions about the applicability of the rule to criminal forfeiture proceedings, no proposed change or amendment to the rule was offered.

Following a discussion on whether some provision should be made for habeas petitions, Judge Trager moved that the Committee add a provision exempting §§ 2241, 2254, and 2255 petitions. Following a brief discussion, the motion carried by a vote of 7 to 2.

Finally, there was a discussion about how trial exhibits should be treated under the proposed rule. Professor Capra responded that if exhibits are filed, they are subject to the rule. At Judge Friedman's suggestion, Professor Capra stated that some language could be added to the Committee Note that would address that point.

B. Amendment to Criminal Rules Regarding Local Rules for Electronic Filings.

Professor Schlueter informed the Committee that it had been asked to consider whether to amend Rule 49 to provide that courts could require electronic filings. He noted that the Committee on Court Administration and Management had recommended that each of the Committees consider the issue, draft amending language, and publish those rules for public comment on an expedited basis.

Mr. Rabiej provided background information on the proposal, noting that the intent was to provide a means of critical cost-savings for the courts. He noted that the Civil and Bankruptcy Committees had already decided to publish proposed amendments on an expedited basis. Mr. Rabiej and Judge Bucklew noted that some issue had been raised about whether any proposed amendment should exempt pro se filers.

Judge Levi noted that roughly one-half of the courts are already requiring parties to use electronic filing, even though the rules do not explicitly provide for that. He added that the proposed amendments would authorize the courts to require mandatory electronic filing.

Professor Schlueter pointed out that Rule 49(d) already provides that filing in criminal cases is determined by the Civil Rules and that he had drafted a new provision that would explicitly address the ability of courts to require electronic filing. Following a discussion on whether the Criminal Rule should be amended, Professor King moved that the proposed language be amended to provide an exemption for pro se filers. Judge Friedman seconded the motion, which failed by a vote of 4 to 6. Judge Jones then moved that no amendment be made to Rule 49 and that the rule continue to rely on an amendment to the Civil Rules. Judge Battaglia seconded the motion which carried by a vote of 6 to 3.

C. Rule 11; Proposed Amendment to Provide that Judge May Question Defendant Regarding Proposed Plea Agreement.

Judge Bucklew pointed out that Judge David Dowd, a former member of the Committee, had proposed an amendment to Rule 11 that would permit a judge to inquire of the defense counsel and defendant during a plea inquiry as to whether all plea offers from the prosecution had been conveyed to the defendant. She stated that he had offered similar amendments to Rule 11 in the past and that on those occasions, following discussion, the Committee had decided not to amend the rule. Following a brief discussion, a consensus emerged that there was insufficient need to pursue the proposed amendment.

D. Rules 11 & Rule 16; Proposed Amendment Regarding Disclosure of *Brady* Information; Report of Subcommittee.

Judge Bucklew called on Mr. Goldberg, Chair of the *Brady* Subcommittee to report on the Subcommittee's findings and recommendations. Mr. Goldberg informed

the Committee that the Subcommittee had reviewed the materials included in the agenda book and had reached a consensus that the Committee should proceed with a proposed amendment to the rules that would require the prosecution to disclose to the defense, 14 days prior to trial, information that was favorable to the defense, either because it tended to be exculpatory or because it was impeaching evidence.

Judge Carnes observed that on earlier occasions the Committee had not recommended other amendments to the Criminal Rules because there was insufficient statistical data to support the need for an amendment. That problem, he noted, could also exist with regard to any amendment concerning *Brady* information.

Ms. Rhodes spoke in opposition to proceeding further with an amendment. She pointed out that the amendment would be a tough sell to the Department of Justice because in its view, Rule 16 and *Brady* are working and there is no need to further amend Rule 16. Even assuming there was a problem, she added, the proposed language in the amendment would not fix the problem. Assistant United States Attorneys, she stated, are trained to treat *Brady* material liberally and that in her 20 years of experience at the DOJ, she can say that it is not the culture of the DOJ to withhold important information from the defense. She recognized that in this area of the law, the courts are necessarily required to apply hindsight for purposes of determining whether a violation occurred, and if so, what the remedy should be. But prudent prosecutors, she added, will not push the issue. If prosecutors do violate *Brady*, there are remedies, including the possibility of a new trial, and serious consequences for the prosecutors involved.

She continued by observing that it would be important for the Committee to consider the impact of the amendment on the Courts of Appeals. Furthermore, there has been no showing that a problem exists, and an ABA survey shows that 70% of prosecutors already turn over more than they are required to. She added that according to the statistics, only 1.7 federal cases per year involve a potential *Brady* issue.

Ms. Rhodes acknowledged that in a recent terrorist trial in Detroit, the prosecutor had withheld important information, but pointed out that it was the Department that had come forward, presented the problem to the trial court, and had recommended corrective action. The Department, she said, is committed to recognizing and addressing the problems associated with discovery. In her view, the proposed rule would only reflect the current status of discovery practices in federal criminal courts and it would not fix any particular problem.

Judge Bucklew observed that this is really the flip side of the Rule 29 problem that had been discussed at earlier meetings where there was insufficient data to support an amendment.

Mr. Goldberg stated that every defense counsel would support the proposed rule and that he did not understand why the Department opposes a simple rule that only requires the prosecution to do what the case law already requires. He provided examples

of cases where important information was not disclosed and added that in his view, the amendment was very important for the system.

Mr. Fiske questioned whether the Department could include the proposed requirement in its United States Attorneys' manual.

Judge Battaglia pointed out that 30 districts had developed local rules addressing this very issue and that those rules had taken various approaches in dealing with the *Brady* issue. That in turn, he noted, might lead to a lack of uniformity and provide more reason for an amendment to Rule 16.

Ms. Rhodes indicated that she would attempt to review those rules. Mr. Wroblewski observed that it is a myth that there is a national, uniform, practice in criminal cases and that it is not essential that there be absolute uniformity. In response, Professor Coquillette reminded the Committee that § 1273 requires that the local rules be consistent with the national rules.

Judge Jones observed that if there was a national rule on this issue, the Department would ultimately benefit.

Judge Bartle expressed interest in pursuing discussion of the amendment. If the Department has already addressed the issue, why not adopt a rule to that effect?

Judge Friedman provided extensive comments on the proposed amendment, observing that he believes that prosecutors are acting in good faith, but that a lot of mistakes do not get any attention. He added that there may be a difference between the Department's policy and what is happening in the field. Judge Friedman said that there was some appeal to uniformity.

Judge Tallman stated that in his view the proposed amendment provided for more discovery than *Brady* required. He noted that California has had an open file policy and that it seems to work well. He stated that he believed Congress should address the issue and indicated that he was generally not supportive of the proposal. He added that as an appellate judge, there is a problem in deciding whether the failure to disclose had an impact on the case.

Judge Trager stated that the fact that 30 districts had addressed the problem was not in itself reason to amend Rule 16. He observed, however, that there do not seem to be many complaints from the prosecutors about how the rules work and that he was not unhappy with the proposal.

Mr. Campbell stated that the Jencks Act and *Brady* could be harmonized but that the cases demonstrate how perilous this area can be for prosecutors. In his view, the matter should be studied further.

In a straw poll on whether to proceed, nine members indicated that they believed that the matter should be considered further. One member voted not to proceed with an amendment and one member abstained.

Judge Kravitz suggested that the Committee consider the possibility of unintended consequences and Ms. Rhodes added that she believed that the real issue in the amendment is the timing requirement.

E. Rule 29. Proposed Amendment Regarding Appeal for Judgments of Acquittal.

Judge Bucklew provided background information on the Department of Justice's proposal to amend Rule 29 to require the court to defer any ruling on a motion for a judgment of acquittal until after the jury has returned its verdict; the amendment would protect the government's right to appeal an adverse ruling on the motion. Although the Committee at its Fall 2003 meeting had initially approved the amendment in concept, at the May 2004 meeting the Committee, following extensive discussion, voted to reject the proposed amendment.

Ms. Rhodes reported that at the Standing Committee's meeting in June 2004, Judge Carnes had explained the Committee's action on the proposed amendment and pointed out the lack of data showing that an amendment was needed. At the same meeting, the Department informed the Standing Committee that it would present the proposal directly to the Standing Committee at its January 2005 meeting.

Ms. Rhodes indicated that because the Department feels so strongly about the proposal it anticipates presenting additional data to the Standing Committee. But that process, she added, has taken much time because it involves reviewing transcripts in the cases in which the court granted the motion on what the Department believed were impermissible grounds. She said that she expected that the information would be ready for the January meeting of the Standing Committee.

Judge Levi noted that if the Department presented additional data and the Standing Committee believed that it was appropriate to consider the amendment further, that the Standing Committee would be very deferential to the Criminal Rules Committee.

F. Rule 41, Status of Amendments Concerning Tracking Device Warrants.

Judge Levi and Professor Schlueter provided background information on a proposal to amend Rule 41 to provide for tracking-device warrants. Professor Schlueter stated that in June 2003, the Committee presented a proposed amendment to Rule 41 that would, inter alia, address the topic of tracking-device warrants. That proposal had been generated during the restyling project several years ago and was driven in large part by magistrate judges who believed it would be very helpful to have some guidance on

tracking-device warrants. The proposal also included language regarding delayed notice of entry. Following the comment period in the Spring 2003, the Committee made several changes to the rule and committee note to address several concerns raised by the Department of Justice.

At the Standing Committee meeting in June 2003, the Committee initially voted to approve and forward the amendment. After the meeting, however, the Deputy Attorney General (who had abstained on the vote) asked the Committee to defer forwarding the proposal to the Judicial Conference, in order to permit the Department to consider and present its concerns to the Standing Committee. Because there was a belief that the Department had proposed the tracking-device amendments, the proposed amendment was deferred.

Professor Schlueter also pointed out that the Criminal Rules Committee was apprised of these developments at the Fall 2003 meeting in Oregon. But to date, there has been no further report from the Department of Justice on the proposed amendment.

Judge Battaglia reported that he had polled magistrate judges and that there was still high interest in the amendment.

Following additional discussion about the fact that from a technical standpoint, the amendment is still pending before the Standing Committee, Ms. Rhodes was asked to determine the status of the Department's review of the proposed amendment.

G. Rule 45; Amendment to Provide for Extending Time for Filing.

Professor Schlueter pointed out that under Rule 45(c), additional time for service is provided if service is by mail, leaving with the clerk of the court, or by electronic means, under Civil Rule 5(b)(2)(B), (C) or (D) respectively. He informed the Committee that the Civil Rules Committee has proposed an amendment to Civil Rule 6, which would clarify that the three-day period is added *after* the prescribed period in the rules. That amendment has been approved by the Judicial Conference and is pending before the Supreme Court. The Appellate Rules Committee is considering a similar amendment to its rules. He added that Judge Carnes has suggested that the Criminal Rules Committee might wish to consider whether to make a similar amendment to Rule 45.

Mr. Campbell expressed some concern about not using the term "calendar" and Mr. McCabe indicated that the Civil Rules Committee had discussed the issue and had decided not to use the term "calendar" days.

Following brief discussion, the Reporter was asked to draft a proposed amendment to Criminal Rule 45, which would parallel the Civil Rule, and present it to the Committee at its Spring 2005 meeting.

H. Use of Section 2254 and 2255 Official Forms.

Judge Bucklew informed the Committee that Judge Tommy Miller, a former member of the Committee, had recommended in a letter to the Chief Judge in his district that that district should begin using the newly revised and adopted forms for §§ 2254 and 2255 proceedings. Judge Jones recommended that a letter be written to the district courts pointing out that the new forms are available and that the courts be encouraged to use them. Following additional brief discussion, Judge Bucklew determined that the Administrative Office would draft the letter to the district courts.

V. DESIGNATION OF TIME AND PLACE OF NEXT MEETING

Judge Bucklew asked for suggestions on a location for the Spring 2005 meeting. There was a consensus that the Administrative Office should attempt to secure a location in Charleston, South Carolina. Members were asked to contact Mr. Rabiej concerning available dates.

The meeting adjourned at 2:30 p.m. on Saturday, October 30, 2004

Respectfully submitted

David A. Schlueter
Professor of Law
Reporter, Criminal Rules Committee

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

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

FROM: **Honorable Jerry E. Smith, Chair**
Advisory Committee on Evidence Rules

DATE: **December 10, 2004**

RE: **Report of the Advisory Committee on Evidence Rules**

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") postponed its Fall meeting to January 15, 2005 in San Francisco, as part of scheduled public hearings on the proposed amendments to the Federal Rules of Evidence that are currently out for comment. At the upcoming meeting, the Committee will 1) review any comments to the proposed amendments, 2) discuss the need, if any, to amend the Federal Rules of Evidence to comply with the Supreme Court's expected rulings in *United States v. Booker* and *United States v. Fanfan*, 3) monitor developments in the law of confrontation after *Crawford v. Washington*, 4) consider an amendment to Evidence Rule 803(8) proposed by a member of the public, and 5) continue to work on a long-term project that will result in a report on the federal law of privileges.

Part III of this Report provides a summary of the matters that will be taken up at the January meeting. The minutes of the January meeting will be attached to our report to the Standing Committee for its June 2005 meeting.

II. Action Items

No action items

III. Information Items

A. Long-Term Project on Possible Changes to Evidence Rules

At its meeting in June 2004 the Standing Committee authorized the release for public comment of proposed amendments to Evidence Rules 404(a), 408, 608(b) and 609. Public hearings have been scheduled on these proposed amendments. The Evidence Rules Committee has received four public comments on these amendments, and it is anticipated that a number of comments will be received before the end of the public comment period.

B. Sentencing Proceedings and the Federal Rules of Evidence

At this writing the Supreme Court has not handed down its decisions in *United States v. Booker* and *United States v. Fanfan.* The question in those cases is whether a jury must decide facts that are used to enhance a sentence under the Federal Sentencing Guidelines. If the Court decides that a jury must decide such facts (absent waiver) then the Federal Rules of Evidence may need to be amended, because the Evidence Rules currently do not apply to sentencing proceedings. See Fed.R.Evid. 1101. At its January 2005 meeting the Evidence Rules Committee will begin to consider the possibility of an amendment to Rule 1101. It will also consider amendments to any other Evidence Rules made necessary by the Court's decisions in *Booker* and *Fanfan.*

C. Federal Rules Hearsay Exceptions and the Right to Confrontation After *Crawford v. Washington.*

The Supreme Court's decision in *Crawford v. Washington* has created some uncertainty about the constitutionality, as applied, of some of the hearsay exceptions in the Federal Rules of Evidence. The *Crawford* Court held that "testimonial" hearsay cannot be admitted in the absence of cross-examination of the declarant. The Court gave some examples of testimonial hearsay (e.g., accomplice statements to law enforcement and grand jury testimony) but declined to provide a precise definition for when hearsay is to be considered "testimonial." Moreover, the Court did not decide whether the Confrontation Clause imposes any restrictions on the admission of hearsay that is not testimonial.

In light of the uncertainty created by *Crawford*, the Evidence Rules Committee has resolved to defer consideration of any proposed amendments to the hearsay exceptions in the Federal Rules of Evidence, insofar as an amendment could apply to a criminal case. The Committee will continue to monitor developments in the federal courts in light of *Crawford*, and will be prepared at the

appropriate time to propose amendments to the hearsay exceptions that might be required to bring them into conformity with the Confrontation Clause.

D. Suggestion from Member of the Public for an Amendment to Evidence Rule 803(8).

The Center for Regulatory Effectiveness has proposed an amendment to Evidence Rule 803(8), the hearsay exception for public reports. The purported goal of the amendment is to ensure that federal statutory standards regulating information quality in agency reports are incorporated into the admissibility requirements of Rule 803(8). This proposal will be considered by the Evidence Rules Committee at its January 2005 meeting.

E. Privileges

The Committee's Subcommittee on Privileges has been working on a long-term project to prepare a "survey" of the existing federal common law of privileges. The end-product is intended to be a descriptive, non-evaluative presentation of the existing federal law, and not a proposal for any amendment to the Evidence Rules. The survey is intended to help courts and lawyers in working through the existing federal common law of privileges, and if completed it will be published as a work of the Consultant to the Committee, Professor Ken Broun, and the Reporter. At this stage, the survey of the psychotherapist-patient privilege has been substantially completed. Professor Broun will present materials on the attorney-client privilege to the Committee at its January 2005 meeting.

Advisory Committee on Evidence Rules

Minutes of the Meeting of April 29th and 30th, 2004

Washington, D.C.

The Advisory Committee on the Federal Rules of Evidence (the "Committee") met on April 29th and 30th 2004 in Marina Del Rey, California.

The following members of the Committee were present:

Hon. Jerry E. Smith, Chair
Hon. Robert L. Hinkel
Hon. Jeffrey L. Amestoy
Thomas W. Hillier, Esq.
David S. Maring, Esq.
Patricia Refo, Esq.
John S. Davis, Esq., Department of Justice

Also present were:

Hon. David F. Levi, Chair of the Standing Committee on Rules of Practice and Procedure
Hon. Thomas W. Thrash, Jr., Liaison from the Standing Committee on Rules of Practice and Procedure
Hon. Christopher M. Klein, Liaison from the Bankruptcy Rules Committee
Hon. Paul Kelly, Liaison from the Civil Rules Committee
Robert Fiske, Esq., Liaison from the Criminal Rules Committee
Hon. C. Arlen Beam, Chair of the Drafting Committee for the Uniform Rules of Evidence
Professor Leo Whinery, Reporter to the Drafting Committee for the Uniform Rules of Evidence
Peter G. McCabe, Esq., Secretary, Standing Committee on Rules of Practice and Procedure
John K. Rabiej, Esq., Chief, Rules Committee Support Office
James Ishida, Esq., Rules Committee Support Office
Jennifer Marsh, Esq., Federal Judicial Center
Professor Daniel J. Capra, Reporter to the Evidence Rules Committee
Professor Kenneth S. Broun, Consultant to the Evidence Rules Committee
Adam J. Szubin, Department of Justice

Opening Business

Judge Smith extended a welcome to those who were attending an Evidence Rules Committee meeting for the first time: John Davis, the new Justice Department representative, Judge Kelly, who was substituting for Judge Kyle as Liaison from the Civil Rules Committee, and Robert Fiske, who

was substituting for Judge Trager as Liaison from the Criminal Rules Committee. Judge Smith asked for approval of the draft minutes of the Fall 2003 Committee meeting. The minutes were approved unanimously. Judge Smith then gave a short report on the June 2003 Standing Committee meeting, noting that the Evidence Rules Committee had no action items for the agenda at that meeting.

On behalf of the Committee, Judge Smith expressed thanks and gratitude to Chief Justice Amestoy and to David Maring, whose terms on the Committee will expire before the next meeting.

Long-Range Planning — Consideration of Possible Amendments to Certain Evidence Rules

At its April 2001 meeting, the Committee directed the Reporter to review scholarship, case law, and other bodies of evidence law to determine whether there are any evidence rules that might be in need of amendment as part of the Committee's long-range planning. At the April 2002 meeting, the Committee reviewed a number of potential changes and directed the Reporter to prepare a report on a number of rules, so that the Committee could take an in-depth look at whether those rules require amendment.

At the October 2002 meeting, the Committee began to consider the Reporter's memoranda on some of the rules that have been found worthy of in-depth consideration. The Committee agreed that the problematic rules should be considered over the course of four Committee meetings, and that if any rules are found in need of amendment, the proposals would be delayed in order to package them as a single set of amendments to the Evidence Rules. This would mean that the package of amendments, if any, would go to the Standing Committee at its June 2004 meeting, with a recommendation that the proposals be released for public comment. With that timeline in mind, the Committee considered reports on several possibly problematic evidence rules at its meetings in 2003. At the Spring 2004 meeting, those rules were reviewed once again; the goal of the Committee was to determine whether to approve amendments to any of those rules for referral to the Standing Committee.

1. Rule 404(a)

At its Fall 2002 meeting, the Committee tentatively agreed on language that would amend Evidence Rule 404(a) to prohibit the circumstantial use of character evidence in civil cases. The Committee determined that an amendment is necessary because the circuits have long been split over whether character evidence can be offered to prove conduct in a civil case. Such a circuit split can cause disruption and disuniform results in the federal courts. Moreover, the question of the admissibility of character evidence to prove conduct arises frequently in section 1983 cases, so an amendment to the Rule would have a helpful impact on a fairly large number of cases. The Committee also concluded that as a policy matter, character evidence should not be admitted to prove conduct in a civil case. The circumstantial use of character evidence is fraught with peril in

any case, because it could lead to a trial of personality and could cause the jury to decide the case on improper grounds. The risks of character evidence historically have been considered worth the costs where a criminal defendant seeks to show his good character or the pertinent bad character of the victim. This so-called "rule of mercy" is thought necessary to provide a counterweight to the resources of the government, and is a recognition of the possibility that the accused, whose liberty is at stake, may have little to defend with other than his good name. But none of these considerations is operative in civil litigation. In civil cases, the substantial problems raised by character evidence were considered by the Committee to outweigh the dubious benefit that character evidence might provide.

The Committee once again discussed the merits of the proposed amendment at the Spring 2004 meeting. A liaison suggested that character evidence could be important to a civil defendant charged with serious misconduct; but Committee members responded that the costs of allowing character evidence outweighed the benefits in civil cases. Specifically, the use of character evidence could result in a trial based on personality rather than the facts.

The Committee considered how the proposed amendment would affect habeas cases. Because habeas cases are civil cases, the amendment would prohibit the circumstantial use of character evidence by a habeas petitioner. Members pointed out that this is already the case under the current majority rule—the majority of courts currently prohibit the circumstantial use of character evidence in all civil cases. Moreover, the Evidence Rules do not break out habeas cases for special evidentiary treatment, and it would be anomalous to do so in this one Rule. The Committee resolved to undertake a long-term project that would assess the use of the Evidence Rules in habeas cases.

A Committee member suggested that the proposed Committee Note be revised slightly to clarify that the ban on circumstantial use of character evidence will apply to all civil cases, even where the defendant's conduct is closely related to criminal charges. The Committee agreed that such a clarification would be useful.

A motion was made and seconded to approve the proposed amendment to Evidence Rule 404(a), together with the Committee Note, and to recommend to the Standing Committee that the proposal be released for public comment. The motion was approved by a unanimous vote.

The proposed amendment to Rule 404 provides as follows:

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(a) Character evidence generally.—Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused.— ~~Evidence~~ In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(2) Character of alleged victim.— ~~Evidence~~ In a criminal case, and subject to the limitations of Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

* * *

The Committee Note to the proposed amendment to Rule 404(a) provides as follows:

Committee Note

The Rule has been amended to clarify that in a civil case evidence of a person's character is never admissible to prove that the person acted in conformity with the character trait. The amendment resolves the dispute in the case law over whether the exceptions in subdivisions (a)(1) and (2) permit the circumstantial use of character evidence in civil cases. *Compare Carson v. Polley*, 689 F.2d 562, 576 (5th Cir. 1982) ("when a central issue in a case is close to one of a criminal nature, the exceptions to the Rule 404(a) ban on character evidence may be invoked"), *with SEC v. Towers Financial Corp.*, 966 F.Supp. 203 (S.D.N.Y. 1997) (relying on the terms "accused" and "prosecution" in Rule 404(a) to conclude that the exceptions in subdivisions (a)(1) and (2) are inapplicable in civil cases). The amendment is consistent with the original intent of the Rule, which was to prohibit the circumstantial use of character evidence in civil cases, even where closely related to criminal charges. *See Ginter v. Northwestern Mut. Life Ins. Co.*, 576 F.Supp. 627, 629-30 (D. Ky.1984) ("It seems beyond peradventure of doubt that the drafters of F.R.Evi. 404(a) explicitly intended that all character evidence, except where 'character is at issue' was to be excluded" in civil cases).

The circumstantial use of character evidence is generally discouraged because it carries serious risks of prejudice, confusion and delay. *See Michelson v. United States,* 335 U.S. 469, 476 (1948) ("The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."). In criminal cases, the so-called "mercy rule" permits a criminal defendant to introduce evidence of pertinent character traits of the defendant and the victim. But that is because the accused, whose liberty is at stake, may need "a counterweight against the strong investigative and prosecutorial resources of

the government." C. Mueller & L. Kirkpatrick, *Evidence: Practice Under the Rules*, pp. 264-5 (2d ed. 1999). See also Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U.Pa.L.Rev. 845, 855 (1982) (the rule prohibiting circumstantial use of character evidence "was relaxed to allow the criminal defendant with so much at stake and so little available in the way of conventional proof to have special dispensation to tell the factfinder just what sort of person he really is"). Those concerns do not apply to parties in civil cases.

The amendment also clarifies that evidence otherwise admissible under Rule 404(a)(2) may nonetheless be excluded in a criminal case involving sexual misconduct. In such a case, the admissibility of evidence of the victim's sexual behavior and predisposition is governed by the more stringent provisions of Rule 412.

2. Rule 408

The Reporter's memorandum on Rule 408, prepared for the Fall 2002 meeting, noted that the courts have been long-divided on three important questions concerning the scope of the Rule:

1) Some courts hold that evidence of compromise is admissible against the settling party in subsequent criminal litigation while others hold that compromise evidence is excluded in subsequent criminal litigation when offered as an admission of guilt.

2) Some courts hold that statements in compromise can be admitted to impeach by way of contradiction or prior inconsistent statement. Other courts disagree, noting that if statements in compromise could be admitted for contradiction or prior inconsistent statement, this would chill settlement negotiations, in violation of the policy behind the Rule.

3) Some courts hold that offers in compromise can be admitted in favor of the party who made the offer; these courts reason that the policy of the rule, to encourage settlements, is not at stake where the party who makes the statement or offer is the one who wants to admit it at trial. Other courts hold that settlement statements and offers are never admissible to prove the validity or the amount of the claim, regardless of who offers the evidence. These courts reason that the text of the Rule does not provide an exception based on identity of the proffering party, and that admitting compromise evidence would raise the risk that lawyers would have to testify about the settlement negotiations, thus risking disqualification.

At the Fall 2002 meeting, the Committee agreed to present, as part of its package, an amendment that would 1) limit the impeachment exception to use for bias, and 2) exclude compromise evidence even if offered by the party who made an offer of settlement. The remaining issue–whether compromise evidence should be admissible in criminal cases–was the subject of extensive discussion at the 2003 meetings and again at the Spring 2004 meeting. At all of these meetings, the Justice Department representative expressed concern that some statements made in civil compromise (e.g., to tax investigators) could be critical evidence needed in a criminal case to

prove that the defendant had committed fraud. If Rule 408 were amended to exclude such statements in criminal cases, then this probative and important evidence would be lost to the government. The DOJ representative recognized the concern that the use of civil compromise evidence in criminal cases would deter civil settlements. But he contended that the Civil Division of the DOJ had not noted any deterrent to civil compromise from such a rule in the circuits holding that civil compromise evidence is indeed admissible in criminal cases.

Discussion of the Rule at the 2003 meetings indicated Committee dissatisfaction with Rule 408 as originally structured. As it stands, Rule 408 is structured in four sentences. The first sentence states that an offer or acceptance in compromise "is not admissible to prove liability for or invalidity of the claim or its amount." The second sentence provides the same preclusion for statements made in compromise negotiations–an awkward construction because a separate sentence is used to apply the same rule of exclusion applied in the first sentence. The third sentence says that the rule "does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations." The rationale of this sentence, added by Congress, is to prevent parties from immunizing pre-existing documents from discovery simply by bringing them to the negotiating table. The addition of this sentence at this point in the Rule, however, creates a structural problem because the fourth sentence of the rule contains a list of permissible purposes for compromise evidence, including proof of bias. As such, the third sentence provides a kind of break in the flow of the Rule. Moreover, the fourth sentence is arguably unnecessary, because none of the permissible purposes involves using compromise evidence to prove the validity or amount of the claim. Under the Rule, the only impermissible purpose for compromise evidence is when it is offered to prove the validity or amount of a claim.

For the Fall 2003 meeting, the Reporter prepared a restructured Rule 408 for the Committee's consideration. Committee members expressed the opinion that the restructured Rule was easier to read and made it much easier to accommodate an amendment (previously agreed upon by the Committee) that would prohibit the use of compromise statements for impeachment by way of prior inconsistent statement or contradiction.

In the discussion of a restructured Rule 408, the Committee considered whether to retain the language of the existing Rule that evidence "otherwise discoverable" is not excluded merely because it was presented in the course of compromise negotiations. After extensive debate, the Committee agreed with courts, commentators, and rules drafters in several states, and concluded that the "otherwise discoverable" sentence is superfluous. It was added to the Rule to emphasize that pre-existing records were not immunized simply because they were presented to the adversary in the course of compromise negotiations. But such a pretextual use of compromise negotiations has never been permitted by the courts. The Committee therefore agreed, to drop the "otherwise discoverable" sentence from the text of the revised Rule 408, with an explanation for such a change to be placed in the Committee Note. The Committee also considered whether it was necessary to improve the language that triggers the protection of the amendment: the Rule applies to compromise negotiations as to a "matter which was in dispute." The Reporter prepared a description of the cases and

commentary on this question and the Committee determined that it would not be appropriate to change this language, as the courts were not in conflict as to its application.

This left the question of the admissibility of compromise evidence in criminal cases. At the Spring 2004 meeting the DOJ representative reiterated the Department's position that Rule 408 should be completely inapplicable in criminal cases. But other Committee members argued for a distinction between statements made in settlement negotiations and the offer or acceptance of the settlement itself. It was noted — from the personal experience of several lawyers — that a defendant may decide to settle a civil case even though it strenuously denies wrongdoing. These Committee members argued that in such cases the settlement should not be admissible in criminal cases because the settlement is more a recognition of reality than an admission of criminality. Moreover, if the settlement itself could be admitted as evidence of guilt, defendants may choose not to settle, and this could delay needed compensation to those allegedly injured by the defendant's activities.

Committee members noted that the DOJ's concerns about admissibility of compromise evidence were almost if not completely limited to statements of fault made in compromise negotiations; such direct statements of criminality are obviously relevant to subsequent criminal liability, but the same does not apply to the settlement agreement itself. These Committee members recognized that even if Rule 408 were inapplicable to settlements, a particular settlement might nonetheless be excluded in a criminal case under Rule 403. But these members concluded that any protection under Rule 403 was too unpredictable for civil defendants to rely upon.

In light of the discussion, the Reporter revised the working draft, which had provided that Rule 408 was completely inapplicable in criminal cases. The new draft distinguished between offers and acceptances of settlement (inadmissible in criminal cases) and statements made in settlement negotiations (admissible in subsequent criminal litigation, subject of course to Rule 403). The DOJ representative opposed this draft, although he recognized that most of the Department's concerns went to the admissibility of statements rather than offers and acceptances. The Department representative contended that courts would have difficulty distinguishing between statements made in negotiation and the ultimate offer or acceptance. In many cases, the statement alleged to be admissible might be intertwined with the offer or acceptance. Thus, the Department representative contended that the proposed amendment would give rise to litigation as to its meaning. In contrast, the public defender on the Committee opposed the draft because it did not go far enough. He favored an amendment that would bar all civil compromise evidence from subsequent criminal litigation. He argued that civil defendants are often poorly represented, and as such they may unwittingly provide evidence of their guilt in the course of civil compromise negotiations. In his view, the proposed amendment would be a trap for the unwary insofar as it allowed statements made in compromise negotiations to be admissible in subsequent criminal cases.

Committee members also discussed some questions about the scope of the Rule. One question was whether the Rule would prevent proof of compromise evidence in a criminal case where the allegation is that the compromise itself was an act of extortion or other illegality. The Reporter responded that the current Rule would not exclude that evidence; courts have held that Rule

408 does not bar proof of wrongdoing in the settlement process because the compromise evidence is not offered to prove the invalidity of the underlying claim, but is rather offered as proof of a criminal act.

Committee members noted that many of the hard questions of Rule 408's applicability involved whether compromise evidence is offered for a purpose other than to prove the validity or amount of the civil claim. If compromise evidence can be offered in criminal cases to prove that the compromise itself was illegal, or to prove that the defendant by settling was made aware of the wrongfulness of his conduct, on the ground that the purpose for this kind of evidence was to prove something other than the validity or amount of the underlying claim, then much of the Department's concerns over Rule 408 protection would be answered. Committee members noted that it would be problematic to change the language in the text of the Rule concerning the "validity", "invalidity", or "amount" of the claim, as this language has been subject to extensive case law and it is by no means certain that an amendment would provide language that was any more clear than the current text. The Committee therefore directed the Reporter to add a paragraph to the Committee Note to clarify that there was no intent to change the existing law on whether compromise evidence is offered for a purpose other than to prove the validity, invalidity, or amount of the claim.

A motion was made and seconded to approve the proposed amendment to Evidence Rule 408, together with the Committee Note, and to recommend to the Standing Committee that the proposal be released for public comment. The motion was approved by a 5-2 vote.

The proposed amendment to Rule 408 provides as follows:

Rule 408. Compromise and Offers to Compromise

(a) General rule. -- ~~Evidence of~~ The following is not admissible on behalf of any party, when offered as evidence of liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:

(1) furnishing or offering or promising to furnish~~,~~ —or ~~(2)~~ accepting or offering or promising to accept~~,~~ —a valuable consideration in compromising or attempting to compromise ~~a~~ the claim ~~which was disputed as to either validity or amount~~; and ~~, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of~~

(2) in a civil case, conduct or statements made in compromise negotiations ~~is likewise not admissible~~ regarding the claim.

~~This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.~~

(b) Other purposes. -- This rule ~~also~~ does not require exclusion ~~when~~ if the evidence is offered for ~~another purpose, such as~~ purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice ~~of a witness,~~ ;

~~negativing~~ negating a contention of undue delay~~,~~ ;~~or~~ and proving an effort to obstruct a criminal investigation or prosecution.

Committee Note

Rule 408 has been amended to settle some questions in the courts about the scope of the Rule, and to make it easier to read. First, the amendment clarifies that Rule 408 does not protect against the use of statements and conduct during civil settlement negotiations when offered in a criminal case. *See, e.g.*, *United States v. Prewitt*, 34 F.3d 436, 439 (7th Cir. 1994) (statements made in civil settlement negotiations are not barred in subsequent criminal prosecutions, given the "public interest in the prosecution of crime"). Statements made in civil compromise negotiations may be excluded in criminal cases where the circumstances so warrant under Rule 403. But there is no absolute exclusion imposed by Rule 408.

The amendment distinguishes statements and conduct in compromise negotiations (such as a direct admission of fault) from an offer or acceptance of a compromise of a civil claim. An offer or acceptance of a compromise of a civil claim is excluded under the Rule if offered against a criminal defendant as an admission of fault. In that case, the predicate for the evidence would be that the defendant, by compromising, has admitted the validity and amount of the civil claim, and that this admission has sufficient probative value to be considered as proof of guilt. But unlike a direct statement of fault, an offer or acceptance of a compromise is not very probative of the defendant's guilt. Moreover, admitting such an offer or acceptance could deter defendants from settling a civil claim, for fear of evidentiary use in a subsequent criminal action. *See, e.g.*, Fishman, *Jones on Evidence, Civil and Criminal*, § 22:16 at 199, n.83 (7th ed. 2000) ("A target of a potential criminal investigation may be unwilling to settle civil claims against him if by doing so he increases the risk of prosecution and conviction.").

The amendment retains the language of the original rule that bars compromise evidence only when offered as evidence of the "validity", "invalidity", or "amount" of the disputed claim. The intent is to retain the extensive case law finding Rule 408 inapplicable when compromise evidence is offered for a purpose other than to prove the validity, invalidity, or amount of a disputed claim. *See, e.g., Athey v. Farmers Ins. Exchange,* 234 F.3d 357 (8th Cir. 2000) (evidence of settlement offer by insurer was properly admitted to prove insurer's bad faith); *Coakley & Williams v. Structural Concrete Equip.*, 973 F.2d 349 (4th Cir. 1992) (evidence of settlement is not precluded by Rule 408 where offered to prove a party's intent with respect to the scope of a release); *Cates v. Morgan Portable Bldg. Corp.*, 708 F.2d 683 (7th Cir. 1985) (Rule 408 does not bar evidence of a settlement when offered to prove a breach of the settlement agreement, as the purpose of the evidence is to prove the fact of settlement as opposed to the validity or amount of the underlying claim); *Uforma/Shelby Bus. Forms, Inc. v. NLRB,* 111 F.3d 1284 (6th Cir. 1997) (threats made in settlement negotiations were admissible; Rule 408 is inapplicable when the claim is based upon a wrong that is committed during the course of settlement negotiations). Nor does the

amendment affect the case law providing that Rule 408 is inapplicable when evidence of the compromise is offered to prove notice. *See, e.g., United States v. Austin,* 54 F.3d 394 (7th Cir. 1995) (no error to admit evidence of the defendant's settlement with the FTC, because it was offered to prove that the defendant was on notice that subsequent similar conduct was wrongful); *Spell v. McDaniel,* 824 F.2d 1380 (4th Cir. 1987) (in a civil rights action alleging that an officer used excessive force, a prior settlement by the City of another brutality claim was properly admitted to prove that the City was on notice of aggressive behavior by police officers).

The amendment prohibits the use of statements made in settlement negotiations when offered to impeach by prior inconsistent statement or through contradiction. Such broad impeachment would tend to swallow the exclusionary rule and would impair the public policy of promoting settlements. *See McCormick on Evidence* at 186 (5th ed. 1999) ("Use of statements made in compromise negotiations to impeach the testimony of a party, which is not specifically treated in Rule 408, is fraught with danger of misuse of the statements to prove liability, threatens frank interchange of information during negotiations, and generally should not be permitted."). *See also EEOC v. Gear Petroleum, Inc.*, 948 F.2d 1542 (10th Cir.1991) (letter sent as part of settlement negotiation cannot be used to impeach defense witnesses by way of contradiction or prior inconsistent statement; such broad impeachment would undermine the policy of encouraging uninhibited settlement negotiations).

The amendment makes clear that Rule 408 excludes compromise evidence even when a party seeks to admit its own settlement offer or statements made in settlement negotiations. If a party were to reveal its own statement or offer, this could itself reveal the fact that the adversary entered into settlement negotiations. The protections of Rule 408 cannot be waived unilaterally because the Rule, by definition, protects both parties from having the fact of negotiation disclosed to the jury. Moreover, proof of statements and offers made in settlement would often have to be made through the testimony of attorneys, leading to the risks and costs of disqualification. *See generally Pierce v. F.R. Tripler & Co.*, 955 F.2d 820, 828 (2d Cir. 1992) (settlement offers are excluded under Rule 408 even if it is the offeror who seeks to admit them; noting that the "widespread admissibility of the substance of settlement offers could bring with it a rash of motions for disqualification of a party's chosen counsel who would likely become a witness at trial").

The sentence of the Rule referring to evidence "otherwise discoverable" has been deleted as superfluous. *See, e.g.,* Advisory Committee Note to Maine Rule of Evidence 408 (refusing to include the sentence in the Maine version of Rule 408 and noting that the sentence "seems to state what the law would be if it were omitted"); Advisory Committee Note to Wyoming Rule of Evidence 408 (refusing to include the sentence in Wyoming Rule 408 on the ground that it was "superfluous"). The intent of the sentence was to prevent a party from trying to immunize admissible information, such as a pre-existing document, through the pretense of disclosing it during compromise negotiations. *See Ramada Development Co. v. Rauch,* 644 F.2d 1097 (5th Cir. 1981). But even without the sentence,

the Rule cannot be read to protect pre-existing information simply because it was presented to the adversary in compromise negotiations.

3. Rule 410

At the Spring 2004 meeting the Committee continued its review of a possible amendment to Rule 410 that would protect statements and offers made by prosecuting attorneys, to the same extent as the Rule currently protects statements and offers made by defendants and their counsel. The policy behind such an amendment would be to encourage a free flow of discussion during guilty plea negotiations.

A draft proposal was prepared by the Reporter for the April 2003 meeting that added "against the government" to the opening sentence of the Rule, at the same place in which the Rule provides that offers and statements in plea negotiations are not admissible "against the defendant." At that meeting the Committee determined that this would not be a satisfactory drafting solution. If the Rule were amended only to provide that offers and statements in guilty plea negotiations were not admissible "against the government," this might provide too broad an exclusion. It would exclude, for example, statements made *by the defendant* during plea negotiations that could be offered "against the government," for example, to prove that the defendant had made a prior consistent statement, or to prove that the defendant believed in his own innocence, or was not trying to obstruct an investigation. Thus, the Committee resolved that any change to Rule 410 should specify that the government's protection would be limited to statements and offers *made by prosecutors* during guilty plea negotiations.

At its Fall 2003 meeting the Committee considered a draft of an amendment to Rule 410 that would protect statements and offers made by prosecutors during guilty plea negotiations. Committee members discussed whether the government should be protected from statements and offers made by the prosecutor in plea negotiations even where the evidence is offered by a different defendant. All Committee members, including the DOJ representative, recognized that a defendant should be able to inquire into a deal struck or to be struck with a former codefendant who is a cooperating witness at the time of the trial–and such inquiry may be pertinent to the bias or prejudice of the cooperating witness even if a deal has not been formally reached or even offered. The working draft of the amendment was revised to provide that statements and offers of prosecutors would not be barred if offered to show the bias or prejudice of a government witness.

At the Spring 2004 meeting, a number of questions and concerns were raised about the merits of the draft amendment to Rule 410. The most important objection was that the amendment did not appear necessary, because no reported case has ever held that a statement or offer made by a prosecutor in a plea negotiation can be admitted against the government as an admission of the weakness of the government's case. Indeed, every reported case has held such evidence inadmissible when offered as a government-admission. It is true that some courts have used questionable authority to reach this result; for example, some courts have held that statements and offers made by prosecutors in guilty plea negotiations are excluded under Rule 408, even though that Rule applies

only to statements and offers made to compromise a civil claim. Yet notwithstanding the questionable reasoning, the fact remains that there is no reported case that has failed to protect against admission of prosecution statements and offers in guilty plea negotiations. Accordingly, there is no conflict among the courts that would be rectified by an amendment; and a conflict in the courts has always been considered by the Committee to be a highly desirable justification for an amendment to the Evidence Rules.

Committee members also observed that the draft amendment could lead to some problematic results. For example, what if a defendant contended that he was a victim of prosecutorial misconduct or selective prosecution, and the prosecutor's statements during a plea negotiation provided relevant evidence of bad intent? Under the draft amendment, this important evidence would be excluded. And yet to provide an exception for such circumstances might result in an exception that would swallow the protective rule. That is, there would be a danger of the exception's applying whenever the defendant made a contention of "misconduct" on the part of the government.

Another problem case is where the defendant wants to testify that he rejected a guilty plea because he is innocent. This testimony would appear to be excluded by the proposed amendment because it would constitute evidence of the government's offer. It could be argued that the relevant evidence would be the defendant's rejection of the offer and not the offer itself, but that would seem to be an insubstantial distinction.

Given the problems involved in applying a rule that explicitly protects prosecution statements and offers, and the fact that the courts are reaching fair and uniform results under the current rules, including Rule 403, members of the Committee questioned whether the benefits of an amendment to Rule 410 would outweigh the costs. The Committee ultimately concluded that Rule 410 was not "broken," and therefore that the costs of a "fix" are not justified.

A motion was made and seconded to defer any proposed amendment to Rule 410. This motion was passed by a unanimous vote.

4. Rule 606(b)

At its April 2002 meeting, the Committee directed the Reporter to prepare a report on a possible amendment to Rule 606(b) that would clarify whether and to what extent juror testimony can be admitted to prove some disparity between the verdict rendered and the verdict intended by the jurors. At its Spring 2003 meeting, the Committee agreed in principle on a proposed amendment to Rule 606(b) that would be part of a possible package of amendments to be referred to the Standing Committee in 2004.

The Committee reviewed the working draft of the proposed amendment at its Fall 2003 meeting. Once again, all Committee members recognized the need for an amendment to Rule 606(b). There are two basic reasons for an amendment to the Rule: 1. All courts have found an exception to the Rule permitting jury testimony on certain errors in the verdict, even though there is no

language permitting such an exception in the text of the Rule; and, more importantly, 2. The courts are in dispute about the breadth of that exception. Some courts allow juror proof whenever the verdict has an effect that is different from the result that the jury intended to reach, while other courts follow a narrower exception permitting juror proof only where the verdict reported is different from that which the jury actually reached because of some clerical error. The former exception is broader because it would permit juror proof whenever the jury misunderstood (or ignored) the court's instructions. For example, if the judge told the jury to report a damage award without reducing it by the plaintiff's proportion of fault, and the jury disregarded that instruction, the verdict reported would be a result different from what the jury actually intended, thus fitting the broader exception. But it would not be different from the verdict actually reached, and so juror proof would not be permitted under the narrow exception for clerical errors.

After extensive discussion at previous meetings, the Committee tentatively determined that an amendment to Rule 606(b) is warranted to rectify the long-standing conflict in the courts, and that the amendment should codify the narrower exception of clerical error. An exception that would permit proof of juror statements whenever the jury misunderstood or ignored the court's instruction would have the potential of intruding into juror deliberations and upsetting the finality of verdicts in a large and undefined number of cases. The broad exception would be in tension with the policies of the Rule. In contrast, an exception permitting proof only if the verdict reported is different from that actually reached by the jury would not intrude on the privacy of jury deliberations, as the inquiry only concerns what the jury decided, not why it decided as it did.

At the Fall 2003 meeting, some Committee members suggested that the scope of the exception to Rule 60(b) should be comparable to the exception permitting a judge to correct a clerical mistake in a judgment under Civil Rule 60(a). But at the Spring 2004 meeting a member pointed out that the exceptions are not analogous. If the jury misunderstands the law and returns a verdict, it cannot be corrected as a clerical mistake. But if the clerk misunderstands the verdict and enters it incorrectly, that error could be corrected as a clerical mistake. In light of this comment, the Committee decided to refrain from including any reference to Civil Rule 60(a) in the Committee Note to the proposed amendment to Evidence Rule 606(b).

The Committee once again discussed whether the exception for juror proof should be made broader to permit correction of verdicts if the intent of the jury was clearly different from that indicated in the verdict reported. But Committee members noted that anything broader than an exception for "clerical mistake" would lead to a slippery slope, allowing evidence of jury deliberations whenever there is arguably a flaw in the decisionmaking process.

Finally, Committee members noted that it would be useful to emphasize that Rule 606(b) does not bar the court from polling the jury and from taking steps to remedy any error that seems obvious when the jury is polled. A paragraph to that effect was added to the proposed Committee Note.

A motion was made and seconded to approve the proposed amendment to Evidence Rule 606(b), together with the Committee Note, and to recommend to the Standing Committee that the proposal be released for public comment. The motion was approved by a 6-1 vote.

The proposed amendment to Rule 606(b) provides as follows:

Rule 606. Competency of Juror as Witness

(a) *At the trial.* — A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting as a juror. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) *Inquiry into validity of verdict or indictment.* — Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith~~;~~. ~~except that~~ But a juror may testify ~~on the question~~ about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) ~~or~~ whether any outside influence was improperly brought to bear upon any juror, or (3) whether the verdict reported is the result of a clerical mistake. ~~Nor may a~~ A juror's affidavit or evidence of any statement by the juror ~~concerning~~ may not be received on a matter about which the juror would be precluded from testifying ~~be received for these purposes~~.

The Committee Note to the proposed amendment to Rule 606(b) provides as follows:

Committee Note

Rule 606(b) has been amended to provide that juror testimony may be used to prove that the verdict reported was the result of a clerical mistake. The amendment responds to a divergence between the text of the Rule and the case law that has established an exception for proof of clerical errors. *See, e.g., Plummer v. Springfield Term. Ry.*, 5 F.3d 1, 3 (1st Cir. 1993) ("A number of circuits hold, and we agree, that juror testimony regarding an alleged clerical error, such as announcing a verdict different than that agreed upon, does not challenge the validity of the verdict or the deliberation of mental processes, and therefore is not subject to Rule 606(b)."); *Teevee Toons, Inc., v. MP3.Com, Inc.*, 148 F.Supp.2d 276, 278 (S.D.N.Y. 2001) (noting that Rule 606(b) has been silent regarding inquiries designed to confirm the accuracy of a verdict).

In adopting the exception for proof of clerical mistakes, the amendment specifically rejects the broader exception, adopted by some courts, permitting the use of juror testimony to prove that the jurors were operating under a misunderstanding about the consequences of the result that they agreed upon. *See, e.g., Attridge v. Cencorp Div. of Dover Techs. Int'l,*

Inc., 836 F.2d 113, 116 (2d Cir. 1987); *Eastridge Development Co., v. Halpert Associates, Inc.*, 853 F.2d 772 (10th Cir. 1988). The broader exception is rejected because an inquiry into whether the jury misunderstood or misapplied an instruction goes to the jurors' mental processes underlying the verdict, rather than the verdict's accuracy in capturing what the jurors had agreed upon. *See, e.g., Karl v. Burlington Northern R.R.*, 880 F.2d 68, 74 (8th Cir. 1989) (error to receive juror testimony on whether verdict was the result of jurors' misunderstanding of instructions: "The jurors did not state that the figure written by the foreman was different from that which they agreed upon, but indicated that the figure the foreman wrote down was intended to be a net figure, not a gross figure. Receiving such statements violates Rule 606(b) because the testimony relates to how the jury interpreted the court's instructions, and concerns the jurors' 'mental processes,' which is forbidden by the rule."); *Robles v. Exxon Corp.*, 862 F.2d 1201, 1208 (5th Cir. 1989) ("the alleged error here goes to the substance of what the jury was asked to decide, necessarily implicating the jury's mental processes insofar as it questions the jury's understanding of the court's instructions and application of those instructions to the facts of the case"). Thus, the "clerical mistake" exception to the Rule is limited to cases such as "where the jury foreperson wrote down, in response to an interrogatory, a number different from that agreed upon by the jury, or mistakenly stated that the defendant was 'guilty' when the jury had actually agreed that the defendant was not guilty." *Id.*

It should be noted that the possibility of clerical error will be reduced substantially by polling the jury. Rule 606(b) does not, of course, prevent this precaution. *See* 8 C. Wigmore, *Evidence,* § 2350 at 691 (McNaughten ed. 1961) (noting that the reasons for the rule barring juror testimony, "namely, the dangers of uncertainty and of tampering with the jurors to procure testimony, disappear in large part if such investigation as may be desired is *made by the judge* and takes place *before the jurors' discharge* and separation") (emphasis in original). Errors that come to light after polling the jury "may be corrected on the spot, or the jury may be sent out to continue deliberations, or, if necessary, a new trial may be ordered." C. Mueller & L. Kirkpatrick, *Evidence Under the Rules* at 671 (2d ed. 1999) (citing *Sincox v. United States,* 571 F.2d 876, 878-79 (5th Cir. 1978)).

5. Rule 609

Rule 609(a)(2) provides for automatic impeachment of all witnesses with prior convictions that "involved dishonesty or false statement." Rule 609(a)(1) provides a nuanced balancing test for impeaching witnesses whose felony convictions do not fall within the definition of Rule 609(a)(2). At its Spring 2002 meeting the Evidence Rules Committee directed the Reporter to prepare a memorandum to advise the Committee on whether it is necessary to amend Evidence Rule 609(a)(2). An investigation into this Rule indicates that the courts are in a long-standing conflict over how to determine whether a certain conviction involves dishonesty or false statement within Rule 609(a)(2). The basic conflict is that some courts determine "dishonesty or false statement" solely by looking at the elements of the conviction for which the witness was found guilty. If none of the elements requires proof of falsity or deceit beyond a reasonable doubt, then the conviction must be admitted

under Rule 609(a)(1) or not at all. Most courts, however, look behind the conviction to determine whether the witness committed an act of dishonesty or false statement before or after committing the crime. Under this view, for example, a witness convicted of murder would have committed a crime involving dishonesty or false statement if he lied about the crime, either before or after committing it.

At its Fall 2003 meeting the Committee tentatively agreed that Rule 609(a)(2) should be amended to resolve the dispute in the courts over how to determine whether a conviction involves dishonesty or false statement. The Committee determined that an amendment would resolve an important issue on which the circuits are clearly divided. The Committee was at that time unanimously in favor of an "elements" definition of crimes involving dishonesty or false statement. Committee members noted that requiring the judge to look behind the conviction to the underlying facts could (and often does) impose a burden on trial judges. Moreover, the inquiry is indefinite because it is often impossible to determine, solely from a guilty verdict, what facts of dishonesty or false statement the jury might have found. Most importantly, whatever additional probative value there might be in a crime committed deceitfully, it is lost on the jury assessing the witness's credibility when the elements of the crime do not in fact require proof of dishonesty or false statement. This is because when the conviction is introduced to impeach the witness, the jury is told only about the general nature of the conviction, not about its underlying facts.

Committee members noted that the "elements" approach to defining crimes that fall within Rule 609(a)(2) is litigant-neutral, in that it would apply to all witnesses in all cases. It was also noted that if a crime not involving false statement as an element (e.g., murder or drug dealing) were inadmissible under Rule 609(a)(2), it might still be admitted under the balancing test of Rule 609(a)(1); moreover, if such a crime *were* committed in a deceitful manner, the underlying facts of deceit might still be inquired into under Rule 608. Thus, the costs of an "elements" approach would appear to be low.

At the Spring 2004 meeting the Committee revisited the draft of an amendment to Rule 609(a)(2), under which a court would determine whether a conviction involved dishonesty or false statement solely by looking at the elements of the crime. The Department of Justice opposed this draft. The DOJ representative recognized that the change was litigant-neutral in that it would protect both prosecution and defense witnesses. Indeed the representative observed that Rule 609(a)(2) is invoked more frequently against the prosecution than it is against the defense. The DOJ representative also emphasized that the Department was not in favor of an open-ended rule that would require the court to divine from the record whether the witness committed some deceitful act in the course of a crime. But the Department was concerned that certain crimes that should be included as *crimina falsi* would not fit under a strict "elements" test. The prime example is obstruction of justice. It may be plain from the charging instrument that the witness committed obstruction by falsifying documents, and it may be evident from the circumstances that this fact was determined beyond a reasonable doubt. And yet deceit is not an absolutely necessary element of the crime of obstruction of justice; that crime could be committed by threatening a witness, for example.

The Department recognized that Rule 609(a)(2) is not the only avenue for admitting a conviction committed through deceit even though the elements do not require proof of receipt. Such a conviction could be offered under the Rule 609(a)(1) balancing test. But the Department's response was that Rule 609(a)(1) would not apply if the conviction is a misdemeanor; and moreover the balancing test of Rule 609(a)(1) might lead to a judge excluding the conviction even though it should really have been admitted under Rule 609(a)(2). The Department also recognized that the deceitful conduct could itself be admissible as a bad act under Rule 608(b). But the Department's response was that Rule 608(b) would not permit extrinsic evidence if the witness denied the deceitful conduct.

The Department also noted that an "elements" test would be dependent on the vagaries of charging and pleading. For example, if a person lies on a government form as part of a plan to obstruct justice, this misconduct could be charged under any number of offenses; some would have an element of false statement, some would not. The Department representative argued that it made no sense for the same conduct to receive different treatment under Rule 609(a)(2) depending solely on how that conduct is charged.

Committee members considered and discussed in detail the Department's objection to an amendment that would provide an "elements" test for determining which convictions fall under Rule 609(a)(2). Initially the Committee voted, over the Department representative's dissent, to adhere to the elements test. Committee members were concerned that anything other than an elements test would return to the poor state of affairs that currently exists in most courts, i.e., an indefinite and time-consuming "min-trial" to determine whether the witness committed some deceitful fact some time in the course of a crime. After extensive discussion, however, the Committee as a whole determined that there was no real conflict within the Committee about the goals of an amendment. Those goals are: 1) to resolve a long-standing dispute among the circuits over the proper methodology for determining when a crime is automatically admitted under Rule 609(a)(2); 2) to avoid a mini-trial into the facts supporting a conviction; and 3) to limit Rule 609(a)(2) to those crimes that are especially probative of the witness's character for untruthfulness.

The Committee resolved to allow the Reporter and the Department of Justice representatives to work on compromise language that would accomplish the goals on which everyone agreed. This work was done overnight and submitted for the Committee's review on the second day of the meeting. The compromise would permit automatic impeachment when an element of the crime required proof of deceit; but it would go somewhat further and permit automatic impeachment if an underlying act of deceit could be "readily determined" from such information as the charging instrument. Some Committee members expressed concern that the language might be too vague and might permit the mini-trial that the Committee sought to avoid. But other members pointed out that the burden is on the proffering party to show the underlying facts that readily indicate deceit, and that the term "readily available" provides the court with authority to terminate an inquiry it finds too indefinite or burdensome. Committee members also noted that the new draft deletes the indefinite term that identified the crime as one that "involved" dishonesty or false statement. Under the new draft, the crime actually must be a crime of dishonesty or false statement; it cannot be admitted under Rule 609(a)(2) merely because there was some act of deceit in committing the crime.

Committee members eventually agreed that the new draft captured the goals of the Committee in proposing an amendment to Rule 609(a)(2): it would rectify a conflict, prevent a mini-trial, and permit automatic admissibility for only those crimes that are especially probative of the witness's character for untruthfulness.

A motion was made and seconded to approve the proposed amendment to Evidence Rule 609(a)(2), together with the Committee Note, and to recommend to the Standing Committee that the proposal be released for public comment. The motion was approved by a unanimous vote.

The proposed amendment to Rule 609(a)(2) provides as follows:

Rule 609. Impeachment by Evidence of Conviction of Crime

(a) General rule.—For the purpose of attacking the ~~credibility~~ character for truthfulness of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime that readily can be determined to have been a crime of dishonesty or false statement shall be admitted ~~if it involved dishonesty or false statement~~, regardless of the punishment.

* * *

The Committee Note to the Proposed Amendment to Rule 609(a)(2) provides as follows:

Committee Note

The amendment provides that Rule 609(a)(2) mandates the admission of evidence of a conviction only when the criminal act was itself an act of dishonesty or false statement. Evidence of all other crimes is inadmissible under this subsection, irrespective of whether the witness exhibited dishonesty or made a false statement in the process of their commission. Thus, evidence that a witness committed a violent crime, such as murder, is not admissible under Rule 609(a)(2), even if the witness acted deceitfully in the course of committing the crime.

This amendment is meant to give effect to the legislative intent to limit the convictions that are automatically admissible under subsection (a)(2). The Conference

Committee provided that by "dishonesty and false statement" it meant "crimes such as perjury, subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the [witness's] propensity to testify truthfully." Historically, offenses classified as *crimina falsi* have included only those crimes in which the ultimate criminal act was itself an act of deceit. *See* Green, *Deceit and the Classification of Crimes: Federal Rule of Evidence 609(a)(2) and the Origins of* Crimen Falsi, 90 J. Crim. L. & Criminology 1087 (2000).

Evidence of crimes in the nature of *crimina falsi* must be admitted under Rule 609(a)(2), regardless of how such crimes are specifically charged. For example, evidence that a witness was convicted of making a false claim to a federal agent is admissible under this subsection regardless of whether the crime was charged under a section that expressly references deceit (e.g., 18 U.S.C. § 1001, Material Misrepresentation to the Federal Government) or a section that does not (e.g., 18 U.S.C. § 1503, Obstruction of Justice).

The amendment also requires that the proponent have ready proof of the nature of the conviction. Ordinarily, the elements of the crime will indicate whether it is one of dishonesty or false statement. Where the deceitful nature of the crime is not apparent from the statute and the face of the judgment – as, for example, where the conviction simply records a finding of guilt for a statutory offense that does not reference deceit expressly – a proponent may offer information such as an indictment, a statement of admitted facts, or jury instructions to show that the witness was necessarily convicted of a crime of dishonesty or false statement. *Cf. Taylor v. United States*, 495 U.S. 575, 602 (1990) (providing that a trial court may look to a charging instrument or jury instructions to ascertain the nature of a prior offense where the statute is insufficiently clear on its face). But the amendment does not contemplate a "mini-trial" in which the court plumbs the record of the previous proceeding to determine whether the crime was in the nature of *crimen falsi.*

The amendment also substitutes the term "character for truthfulness" for the term "credibility" in the first sentence of the Rule. The limitations of Rule 609 are not applicable if a conviction is admitted for a purpose other than to prove the witness's character for untruthfulness. *See, e.g., United States v. Lopez*, 979 F.2d 1024 (5th Cir. 1992) (Rule 609 was not applicable where the conviction was offered for purposes of contradiction). The use of the term "credibility" in subsection (d) is retained, however, as that subdivision is intended to govern the use of a juvenile adjudication for any type of impeachment.

6. Rule 706

Judge Gettleman has requested that the Committee consider an amendment to Rule 706 that would make stylistic changes and that also would dispense with the requirement of an order to show cause before an expert is appointed. Commentators have raised other problems in the administration of the Rule. At the Fall 2003 meeting, the Committee directed the Reporter to prepare a memorandum on Rule 706, so that the Committee could determine whether an amendment to the Rule should be included as part of the package to be sent to the Standing Committee.

The Committee reviewed and discussed the Reporter's memorandum on Rule 706. The Committee observed that Rule 706 does not address some important issues concerning the appointment of expert witnesses. Among the open issues are: standards for appointment, method for selection, ex parte contacts, jury instructions, and allocation of the expert witness's fee. The Committee ultimately concluded, however, that an amendment to Rule 706 was not necessary at this time. There is very little case law on Rule 706, and the case law that exists does not indicate that there is a conflict in interpreting the Rule. The courts do not appear to be having problems in resolving the questions left open by the existing Rule. Finally, while Judge Gettleman's stylistic suggestions would provide an improvement, the Committee concluded that this improvement was not enough to justify the costs of an amendment to the Evidence Rules.

A motion was made and seconded to take no further action on an amendment to Rule 706. That motion was approved by a unanimous vote.

7. Rule 803(3)

At its Fall 2003 meeting the Evidence Rules Committee directed the Reporter to prepare a report on Rule 803(3)—the hearsay exception for a declarant's statement of his or her state of mind—so that the Committee could determine the necessity of an amendment to that Rule. The possible need for amendment of Rule 803(3) arises from a dispute in the courts about whether the hearsay exception covers statements of a declarant's state of mind when offered to prove the conduct of another person.

The Reporter's memorandum noted that the Supreme Court's decision in *Crawford v. Washington*, handed down after the Fall 2003 meeting, rendered any amendment to a hearsay exception inappropriate at this time. The Court in *Crawford* radically revised its Confrontation Clause jurisprudence. This has a direct bearing on the scope of Rule 803(3), because the use of the state of mind exception to prove the conduct of a non-declarant occurs almost exclusively in criminal cases, where the statement is offered to prove the conduct of the accused. This means that any amendment of Rule 803(3) that would apply to criminal cases is almost surely premature and unwise so shortly after *Crawford.*

The Committee agreed unanimously with the Reporter's conclusion. The Court in *Crawford* left open a number of questions about the relationship between hearsay exceptions and the

Confrontation Clause. It held that the admission of "testimonial" hearsay violates the Confrontation Clause even if the hearsay is reliable — but it did not provide a definition of the term "testimonial." It intimated that if hearsay is not "testimonial" it might escape constitutional regulation entirely; but it did not so hold. Consequently, the full import of *Crawford* and of the constitutionality of the Federal Rules hearsay exceptions must await development by the courts, probably over a number of years. Under these circumstances, the Committee believes that it would be inappropriate to propose any amendment to a hearsay exception that would have a substantial effect in criminal cases.

The Committee directed the Reporter to keep it apprised of the case law as it develops after *Crawford.*

8. Rule 803(8)

At its Fall 2003 meeting the Evidence Rules Committee directed the Reporter to prepare a report on Rule 803(8)—the hearsay exception for public reports—so that the Committee could determine the necessity of an amendment to that Rule. The possible need for amendment of Rule 803(8) arises from several anomalies in the Rule as well as a dispute in the courts about the scope of the Rule. The Reporter's memorandum noted (as with Rule 803(3)) that any amendment to a hearsay exception is probably premature in light of the Supreme Court's recent decision in *Crawford v. Washington*. The problems that the courts have had with the public records exception arise almost exclusively when a public record is offered against a criminal defendant. This is the very situation addressed by the Court in *Crawford*. The Committee resolved unanimously to defer consideration of any amendment to Rule 803(8).

9. Rule 804(b)(3)

In 2003 the Evidence Rules Committee proposed an amendment to Evidence Rule 804(b)(3). The amendment provided that statements against penal interest offered by the prosecution in criminal cases would not be admissible unless the government could show that the statements carried "particularized guarantees of trustworthiness." The intent of the amendment was to assure that statements offered by the prosecution under Rule 804(b)(3) would comply with constitutional safeguards imposed by the Confrontation Clause. The amendment was approved by the Judicial Conference and referred to the Supreme Court.

The amendment to Rule 804(b)(3) essentially codified the Supreme Court's Confrontation Clause jurisprudence, which required a showing of "particularized guarantees of trustworthiness" for hearsay admitted under an exception that was not "firmly rooted." But while the amendment was pending in the Supreme Court, that Court granted certiorari and decided *Crawford v. Washington*. *Crawford* essentially rejected the Supreme Court's prior jurisprudence, which had held that the Confrontation Clause demands that hearsay offered against an accused must be reliable. The *Crawford* Court replaced the reliability-based standard with a test dependent on whether the proffered hearsay is "testimonial."

Shortly after the Supreme Court decided *Crawford*, it considered the proposed amendment to Rule 804(b)(3). The Court decided to send the amendment back to the Standing Committee for reconsideration in light of *Crawford*. This action was not surprising, because the very reason for the amendment was to bring the Rule into line with the Confrontation Clause. Now that the governing standards for the Confrontation Clause have been changed, the proposed amendment did not meet its intended goal. It embraced constitutional standards that are no longer applicable.

For reasons discussed earlier in the meeting in the discussion of other hearsay exceptions, the Committee determined that it was prudent to hold off on any consideration of an amendment to a hearsay exception until the courts are given some time to figure out the meaning and all the implications of *Crawford*. Any attempt to bring Rule 804(b)(3) into line with *Crawford* standards at this point would be unwise given the fact that those standards have not yet been clarified.

PROJECT ON PRIVILEGES

At its Fall 2002 meeting, the Evidence Rules Committee decided that it would not propose any amendments to the Evidence Rules on matters of privilege. The Committee determined, however, that — under the auspices of its consultant on privileges, Professor Broun — it could perform a valuable service to the bench and bar by giving guidance on what the federal common law of privilege currently provides. This could be accomplished by a publication outside the rulemaking process, such as has been previously done with respect to outdated Advisory Committee Notes and caselaw divergence from the Federal Rules of Evidence. Thus, the Committee agreed to continue with the privileges project and determined that the goal of the project would be to provide, in the form of a draft rule and commentary, a "survey" of the existing federal common law of privilege. This essentially would be a descriptive, non-evaluative presentation of the existing federal law, not a "best principles" attempt to write how the rules of privilege "ought" to look. Rather, the survey would be intended to help courts and lawyers determine what the federal law of privilege actually is and where it might be going. The Committee determined that the survey of each privilege will be structured as follows:

> 1. The first section for each rule would be a draft "survey" rule that would set out the existing federal law of the particular privilege. Where there is a significant split of authority in the federal courts, the draft would include alternative clauses or provisions.
>
> 2. The second section for each rule would be a commentary on existing federal law. This section would provide case law support for each aspect of the survey rule and an explanation of the alternatives, as well as a description of any aberrational caselaw. This commentary section is intended to be detailed but not encyclopedic. It would include representative cases on key points rather than every case, and important law review articles on the privilege, but not every article.
>
> 3. The third section would be a discussion of reasonably anticipated choices that the federal courts, or Congress if it elected to codify privileges, might take into consideration.

For example, it would include the possibility of different approaches to the attorney-client privilege in the corporate context and the possibility of a general physician-patient privilege. This section, like the project itself, will be descriptive rather than evaluative.

The materials on the psychotherapist-patient privilege were presented at the Fall 2003 meeting and were tentatively approved by the Committee.

At the Spring 2004 meeting Professor Broun presented, for the Committee's information and review, a draft of the survey rule and commentary on the attorney-client privilege. Committee members commended Professor Broun on his excellent work, and provided some comments and suggestions. Professor Broun noted that he would continue his work on the "future developments" section for the attorney-client privilege, and this work would be completed for the next meeting. The Reporter noted that he would work on the materials on waiver and would provide some work product on that rule for the Committee to review at the next meeting.

New Business

1. Civil Rules Restyling

The Evidence Rules Committee considered whether it should provide any suggestions to the Civil Rules Committee concerning the restylization of two Civil Rules that have a bearing on the admissibility of evidence. Those rules are Rules 32 and 44. The Reporter provided the Committee with a memorandum on the subject.

One possible suggestion is to provide a uniform reference to the Federal Rules of Evidence whenever the Civil Rules refer to rules of admissibility. As it is currently restyled, Rule 32 refers both to the "rules of evidence" and to the "Federal Rules of Evidence." The Reporter noted that he had already provided a memorandum at the request of the Civil Rules Committee, suggesting that the references be made uniformly to the "Federal Rules of Evidence." The Civil Rules Committee is concerned, however, that the reference to "the rules of evidence" might intentionally be broader than the Federal Rules. It might encompass state rules, common law rules, and statutory rules of evidence. But the Reporter noted that the Federal Rules themselves incorporate these extrinsic rules of evidence. See, e.g., Rules 302, 402, 501, 801, and 1101. On the other hand, the Civil Rules Committee understandably wishes to be certain that a uniform reference will not create a change in any result. The Committee asked Professor Broun to research the matter to determine whether a uniform reference to the Federal Rules of Evidence could lead to a change of result in any case.

In all other respects, the Committee concluded that the restylized Rules 32 and 44 are excellent and would make those rules much easier to understand and more user-friendly.

The Reporter's memorandum on Rules 32 and 44 also noted that the Civil Rules Committee might be interested in a broader project that would better integrate the Civil Rules and the Evidence Rules. The Evidence Rules Committee has consistently concluded that rules of admissibility should

be placed in the Evidence Rules. The Evidence Rules are where courts and litigators will look for the applicable rules of evidence. Yet there are a few Civil Rules (most importantly Rules 32 and 44) that specifically govern the admissibility of evidence at trial.

One possibility to be explored is whether these Civil Rules can be amended to provide that admissibility of deposition testimony (Rule 32) and public records (Rule 44) is governed by the Federal Rules of Evidence. This was the solution adopted by the Criminal Rules Committee when it amended Criminal Rule 11, which overlapped the provisions of Evidence Rule 410. Any similar change to the Civil Rules has been determined to be beyond the scope of the style project. The Evidence Rules Committee expressed its interest in a joint project with the Civil Rules Committee to provide a better integration between the Civil and Evidence Rules. But it was also noted that such a project would have an effect on the Bankruptcy Rules and the Criminal Rules as well. So while the project would be a useful one, it might be better placed under the auspices of the Standing Committee.

2. Civil Rules Inadvertent Waiver Proposal

The liaison from the Civil Rules Committee reported that his Committee was proposing a rule concerning waiver of privilege by disclosure during the course of discovery. The proposed rule would govern the procedure for making a claim that disclosure was inadvertent. The rule does not purport to set forth substantive standards for when a waiver should or must be found. The Civil Rules Committee justifiably was concerned that a rule setting forth legal standards for determining waiver would be a rule of privilege requiring direct enactment by Congress. Such a rule would also, of course, be a rule of evidence, and would therefore be of interest to the Evidence Rules Committee.

The Civil Rules Committee has indicated its interest in working with the Evidence Rules Committee on a rule concerning inadvertent disclosure of privileged material. The Evidence Rules Committee unanimously agreed that a joint project on this important subject is in order. It was noted that the goal of the project might be a suggestion to Congress rather than a proposed rule through the rulemaking process.

The meeting was adjourned Friday, April 30th.

Respectfully submitted,

Daniel J. Capra
Reporter

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U.S. Department of Justice

Office of the Deputy Attorney General

Washington, D.C. 20530

December 16, 2004

MEMORANDUM

TO: Judge David F. Levi
Chairman, Committee on Rules of Practice and Procedure

FROM: James B. Comey
Deputy Attorney General

Robert McCallum
Associate Attorney General

Christopher Wray
Assistant Attorney General
Criminal Division

SUBJECT: Proposed Amendment to Criminal Rule 29

I. Introduction

Several years ago, at the strong urging of career prosecutors from across the country, the Department of Justice asked the Advisory Committee on Criminal Rules to consider amending Rule 29 of the Federal Rules of Criminal Procedure to preserve the Government's right to appeal a trial court's decision to grant a motion for judgment of acquittal. We worked closely with the Committee over a number of meetings on the issue. We collected and presented data, responded to questions and concerns raised by members of the Committee, developed a number of draft amendments, and strongly advocated on behalf of publishing for public comment a proposed amendment to the Rule.

At its May 2004 meeting, the Committee voted 9-3 not to publish any proposed amendment to the Rule and not to take any further action on the Department's request. Based upon the discussion prior to the vote, the basis for this action appeared to be: (1) the perception that unappealable, pre-verdict judgments under the Rule were extremely rare and, thus, did not

undermine the public's confidence in the criminal justice system or create public harm to the extent necessary to warrant an amendment; and (2) the usefulness of the Rule as a procedural device enabling judges to manage appropriately and effectively the trial of criminal cases, especially ones involving multiple defendants, multiple counts and hung juries.

At the meeting of the Standing Committee that followed a few weeks later in June 2004, Associate Attorney General Robert McCallum requested the opportunity for the Department to make a presentation on Rule 29 at the January 2005 meeting of the Standing Committee. We were pleased that the request was met favorably. This memorandum sets forth the reasons for our continuing efforts to amend Rule 29. We hope the Standing Committee will take appropriate steps so that this issue can be addressed through the procedures of the Rules Enabling Act. Specifically, we ask the Standing Committee: (1) to find, based upon the documentation herein, that pre-verdict judgments of acquittal cause significant public harm and that Rule 29 is inadequate to address this harm; and (2) to refer the issue to the Advisory Committee with the instruction to address this issue by publishing one or more proposals to amend the Rule and, thereafter, to amend the Rule appropriately or to explain why it does not require amendment.

This memorandum incorporates the materials previously presented to the Advisory Committee and includes an expanded discussion and documentation of selected Rule 29 cases. First, it discusses Rule 29 in its current form and why we believe it should be amended. We set out, here, the history and some of the case law relating to Rule 29. Second, we review the available data on Rule 29 cases and explain why we believe this data satisfies the threshold for publishing a proposed amendment to the Rule. We also summarize several selected Rule 29 cases to demonstrate how the current Rule impacts a wide variety of cases and causes significant harm to the community. Finally, the memorandum discusses two proposals for amending the Rule and recommends that one or both of them, or a variation thereof, be published for comment.

We very much appreciate the Standing Committee's consideration of this issue, and we look forward to a full discussion at the upcoming meeting of the Committee.

II. Rule 29 In Its Current Form, It's History, And Why It Should Be Amended

Currently, Rule 29(a) permits a defendant to make a motion for judgment of acquittal "after the government closes its evidence or after the close of all the evidence," and authorizes the district court, in response to such a motion or on its own, to grant a judgment of acquittal if it believes the evidence is insufficient to support a conviction. Rule 29(b) permits, but does not require, the court to reserve decision on an acquittal motion until the jury has reached a verdict. Rule 29(b) also authorizes a court to grant a judgment of acquittal if the jury is discharged without a verdict. Such rulings, when made before the jury enters a verdict, can not be appealed – no matter how erroneous – because of the impact of the Double Jeopardy Clause. United States v. Martin Linen Supply Co., 430 U.S. 564 (1977).

Rule 29 currently permits an anomaly: orders disposing of entire prosecutions or counts without any possibility of appellate review. This anomaly was partially addressed, first by judicial decisions, and then by a 1994 amendment to Rule 29, which permitted and, in fact, encouraged district judges to reserve decision on a motion for judgment of acquittal until after the guilty verdict. Because our experience shows that the majority of Rule 29 judgments of acquittal are granted *pre-verdict,* and are therefore unappealable, we believe trial courts should now be required to do what the 1994 amendment encouraged them to do – reserve decision until after a guilty verdict. An amendment is necessary, we believe, to correct the legal anomaly, to ensure the Government its full statutory right to appeal, and to permit the correction of erroneous rulings dismissing whole prosecutions and counts.

Rule 29 is unique. As commentators have recognized:

> In all of federal jurisprudence there is only one district court ruling that is both absolutely dispositive and entirely unappealable. Federal Rule of Criminal Procedure 29 enables the trial judge upon her own initiative or motion of the defense to direct a judgment of acquittal in a criminal trial at any time prior to the submission of the case to the jury. Once the judgment of acquittal is entered, the government's right of appeal is effectively blocked by the Double Jeopardy Clause of the U.S. Constitution, as the only remedy available to the Court of Appeals would be to order a retrial. No matter how irrational or capricious, the district judge's ruling terminating the prosecution cannot be appealed.

Richard Sauber & Michael Waldman, Unlimited Power: Rule 29(a) and the Unreviewability of Directed Judgments of Acquittal, 44 Am. U. L. Rev. 433, 433-34 (1994) (footnote omitted) (hereafter "Unlimited Power"). As these commentators note: "[t]hough there is only one such rule in federal jurisprudence, it is one too many." Id. (footnote omitted).

This anomaly arises from a relatively recent historical accident. Rule 29 first authorized the granting of judgments of acquittal in 1944.[1] At that time, the Government had extremely limited rights of appeal under the 1907 Criminal Appeals Act, and could not appeal a judgment of acquittal whether rendered before or after the guilty verdict. See United States v. Sisson, 399 U.S. 267 (1970). It was thus of no moment that Rule 29 allowed the court to grant a motion for judgment of acquittal at the close of the government's case, or at the close of all the evidence, or after the jury verdict. See Fed. R. Crim. P. 29 (1944).[2]

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[1] "The preverdict acquittal of Rule 29 has no impressive historical lineage." Unlimited Power, at 434. Prior to 1944, some courts directed verdicts of acquittal, but "the power to direct an acquittal developed as a corollary to the [appealable] directed verdict in civil cases, with little thought or reasoning." Id. (note omitted).

[2] The authorization of rulings at these different times was not intended to create differences in appealability. Indeed, Rule 29 was patterned after Civil Rule 50, which allowed a

In 1971, however, Congress enacted the Criminal Appeals Act, permitting the Government to appeal from any judgment dismissing an indictment or any count thereof, including a judgment of acquittal under Rule 29, unless "the double jeopardy clause of the United States Constitution prohibits further prosecution." 18 U.S.C. § 3731; see United States v. Scott, 437 U.S. 82, 91 & n.7 (1978); United States v. Wilson, 420 U.S. 332, 337, 352-53 (1978); United States v. Genova, 333 F.3d 750, 756 & n.1 (7th Cir. 2003) (citing cases). In enacting § 3731, "Congress intended to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit. . . . Congress was determined to avoid creating non-constitutional bars to the Government's right to appeal." Wilson, 420 U.S. at 337-38.

"When Congress removed all statutory barriers to government appeals in 1971, the unappealable preverdict acquittal of Rule 29(a) emerged as an historic anachronism, a procedural appendix left over from an era in which appeals of any kind were unavailable." Unlimited Power, at 434. Nonetheless, for many years, Rule 29 was not amended to reflect the expansion of the Government's right of appeal. As a result, this non-constitutional rule of procedure inadvertently created a bar to the Government's right to appeal, by permitting district courts to enter judgments of acquittal at times (at the close of the Government's case, at the close of all the evidence, after the jury is discharged without returning a verdict) when the Double Jeopardy Clause prohibited appeal. The result was a flurry of litigation, in the Supreme Court and lower courts, over whether a ruling was an unappealable pre-verdict judgment of acquittal under Rule 29 or was an appealable pre-verdict dismissal. See, e.g., United States v. Scott, 437 U.S. 82, 85, 95 (1978), overruling United States v. Jenkins, 420 U.S. 358 (1975); United States v. Martin Linen Supply Co., 430 U.S. 564, 570-72 (1977); United States v. Torkington, 874 F.2d 1441, 1444 (11th Cir. 1989); United States v. Giampa, 758 F.2d 928, 932-36 (3d Cir. 1985); United States v. Ember, 726 F.2d 522, 524-26 (9th Cir. 1984); United States v. Gonzales, 617 F.2d 1358, 1361-62 (9th Cir. 1980).

In Martin Linen, 430 U.S. at 570-72, both the majority and the dissent decried the idea of having the appealability and "the constitutional significance of a Rule 29 judgment of acquittal [turn] on a matter of timing." 430 U.S. at 574-75 (majority) ("Rule 29 contemplated no such artificial distinctions"), 583 (dissent) ("hinging the outcome of this case on the timing ... elevat[es] form over substance"). That, however, was the consequence of failing to amend the Rule. See Scott, 437 U.S. at 91 n.7; United States v. DiFrancesco, 449 U.S. 117, 130 (1980) ("the Double Jeopardy Clause does not bar a Government appeal from a ruling in favor of the defendant after a guilty verdict has been entered by the trier of fact," citing post-verdict Rule 29 cases).

In 1994, a partial correction was made. Based on a proposal of the Advisory Committee on the Criminal Rules, subsequently approved by the Standing Committee, the Supreme Court amended

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district court to direct a verdict at the close of the opponent's case, at the close of all the evidence, or after the jury's verdict. See Fed. R. Civ. P. 50 (1937); Fed. R. Crim. P. 29, 1944 Advisory Committee Notes. Civil Rule 50, like Criminal Rule 29, was not drawing any distinctions concerning appealablility – these civil judgments would be appealable regardless of their timing. See Unlimited Power, at 456-57 & nn.168-70.

Rule 29 to permit and encourage district judges to preserve the right to appeal. The 1994 amendment allowed district courts that received motions for judgment of acquittal at the close of the Government's case to "reserve decision on a motion for judgment of acquittal, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury and decide the motion . . . after it returns a verdict of guilty. . . ." Fed. R. Crim. P. 29(b) (1994).

Reservation of decision was not a new idea. Beginning with its 1944 enactment, Rule 29 has always permitted a judge to reserve decision on a motion for judgment of acquittal made at the close of all the evidence, and to decide it after the jury's verdict. Fed. R. Crim. P. 29(b) & Advisory Committee Note (1944). After the 1971 enactment of the Criminal Appeals Act, appellate courts encouraged judges to reserve decision on motions made at the close of the evidence. See United States v. Singleton, 702 F.2d 1159, 1163 n.12 (D.C. Cir. 1983) ("where all the evidence has been presented, trial courts should reserve judgment on motions for acquittal until after the return of the jury verdict"). Even before the 1994 amendment, many courts began to reserve decision on motions made at the close of the Government's case, and the Supreme Court commended the practice. See 1994 Advisory Committee Notes below. The 1994 amendment explicitly authorized such reservation of decision on motions made at the close of the Government's case, and encouraged district judges to do so:

> The amendment permits the reservation of a motion for a judgment of acquittal made at the close of the government's case in the same manner as the rule now permits for motions made at the close of all of the evidence. Although the rule as written did not permit the court to reserve such motions made at the end of the government's case, trial courts on occasion have nonetheless reserved ruling. See, e.g., United States v. Bruno, 873 F.2d 555 (2d Cir.), cert. denied, 110 S. Ct. 125 (1989); United States v. Reifsteck, 841 F.2d 701 (6th Cir. 1988). While the amendment will not affect a large number of cases, it should remove the dilemma in those close cases in which the court would feel pressured into making an immediate, and possibly erroneous, decision or violating the Rule as presently written by reserving its ruling on the motion.
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> The amendment also permits the trial court to balance the defendant's interest in an immediate resolution of the motion against the interest of the government in proceeding to a verdict thereby preserving its right to appeal in the event a verdict of guilty is returned but is then set aside by the granting of a judgment of acquittal. Under the double jeopardy clause the government may appeal the granting of a motion for judgment of acquittal only if there would be no necessity for another trial, i.e., only where the jury has returned a verdict of guilty. United States v. Martin Linen Supply Co., 430 U.S. 564 (1977). Thus, the government's right to appeal a Rule 29 motion is only preserved where the ruling is reserved until after the verdict.
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> In addressing the issue of preserving the government's right to appeal and at the same time recognizing double jeopardy concerns, the Supreme Court observed:

> We should point out that it is entirely possible for a trial court to reconcile the public interest in the Government's right to appeal from an erroneous conclusion of law with the defendant's interest in avoiding a second prosecution. In United States v. Wilson, 420 U.S. 332 (1975), the court permitted the case to go to the jury, which returned a verdict of guilty, but it subsequently dismissed the indictment for preindictment delay on the basis of evidence adduced at trial. Most recently in United States v. Ceccolini, 435 U.S. 268 (1978), we described similar action with approval: 'The District Court had sensibly made its finding on the factual question of guilt or innocence, and then ruled on the motion to suppress; a reversal of these rulings would require no further proceeding in the District Court, but merely a reinstatement of the finding of guilt.' Id. at 271.
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> United States v. Scott, 437 U.S. 82, 100 n.13 (1978). By analogy, reserving a ruling on a motion for judgment of acquittal strikes the same balance as that reflected by the Supreme Court in Scott.

Fed. R. Crim. P. 29 Advisory Committee Note (1994).

To ensure that reservation did not prejudice the defendant, the 1994 amendment also altered what evidence could be considered by the court considering the motion. Under governing law at the time, if a defendant makes a motion for judgment of acquittal at the close of the government's case, and then decides to put on evidence, he "waives his objections to the denial of his motion to acquit," United States v. Calderon, 348 U.S. 160, 164 & n.1 (1954), and takes "the risk that in so doing he will bolster the Government case enough for it to support a verdict of guilty," McGautha v. California, 402 U.S. 183, 215 (1971), vacated in part on other grounds, Crampton v. Ohio, 408 U.S. 941, 942 (1972). See, e.g., United States v. Vallo, 238 F.3d 1242, 1247-48 (10th Cir. 2001); United States v. Brown, 53 F.3d 312, 314 (11th Cir. 1995). The 1994 amendment provided: "[i]f the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved." Fed. R. Crim. P. 29(b) (1994) & Advisory Committee Note. The 1994 amendment thus ensured that a defendant received the same ruling on the sufficiency of the Government's case as he would have had the decision not been reserved, while it preserved the ability for the Government to appeal and for errors thus to be corrected.

Courts and commentators have spoken favorably of the 1994 amendments and have continued to encourage reservation as best practice. For example, Justice Stevens noted in Carlisle v. United States, 517 U.S. 416, 444-45 (1996), that Rule 29(b) "accommodates the defendant's right to a move for a directed acquittal with the Government's right to seek appellate review. Indeed, the subdivision was amended in 1994 for the very purpose of striking a more proper balance between those two interests." (Stevens joined by Kennedy, JJ., dissenting). The "value" of reserving a decision on a directed verdict of acquittal was also noted in Wright & Miller, Federal Practice and Procedure, 2A Fed. Prac. & Proc. Crim 3d §464. See also, e.g., United States v. Renick, 273 F.3d

1009, 1013 (11th Cir. 2001); United States v. Byrne, 203 F.3d 671, 675 (9th Cir. 2001); 5 W. LaFave, J. Israel & N. King, Criminal Procedure, §24.6(b) p.545 (1999).

Unfortunately, as set forth below, district courts have not always followed that best practice, instead issuing erroneous judgments of acquittal before verdict which are unappealable. Indeed, in some instances, district judges have intentionally timed their entry of the judgment of acquittal to prevent its review. To end such dispositions, and to conform federal practice to best practice, we propose to finish the reform the Committee began in 1994.

III. Scope Of The Problem And Representative Examples Of Pre-Verdict Rule 29 Cases

An amendment to Rule 29 is not solely a matter of legal reform or theory, however. It is necessary because pre-verdict judgments of acquittal are not infrequent, are often wrong, cause significant harm to the public, and undermine the public's confidence in the criminal justice system.

A. Various Data Sources

While the precise numbers are not tracked in any data base,[3] it is clear that district courts grant substantial numbers of judgments of acquittal each year, many of which are granted before the jury reaches a verdict. The Administrative Office of the Courts ("AOC") reports that in the year ending on September 30, 2002, 336 defendants were totally acquitted by judges – almost as many defendants as were acquitted by juries (400) or convicted by judges (423). See Exhibit A, AOC, Judicial Business of the United States Courts 2002, Table D-4.[4] Given that during this period only 2,671 defendants had their cases disposed of by jury verdict, and 759 by judicial verdict, these 336 judicial acquittals represent a substantial proportion – 13% of all jury verdicts and almost 10% of the verdicts issued at trial. Id., Table D-6. These judicial acquittals occurred for all types of crimes, including crimes that pose a significant risk to the public (homicide, assault, robbery, extortion, theft, fraud, sex offenses, drug crimes, firearms crimes, and drunk driving). Id., Table D-4. While the AOC data is imprecise and subsequent inquiries by the AOC and the Department indicate a smaller number of pre-verdict Rule 29 rulings,[5] it does indicate that a significant number and percentage of defendants may be receiving pre-verdict judgments of acquittal.

Data collected by the Department shows more directly a significant number of pre-verdict Rule 29 cases. During 2002 and again in mid-2003, the Department conducted a survey of all United States Attorney's Offices asking for empirical data regarding the instances of judges granting

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[3] No data base specifically tracks pre-verdict Rule 29 judgments of acquittal. Thus, the numbers must be estimated from other data or based upon surveys of the field.

[4] These AOC Tables were obtained from www.uscourts.gov/judbus2002/contents.html.

[5] The AOC data does not differentiate between pre- and post-trial judgments of acquittals and "not guilty" verdicts in bench trials.

judgments of acquittal, both before and after the jury's verdict, since October 1, 1999. We received responses from 83 out of 94 districts. See Exhibit B, Summary Table. The results of the survey are, therefore, under-representative – not only because districts did not report, but also because it is unlikely that the responding districts reported every Rule 29 case. The responding districts reported that, during this approximately three and one-half year period, judges had granted judgments of acquittal in a total of 256 cases. In 184 of these cases (72%), judgments of acquittal were granted before the jury verdict. In other words, in only 72 cases (28%) did judges follow the intent of the 1994 amendment and reserve the Rule 29 rulings until after the verdict. Further, in 134 of the 184 cases (73%) in which judgments of acquittal were entered before the jury verdict, the judgments of acquittal ended the entire prosecution and freed all of the defendants; in 9 more cases, the judgments of acquittal freed some of the defendants. Thus, this survey shows that pre-verdict Rule 29 cases were granted, on average, 73 times per year.

We also researched published appellate opinions of post-verdict Rule 29 dismissals. These opinions indicate that district judges often err in granting judgments of acquittal. There are at least 18 published appellate opinions in the 18 months ending June 30, 2003, which reverse judgments of acquittal entered after the verdict. See e.g., United States v. Jackson, 335 F.3d 170 (2d Cir. 2003); United States v. Velte, 331 F.3d 673 (9th Cir. 2003); United States v. Lenertz, 63 Fed.Appx. 704, 2003 WL 21129842 (4th Cir. 2003); United States v. Hernandez, 327 F.3d 1110 (10th Cir. 2003); United States v. Bologna, 58 Fed.Appx. 865, 2003 WL 282461 (2d Cir. 2003); United States v. Brown, 52 Fed.Appx. 612, 2002 WL 31771265 (4th Cir. 2002); United States v. Donaldson, 52 Fed.Appx. 700, 2002 WL 31770311 (6th Cir. 2002); United States v. Brown, 50 Fed.Appx. 970, 2002 WL 31529016 (10th Cir. 2002); United States v. Moran, 312 F.3d 480 (1st Cir. 2002); United States v. Zheng, 306 F.3d 1080 (11th Cir. 2002); United States v. Reyes, 302 F.3d 48 (2d Cir. 2002); United States v. Smith, 294 F.3d 473 (3d Cir. 2002); United States v. Johnson, 39 Fed.Appx. 114, 2002 WL 818229 (6th Cir. 2002); United States v. Thompson, 285 F.3d 731 (8th Cir. 2002); United States v. Oberhauser, 284 F.3d 827 (8th Cir. 2002); United States v. Canine, 30 Fed.Appx. 678, 2002 WL 417271 (8th Cir. 2002); United States v. Timmons, 283 F.3d 1246, 1250 (11th Cir. 2002); United States v. Deville, 278 F.3d 500 (5th Cir. 2002). This data is also under-inclusive, as it does not include unpublished reversals.

The frequency of reversible error is confirmed by data from the Criminal Appellate Section at Main Justice, which handles reports of adverse decisions and requests for Government appeals. See Exhibit C, Summary Table and Facts. During 2000 and 2001, Criminal Appellate handled a total of 34 reports of *post-verdict* judgments of acquittals. Id. The Solicitor General, who is selective in authorizing appeals, authorized appeal in 25 cases; the appellate court reversed in 17 of those cases, and reversed in part in an 18th case. Id. Thus, the appellate court found reversible error in almost 72% of the cases appealed, and over 50% of the cases reported. During 2002 alone, Criminal Appellate handled 22 reports of post-verdict judgments of acquittal, and the Solicitor

General authorized appeal in 15 of them; rulings have been received in at least 10 of those cases, 8 of them reversals.[6]

Given the substantial rate of reversible error in judgments of acquittal entered after the verdict, there is no reason to believe that district judges err any less frequently when they grant motions for judgment of acquittal before verdict.[7] Indeed, the rate of error may be even higher, since such pre-verdict rulings are made when the jury, witnesses and counsel are waiting in the courtroom, a situation "in which the court would feel pressured into making an immediate, and possibly erroneous, decision." Fed. R. Crim. P. 29, 1994 Advisory Committee Notes.

B. The Threshold For Rules Changes

The precise number of pre-verdict Rule 29 judgments granted each year is not clear. But what is clear from the above data is the following: notwithstanding the 1994 amendment, the majority of courts granting judgments of acquittal do so pre-verdict; this results, every year, in scores of cases being disposed of without the possibility of review; and over half of these decisions would be reversed on appeal. In rejecting the Department's request to publish for comment an amendment to Rule 29, the Advisory Committee noted that the Government had not made an adequate showing of a significant problem – that the concerns raised by the Department had not met the threshold for further consideration of an amendment to the Rule. We think otherwise.

We believe that in circumstances such as we have here – where there has been rigorous documentation of a significant number of cases; where those cases recur every year and, therefore, have a cumulative effect; where the Rule results in substantive (not merely procedural) harm to the community, including a loss of confidence in the criminal justice system; and where there is no remedy – the proposed amendment demands further consideration, publication for public comment, and an appropriate solution. While the raw number of pre-verdict Rule 29 dismissals alone is not extraordinary, the consequences and potential harm of such dismissals are. As the cases described below document, Rule 29 acquittals directly affect the integrity and security of the community and damage the public's confidence that the criminal justice system provides equal justice to all, including the leaders of the community. Most importantly, the harm has no remedy. As the Advisory Committee stated with regard to the 1994 amendment to Rule 29, even if the proposed

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[6] The following additional cases have been reversed since the 2002 Table in Exhibit C was prepared: United States v. Baker, 367 F.3d 790 (8th Cir. 2004); United States v. 363 F.3d 1169 (11th Cir. 2004); United States v. Alvarez, 351 F.3d 126 (4th Cir. 2003).

[7] The Supreme Court cases finding such decisions unappealable certainly confirm the occurrence of such errors, some of them glaring. See, e.g., Sanabria v. United States, 437 U.S. 54, 68 & n.22, 77-78 (1978) ("The trial court's ruling here led to an erroneous resolution in the defendant's favor ..."); Fong Foo v. United States, 369 U.S. 141, 142-43 (1969) (acquittal was improperly entered well before the Government completed its case, and was "based upon an egregiously erroneous foundation").

amendment would "not affect a large number of cases," it is still a worthwhile and necessary amendment. Fed. R. Crim. P. 29, 1994 Advisory Committee Notes.[8]

C. Representative Case Summaries[9]

Career Department prosecutors have observed repeated instances in which courts enter pre-verdict judgments of acquittal which are erroneous and have serious consequences. The cases discussed below are representative examples which illustrate the larger problem. Rule 29 cases include every type of offense. See Exhibit A. The cases below involve tons of cocaine, bank robberies, a civil rights beating, and money laundering. None could be appealed.

The following cases also illustrate the variety of problems caused by pre-verdict acquittals: irreparable prejudice caused by applying erroneous legal standards and analysis; the political difficulty *and yet necessity* of enforcing the criminal laws equally, even when that requires the prosecution of law enforcement officials and lawyers; the risk posed to the public when dangerous criminals are released; and the danger that the public will lose respect and confidence in the criminal justice system. In short, the rule of law, equal justice, public safety, and public respect and confidence are fundamental to our criminal justice system. When these principles are undermined, so is justice. These cases demonstrate a problem. They demand the *modest but essential* remedy of appellate review.

1. Standard of Review

The central tenet of Rule 29 is that the trial court must review the evidence in the light most favorable to the government, must not inject *its* view of the evidence, and must allow the jury to

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[8] To whatever extent the amendment is considered unnecessary because it effects only a small number of cases, it is likewise true that an equally small number of cases would be affected by the inability to dispose of multiple counts or defendants, or by an increase in Government appeals. Since the number of cases affected is the same, we believe the analysis should focus on comparing the relative harms and benefits to amending the Rule.

[9] The discussion of these cases is necessarily brief, so that a number of cases could be discussed within a memorandum of reasonable length. Summaries of each case, together with supporting excerpts of record, are attached as Exhibits D-H. Additional excerpts of record have been obtained – and are available upon request – but were not practical to attach as exhibits. It is worth noting that the compilation of these records was extremely time- and labor-intensive. In many cases, it required lengthy case files to be retrieved, reviewed, summarized and transcripts ordered – often by an attorney unfamiliar with the case because the trial attorney had left the office. That the field undertook this task – amidst the additional and simultaneous burdens imposed by Blakely issues – speaks to the level of commitment to this issue by United States Attorney's Offices around the country.

decide the case if "any rational trier of fact" could find the defendant guilty. Jackson v. Virginia, 443 U.S. 307, 318-319 (1979) (emphasis in original). This principle is well known.

There are, however, too many cases where this principle is not applied. When it is not, the Government does not receive a fair trial and the public is not served. In all of the Rule 29 cases discussed herein, the court substituted *its* view of the evidence for that of the appropriate fact-finder – the jury.

2. Additional Legal Error

In addition, most of these cases also involve additional legal error. The two following cases illustrate a misunderstanding of identity case law. They show that cases including identity evidence as strong as photographs and fingerprints – which some might have thought Rule 29-proof – cannot prevent erroneous acquittals when the court makes legal error. In these cases, pre-verdict acquittals were granted notwithstanding defendants' photographs taken at the location of the crime, and defendant's fingerprints on two separate demand notes from two separate bank robberies.

A. Eight Defendants and Two and One-Half Tons of Cocaine

In United States v. Joya-Joya, a case in the Southern District of California, eight defendants were charged with conspiracy to distribute two and one-half tons (2,365 kilograms) of cocaine. See Exhibit D. In September 2003, the eight defendants were in the middle of the Eastern Pacific Ocean on two "go-fast" boats – notoriously used to smuggle drugs on the high seas. A Navy helicopter spotted and video-taped the two boats operating together. Once spotted, the men aboard the blue/green "go-fast" jumped into the white "go-fast" and took off. The Navy helicopter chased the white "go-fast" for over an hour, while the white-"go-fast" refused to yield. The "go-fast" did not stop until another helicopter fired warning shots. The eight men aboard the white "go-fast" surrendered and were taken aboard a Navy ship, the USS Shoup. Once on board the Navy ship, the Coast Guard took individual color photographs of the eight defendants. The Coast Guard also seized 2,365 kilograms of cocaine from the abandoned blue/green "go-fast." The cocaine was 90% pure and had a wholesale value in Mexico of $17,042,000.[10]

At trial, the defendants' photographs were introduced into evidence by Coast Guard Officer Hoke, the boarding officer, who testified that the photographs fairly and accurately depicted the eight people transferred by the Coast Guard in the middle of the ocean from the white "go-fast" to the Navy ship. Officer Hoke did not make a court-room identification.[11] In addition to the photographs,

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[10] Its wholesale value in the United States would be much higher, and its retail value higher still.

[11] The court excluded other identity testimony that one of the eight men – with extremely large feet – had a white substance on his foot. In fact, a pair of size 15 shoes were seized from the blue/green boat with the tons of cocaine. Ironically, the court excluded this testimony stating

each of the defendants signed his name to written stipulations which were admitted at trial. Further, during the trial, defense counsel referred to their clients by name, the Government referred to the eight defendants as the same eight men on the white "go-fast," and defense counsel never objected that the defendants had been brought to the wrong courtroom to be tried on the wrong case.

The court granted a pre-verdict Rule 29 motion stating, repeatedly and in various ways, that the evidence was insufficient because no witness identified the defendants in the court-room.[12] As to the defendants' photographs and authenticating testimony, the court made the astounding statement that "[t]he only evidence in the record even *indirectly relating to defendants* are photos of eight individuals taken on the Shoup, and, according to the testimony of Officer Hoke, consists of individual photographs of the individuals who were removed from the white boat." (emphasis added). The court then discounted these photos because they were not "particularly clear." The court also denied the Government's motion to re-open its case-in-chief.

In fact, the photographs are quite clear.[13] So is the law. It is also uniform. Courts have long held that in-court identification by a witness is not required. See e.g., United States v. Doherty, 867 F.2d 47, 67 (1st 1989 Cir.); United States v. Morrow, 925 F.2d 779, 781 (4th Cir. 1991); Delegal v. United States, 329 F.2d 494, 494 (5th Cir. 1964); United States v. Capozzi, 883 F.2d 608, 617 (8th Cir. 1989); United States v. Cooper, 733 F.2d 91, 92 (11th Cir. 1984). "A witness need not physically point out a defendant so long as the evidence is sufficient to permit the inference that the person on trial was the person who committed the crime." United States v. Darrell, 629 F.2d 1089, 1091 (5th Cir. 1980). Identification can be inferred from all of the facts and circumstances in evidence, United States v. Weed, 689 F.2d 752, 754 (7th Cir. 1982), including, as here: when the defendants entered and signed various stipulations, United States v. Green, 757 F.2d 116 (7th Cir. 1985); when defense counsel identifies his client at trial, United States v. Alexander, 48 F.3d 1477, 1490 (9th Cir. 1995), and when no one points out that the wrong person has been brought to trial. Id. at 1490. In this case, the photographs and the authenticating testimony alone were sufficient evidence of identity for a rational fact-finder to convict the defendants. In addition, there were the stipulations entered into

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it was a "connect the dot" type of argument, but later found that the identity dots were not connected.

[12] In lamenting that Officer Hoke, who "impressed the court with his honesty and credibility," had not made a court-room identification, the court did not fault the officer. To the contrary, the court noted that Officer Hoke was "rushed" by "circumstances beyond his control"; there were "limited resources," "they cover a big ocean," and "the weather, the elements, were certainly part of it as well"; in addition he had a "limited amount of sleep," was "multi-tasking, running back and forth taking care of contraband, making sure that these eight individuals had proper clothing, were cleaned up, had their medical exams, were fed, received cots," and had to complete his paperwork before all of the defendants, contraband and exhibits were transferred to another ship. Exhbit D.

[13] The photographs will be made available.

and signed by each of the defendants, defense counsel's identification of the defendants and the absence of any contrary identity evidence.

The harm is also clear. Eight men smuggling over two tons of cocaine were released. Though obvious, it merits saying that the public has a strong interest in successfully prosecuting those responsible for bringing to our communities tons of cocaine and the myriad of crimes that accompany cocaine trafficking and use. Also obvious, but worth saying, is that those entrusted with an illegal and valuable cargo worth over $17 million wholesale in Mexico, have a significant role/contacts with a drug cartel. Undaunted by the magnitude of this offense, the court made an irrevocable determination that we believe is both legally and factually erroneous. The consequences of this error could have been corrected had the ruling been deferred.

B. Two Bank Robberies

Similarly, in United States v. Cooley, a case from Massachusetts, the court exonerated a defendant charged with two bank robberies whose fingerprints were on the two separate demand notes. See Exhibit E. In addition to the fingerprints, the evidence included two video-tapes of the bank robber, carrying a demand note, and matching the same physical description of the defendant. The two bank tellers also gave a description of the defendant. The court precluded them from identifying the defendant in the court room.[14]

In granting an acquittal, the judge relied on a Fourth Circuit case, United States v. Corso, 439 F.2d 956 (4th Cir. 1971), where the only evidence linking the defendant to the robbery was his fingerprint on a matchbox that had been folded up and used to prevent the automatic door from catching properly, stating "[t]he probative value of an accused's fingerprints upon a readily movable object is highly questionable, unless it can be shown that the prints could have been impressed only during the commission of the crime." Corso, 439 F.2d at 957. Here, unlike Corso, the prints could have been impressed only during the commission of the crime. The fingerprints were on two different demand notes presented to two tellers in two different robberies. The court not only failed to consider how unlikely it was that the defendant's prints would be found on both notes if he had merely touched the paper at some unrelated to the robberies, it also failed to consider the other identity evidence presented – such as the videotape of the robberies, which confirmed the robber's possession of the demand notes, and allowed the jury to compare the person in the videotape to the defendant, as well as to compare the similarity of the tellers' descriptions of the robber to the defendant.

The evidence in this case was not simply a fingerprint that could have been placed at any time. Yet the judge's misinterpretation of the law, and his refusal to consider all of the evidence in the light most favorable to the government could not be challenged through the appellate process, because the judge's ruling was made pre-verdict. As a result, a bank robber was released back into the community, posing a risk of further harm.

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[14] The court found that too much time had passed since the robbery

3. Cases Against Law Enforcement Officials and Lawyers

Criminal prosecutions against public officials, law enforcement officers and lawyers are especially challenging for well-known reasons. These people are leaders in the community. They have political and institutional connections. They are often powerful. They are often wealthy. Courts sometimes treat these defendants with greater respect and deference. Witnesses are often reluctant to testify. There may be serious personal and financial repercussions for those witnesses courageous enough to do so. These cases have an additional burden, particularly in civil rights cases. The witnesses are often criminals, who may make poor witnesses. The following three cases illustrate the difficulty in getting the case to the jury, much less obtaining a conviction. Each of these defendants – prison supervisors, and lawyers – were acquitted by the court and returned to the community without punishment, and without the community having any say. In one case, a juror voiced criticism. See Exhibit H.

A. Civil Rights Beating

In United States v. Collins, a recent civil rights case, out of the Western District of North Carolina, the court acquitted two supervisory correctional officers who beat and kicked an inmate in the head and torso. See Exhibit F. The inmate, Paul Midgett, got into a verbal altercation with another corrections officer and refused an order to return to his cell. A female officer came to assist and they quickly subdued Midgett, who stands 5'5" and weighs 110 pounds. After Midgett was subdued and on the ground, two supervisory officers, each standing over six feet tall and weighing over 200 pounds, punched and kicked Midgett multiple times in the head and torso, causing serious bruising and a broken rib. There was blood on the floor and wall. Afterward the supervisory officers made comments including, "We whipped the wheels off of him." The two corrections officers and another inmate witnessed the beating and testified to it.[15] The prison doctor, who examined Midgett, testified that he had never seen an inmate in that condition after an incident with guards. A photograph of the defendant's badly bruised face and chest was also admitted.[16]

In granting a pre-verdict acquittal, the court made several errors. First, the court misunderstood civil rights law stating, "I believe that I am compelled at this time to determine that the evidence fails to establish any motive to punish by ordeal rather than by trial," an incorrect legal standard which defense counsel had argued. The law is clear that the Government is required to prove only that the defendants purposely engaged in conduct that constituted excessive force amounting to punishment. Bell v. Wolfish, 441 U.S. 520, 535-39 (1979). There is no requirement that the government prove that the defendants intended to punish the victim; only, that the lack of

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[15] During the trial, the court took an unusual tone with one of the testifying officers. The court told her to listen and answer the question before he became "real irritated," that he would strike her testimony if she didn't raise her voice, and that he would "incarcerat[e]" her if she spoke to anyone about her testimony.

[16] This photograph will be made available.

legitimate justification for the defendants' actions rendered them "malicious and sadistic for the purpose of causing harm." Hudson v. McMillian, 503 U.S. 1, 5 (1992). Second, the court incorrectly imposed a requirement that the victim testify, stating "the failure to call Mr. Midgett, indeed, creates a fatal vacuum . . . ." Third, the court inserted its view of the evidence and of the witnesses' credibility by stating, "the relatively minor injuries he sustained are completely inconsistent with government testimony."

The court's ruling dealt a considerable blow to the Department's efforts to enforce the civil rights laws in Mecklenburg County jail in western North Carolina. After the acquittal, the Sheriff of Mecklenburg declared victory by telling the press that the case was frivolous and a "witch hunt." The community could take that view, or it could take the view that the criminal justice system is unable to hold law enforcement officers accountable. Either serves to undermine the public's trust and confidence in the criminal justice system. While the defendants were released, the two subordinate officers who testified against them were suspended and will most likely be fired.

B. Money Laundering by Attorneys

In United States v. Foster, a case from Massachusetts, the Government presented evidence of a lawyer who laundered hundreds of thousands of dollars of his client's drug money. See Exhibit G. The evidence showed that the lawyer received bags of cash containing hundreds of thousands of dollars, that there were fourteen payments in two years, that the money was from clients who sold ecstasy, that the lawyer ran at least $370,000 in cash through his client trust account, and that the lawyer used the money to invest in a nightclub with his clients, while other money was used to buy boats and cars. The evidence included a wiretap and the testimony of multiple coconspirators testifying to events showing defendant's knowledge of the drug money. For example, after spotting law enforcement surveillance, one dealer picked up the lawyer, told him about it, and together they removed ecstasy pills and money from the dealer's apartment, with the lawyer saying he was happy to do it.

The court granted a pre-verdict acquittal because it viewed the evidence in the light most favorable to the defendant – instead of the Government. In finding insufficient evidence that defendant knew the cash was drug money, the court noted it is "not a crime" to deposit $370,000 in cash. The court repeatedly commented on the defendant's lack of "subterfuge," stating: "the fact that he is so out front, isn't that consistent *also* with the fact that he didn't know?" (emphasis added.) The court also applied an incorrect legal standard for proving knowledge, stating: "It has to be either he was told . . . 'I'm a drug dealer and this is where I got the money.' Or he acts in a way that shows his state of mind as being someone who is aware of the fact that he is dealing with criminals and he acts that way." Unlike the court, the jury may have found the lawyer's blatancy demonstrated his guilt, rather than his innocence. The jury may have chosen to believe the testimony of multiple witnesses and may have concluded that a lawyer accepting bags containing hundreds of thousands of dollars of cash from drug clients, and entering into business partnerships with them, knows that it is drug money. Instead of reviewing the evidence in the light most favorable to the Government, the court focused on one possible, and unlikely, interpretation of the evidence. By precluding the

jury from considering the facts, the court created a "blatancy" defense that does not exist and applied it to this case as a matter of law. Following the acquittal, one juror said that she found the evidence of knowledge very persuasive and expressed frustration by asking, "What is the point of the jury being there?"

The disconcerting problem with Rule 29 is less that judges err; it is the inability to seek further review of what we believe to be erroneous legal decisions through the appellate process. At times, it appears that courts may intentionally rule pre-verdict in order to shield rulings from appeal.

For example, in United States v. Levine, a money laundering/lawyer case from New Jersey, the government presented evidence that a lawyer and another defendant laundered $400,000 through a shell corporation in the Cayman Islands and various other accounts. See Exhibit H. Ultimately the money, proceeds from a fraud scheme, returned to the defendants. Despite ample evidence of these transfers, which were not contested, the court repeatedly expressed the view that there could be no money laundering, because the funds, after circuitous routing, were returned to the original source: the defendants. In granting the pre-verdict acquittal, the court said:

> There is not sufficient proof to show any of the elements of money laundering. This circuitous route of the money going around the circle and ultimately going back home to roost to him – while it makes no sense, this does not constitute money laundering, so far as this Court is concerned, and I'll dismiss all the money laundering counts.

In fact, the money laundering statute requires proof only that the defendant moved the proceeds of a crime in and out of the United States with the intent to conceal or disguise the nature, location, source, ownership or control of the proceeds. This fundamental misunderstanding of the elements of the offense was, unreviewable, as the court was aware. The next court day, when the AUSA asked the court to reconsider its order, the court responded:

> It is done. Finished. Judgment of acquittal. It is gone. *I know what I'm doing. I recognized what I was doing. I recognized what I was doing. . . .* Jeopardy has attached. Once I enter judgment of acquittal at the end of the government's case or the end of the whole case, that is the end of the jeopardy that the person is put in. You can't reargue that. You can't appeal. You can't do anything with it. I'm aware of that. (Emphasis added.)

The court further opined that it could not reconsider a Rule 29 motion and asked the AUSA if there was any case authority allowing reconsideration.[17] When the AUSA noted that there is and began to summarize it, the court said "I'm not going to reconsider it."

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[17] This issue is currently pending before the United States Supreme Court in Smith v. Massachusetts, No. 03-8661 (Whether the double jeopardy clause's prohibition against successive prosecutions is violated when the judge rules that the defendant is not guilty because the government's evidence is insufficient, but later reverses that finding).

In this case, the court ruled pre-verdict knowing that the acquittal permanently relieved defendants of criminal liability and returned a lawyer to practice. In the process, the court declared a certain form of money laundering legal, and shielded (apparently intentionally) that decision from appellate review and, likely, reversal.

These few cases are illustrative. Many other examples have been and could be provided if time and space allowed. Despite the 1994 amendment encouraging reservation of the decision, district judges do not follow the best practice, thus, precluding appellate review of erroneous decisions. Allowing these decisions, which dispose of entire cases, counts or defendants, to escape the appellate review which protects against error in all other like rulings, is anomalous, it shields error, it invites abuse, it releases dangerous individuals, it prevents the jury and the justice system from performing their most basic function – adjudicating guilt correctly, and it undermines the public's confidence in the criminal justice system.

IV. Proposals To Amend Rule 29

The Department's objective before the Standing Committee is less to discuss the specifics of a particular proposal and more to ensure that this important issue is thoroughly and completely addressed through the Rules Enabling Act process. Nevertheless, the following briefly discusses the Department's original proposal and another proposal which was discussed before the Advisory Committee.

A. The Department's Original Proposal

The Department's original proposal is straightforward and is not intended to alter the basic purpose of the Rule. See Exhibit I. It would require the district court to reserve decision on whether to grant a judgment of acquittal until after the jury returns a verdict. The amended Rule would thus preclude the entry of a judgment of acquittal before the jury returns a verdict, or if the jury is discharged without having returned a verdict. It would preserve the government's appellate rights and ensure that erroneous rulings will be corrected by the Courts of Appeals. Meritless or erroneous dismissals can be reversed and verdicts of guilt reinstated without offending the Double Jeopardy Clause. See United States v. Scott, 437 U.S. 82 (1978).

The proposed amendment would simply complete the work of the 1994 amendment and make the best practice the standard practice. The proposed amendment would bring substantial benefits. It "reconcile[s] the public interest in the Government's right to appeal from an erroneous conclusion of law with the defendant's interest in avoiding a second prosecution," as the Supreme Court suggested. See Fed. R. Crim. P. 29 Advisory Committee Note (1994) (quoting Scott, 437 U.S. at 100 n.13). By requiring reservation until after the jury verdict of guilty, the Government's right to appeal is preserved. The resulting appellate review protects the public's interests in correcting erroneous rulings, convicting defendants against whom sufficient evidence has been presented, and confining dangerous defendants who would otherwise be erroneously freed to prey again on the public.

At the same time, the proposed amendment safeguards the defendant's constitutionally-protected interest in avoiding a second trial, by allowing reinstatement of a guilty verdict following reversal of a post-verdict Rule 29 acquittal on appeal. See Carlisle v. United States, 517 U.S. 416, 445 (1996) (Stevens joined by Kennedy, JJ., dissenting) ("The defendant's interests are obviously fully protected by an acquittal, while the Government's right to appeal is protected because the jury has already returned its verdict of guilty.").

Our proposal, like the 1994 amendment, further protects defendants' rights by requiring that the reserved decision on a motion at the close of the Government's case be made "on the basis of the evidence at the time the ruling was reserved." Fed. R. Crim. P. 29(b). Thus, a defendant still can require that the Government set forth sufficient evidence in its case in chief by making his Rule 29 motion at the close of the Government's case. That defendant will receive precisely the same ruling he would have received had the decision not been reserved.

The proposal would preserve the power of the district court to enter a judgment of acquittal on the defendant's motion, but simply shift the timing. We would also preserve the court's power to grant a judgment of acquittal *sua sponte*, again merely moving the timing of such a motion from before submission of the case to the jury to within seven days after the verdict. The proposed amendment thus preserves the longstanding ability of district courts to dismiss criminal counts as insufficiently supported by the evidence, but simply requires that decision, like virtually all others, be subject to judicial review. The amendment also permits the appellate courts to provide the same checks and balances against judicial error they do in virtually every other context. See Unlimited Power, at 452-56 (detailing the virtues of ensuring appellate review of Rule 29 decisions).

The proposed amendment achieves other goals as well. The amendment removes the pressure on the district court for a quick decision on a dispositive issue. As the 1994 Advisory Committee noted, reservation allows the district judge to rule after the verdict, rather than in the midst of trial while the jury, counsel and witnesses are waiting, and thus "remove[s] the dilemma in those close cases in which the court would feel pressured into making an immediate, and possibly erroneous, decision." Id.[18]

Further, the proposed amendment, when considered in the context of the entire prosecution, will result in less wasted time and effort. When an erroneous judgment of acquittal is granted, all of the time and effort invested by the prosecutors, by the judge, and by the jury – in investigation, grand jury presentations, pre-trial motion practice, trial preparation, jury selection, and the bulk of the trial – are totally and irretrievably wasted. By contrast, in most cases, reserving the ruling until after the verdict involves relatively little delay. Where the motion is made at the close of the evidence, all that remains of trial is closing arguments, jury instructions, and deliberations. If the motion is made at the close of the Government's case, the only additional portion of trial remaining

[18] The proposed amendment thus "afford[s] a trial judge the maximum opportunity to consider with care a pending acquittal motion," which has been termed the purpose of Rule 29's "differentiations in timing," *see* Martin Linen, 430 U.S. at 574.

is the defense case, if any, and any rebuttal case. In most cases, these portions of the trial are brief. The AOC reports that, in 2003, 50% of criminal trials were 1 day; 79% were 3 days or less; and 96% were 9 days or less. See Exhibit A, Table C-8.

In almost all cases, particularly more substantial prosecutions, these portions of the trial are relatively short compared to the length of the completed portions of the trial, and are dwarfed by the length of the prosecution as a whole. The AOC reports that, in 2003, the median time interval from filing to jury trial was 12.3 months. See Exhibit A, Table D-10. Thus, the relatively short time "saved" by granting a motion for judgment of acquittal pre-verdict is outweighed by the time and effort lost when a judgment of acquittal is erroneously granted, thus wrongly discarding the already completed portions of the trial and prosecution, and the time and effort already invested by the judge, jury, and prosecution. Overall, the proposed amendment saves time and effort.

Finally, the proposed amendment respects the role of the jurors. Reserving a Rule 29 motion allows the jury to complete the task which is its *raison d'etre*, and for which the jurors were called to serve.

In sum, the proposed amendment requires judges to do what the 1994 amendment encourages them to do – reserve decision until after a guilty verdict. In so doing, the proposed amendment (1) conforms Rule 29 to § 3731, securing the Government's full scope of its right to appeal under that statute and the Constitution, (2) provides district judges with additional time to consider and correctly rule on Rule 29 motions, (3) ensures that erroneous grants of judgments of acquittal can be corrected, (4) protects the public from dangerous defendants who would otherwise be erroneously freed, and (5) prevents the waste of the judicial, juror and prosecutorial time and effort already invested in the prosecution and trial. At the same time, the proposed amendment preserves the defendant's ability to obtain a judgment of acquittal; the defendant's ability to move for a judgment of acquittal at the close of the government's case in chief, and to require that the evidence be sufficient at that point; and the district court's ability on its own motion to move for a judgment of acquittal. The proposed amendment will thus be, we believe, a marked improvement to Rule 29.

Some members of the Advisory Committee expressed general support for the Department's proposal but were concerned that in multi-defendant and/or multi-count cases, a procedure should be authorized to streamline the case in order to eliminate weak counts. One means of addressing this concern is by encouraging judicial suasion and voluntary dismissal in the Rule or the Committee Note. Moreover, dismissing some but not all of the defendants or counts is often favorable to all parties, including the Government, because it simplifies the case for the jury while terminating only portions of the case that are unnecessary for the Government. We are open to further consideration of this issue and how it might be addressed.

B. Other Proposals

Other mechanisms have been suggested to accomplish the same goals. One proposal, suggested by Judge Levi, would require a defendant to waive any double jeopardy claims before a

Rule 29 motion could be granted prior to verdict. See Exhibit J. This proposal, which the Department views very favorably, was first discussed at the Advisory Committee meeting in May 2004. As the Department noted then, this proposal addresses both the Department's interest in an appellate right and the court's interest in retaining discretion to dispose of weak counts, particularly in the case of multiple defendants and/or counts and retrials after hung juries. While this proposal presents the issue of whether double jeopardy can be waived and, if so, what procedures the rule should require, preliminary research indicates that a waiver requirement might be constitutionally imposed before a trial court were permitted to grant a pre-verdict Rule 29 dismissal. While the waiver proposal does not necessarily achieve all of the efficiencies of the Department's original proposal (it would require a second trial following a successful appeal), we favor it and think it merits further consideration by the Advisory Committee.

In short, the Department is open to any proposal which will accomplish the policy objectives discussed here. Publishing for public comment one or more proposed amendments will continue the dialogue necessary to amend Rule 29 and to fulfill the promise of the Rules Enabling Act process.

V. Conclusion

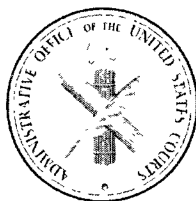
The Department of Justice has considered this issue at great length and does not lightly urge substantive amendments to the Criminal Rules. Nonetheless we believe that Rule 29 as currently constituted represents an anomaly within the Rules and indeed within the judicial system. Throughout the legal system, nearly every ruling made by the judge or decisionmaker can at some point be substantively appealed. For the Rules to permit a single judge to enter an unreviewable acquittal ending a federal prosecution in a criminal case, perhaps the most fundamental and grave proceeding in any system of laws, "runs directly counter to the principles of fairness and uniformity inherent in the process of appellate review." Unlimited Power, at 434, 452, 463 (urging that "a revision of Rule 29 that eliminates the power of trial judges to order pre-verdict judgments of acquittal would best serve the interests of justice and fairness").

To an extent rarely equaled in our history, citizens look to the federal criminal justice system to play a leading role in ensuring the national security, policing financial markets and corporate suites, and ensuring the consistent enforcement of a host of important laws. The societal costs suffered when even a small number of meritorious criminal cases are irretrievably and erroneously abrogated far outweigh the burdens placed on the court, the parties and the jurors to await the deliberation of the defendant's peers. The Rules should ensure a just result for crime victims and for the public as well as for the criminal defendant. The proposed amendment to Rule 29 would help "provide for the just determination of every criminal proceeding," the very purpose of the Rules of Criminal Procedure. Fed. R. Crim. P. 2. It also allows the Department of Justice to do a better job vindicating the interests of both the United States and the victims of crime. We thank the Committee for seriously considering our views. We urge the Committee to recognize that there is a problem and to take appropriate steps so that an appropriate solution can be found through the procedures of the Rules Enabling Act.

cc: Judge Susan C. Bucklew
Chair, Advisory Committee on Criminal Rules

Judge Edward E. Carnes
Former Chair, Advisory Committee on Criminal Rules

EXHIBITS CONTAINED IN SEPARATE VOLUME



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December 16, 2004

MEMORANDUM TO STANDING COMMITTEE

Subject: *Revised E-Government Privacy Template Rule*

Section 205 of the E-Government Act of 2002 requires the Judicial Conference to propose rules that will protect against disclosure of the personal identifiers that are found in court filings. The Act was amended in August 2004 to authorize a party to file a paper cross-referencing redactions contained in a separately filed list.

The Standing E-Government Subcommittee prepared a proposed revised template rule for consideration by the advisory rules committees. At their fall 2004 meetings, the Appellate, Bankruptcy, Civil, and Criminal Rules Committees suggested changes to the template rule. Professor Capra incorporated the advisory committees' suggestions in the attached revised rule. It is expected that the advisory committees will consider the revised template one last time at their spring 2005 meetings before submitting proposed rules amendments to the Standing Committee with recommendations to publish them for comment in August 2005.

John K. Rabiej

Attachment

Revised Privacy Template

Date: November 19, 2004.[1]

Rule [ ] Privacy in Court Filings[2]

(a) Limits on Information Disclosed in a Filing. Unless the court orders otherwise,[3] an electronic or paper filing[4] made with the court[5] that includes a social security number or tax identification number,[6] a minor's name, a person's birth date, [or] a financial account number [or

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[1] This latest version of the template responds to comments made at the fall meetings of the Appellate, Bankruptcy, Civil and Criminal Rules Committees. It also incorporates suggestions of the Standing Committee's Subcommittee on Style. Edits shown in this draft are the result of discussions among various interested parties and found necessary to address a few questions that were raised and not resolved at the Advisory Committee meetings.

[2] The Appellate Rules Committee has tentatively determined that it will seek to draft and approve a "piggy-back" version of the template. The piggy back version will provide that if a filing has been made with the lower court, the rules of the lower court would continue to apply to the filing in a court of appeals. With respect to first-time filings in the court of appeals, the parties will have to comply with e-privacy rule that would have been applicable had the filing been made in the district court. Accordingly, this template provides the basis for the e-privacy projected e-privacy provision in the Bankruptcy, Civil and Criminal Rules.

[3] The subcommittee determined that flexibility should be added to the rule by allowing the court to excuse the redaction requirements in a particular case.

[4] The subcommittee rejected an option that would apply the redaction requirement only to filings made by parties: "If a party includes any of the following identifiers in an electronic or paper filing with the court, the party is limited to disclosing:"

[5] Ed Cooper suggests striking the language "made with the court". Dan Capra suggests that the language be retained to make it clear that only filings with the court are covered by the rule — as is the case with the model local rule approved by CACM. Otherwise there might be a concern about some other filing that is not made with the court. Ed replies that at least the Civil Rules apply only to the District Courts. See FRCP 1.

[6] The advisory committees may wish to consider whether to cover other private "numbers" such as driver's license, alien registration card, and the like. CACM considered the merits of covering more information (such as driver's licenses) and decided that "the line had to

the home address of a person][7] may include only [8]

> **(1)** the last four digits of the social-security number and tax-identification number[9];
>
> **(2)** the minor's initials;
>
> **(3)** the year of birth; [and]

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be drawn somewhere". CACM approved a comment to its privacy policy that would warn litigants that information such as driver's license numbers in court filings would be published on the internet, and concerned parties should seek a sealing order. The Committee Note, infra, provides similar comment.

[7] The coverage of home address is for the Criminal Rules Committee only. The other Advisory Committees have decided that it is unnecessary, and perhaps problematic, to delete the full address from court filings. In criminal cases, however, there may be special concerns for protecting victims and witnesses from disclosure of a complete address. The model local rule prepared by CACM imposes a redaction requirement for addresses in criminal cases only.

The Criminal Rules Committee will consider whether the redaction requirement for addresses should be narrowed to cover only the addresses of alleged victims and prospective witnesses. CACM's model rule contains no such narrowing, but it is fair to state that CACM did not consider the possibility of limiting the protection to victims and witnesses.

[8] The stylistic revision of the opening clauses of subdivision (a) deletes the use of the term "identifiers" in the text of the rule. Some of those present at the Bankruptcy Committee meeting found it confusing to refer to "identifiers" that were not specifically identified in the body of the rule.

[9] The subcommittee determined that tax identification numbers raise the same privacy concerns as social security numbers; for many individuals, those numbers are the same.

(4) the last four digits of the financial account[10] number.[11] [and]

[(5) the city and state of the home address.][12]

(b) Unredacted Filing Under Seal. A party making a redacted filing under (a) may also file an unredacted copy under seal. The unredacted copy must be retained by the court as part of the record.[13]

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[10] The subcommittee rejected language that would limit the protection of financial accounts to those accounts that were personal; to active accounts; and to asset accounts. The subcommittee concluded that the risk of identity theft was significant with respect to *any* financial account number available over the internet.

[11] Ed Cooper suggests that financial account numbers be grouped with social security numbers and tax identification numbers, as all of these numbers are to be redacted in the same way — leaving only the last four numbers. Dan Capra suggests that financial account numbers be left to treatment by a separate subclause. Financial account numbers are different conceptually from social security and tax identification numbers, and including a separate subclause arguably provides a useful emphasis.

[12] The redaction requirement for home addresses is to be included, if at all, only in the Criminal rule. See note 7.

Ed Cooper suggests an addition to subdivision (a). He explains as follows:

Shouldn't we have an explicit provision that allows the court to order redaction of other information? Home address is a familiar example. A driver' s license number is another. One way to do this would be to make present (a) paragraph (a)(1), adding a new paragraph (2):

(2) The court may order redaction of any other information to protect privacy or security interests.

This approach would have the further advantage of bringing "security" into the rule. The Act suggests that security be protected, albeit without any clear indication whether it is thinking of security of private information, the personal security of individuals (see the redaction of names in the Criminal Rules), or national security.

[13] The subcommittee rejected the following language that was proposed by the Justice Department:

Where a document is filed under seal solely to comply with this rule, the seal does not

(c) Reference List. A filing that contains information redacted under (a) may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item of redacted information listed. The reference list must be filed under seal and may be amended as of right. Any references in the case to an identifier included in the reference list will be construed to refer to the corresponding item of information.[14]

(d) Exemptions from the Redaction Requirement. The redaction requirement of Rule [ ] (a) does not apply to the following:

(1) in a civil or criminal forfeiture proceeding, a financial-account number that identifies the property alleged to be subject to forfeiture;

(2) the record of an administrative-agency proceeding;[15]

(3) the official record of a state-court proceeding in an action removed to federal court; [16]

(4) the record of a court or tribunal whose decision is being reviewed, if that record was not subject to (a) when originally filed;[17] [and]

[**(5)** a filing made in an actions brought under 28 U.S.C. section 2241, section

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prohibit the disclosure of the document to the parties, their counsel, their agents, law enforcement officers, and triers of fact, nor the disclosure by those persons when appropriate to the performance of their official duties.

[14] This language tracks the amendment to the E-Government Act that permits the filing of a registry list as an alternative to an unredacted document under seal.

[15] Ed Cooper questions whether the term "administrative-agency" proceeding is broad enough to cover all of the kinds of administrative-type proceedings that should be exempt from the redaction requirements.

[16] The subcommittee rejected an exception for "a certified copy of a document filed with the court." The subcommittee determined that a redaction could be indicated on a certified copy where necessary to protect an identifier.

[17] Some subcommittee members suggested that the exemption apply to "the records of a court or tribunal whose decision is being reviewed, if those records were not subject to subdivision (a) of this rule when originally ***created.***"

2254 or section 2255, unless the action is otherwise covered by (e).][18]

[(6) a filing in any court in relation to a criminal matter or investigation that is prepared[19] before the filing of a criminal charge or that is not filed as part of any docketed criminal case;

(7) an arrest warrant;

(8) a charging document—including an indictment, information, and criminal complaint—and an affidavit filed in support of any charging document; and

(9) a criminal case cover sheet.][20]

[(e) Social Security Appeals and Immigration Cases; Limitations on Remote Access to Electronic Files. In an action for benefits under the Social Security Act, and in an action under Title 8, United States Code relating to an order of removal, release from removal, or immigration benefits or detention, access to an electronic file is authorized as follows, unless the court orders otherwise:

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[18] The Criminal Rules Committee has determined, at least preliminarily, that filings in habeas actions should be exempt from the redaction requirement. Civil Rules may wish to consider whether to include a reference to habeas actions in the text of its rule, or otherwise in the Committee Note.

There might be a problem exempting Section 2241 actions and then providing special treatment for immigration cases in subdivision (e). Some immigration cases are brought under section 2241. The rule as written would therefore provide that an immigration proceeding brought under section 2241 would be exempt from the redaction requirement but would not be available to non-parties by remote access. The underlined material attempts to write in an exception that would give uniform treatment to immigration cases.

[19] Ed Cooper wonders whether "filed" should be substituted for "prepared." DOJ has suggested that the word "prepared" is accurate. It is for the Criminal Rules Committee to determine the scope of this exemption.

[20] Bracketed subdivisions 6-9 are to be included, if at all, in the Criminal Rule only. DOJ has agreed to provide more information on the character of, and the necessity for exemption of, criminal case cover sheets.

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

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

(A) the docket maintained under Rule [relevant civil or appellate rule]; and

(B) an opinion, order, judgment, or other disposition of the court, but not any other part of the case file or the administrative record.][21]

(f) Court Orders. In addition to the redaction requirement of (a), a court may by order in a case[22] limit or prohibit non-parties' remote electronic access to a document filed with the court. The court must be satisfied that a limitation on remote electronic access is necessary to protect against widespread disclosure of private or sensitive information that is not otherwise protected under (a).[23]

(g) Waiver of Protection of Identifiers. A party waives the protection of (a) as to the party's own information by filing that information without redaction.

(h) Sealing at Time of Filing. The court may order that a filing be made under seal without redaction. If the court later orders that the filing be unsealed, the person who made the

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[21] This subdivision (e) is intended to be included, if at all, in the Civil Rules only. The Criminal Rules Committee has determined that there is no need for such an exception in the Criminal Rules, and there would appear to be no need for the exception in the Bankruptcy Rules.

The special treatment for immigration cases was added to the template at the request of the Justice Department and tentatively approved by the Civil Rules Committee. See note 17, however, for the anomaly created by the Rule when an immigration case is brought as a habeas action. Language is suggested in (d)(5) to correct this anomaly.

[22] The "in a case" limitation was suggested by the Criminal Rules Committee.

[23] Ed Cooper suggests that the text of this subdivision can be shortened as follows:

If necessary to protect against widespread disclosure of private or sensitive information that is not otherwise protected under (a), a court may by order limit or prohibit remote access by nonparties to a document filed with the court.

filing must then file a redacted copy as provided by this rule unless the court orders otherwise.[24]

Revised Template Committee Note

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

The rule is derived from and implements the policy adopted by the Judicial Conference in September 2001 to address the privacy concerns resulting from public access to electronic case files. See http://www.privacy.uscourts.gov/Policy.htm The Judicial Conference policy is that documents in case files generally should be made available electronically to the same extent they are available at the courthouse, provided that certain "personal data identifiers" are not included in the public file.

While providing for the public filing of some information, such as the last four digits of an account number, the rule does not intend to establish a presumption that this information never could or should be protected. For example, it may well be necessary in individual cases to prevent remote access by nonparties to any part of an account number or social security number. It may also be necessary to protect information not covered by the redaction requirement — such as driver's license numbers and alien registration numbers — in a particular case. In such cases, the party may seek protection under subdivision (f) or (h).[25]

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[24] This subdivision has been added to the template in response to the suggestions of some members of the Advisory Committees that the rule should clarify that redaction is not required for filings that are going to be made under seal in the first instance. The second sentence of the subdivision has been suggested by Judge Levi, to cover the problem of filings that are sealed as an initial matter and unsealed subsequently.

[25] This paragraph was added at the suggestion of the Civil Rules Committee, to clarify that the redaction requirement does not establish a presumption that information not redacted should always be exposed to public access.

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

Subdivision (b) allows a party who makes a redacted filing to file an unredacted document under seal. This provision is derived from section 205(c)(3)(iv) of the E-Government Act. Subdivision (c) allows parties to file a register of redacted information. This provision is derived from section 205(c)(3)(v) of the E-Government Act, as amended in 2004.

In accordance with the E-Government Act, subdivision (c) of the rule refers to "redacted" information. The term "redacted" is intended to govern a filing that is prepared with abbreviated identifiers in the first instance, as well as a filing in which a personal identifier is edited after its preparation.

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

[Subdivision (e) provides for limited public access in Social Security cases and immigration cases. Those actions are entitled to special treatment due to the prevalence of sensitive information and the volume of filings. Remote electronic access by non-parties is limited to the docket and the written dispositions of the court. The rule contemplates, however, that non-parties can obtain full access to the case file at the courthouse, including access through the court's public computer terminal.] [26]

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

Trial exhibits are subject to the redaction requirements of Rule [ ] to the extent they are filed with the court. Trial exhibits that are not initially filed with the court must be redacted in accordance with the rule if and when they are filed as part of an appeal. [27]

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[26] This paragraph of the Note is for the Civil Rules only.

[27] This paragraph of the Note was added to clarify the treatment of exhibits. Exhibits need not be treated in the text of the rule, because if exhibits are filed, they must be redacted in the same way as any other filing. Treatment in the note was considered useful, however, because an

The Judicial Conference Committee on Court Administration and Case Management has issued "Guidance for Implementation of the Judicial Conference Policy on Privacy and Public Access to Electronic Criminal Case Files" (March 2004). This document sets out limitations on remote electronic access to certain sensitive materials in criminal cases. It provides in part as follows:

> The following documents shall not be included in the public case file and should not be made available to the public at the courthouse or via remote electronic access:
>
> - unexecuted summonses or warrants of any kind (e.g., search warrants, arrest warrants;
> - pretrial bail or presentence investigation reports;
> - statements of reasons in the judgment of conviction;
> - juvenile records;
> - documents containing identifying information about jurors or potential jurors;
> - financial affidavits filed in seeking representation pursuant to the Criminal Justice Act;
> - ex parte requests for authorization of investigative, expert or other services pursuant to the Criminal Justice Act; and
> - sealed documents (e.g., motions for downward departure for substantial assistance, plea agreements indicating cooperation)

The privacy concerns attendant to the above documents in criminal cases can be accommodated under the rule through the sealing provision of subdivision (h). [28]

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exhibit that is not initially filed may be filed later as part of the record on appeal. In that case, the exhibits must be redacted accordingly.

[28] The underlined material is a new addition to the Committee Note that addresses a CACM commentary concerning certain documents that might be filed but should not be made part of the "criminal case file." The term "criminal case file" is not defined, and it is difficult to mesh with the E-Government Act and the template, both of which presume that if a document is filed with the court it is subject to remote electronic access. The paragraph tries to solve this disconnect by stating that such documents — even though filed and thus subject to remote access — can be sealed by the court.

12-13

AGENDA # ______
Winter 2004

Long-Range Planning (Information)

The long-range planning meeting of Judicial Conference committee chairs was held on September 20, 2004. The meeting was devoted to a discussion of the committees' specific plans related to implementation of the *Cost-Containment Strategy for the Federal Judiciary: 2005 and Beyond.*

The cost-containment strategy report was produced by the Executive Committee with substantial input from the Conference committees and others. Chief Judge Carolyn Dineen King, chair of the Executive Committee, thanked the committee chairs for their hard work in the development of the strategy. As a result of cost-containment efforts, Judge King noted that the judiciary has been able to trim its operating expenses through fiscal year 2009, but not enough to eliminate the expected cash-flow deficit in the coming years. The Executive Committee's continuing role with regard to the cost-containment strategy will be to ensure that the components of the cost-containment strategy that remain to be developed are developed and that all components are implemented.

The cost-containment strategy was presented to the Judicial Conference on September 21. The Judicial Conference approved the strategy unanimously.

The report of the long-range planning meeting is included as Attachment 1.

Attachment 1. Report of the September 20, 2004 Judicial Conference Committee Chairs' Long-Range Planning

Judicial Conference Committee Chairs Long-Range Planning Meeting

September 20, 2004

Report

Administrative Office of the United States Courts
Office of Management, Planning and Assessment

SUMMARY REPORT
SEPTEMBER 2004 LONG-RANGE PLANNING MEETING

The September 20, 2004 long-range planning meeting was held in Washington, D.C. It was facilitated by Chief Judge Michael Boudin, planning coordinator for the Judicial Conference's Executive Committee. The meeting was attended by the chair and several members of the Executive Committee, and chairs of 13 Judicial Conference committees. Also in attendance were: Administrative Office Associate Director Clarence A. Lee, Jr.; Deputy Associate Director Cathy A. McCarthy and Long-Range Planning Officer William M. Lucianovic, who provide principal staff support for the long-range planning process; and other Administrative Office staff. A list of participants is included as Appendix A.

The long-range planning meeting was devoted to a discussion of the committees' specific plans related to implementation of the *Cost-Containment Strategy for the Federal Judiciary: 2005 and Beyond.*[1] The cost-containment strategy report was produced by the Executive Committee with substantial input from the Conference committees and others, and it contains six broad avenues of cost-containment initiatives to be undertaken by Conference committees:

- Space and Facilities Cost Control: Impose tighter restraints on future space and facilities costs.

- Workforce Efficiency: Trim future staffing needs through re-engineering work processes and reorganizing functions to increase efficiency, and by employing different staffing techniques.

- Compensation Review: Explore fair and reasonable opportunities to limit future compensation costs.

- Effective Use of Technology: Invest wisely in technologies to enhance productivity and service, while controlling operating costs by revamping the service-delivery model for national information technology systems.

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[1]The Executive Committee recommended that the Judicial Conference of the United States approve the cost-containment strategy at its September 21, 2004 session. The Judicial Conference approved the strategy unanimously.

- Defender Services, Court Security, Law Enforcement and Other Program Changes: Study and implement cost-effective modifications to programs.

- Fee Adjustments: Ensure that fees are examined regularly and adjusted as necessary to reflect economic changes.

Chief Judge Carolyn Dineen King, chair of the Executive Committee, thanked the committee chairs for their hard work in the development of the cost-containment strategy. She described the strategy as the product of many judges throughout the judiciary, with about 140 judges contributing to its development. The contributions made by the Judicial Conference committees were instrumental to the Executive Committee in developing the strategy.

As a result of cost-containment efforts, Judge King noted that the judiciary has been able to trim $225 million from its operating expenses by fiscal year 2009. While this is a substantial achievement, it is not enough to eliminate the expected cash-flow deficit in the coming years. The extent to which the judiciary will be successful in reducing future deficits by bringing incoming revenues and outgoing expenditures into alignment will depend on the work of the Judicial Conference committees. Judge King said that the Executive Committee's continuing role with regard to the cost-containment strategy will be to ensure that the components of the cost-containment strategy that remain to be developed are developed and that all components are implemented.

Chief Judge John G. Heyburn II, chair of the Committee on the Budget, said that the development of the cost-containment strategy will be a great help in the judiciary's efforts to obtain a fair appropriation. He noted that Congress is facing tremendous pressure to fund a wide range of needs in a very difficult economic environment. The cost-containment strategy allows the judiciary to communicate that it is serious about living within its means, and that it is doing everything it can to contain costs. This message bolsters the judiciary's case for additional needed resources. Judge Heyburn expressed confidence that he can now demonstrate that the judiciary is doing its part, and ask Congress to do its part by providing the judiciary with needed resources.

Judge Heyburn also stressed the importance of successfully implementing the cost-containment strategy. The cost-containment strategy, once approved by the Conference, provides the policies under which the Committee on the Budget will operate. The strategy will also provide the Budget Committee's Economy Subcommittee with a consistent approach to work with committees in developing future budget requests.

Seven committee chairs with major efforts related to the cost-containment strategy described and responded to questions about specific committee plans and initiatives. They discussed objectives, scope, expected outcomes, challenges, potential savings, schedules, and assistance needed from other committees.

Security and Facilities Cost Control

Rental payments currently account for 22 percent of the courts' Salaries and Expenses expenditures. Judge Jane R. Roth, chair of the Committee on Security and Facilities, noted that it is appropriate for the cost-containment strategy to begin with controlling space and facilities costs because it requires a significant change in mind-set. The judiciary is accustomed to focusing on the cost of *building* space, but as rent becomes a larger portion of overall judiciary costs, the judiciary needs to focus on the cost of *using* space. For too long, space has been treated as a free commodity in the judiciary. The committee's initiatives are designed to account better for the cost of using space and to balance those costs with other judiciary priorities.

Judge Roth described four major initiatives relating to the cost-containment strategy: 1) a re-examination of the long-range facilities planning process; 2) the establishment of tighter space-acquisition controls; 3) a review of space standards in the *U.S. Courts Design Guide*; and 4) a review of the Court Security Officer staffing formula.

With regard to evaluating planning assumptions and space requirements, Judge Roth invited the Committees on Information Technology, Court Administration and Case Management, the Administration of the Bankruptcy System, the Administration of the Magistrate Judges System, Criminal Law, Judicial Resources, and Defender Services to consider establishing liaisons with the Security and Facilities Committee to discuss the issues and help establish new requirements, guidelines, and recommended policies.

Workforce Efficiency

Sixty-two percent of the current Salaries and Expenses budget – which funds the circuits and courts of appeals, district and bankruptcy courts, and probation and pretrial services – is for pay and benefits. Making the workforce more efficient, in order to avoid staff growth while workload grows, is a critical objective in the cost-containment strategy. Judge Boudin remarked that funding shortages in the coming years mean that, after finding other savings, if there is still a shortfall, the future loss of employees is a certainty – what remains uncertain is the number of employees that will be lost.

Judge W. Royal Furgeson, Jr., incoming chair of the Committee on Judicial Resources, described the process redesign effort launched by his committee to evaluate work processes to identify efficiency improvements. Judge Furgeson stressed the need for the participation and buy-in of the clerks of court and other court managers. The process-redesign initiative is a partnership between courts and the Administrative Office. On-site teams will work with 20 district court clerks' offices and 20 bankruptcy clerks' offices to develop procedural changes to achieve local efficiencies and long-term savings for all 94 districts. Participating courts will also identify quality and performance criteria. Based on results achieved in other institutions which have undergone process redesign initiatives, the Judicial Resources Committee expects that, conservatively, this effort will reduce staffing requirements by two percent each year.

Over 20 percent of court unit staff perform administrative functions, including budget management, accounting, personnel, information technology support, procurement, property management, and facilities management. Chief Judge John W. Lungstrum, chair of the Committee on Court Administration and Case Management (CACM), described a study underway to improve efficiency in the delivery of administrative services. A final report, due in April 2005, will address cost-effective alternatives for service delivery, such as whether some services should be delivered in regional or national service centers. The implementation of any such changes is likely to take a few years. In the interest of attaining more immediate results, CACM made a recommendation to the Judicial Conference that the Executive Committee send a letter to the chief judges of district and bankruptcy courts as well as relevant court unit executives urging them to discuss the sharing of administrative services locally and report back to the Executive Committee. This recommendation was part of the cost-containment strategy that was approved by the Judicial Conference on September 21, 2004.

Compensation Review

The judiciary's pay and benefits costs for current employees grow more than 6 percent each year. Judge Furgeson stated that this rate of increase is higher than can be sustained into the future. The Committee on Judicial Resources has asked the Administrative Office to present a plan at the committee's December 2004 meeting for a study of compensation policies for all court employees. The study will consider a range of alternatives that will emphasize cost control, but allow the judiciary to remain competitive in the labor marketplace.

Effective Use of Technology

Judge Lungstrum discussed how electronic case filing (ECF) will reduce staffing needs in the judiciary. He noted that, like others, he knew that ECF would enhance productivity and functionality, but was initially skeptical that it would save money. Based on the experiences of bankruptcy and district courts that have implemented CM/ECF, he is now convinced that ECF can save money, but only if virtually everyone has to use it; otherwise, there is too much staff time spent converting paper filings into electronic records. Through local rules and practices in some courts, ECF has become nearly mandatory in practice. Many of these courts have been able to save positions formerly dedicated to intake, docketing and file-management work.

In an effort to expedite mandatory electronic filing, CACM recognized that amending only the model local rules would conflict with certain provisions in the national rules, so it asked the Committee on Rules of Practice and Procedure to amend current rules on an expedited basis to allow courts to "require" ECF, with appropriate exceptions.

Chief Judge David F. Levi, chair of the Committee on Rules of Practice and Procedure, reported that the Rules Committee agreed to expedite the revision process. If approved, the mandatory ECF provisions could be placed into effect by the end of 2006 (one year sooner than the normal process).

Judge James Robertson, chair of the Committee on Information Technology, reported on his committee's effort to reduce costs through modifications to the information technology architecture of the judiciary. There are approximately 1,600 computer servers deployed in individual courts to run national applications. The committee will study how to consolidate computer servers to fewer locations, rather than deploying them at the court unit level. The increased aggregation of servers can avoid substantial future costs. Judge Robertson said the biggest challenges are the up-front costs of transition to consolidated servers and changing the judiciary's culture, which has embraced the idea of separate servers in every unit. The committee plans to begin server consolidation efforts with the email system (Lotus Notes), the financial systems (FAS_4T), and PACTS-ECM for probation/pretrial services. Moving the CM/ECF application servers will be considered later, after savings and performance can be demonstrated for other applications. The committee hopes to have an initial transition plan by December 2004.

Probation and Pretrial Services Program Changes

Judge Sim Lake, chair of the Committee on Criminal Law, described how his committee is focusing on eliminating useful but less-critical work requirements in probation and pretrial services offices. Having reduced requirements by approximately $40 million for fiscal year 2005 and 2006, the Criminal Law Committee will continue to modify program guidelines so that limited resources are devoted mostly to the highest-need tasks, such as supervising high-risk offenders and providing judges with critical information for decision-making. With the Committee on Judicial Resources, the Criminal Law Committee will work to modify staffing formulas to reflect changes in recommended work practices. Judge Lake said that the "one size fits all" approach to work is no longer justifiable. For example, pretrial reports in cases that involve offenders who are not eligible for release may be scaled back or eliminated.

The committee is also focusing on collecting substance-abuse treatment data in order to be able to assess the relative effectiveness of various approaches to treatment and recommend the use of less costly treatment methods where appropriate. The committee will also study the impact of technology improvements on the way officers work, and consider how these changes in work affect their need for space.

Defender Services Program Changes

Judge Patti B. Saris, chair of the Committee on Defender Services, reported that her committee is taking cost containment very seriously while also facing increasing numbers of representations and increasing complexity of cases. For the long term, there is first an effort to control costs in large and complex cases. In fiscal year 2003, ten percent of cases handled by panel attorneys represented 56 percent of panel attorney expenditures. Also, an increasing number of complex cases are being handled by federal defender offices, which has had a great impact on their budgets.

The Defender Services Committee's subcommittee on long-range planning and budgeting will consider how to achieve large-case cost control while preserving quality. For example, the subcommittee will discuss case budgeting practices and techniques for death penalty and non-capital cases that are large and complex. Also, the subcommittee will review whether to change the CJA guidelines in capital cases when the death penalty is no longer being sought – thereby potentially releasing one of the two attorneys originally assigned.

Also, the Defender Services Committee will review the staffing assumptions for federal defender offices. The committee plans to study offices with high and low staffing

levels to see whether changes in the staffing methodology are needed. Finally, the committee is continuing to consider case weighting, and will review staff efforts to analyze workload data.

Wrap-Up

Judge Lungstrum, joined by other committee chairs, expressed appreciation to the members of the Executive Committee for their leadership role in developing the cost-containment strategy. Judge Boudin also credited the insight and leadership of Judge King in this effort and the hard work of the Administrative Office staff.

The next long-range planning meeting of committee chairs is scheduled for March 14, 2005.

Appendix A: Participants in the September 2004 Long-Range Planning Meeting

Committee Representatives	Administrative Office Staff
Planning Coordinator, Executive Committee Hon. Michael Boudin	Clarence A. Lee, Jr. Cathy A. McCarthy William M. Lucianovic Brian Lynch
Executive Committee Hon. Carolyn Dineen King, Chair Hon. Joel M. Flaum Hon. J. Owen Forrester Hon. David L. Russell Hon. John M. Walker, Jr.	Karen K. Siegel Wendy Jennis Helen G. Bornstein
Committee on the Administrative Office Hon. Robert B. Kugler, Chair	Cathy A. McCarthy
Committee on the Administration of the Bankruptcy System Hon. Marjorie O. Rendell, Chair	Francis F. Szczebak Ralph Avery Kevin Gallagher Mark Silver
Committee on the Budget Hon. John G. Heyburn II, Chair Hon. Robert C. Broomfield	George H. Schafer Gregory D. Cummings Eugene Shied James R. Baugher
Committee on Court Administration and Case Management Hon. John W. Lungstrum, Chair	Noel J. Augustyn Abel J. Mattos Mark S. Miskovsky
Committee on Criminal Law Hon. Sim Lake, Chair	John M. Hughes Kim M. Whatley

Committee on Defender Services
Hon. Patti B. Saris, Chair

Steven G. Asin
Richard A. Wolff
Carole Cheatham

Committee on Federal-State Jurisdiction
Hon. Frederick P. Stamp, Jr., Chair

Mark Braswell

Committee on Information Technology
Hon. James Robertson, Chair

Melvin J. Bryson
Terry A. Cain
Michel Ishakian

Committee on Intercircuit Assignments
Hon. Royce C. Lamberth, Chair

Peter G. McCabe
Patrick Walker

Committee on the Judicial Branch
Hon. Deanell R. Tacha, Chair

Steven Tevlowitz

Committee on Judicial Resources
Hon. W. Royal Furgeson, Jr.
Incoming Chair

Charlotte G. Peddicord
H. Allen Brown
Beverly Bone

Committee on the Administration of the Magistrate Judges System
Hon. Nina Gershon, Chair

Thomas C. Hnatowski
Charles E. Six
Kathryn Marrone

Committee on Rules of Practice and Procedure
Hon. David F. Levi, Chair

Peter G. McCabe
John Rabiej

Committee on Security and Facilities
Hon. Jane R. Roth, Chair

Ross Eisenman
Melanie Gilbert
Linda Holz

Other Administrative Office staff in attendance:

Richard Fennel
Peggy Irving
Robert Lowney
Mary Louise Mitterhoff
Tara Treacy
Leeann R. Yufanyi